

## **PROGRAM**

- 8:00 a.m. to 8:30 a.m.      **Registration**
- 8:30 a.m. to 8:45 a.m.      **Odds and Ends**  
*Nick Drees*  
Federal Public Defender
- 8:45 a.m. to 9:45 a.m.      **“Orange is the New Black”**  
*Piper Kerman, Author*  
Brooklyn, NY
- 9:45 a.m. to 10:00 a.m.      **Break**
- 10:00 a.m. to 11:00 a.m.      **Supreme Court & Eighth Circuit Update**  
*John Messina*  
Research & Writing Attorney  
Federal Public Defender’s Office
- 11:00 a.m. to 11:30 a.m.      **Alternatives to Incarceration**  
*Mike Smart*  
Assistant Federal Public Defender
- 11:30 a.m. to 12:45 p.m.      **Lunch (On your own)**
- 12:45 p.m. to 1:15 p.m.      **Mock Supreme Court Argument**  
**U.S. v. Pepper**  
*Alfredo Parrish*  
CJA Attorney  
Des Moines, Iowa
- 1:15 p.m. to 2:15 p.m.      **Eyewitness Identification**  
*Otto H. MacLin, Ph.D.*  
Associate Professor  
University of Northern Iowa
- 2:15 p.m. to 2:30 p.m.      **Break**
- 2:30 p.m. to 3:15 p.m.      **Storytelling for Lawyers**  
*Maureen Korte, Storyteller*  
Des Moines, Iowa
- 3:15 p.m. to 4:15 p.m.      **Ethics - Dealing With Lawyers Assistance Program**  
*Hugh Grady, Director*  
Iowa Lawyers Assistance Program

# **ODDS AND ENDS**

**PRESENTED BY**

***NICK DREES***

**FEDERAL PUBLIC DEFENDER**

## Tips from our CJA Panel Administrator

1. Do not duplicate vouchers by mailing and e-mailing. If Nancy prints off the e-mail version and starts working on it and I get the same voucher in the mail, it is entirely possible that we could send both vouchers to the judge for payment.
2. Timing of voucher. You have 45 days after final disposition of the case to submit your voucher. The judges are asked to adhere to processing the voucher within 30 days after receipt. Reasons: (1) keeps panel attorneys happy, and happy attorneys stay on the panel; (2) keeps case fresh in judge's mind.
3. Audit. All CJA payments are subject to audit. You must keep your CJA records for three years for auditing purposes.
4. Case Budgeting. If you have a complex case, consider whether you think it might exceed 300 hours or \$30,000. If it will, you'll need to put together a budget. We can direct you to resources to help with this.
5. Travel. If you're traveling and splitting the travel between two or more defendants, please pro-rate travel time and mileage between defendants. For non-overnight travel, meals are not reimbursable unless you have 10 hours or more on the road.
6. Per Diem. You are not paid based on a per diem when you have reimbursable travel. Your actual expenses for hotel will be paid up to 150% of the govt per diem rate. Make sure to get itemized receipts for lodging. If you exceed 150% of per diem, you will need to provide supporting documentation to explain why.
7. Experts. **Use experts**, especially paralegals and investigators. The Administrative Office has budgeted money for experts to assist with your cases. Think about all the help the government has in presenting its case: DEA, ATF, FBI, ICE, Postal Inspectors, US Marshals, Inspector General, Department of Defense, S.S. Administration, local and state police departments, along with expert forensics, computer technology experts, expert witnesses, and on and on. Use the available resources to try to even the playing field.
8. Online Reference Guide. [www.uscourts.gov](http://www.uscourts.gov) provides quick access to the policies and procedures related to CJA cases. The "National Contacts and Resources" tab offers several sources for information and assistance.

Go to <http://www.uscourts.gov>

Click on "Appointment of Counsel"

Click on "More"

Click on "Training"

Click on "National CJA Voucher Reference Tool"

Choose from "Topics," "Roles," and "Resources."

9. [www.fd.org](http://www.fd.org), the website of the Office of Defender Services' Training Branch provides many resources for CJA lawyers.
10. [National Litigation Support Team](#). Click the "Litigation Support" link at [www.fd.org](http://www.fd.org) for information on this resource for managing voluminous data and discovery materials. Their services also include providing licenses for software that can be used for the duration of a case, consulting on cases to make recommendations for budgeting and experts to hire, etc.
11. [Treasure Hunt](#). (SDIA CJA lawyers only). Contact Val Gall or Nancy Lanoue if you are awaiting payment for money withheld from previous vouchers—either interim vouchers or final vouchers if you were replaced as counsel on a case.

# Selected Helpful Guideline Amendments - 2010

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Effective November 1

## §4A1.1(e) – Recency Points

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- Deletes criminal history points for committing offense within 2 years of release from imprisonment
- Comm'n says crim hist score still a good predictor of recidivism
- Status points remain - §4A1.1(d)

## Bottom of Zones B & C Moves Down 1 Level

	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	<del>0-6</del>	1-7
	3	0-6	0-6	0-6	<del>0-6</del>	2-8	3-9
Zone A	4	0-6	0-6	<del>0-6</del>	2-8	4-10	<del>6-12</del>
	5	0-6	<del>0-6</del>	1-7	4-10	<del>6-12</del>	<del>9-15</del>
	6	0-6	1-7	2-8	6-12	↓ 9-15	↓ 12-18
	7	0-6	2-8	4-10	↓ 8-14	↓ 12-18	15-21
Zone B	8	<del>0-6</del>	4-10	<del>6-12</del>	↓ 10-16	↓ 15-21	18-24
	9	4-10	<del>6-12</del>	↓ 8-14	↓ 12-18	↓ 18-24	21-27
Zone C	10	↓ 6-12	↓ 8-14	↓ 10-16	15-21	21-27	24-30
	11	↓ 8-14	↓ 10-16	↓ 12-18	18-24	24-30	27-33
	12	↓ 10-16	↓ 12-18	↓ 15-21	21-27	27-33	30-37
	13	↓ 12-18	↓ 15-21	↓ 18-24	24-30	30-37	33-41

## §5C1.1 - Treatment Departure

- Amends §5C1.1 to allow departure from Zone C to Zone B if
  - Δ has subst. abuse problem or mental health issue; and
  - crime is related to condition to be treated.
- Note: possible credit for pretrial conditions
  - But remember *Reno v Koray*, 515 US 50 (1995) (no credit allowed toward sentence for pre-trial time spent in halfway house).

## §2L1.2 – Unlawfully Entering or Remaining in U.S.

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- Cultural assimilation departure available if:
  - Δ formed cultural ties from residing in U.S. since childhood;
  - cultural ties were main reason for returning or remaining in U.S.;
  - departure not likely to increase risk to public

## Ch. 5H – Relevance of Specific Offender Characteristics

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- “May be relevant” if “present to an unusual degree” and distinguishes from typical case: age, mental and emotional conditions, physical condition, military service
- Drug or alcohol dependence: formerly prohibited, now merely discouraged as departure

## S. 1789 – Fair Sentencing Act of 2010

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- Reduces crack/powder ratio to 18:1
- Commission issued emergency amendments including
  - adjusting levels for crack cocaine in the drug table and
  - providing additional offense level reductions for drug defendants who receive mitigating role reductions. §§2D1.1(a)(5) and (b)(15),

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 10-456**

**July 14, 2010**

## **Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim**

*Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.*

This opinion addresses whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may, without the former client's informed consent, disclose confidential information to government lawyers prior to any proceeding on the defendant's claim in order to help the prosecution establish that the lawyer's representation was competent.<sup>1</sup> This question may arise, for example, because a prosecutor or other government lawyer defending the former client's ineffective assistance claim seeks the trial lawyer's file or an informal interview to respond to the convicted defendant's claim, or to prepare for a hearing on the claim.

Under *Strickland v. Washington*,<sup>2</sup> a convicted defendant seeking relief (e.g., a new trial or sentencing) based on a lawyer's failure to provide constitutionally effective representation, must establish both that the representation "fell below an objective standard of reasonableness" and that the defendant thereby was prejudiced, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>3</sup> Claims of ineffective assistance of counsel often are dismissed without taking evidence due to insufficient factual allegations or other procedural deficiencies. Numerous claims also are dismissed without a determination regarding the reasonableness of the trial lawyer's representation based on the defendant's failure to show prejudice. The Supreme Court recently expressed confidence "that lower courts – now quite experienced with applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit."<sup>4</sup> Although it is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding, sometimes trial lawyers have done so,<sup>5</sup> and commentators have expressed concerns about the practice.<sup>6</sup>

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. See Rules 1.6 & 1.9(c). The confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."<sup>7</sup>

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> 466 U.S. 668 (1984).

<sup>3</sup> *Id.* at 694.

<sup>4</sup> *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473, 1485 (2010).

<sup>5</sup> See, e.g., *Purkey v. United States*, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009), *motion to amend denied*, 2009 WL 5176598 (Dec. 22, 2009) (lawyer represented criminal defendant at trial and on appeal voluntarily filed 117-page affidavit extensively refuting former client's ineffective assistance of counsel claim); *State v. Binney*, 683 S.E.2d 478 (S.C. 2009) (defendant's trial counsel met with law enforcement authorities and provided his case file to them in response to defendant's ineffective assistance of counsel claim).

<sup>6</sup> See, e.g., Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1186-88 (2003); David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, Feb. 2009, at 14.

<sup>7</sup> Rule 1.6 cmt. 3. See, e.g., *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991) (law firm breached its fiduciary duty when,

Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise.<sup>8</sup> Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent.

Accordingly, unless there is an applicable exception to Rule 1.6, a criminal defense lawyer required to give evidence at a deposition, hearing, or other formal proceeding regarding the defendant's ineffective assistance claim must invoke the attorney-client privilege and interpose any other objections if there are nonfrivolous grounds on which to do so. The criminal defendant may be able to make nonfrivolous objections to the trial lawyer's disclosures even though the ineffective assistance of counsel claim ordinarily waives the attorney-client privilege and work product protection with regard to otherwise privileged communications and protected work product relevant to the claim.<sup>9</sup> For example, the criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review.

Even if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information outside the context of a formal proceeding, thereby eliminating the former client's opportunity to object and obtain a judicial ruling. Absent a relevant exception, a lawyer may disclose client information protected by Rule 1.6 only with the client's "informed consent." Such consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rules 1.0(e) & 1.6(a). A client's express or implied waiver of the attorney-client privilege has the legal effect of forgoing the right to bar disclosure of the client's prior confidential communications in a judicial or similar proceeding. Standing alone, however, it does not constitute "informed consent" to the lawyer's voluntary disclosure of client information outside such a proceeding.<sup>10</sup> A client might agree that the former lawyer may testify in an adjudicative proceeding to the

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under threat of subpoena, it disclosed former client's statement to prosecutor without former client's consent; court stated that "[d]isclosure of confidential communications by an attorney, whether privileged or not under the rules of evidence, is generally prohibited by the disciplinary rules," *id.* at 265 n.5).

<sup>8</sup> "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that ... the information sought [in a judicial or other proceeding] is protected against disclosure by the attorney-client privilege or other applicable law." Rule 1.6, cmt. 13. The lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client. *See, e.g.,* ABA Comm. on Eth. and Prof'l Responsibility, Formal Op. 94-385 (1994) (Subpoenas of a Lawyer's Files) ("If a governmental agency, or any other entity or person, subpoenas, or obtains a court order for, a lawyer's files and records relating to the lawyer's representation of a current or former client, the lawyer has a professional responsibility to seek to limit the subpoena or court order on any legitimate available grounds so as to protect documents that are deemed to be confidential under Rule 1.6."); *see also* Connecticut Bar Ass'n Eth. Op. 99-38 (absent a waiver, subpoenaed lawyer must invoke the attorney-client privilege if asked to testify regarding inconsistencies between former client's court testimony and former client's communications with lawyer and previous lawyer), 1999 WL 33115188; Maryland State Bar Ass'n Committee on Eth. Op. 2004-17 (2004) (if subpoenaed lawyer's client was "estate," lawyer permitted to turn over documents to successor personal representative and may reveal information; if representation included the former personal representative in both his fiduciary and in his individual capacity, lawyer is subject to constraints of Rule 1.6(a)); Rhode Island Sup. Ct. Eth. Adv. Panel Op. No. 98-02 (1998) (lawyer who received notice of deposition and subpoena must not disclose information relating to representation of former client); South Carolina Bar Eth. Adv. Committee Adv. Op. 98-30 (1998) (in response to third party's request for affidavits and/or depositions, lawyer must assert attorney-client privilege and may only disclose such information by order of court); Utah State Bar Eth. Advisory Op. Committee Op. 05-01, 2005 WL 5302775 (2005) (absent court order requiring lawyer's testimony, and notwithstanding subpoena served on lawyer by prosecution, lawyer may not divulge any attorney-client information, either to prosecution or in open court).

<sup>9</sup> *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to communications relevant to that contention. Waiver affords to interested parties fair opportunity to establish the facts underlying the claim.")

<sup>10</sup> *Cf. Clock v. United States*, No. 09-cv-379-JD, slip op. (D.N.H. 2010). In *Clock*, at the prosecution's request, the defendant signed a form explicitly waiving the attorney-client privilege with respect to the issues in her post-conviction petition in order to authorize her trial lawyer to answer questions regarding her ineffective assistance of counsel claim. Based on her office's institutional policy, trial counsel nonetheless declined to respond to the prosecution's questions unless ordered to do so by the court. Based on the defendant's

extent the court requires but not agree that the former lawyer voluntarily may disclose the same client confidences to the opposite party prior to the proceeding.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the “self-defense exception” of Rule 1.6(b)(5),<sup>11</sup> which provides that “[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” The self-defense exception grows out of agency law and rests on considerations of fairness.<sup>12</sup> Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer’s self-defense.<sup>13</sup>

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so.<sup>14</sup> For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer’s firm, and need not wait until charges or claims are filed before invoking the self-defense exception.<sup>15</sup> Although the scope of the exception has expanded over time,<sup>16</sup> the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation.<sup>17</sup> Consequently, it has been said that “[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer’s associate or agent with *serious* consequences ...”<sup>18</sup>

When a former client calls the lawyer’s representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b) (5) do not apply. The lawyer may not respond in order “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer

explicit waiver, the court ordered trial counsel to submit an affidavit limited to the issues in the defendant’s petition. *Id.* at \*2.

<sup>11</sup> Although the confidentiality duty is subject to other exceptions, none of the other exceptions seems applicable to this situation.

<sup>12</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. b (“in the absence of the exception . . . , lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group”).

<sup>13</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83.

<sup>14</sup> Rule 1.6 cmt. 10 (“The rule] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.”). Cases addressing the self-defense exception to the attorney-client privilege are to the same effect. See, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974) (lawyer named as defendant in class action brought by purchasers of securities who claimed that prospectus contained misrepresentations had right to make appropriate disclosure to lawyers representing stockholders as to his role in public offering of securities).

<sup>15</sup> See, e.g., *First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557 (S.D.N.Y. 1986) (self-defense exception to attorney-client privilege permits lawyer who is being sued for misconduct in securities matter to disclose in discovery documents within attorney-client privilege if lawyer’s interest in disclosure outweighs interest of client in maintaining confidentiality of communications, and if disclosure will serve truth-finding function of litigation process); Association of the Bar of the City of New York Committee on Prof’l and Jud. Eth. Op. 1986-7, 1986 WL 293096 (1986) (lawyer need not resist disclosure until formally accused because of cost and other burdens of defending against formal charge and damage to reputation); Pennsylvania Bar Association Committee on Legal Eth. and Prof’l Resp Eth. Op. 96-48, 1996 WL 928143 (1996) (lawyer charged by former clients with malpractice in their defense in SEC is permitted to speak to SEC lawyers and reveal information concerning the representation as he reasonably believes necessary to respond to allegations); South Carolina Bar Eth. Adv. Committee Adv. Op. 94-23, 1994 WL 928298, (1994) (lawyer under investigation by Social Security Administration for possible misconduct in connection with his client may reveal confidential information as may be necessary to respond to or defend against allegations; no grievance proceeding pending anywhere else against lawyer).

<sup>16</sup> Disciplinary Rule 4-101(C)(4) of the predecessor ABA Model Code of Professional Responsibility (1980) provided: “A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct,” but did not expressly authorize the disclosure of confidences to establish a claim on behalf of a lawyer other than for legal fees.

<sup>17</sup> Rule 1.6 cmt. 2. Commentators have maintained that the exception should be narrowly construed, both because the justifications for the exception are weak, see CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 308 (1986), and because there are strong policy considerations that disfavor the exception, including that it is subject to abuse, frustrates the policy of encouraging candor by clients, and undermines public confidence in the legal profession because it appears inequitable and self-serving. See Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 810-11 (1977).

<sup>18</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c (emphasis added).

and the client,” because the legal controversy is not between the client and the lawyer.<sup>19</sup> Nor is disclosure justified “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved,” because the defendant’s motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

The more difficult question is whether, in the context of an ineffective assistance of counsel claim, the lawyer may reveal information relating to the representation “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” This provision enables lawyers to defend themselves and their associates as reasonably necessary against allegations of misconduct in proceedings that are comparable to those involving criminal or civil claims against a lawyer. For example, lawyers may disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation. On its face, the provision also might be read to apply to a proceeding brought to set aside a criminal conviction based on a lawyer’s alleged ineffective assistance of counsel, because the proceeding includes an allegation concerning the lawyer’s representation of the client to which the lawyer might wish to respond.<sup>20</sup>

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is *necessary* to do so.<sup>21</sup> It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer’s belief must be objectively reasonable.<sup>22</sup> The Comment explaining Rule 1.6(b)(5) cautions lawyers to take steps to limit “access to the information to the tribunal or other persons having a need to know it” and to seek “appropriate protective orders or other arrangements . . . to the fullest extent practicable.”<sup>23</sup> Judicial decisions addressing the necessity for disclosure under the self-defense exception to the attorney-client privilege recognize that when there is a legitimate need for the lawyer to present a defense, the lawyer may not disclose all information relating to the representation, but only particular information that reasonably must be disclosed to avoid adverse legal consequences.<sup>24</sup> These limitations are equally applicable to Rule 1.6(b)(5).<sup>25</sup>

#### Permitting disclosure of client confidential information outside court-supervised proceedings

<sup>19</sup> See Utah State Bar Eth. Adv. Op. Committee Eth. Op. 05-01, 2005 WL 5302775, at \*6 (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or in court in response to defendant’s claim that lawyer’s prior advice was confusing; court stated, “[w]hile an arguable case might be made for disclosure under this exception, it . . . is fraught with problems. The primary problem is that the ‘controversy’ is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no ‘controversy’ between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer.”). *But see* Arizona State Bar Op. 93-02 (1993), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=652> (interpreting “controversy” to include a disagreement in the public media).

<sup>20</sup> *Cf.* State v. Madigan, 68 N.W. 179, 180 (Minn. 1896) (lawyer accused of inadequate criminal defense representation may submit affidavit containing attorney-client privileged information to disprove such charge).

<sup>21</sup> See Rule 1.6(b)(5) (allowing disclosure only “to the extent the lawyer reasonably believes necessary”); Rule 1.6 cmts. 10 & 14.

<sup>22</sup> See Rule 1.0(i) (“‘Reasonable belief’ or ‘reasonably believes’ when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.”)

<sup>23</sup> Rule 1.6 cmt. 14. Similar restrictions have been held applicable to the related context in which a lawyer seeks to disclose confidences to collect a fee. See, e.g., ABA Comm. on Eth. and Prof’l Responsibility, Formal Op. 250 (1943), in OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS ANNOTATED 555, 556 (American Bar Foundation 1967) (“where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights”).

<sup>24</sup> For example, in *In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 120 F.R.D. 687, 692 (C.D. Cal. 1988), the district court “reject[ed] the suggestion made by some parties that ‘selective’ disclosure should not be allowed, that if the exception is permitted to be invoked, all attorney-client communications should be disclosed,” finding that this suggestion was “directly contrary to the reasonable necessity standard.” *Accord* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83 cmt. e (“The lawyer’s invocation of the exception must be appropriate to the lawyer’s need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence.”); *cf.* *Dixon v. State Bar*, 653 P.2d 321, 325 (Cal. 1982) (lawyer sanctioned for gratuitous disclosure of confidence in response to former client’s motion to enjoin lawyer from harassing her); *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876, 886-87 (E.D. Pa. 1976) (“In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word ‘necessary’ in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage the disclosure will cause to the client and to the legal profession.”).

<sup>25</sup> Courts further recognize that disclosures may be made to defend against a non-client’s accusation of misconduct only if the accusation is credible enough to put the lawyer at some risk of adverse consequences, such as a criminal indictment or a civil lawsuit; third parties otherwise would have an incentive to raise utterly meritless claims of lawyer misconduct to gain access to confidential information. *Cf.* *SEC v. Forma*, 117 F.R.D. 516, 519-525 (S.D.N.Y. 1987) (formal charges need not be issued in order for the self defense exception to apply); *First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 566 n.15 (S.D.N.Y. 1986) (former auditor’s evidence against lawyer must “pass muster under Fed. R. Civ. P. 11”).

undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding.<sup>26</sup> Disclosure of such information might prejudice the defendant in the event of a retrial.<sup>27</sup> Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers.

Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information.<sup>28</sup> If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since *Strickland*, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.<sup>29</sup>

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<sup>26</sup> Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. e (before making disclosures under the self-defense exception, a lawyer ordinarily must give notice to former client).

<sup>27</sup> Some courts preclude the prosecution from introducing the trial lawyer's statements in a later trial, *see, e.g.*, *Bittaker v. Woodford*, 331 F.3d 715 (9<sup>th</sup> Cir.), *cert. denied*, 540 U.S. 1013 (2003) (waiver of privilege for purposes of habeas claim does not necessarily mean extinguishment of the privilege for all time and in all circumstances), but not all courts have done so. *See, e.g.*, *Fears v. Warden*, 2003 WL 23770605 (S.D. Ohio 2003) (scope of habeas petitioner's waiver of privilege not waived for all time and all purposes including possible retrial).

<sup>28</sup> *See, e.g.*, Utah State Bar Eth. Advisory Op. Committee Op. 05-01, *supra* notes 8 & 19 (where criminal defense lawyer's former client moved to set aside his guilty plea on ground that lawyer's advice about plea offer confused him, lawyer may not divulge attorney-client information to prosecutor to prevent a possible fraud on court or protect lawyer's reputation; lawyer must assert attorney-client privilege in hearing on former client's motion, and may testify only upon court order).

<sup>29</sup> *See* Rule 1.6 cmt. 14.

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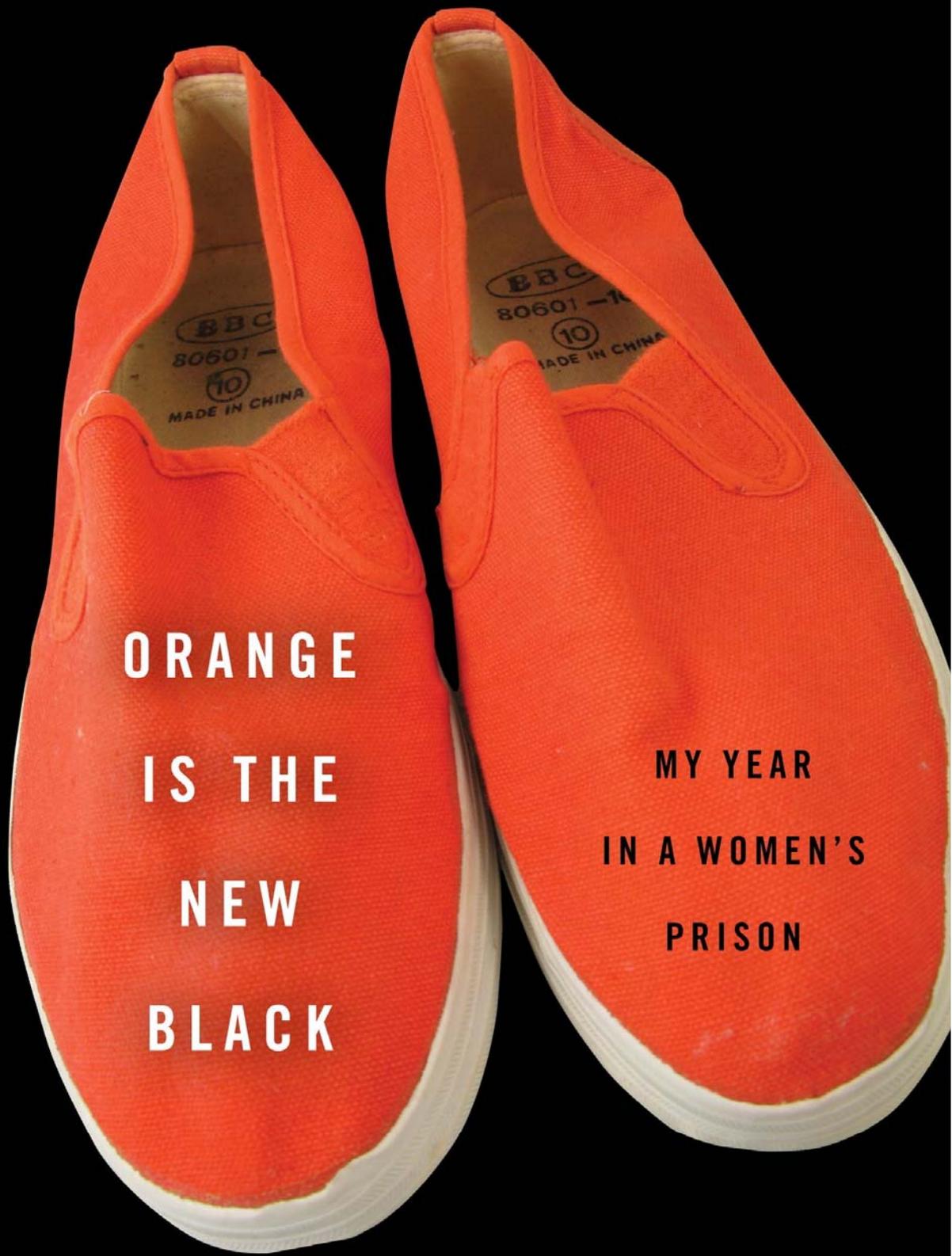
**“ORANGE IS  
THE NEW BLACK”**

**PRESENTED BY**

**PIPER KERMAN**

**AUTHOR**

**BROOKLYN, NY**



**ORANGE  
IS THE  
NEW  
BLACK**

**MY YEAR  
IN A WOMEN'S  
PRISON**

*A Memoir*

**PIPER KERMAN**

## EXCERPT...

### *Chapter One*

#### Are You Gonna Go My Way?

International baggage claim in the Brussels airport was large and airy, with multiple carousels circling endlessly. I scurried from one to another, desperately trying to find my black suitcase. Because it was stuffed with drug money, I was more concerned than one might normally be about lost luggage.

I was twenty-three in 1993 and probably looked like just another anxious young professional woman. My Doc Martens had been jettisoned in favor of beautiful handmade black suede heels. I wore black silk pants and a beige jacket, a typical *jeune fille*, not a bit counterculture, unless you spotted the tattoo on my neck. I had done exactly as I had been instructed, checking my bag in Chicago through Paris, where I had to switch planes to take a short flight to Brussels.

When I arrived in Belgium, I looked for my black rollie at the baggage claim. It was nowhere to be seen. Fighting a rushing tide of panic, I asked in my mangled high school French what had become of my suitcase. "Bags don't make it onto the right flight sometimes," said the big lug working in baggage handling. "Wait for the next shuttle from Paris—it's probably on that plane."

Had my bag been detected? I knew that carrying more than \$10,000 undeclared was illegal, let alone carrying it for a West African drug lord. Were the authorities closing in on me? Maybe I should try to get through customs and run? Or perhaps the bag really was just delayed, and I would be abandoning a large sum of money that belonged to someone who could probably have me killed with a simple phone call. I decided that the latter choice was slightly more terrifying. So I waited.

The next flight from Paris finally arrived. I sidled over to my new "friend" in baggage handling, who was sorting things out. It is hard to flirt when you're frightened. I spotted the suitcase. "Mon bag!" I exclaimed in ecstasy, seizing the Tumi. I thanked him effusively, waving with giddy affection as I sailed through one of the unmanned doors into the terminal, where I spotted my friend Billy waiting for me. I had inadvertently skipped customs.

"I was worried. What happened?" Billy asked.

"Get me into a cab!" I hissed.

I didn't breathe until we had pulled away from the airport and were halfway across Brussels.

My graduation procession at Smith College the year before was on a perfect New England spring day. In the sun-dappled quad, bagpipes whined and Texas governor Ann Richards exhorted my classmates and me to get out there and show the world what kind of women we were. My family was proud and beaming as I took my degree. My freshly separated parents were on their best behavior, my stately southern grandparents pleased to see their oldest grandchild wearing a mortarboard and surrounded by WASPs and ivy, my little brother bored out of his mind. My more

organized and goal-oriented classmates set off for their graduate school programs or entry-level jobs at nonprofits, or they moved back home—not uncommon during the depths of the first Bush recession.

I, on the other hand, stayed on in Northampton, Massachusetts. I had majored in theater, much to the skepticism of my father and grandfather. I came from a family that prized education. We were a clan of doctors and lawyers and teachers, with the odd nurse, poet, or judge thrown into the mix. After four years of study I still felt like a dilettante, underqualified and unmotivated for a life in the theater, but neither did I have an alternate plan, for academic studies, a meaningful career, or the great default—law school.

I wasn't lazy. I had always worked hard through my college jobs in restaurants, bars, and nightclubs, winning the affection of my bosses and coworkers via sweat, humor, and a willingness to work doubles. Those jobs and those people were more my speed than many of the people I had met at college. I was glad that I had chosen Smith, a college full of smart and dynamic women. But I was finished with what was required of me by birth and background. I had chafed within the safe confines of Smith, graduating by a narrow margin, and I longed to experience, experiment, investigate. It was time for me to live my own life.

I was a well-educated young lady from Boston with a thirst for bohemian counterculture and no clear plan. But I had no idea what to do with all my pent-up longing for adventure, or how to make my eagerness to take risks productive. No scientific or analytical bent was evident in my thinking—what I valued was artistry and effort and emotion. I got an apartment with a fellow theater grad and her nutty artist girlfriend, and a job waiting tables at a microbrewery. I bonded with fellow waitrons, bartenders, and musicians, all equally nubile and constantly clad in black. We worked, we threw parties, we went skinny-dipping or sledding, we fucked, sometimes we fell in love. We got tattoos.

I enjoyed everything Northampton and the surrounding Pioneer Valley had to offer. I ran for miles and miles on country lanes, learned how to carry a dozen pints of beer up steep stairs, indulged in numerous romantic peccadilloes with appetizing girls and boys, and journeyed to Provincetown for midweek beach excursions on my days off throughout the summer and fall.

When winter set in, I began to grow uneasy. My friends from school told me about their jobs and their lives in New York, Washington, and San Francisco, and I wondered what the hell I was doing. I knew I wasn't going back to Boston. I loved my family, but the fallout of my parents' divorce was something I wanted to avoid completely. In retrospect a EuroRail ticket or volunteering in Bangladesh would have been brilliant choices, but I stayed stuck in the Valley.

Among our loose social circle was a clique of impossibly stylish and cool lesbians in their mid-thirties. These worldly and sophisticated older women made me feel uncharacteristically shy, but when several of them moved in next door to my apartment, we became friends. Among them was a raspy-voiced midwesterner named Nora Jansen who had a mop of curly sandy-brown hair. Nora was short and looked a bit like a French bulldog, or maybe a white Eartha Kitt. Everything about her was droll—her drawling, wisecracking husky voice, the way she cocked her head to look at you with bright brown eyes from under her mop, even the way she held her ever-present cigarette, wrist flexed and ready for gesture. She had a playful, watchful way of drawing a person out, and when she paid you attention, it felt as if

she were about to let you in on a private joke. Nora was the only one of that group of older women who paid any attention to me. It wasn't exactly love at first sight, but in Northampton, to a twenty-two-year-old looking for adventure, she was a figure of intrigue.

And then, in the fall of 1992, she was gone.

She reappeared after Christmas. Now she rented a big apartment of her own, furnished with brand-new Arts and Crafts–style furniture and a killer stereo. Everyone else I knew was sitting on thrift store couches with their roommates, while she was throwing money around in a way that got attention.

Nora asked me out for a drink, just the two of us, which was a first. Was it a date? Perhaps it was, because she took me to the bar of the Hotel Northampton, the closest local approximation to a swank hotel lounge, painted pale green with white trelliswork everywhere. I nervously ordered a margarita with salt, at which Nora arched a brow.

“Sort of chilly for a marg?” she commented, as she asked for a scotch.

It was true, the January winds were making western Massachusetts uninviting. I should have ordered something dark in a smaller glass—my frosty margarita now seemed ridiculously juvenile.

“What’s that?” she asked, indicating the little metal box I had placed on the table.

The box was yellow and green and had originally held Sour Lemon pastilles. Napoleon gazed westward from its lid, identifiable by his cocked hat and gold epaulettes. The box had served as a wallet for a woman I’d known at Smith, an upperclasswoman who was the coolest person I had ever met. She had gone to art school, lived off campus, was wry and curious and kind and superhip, and one day when I had admired the box, she gave it to me. It was the perfect size for a pack of cigarettes, a license, and a twenty. When I tried to pull money out of my treasured tin wallet to pay for the round, Nora waved it away.

Where had she been for so many months? I asked, and Nora gave me an appraising once-over. She calmly explained to me that she had been brought into a drug-smuggling enterprise by a friend of her sister, who was “connected,” and that she had gone to Europe and been formally trained in the ways of the underworld by an American art dealer who was also “connected.” She had smuggled drugs into this country and been paid handsomely for her work.

I was completely floored. Why was Nora telling me this? What if I went to the police? I ordered another drink, half-certain that Nora was making the entire thing up and that this was the most harebrained seduction attempt ever.

I had met Nora’s younger sister once before, when she came to visit. She went by the name of Hester, was into the occult, and would leave a trail of charms and feathered trinkets made of chicken bones. I thought she was just a Wiccan heterosexual version of her sister, but apparently she was the lover of a West African drug kingpin. Nora described how she had traveled with Hester to Benin to meet the kingpin, who went by the name Alaji and bore a striking resemblance to MC Hammer. She had stayed as a guest at his compound, witnessed and been subject to “witch-doctor” ministrations, and was now considered his sister-in-law. It all sounded

dark, awful, scary, wild—and exciting beyond belief. I couldn't believe that she, the keeper of so many terrifying and tantalizing secrets, was taking me into her confidence.

It was as if by revealing her secrets to me, Nora had bound me to her, and a secretive courtship began. No one would call Nora a classic beauty, but she had wit and charm in excess and was a master at the art of seeming effortless. And as has always been true, I respond to people who come after me with clear determination. In her seduction of me, she was both persistent and patient.

Over the months that followed, we grew much closer, and I learned that a number of local guys I knew were secretly working for her, which proved reassuring to me. I was entranced by the illicit adventure Nora represented. When she was in Europe or Southeast Asia for a long period of time, I all but moved into her house, caring for her beloved black cats, Edith and Dum-Dum. She would call at odd hours of the night from the other side of the globe to see how the kitties were, and the phone line would click and hiss with the distance. I kept all this quiet—even as I was dodging questions from my already-curious friends.

Since business was conducted out of town, the reality of the drugs felt like a complete abstraction to me. I didn't know anyone who used heroin; and the suffering of addiction was not something I thought about. One day in the spring Nora returned home with a brand-new white Miata convertible and a suitcase full of money. She dumped the cash on the bed and rolled around in it, naked and giggling. It was her biggest payout yet. Soon I was zipping around in that Miata, with Lenny Kravitz on the tape deck demanding to know, "Are You Gonna Go My Way?"

Despite (or perhaps because of) the bizarre romantic situation with Nora, I knew I needed to get out of Northampton and do something. My friend Lisa B. and I had been saving our tips and decided that we would quit our jobs at the brewery and take off for San Francisco at the end of the summer. (Lisa knew nothing about Nora's secret activities.) When I told Nora, she replied that she would love to have an apartment in San Francisco and suggested that we fly out there and house-hunt. I was shocked that she felt so strongly about me.

Just weeks before I was to leave Northampton, Nora learned that she had to return to Indonesia. "Why don't you come with me, keep me company?" she suggested. "You don't have to do anything, just hang out."

I had never been out of the United States. Although I was supposed to begin my new life in California, the prospect was irresistible. I wanted an adventure, and Nora had one on offer. Nothing bad had ever happened to the guys from Northampton who had gone with her to exotic places as errand boys—in fact, they returned with high-flying stories that only a select group could even hear. I rationalized that there was no harm in keeping Nora company. She gave me money to purchase a ticket from San Francisco to Paris and said there would be a ticket to Bali waiting for me at the Garuda Air counter at Charles de Gaulle. It was that simple.

Nora's cover for her illegal activities was that she and her partner in crime, a goateed guy named Jack, were starting an art and literary magazine—questionable, but it lent itself to vagueness. When I explained to my friends and family that I was moving to San Francisco and would be working and traveling for the magazine, they

were uniformly surprised and suspicious of my new job, but I rebuffed their questions, adopting the air of a woman of mystery. As I drove out of Northampton headed west with my buddy Lisa, I felt as if I were finally embarking on my life. I felt ready for anything.

Lisa and I drove nonstop from Massachusetts to the Montana border, taking turns sleeping and driving. In the middle of the night we pulled into a rest stop to sleep, where we awoke to see the incredible golden eastern Montana dawn. I could not remember ever being so happy. After lingering in Big Sky country, we sped through Wyoming and Nevada until finally we sailed over the Bay Bridge into San Francisco. I had a plane to catch.

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**“Kerman’s memoir, *Orange Is the New Black*, reads like an estrogen-drenched version of Dostoevsky’s *The House of the Dead*... It’s a fantastic tale from the Siberia of America’s war on drugs and is a rippingly fun read right down to the unexpected moment of closure...”**

**– Ben Dickinson, *Elle Magazine***  
(full review on other side)

## **ORANGE IS THE NEW BLACK**

### ***My Year in a Women’s Prison***

**Piper Kerman**

(Spiegel & Grau Hardcover ■ On-Sale: April 6, 2010)

**Tour Cities: NYC, Boston, Greenwich, CT, San Francisco, Washington, DC**

#### **More Praise for *Orange is the New Black***

“Ten years after a fleeting post-Smith College flirtation with drug trafficking, Piper Kerman was arrested—a P.O.W. in the war on drugs. In *Orange Is the New Black* (Spiegel & Grau), Kerman presents—devoid of self-pity, and with novelistic flair—life in the clink as less Caged Heat and more Steel Magnolias. —*Vanity Fair*

“*Orange* transcends the memoir genre’s usual self-centeredness to explore how human beings can always surprise you. You’d expect bad behavior in prison. But it’s the moments of joy, friendship and kindness that the author experienced that make *Orange* so moving and lovely...You sense [Kerman] wrote *Orange* to make readers think not about her but her fellow inmates. And, boy, does she succeed.” —*USA Today*

“Impossible to put down.” —*Los Angeles Times*

“Vivid, revealing...” —*Entertainment Weekly*

“[An] insightful and often very funny book...” —*Salon.com*

“Don’t let the irreverent title mislead: This is a serious and bighearted book that depicts life in a women’s prison with great detail and—crucially—with empathy and respect for Piper Kerman’s fellow prisoners, most of whom did not and do not have her advantages and options. With its expert reporting and humane, clear-eyed storytelling, *Orange Is the New Black* will join Ted Conover’s *Newjack* among the necessary contemporary books about the American prison experience.”

—Dave Eggers, author of *Zeitoun* and co-author of *Surviving Justice: America’s Wrongfully Convicted and Exonerated*

“I loved this book, to a depth and degree that caught me by surprise. Of course it’s a compelling insider’s account of life in a women’s federal prison, and of course it’s a behind-the-scenes look at America’s war on drugs, and of course it’s a story rich with humor, pathos and redemption: All of that was to be expected. What I did not expect from this memoir was the affection, compassion, and even reverence that Piper Kerman demonstrates for all the women she encountered while she was locked away in jail. That was the surprising twist: that behind the bars of women’s prisons grow extraordinary friendships, ad hoc families, and delicate communities. In the end, this book is not just a tale of prisons, drugs, crime, or justice; it is, simply put, a beautifully told story about how incredible women can be, and I will never forget it.”

– Elizabeth Gilbert, author of *Eat, Pray, Love*

Piper Kerman majored in theater at Smith College and graduated in the recession year of 1992. So the boho bisexual Bostonian stuck around Northampton, waiting tables and spinning her wheels. Then she got involved with Nora Jansen, who suddenly acquired a lot of money, and before she knew it, Kerman was crisscrossing the globe with her drug-trafficking girlfriend and even, just once, running drug money herself on a trip from Chicago to Brussels.

After four months, though, Kerman realized that she was in an underworld way over her head, so she left Nora for San Francisco, got a job in TV production, met a nice Jewish boy named Larry, and settled down. In 1998, they moved to New York City to pursue their careers. Then, one May afternoon, the doorbell rang at their West Village walk-up. Who could that be? “Miss Kerman? It’s officers Maloney and Wong.” Apparently, Nora had been snared. Thus began a glacially slow and implacable legal journey toward Kerman’s 13-month stretch in Danbury, Connecticut’s federal prison. There, she consorted (but chastely, between regular visits from the nobly loyal Larry) with women from all the walks of life that a nice Smith girl would never ordinarily travel.

Kerman’s memoir, *Orange Is the New Black* (Spiegel & Grau), reads like an estrogen-drenched version of Dostoevsky’s *The House of the Dead*, as our gentlewoman protagonist becomes exalted by her exposure to the beautiful souls of trannie divas, Latina grandmothers, a West Indian roommate, even a few politicals—radical pacifists and nuns who managed against all odds to run afoul of the U.S. penal code (along with, of course, a good few of the truly damned). It’s a fantastic tale from the Siberia of America’s war on drugs and is a rippingly fun read right down to the unexpected moment of closure that arrives before Kerman goes home to Larry for good.

—Ben Dickinson, *Elle Magazine* (May issue)

About the Author:

**Piper Kerman** is a vice president at a Washington, D.C.-based communications firm that works with foundations and nonprofits. A graduate of Smith College, she lives in Brooklyn with her husband.

**ORANGE IS THE NEW BLACK: *My Year in a Women's Prison***

*Piper Kerman*

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**ALTERNATIVES  
TO  
INCARCERATION**

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## ALTERNATIVES TO INCARCERATION

- The Commission voted to increase Zones B and C by one level in each criminal history category. Clients with ranges of 8-14 months (CHCs I-IV) and 9-15 months (CHC V-VI) will fall within Zone B rather than C; clients in a range of 12-18 months (all CHCs) will fall within Zone C rather than D.
- The Commission also voted to amend USSG §5C1.1 to provide for a treatment departure from Zone C to Zone B. The amendment clarifies §5C1.1 n.6 by giving examples of when a treatment alternative departure from Zone C to Zone B may be appropriate for drug and alcohol abusers as well as those who suffer from “significant mental illness.” Under the terms of the guideline, the court must find (A) “that the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness,” and (B) “the defendant’s criminality must be related to the treatment problems to be addressed before a departure is warranted.” The court should also consider “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 and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.” Finally, the amendment contains a new application note that advises courts to consider the effectiveness of residential treatment programs in deciding to impose a condition of community confinement.
- **Clients in CH III or above.** The guidelines continue to recommend against the use of substitutes for imprisonment for “most defendants with a criminal history category of III or above.” USSC § 5C1.1 n.7. The Commission, however, voted to remove the statement that “such defendants have failed to reform despite the use of such alternatives.” Removal of that language should permit arguments that your client is an exception to the general rule because he or she has not received treatment or that prior treatment was not adequate to meet the client’s needs. It would also give you an opportunity to educate your judge about how relapse is common among drug/alcohol abusers and that mentally ill defendants often lack insight into their illness, which impedes their treatment and medication compliance.
- **Recognizing pretrial community confinement or home detention.** Clients should be able to get “credit” toward a condition that requires community confinement or home detention for any time they spent in such confinement or detention pretrial so that they spend the least amount of post-sentencing time in community confinement, home detention, or imprisonment (for Class A and B felonies where a minimal term of imprisonment is statutorily required).
- No statute prohibits a court from deciding that a defendant has already satisfied a condition of probation or supervised release. Take for example, a defendant in a 12-18 month range who receives a sentence of probation with twelve months

intermittent confinement, community confinement or home detention. If before sentencing the defendant already has completed a 60 day residential treatment program and remained on home detention for an additional 2 months, the court may find that the defendant has already satisfied 4 months of the condition that he spend time in community confinement or home detention. See also 18 U.S.C. §3564(a) (“term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court”)(emphasis added). The same reasoning applies to defendants sentenced to terms of imprisonment with supervised release. 18 U.S.C. §3583(a) provides that a *term* of supervised release commences after imprisonment, but nothing in the statute precludes a court from finding that a *condition* of supervised release has already been satisfied.

- The general rule that a defendant’s presentencing confinement in community confinement or home detention cannot be credited toward the term of imprisonment, *Reno v. Koray*, 515 U.S. 50 (1995); 18 U.S.C. §3583(b), should not preclude the court from crediting a pretrial condition toward a condition of probation or supervised release.
- **BOP placement in community confinement for the minimal term of imprisonment.**
- Go to [http://www.famm.org/Repository/Files/2nd Chance Act - RRC Placements 04-14-08%5B1%5D.pdf](http://www.famm.org/Repository/Files/2nd%20Chance%20Act%20-%20RRC%20Placements%2004-14-08%5B1%5D.pdf) for the BOP memo regarding front-end designations to community confinement. Keep this in mind when structuring sentences and be sure to ask the court to recommend that BOP designate a RRC placement.

# SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

- **THE UNITED STATES INCARCERATES MORE OF ITS CITIZENS THAN THE TOP 35 EUROPEAN COUNTRIES COMBINED\***
- **2010 Population of the United States: 311,000,000\*\***
- **2010 Population of Europe: 830,000,000\*\*\***

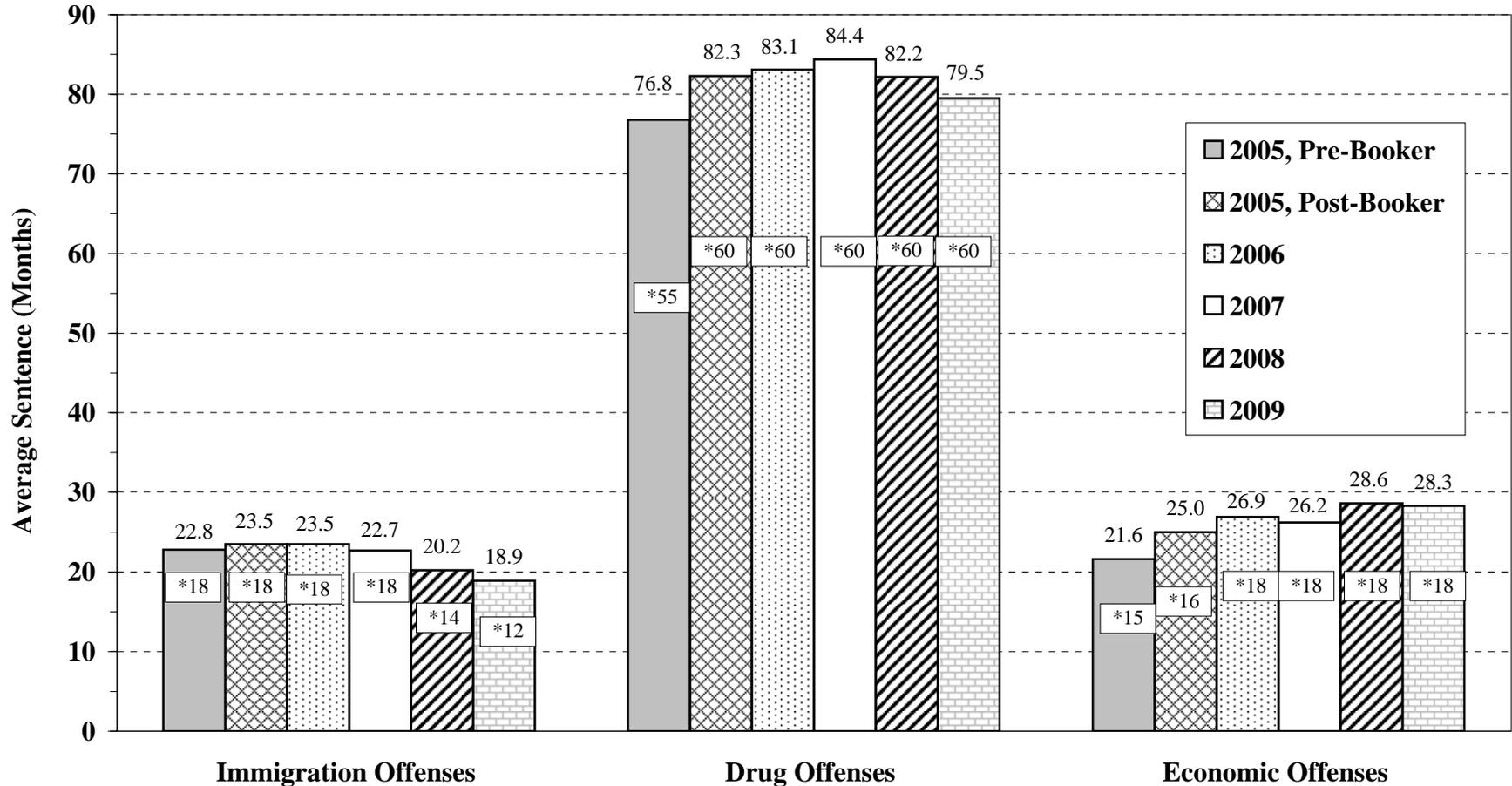
**\*Source: International Centre for Prison Studies at Kings College, London “World Prison Brief”**

**\*\* United States Census Bureau**

**\*\*\* United Nations**

Figure E

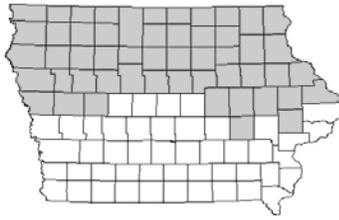
**AVERAGE LENGTH OF IMPRISONMENT IN EACH GENERAL CRIME CATEGORY<sup>1</sup>**  
**Fiscal Years 2005 - 2009**



<sup>1</sup>Drug offenses include drug trafficking, use of a communication facility, and simple possession. Economic offenses include fraud, embezzlement, forgery/counterfeiting, bribery, tax offenses, and money laundering. This figure does not include sentences of probation and any confinement as described in USSG §5C1.1. Descriptions of variables used in this figure are provided in Appendix A.

\* Median values are superimposed on the bars and are preceded by asterisks.

SOURCE: U.S. Sentencing Commission, 2005 - 2009 Datafiles, USSCFY05 - USSCFY09.



**Gender, Race, and Ethnicity<sup>1</sup>**

	TOTAL		Male		Female	
	Count	Percentage	Count	Percentage	Count	Percentage
<b>TOTAL</b>	<b>348</b>	<b>100.0%</b>	<b>309</b>	<b>88.8%</b>	<b>39</b>	<b>11.2%</b>
White	188	54.0%	155	82.4%	33	17.6%
Black	59	17.0%	57	96.6%	2	3.4%
Hispanic	86	24.7%	85	98.8%	1	1.2%
Other	15	4.3%	12	80.0%	3	20.0%

**Departure Status<sup>2</sup>**

	Count	Percentage
<b>TOTAL</b>	<b>349</b>	<b>100.0%</b>
Sentenced Within Guideline Range	180	51.6%
Upward Departure from Guideline Range	12	3.4%
Upward Departure with <i>Booker</i> /18 U.S.C. § 3553	1	0.3%
Above Guideline Range with <i>Booker</i> /18 U.S.C. § 3553	4	1.1%
All Remaining Cases Above Guideline Range	3	0.9%
§5K1.1 Substantial Assistance Departure	69	19.8%
§5K3.1 Early Disposition Program Departure	0	0.0%
Other Government-Sponsored Below Guideline Range	5	1.4%
Downward Departure from Guideline Range	1	0.3%
Downward Departure with <i>Booker</i> /18 U.S.C. § 3553	0	0.0%
Below Guideline Range with <i>Booker</i> /18 U.S.C. § 3553	74	21.2%
All Remaining Cases Below Guideline Range	0	0.0%

<b>Average Age<sup>3</sup></b>	Mean	Median
<b>TOTAL</b>	<b>34.4</b>	<b>31.0</b>
Male	34.1	31.0
Female	37.1	37.0

<b>Mode of Conviction<sup>4</sup></b>	Count	Percentage
<b>TOTAL</b>	<b>349</b>	<b>100.0%</b>
Plea	328	94.0%
Trial	21	6.0%

**SENTENCING INFORMATION BY PRIMARY OFFENSE<sup>5</sup>**

	TOTAL	Robbery	Larceny	Embezzlmt	Fraud	Drug Traffck	Counterftng	Firearms	Immigratr	All Other
	349	2	6	2	18	175	0	59	31	56

**CASES INVOLVING PRISON<sup>6</sup>**

<b>Total Receiving Prison</b>	<b>336</b>	<b>2</b>	<b>5</b>	<b>2</b>	<b>15</b>	<b>174</b>	<b>0</b>	<b>55</b>	<b>31</b>	<b>52</b>
Prison	327	2	5	2	11	174	0	53	31	49
Prison/Community Split	9	0	0	0	4	0	0	2	0	3
<b>Prison Term Ordered</b>										
Up to 12 Months	36	0	2	0	6	0	0	6	15	7
13-24 Months	36	0	2	1	3	3	0	8	7	12
25-36 Months	27	0	1	1	1	10	0	5	3	6
37-60 Months	47	0	0	0	1	26	0	9	5	6
Over 60 Months	190	2	0	0	4	135	0	27	1	21
Mean Sentence	109.3	-	17.0	-	39.5	148.2	-	75.2	18.9	100.1
Median Sentence	78.0	-	18.0	-	18.0	120.0	-	60.0	12.0	42.5

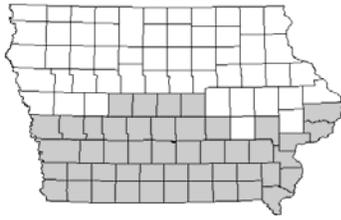
**CASES INVOLVING PROBATION**

<b>Total Receiving Probation</b>	<b>12</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>3</b>	<b>1</b>	<b>0</b>	<b>4</b>	<b>0</b>	<b>3</b>
Probation Only	7	0	0	0	2	0	0	3	0	2
Probation and Confinement	5	0	1	0	1	1	0	1	0	1

**CASES INVOLVING FINES AND RESTITUTION<sup>7</sup>**

<b>Total Receiving Fines and Restitution</b>	<b>36</b>	<b>2</b>	<b>3</b>	<b>2</b>	<b>9</b>	<b>5</b>	<b>0</b>	<b>3</b>	<b>0</b>	<b>12</b>
Median Dollar Amount	\$9,588	-	\$21,818	-	\$33,557	\$6,387	-	\$2,765	-	\$9,271

Footnotes and a complete description of all variables in this table are provided in Appendix A.  
SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY09.



**Gender, Race, and Ethnicity<sup>1</sup>**

	TOTAL		Male		Female	
	Count	Percentage	Count	Percentage	Count	Percentage
<b>TOTAL</b>	<b>464</b>	<b>100.0%</b>	<b>402</b>	<b>86.6%</b>	<b>62</b>	<b>13.4%</b>
White	223	48.1%	191	85.7%	32	14.3%
Black	122	26.3%	110	90.2%	12	9.8%
Hispanic	111	23.9%	93	83.8%	18	16.2%
Other	8	1.7%	8	100.0%	0	0.0%

**Departure Status<sup>2</sup>**

	Count	Percentage
<b>TOTAL</b>	<b>469</b>	<b>100.0%</b>
Sentenced Within Guideline Range	243	51.8%
Upward Departure from Guideline Range	0	0.0%
Upward Departure with <i>Booker</i> /18 U.S.C. § 3553	0	0.0%
Above Guideline Range with <i>Booker</i> /18 U.S.C. § 3553	10	2.1%
All Remaining Cases Above Guideline Range	0	0.0%
§5K1.1 Substantial Assistance Departure	81	17.3%
§5K3.1 Early Disposition Program Departure	0	0.0%
Other Government-Sponsored Below Guideline Range	13	2.8%
Downward Departure from Guideline Range	3	0.6%
Downward Departure with <i>Booker</i> /18 U.S.C. § 3553	3	0.6%
Below Guideline Range with <i>Booker</i> /18 U.S.C. § 3553	110	23.5%
All Remaining Cases Below Guideline Range	6	1.3%

**Average Age<sup>3</sup>**

	Mean	Median
<b>TOTAL</b>	<b>35.5</b>	<b>34.0</b>
Male	35.2	33.0
Female	37.5	35.5

**Mode of Conviction<sup>4</sup>**

	Count	Percentage
<b>TOTAL</b>	<b>469</b>	<b>100.0%</b>
Plea	427	91.0%
Trial	42	9.0%

**SENTENCING INFORMATION BY PRIMARY OFFENSE<sup>5</sup>**

	TOTAL	Robbery	Larceny	Embezzlmt	Fraud	Drug Trafck	Counterftng	Firearms	Immigratr	All Other
	<b>469</b>	<b>3</b>	<b>8</b>	<b>1</b>	<b>28</b>	<b>219</b>	<b>5</b>	<b>106</b>	<b>28</b>	<b>71</b>

**CASES INVOLVING PRISON<sup>6</sup>**

<b>Total Receiving Prison</b>	<b>439</b>	<b>3</b>	<b>4</b>	<b>0</b>	<b>25</b>	<b>217</b>	<b>5</b>	<b>94</b>	<b>28</b>	<b>63</b>
Prison	420	3	4	0	24	210	5	87	28	59
Prison/Community Split	19	0	0	0	1	7	0	7	0	4
<b>Prison Term Ordered</b>										
Up to 12 Months	30	0	1	0	4	1	2	10	6	6
13-24 Months	63	0	3	0	8	11	1	21	10	9
25-36 Months	28	1	0	0	3	4	2	11	2	5
37-60 Months	53	0	0	0	1	31	0	12	7	2
Over 60 Months	255	2	0	0	9	165	0	38	2	39
Mean Sentence	119.7	192.3	13.0	-	48.4	167.0	20.6	73.3	28.4	106.2
Median Sentence	84.0	71.0	15.5	-	25.0	120.0	18.0	49.0	18.0	84.0

**CASES INVOLVING PROBATION**

<b>Total Receiving Probation</b>	<b>30</b>	<b>0</b>	<b>4</b>	<b>1</b>	<b>3</b>	<b>2</b>	<b>0</b>	<b>12</b>	<b>0</b>	<b>8</b>
Probation Only	23	0	1	1	1	2	0	10	0	8
Probation and Confinement	7	0	3	0	2	0	0	2	0	0

**CASES INVOLVING FINES AND RESTITUTION<sup>7</sup>**

<b>Total Receiving Fines and Restitution</b>	<b>75</b>	<b>3</b>	<b>6</b>	<b>1</b>	<b>17</b>	<b>10</b>	<b>4</b>	<b>14</b>	<b>0</b>	<b>20</b>
Median Dollar Amount	\$9,856	\$2,559	\$40,089	-	\$128,712	\$8,290	\$1,862	\$750	-	\$9,251

Footnotes and a complete description of all variables in this table are provided in Appendix A.  
SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY09.

**Figure 1: Table Representation of Mean Sentences in Drug Trafficking Cases in Selected Jurisdictions- Fiscal Year 2003 \***

<b>Jurisdiction</b>	<b>Average Sentence</b>
Northern District Iowa	128 months
Southern District Iowa	137.6 months
South Dakota	103.1 months
Nebraska	122.4 months
Missouri Western Dist.	79.2 months
Minnesota	79.1 months
National Average	80.1 months

**Figure 2: Table Representation of Mean Sentences in Drug Trafficking Cases in Selected Jurisdictions- Fiscal Year 2007 \***

<b>Jurisdiction</b>	<b>Average Sentence</b>
Northern District Iowa	150.2 months
Southern District Iowa	135.4 months
South Dakota	103.1 months
Nebraska	99.2 months
Missouri	87.6 months
Minnesota	83.1 months
National Average	85.6 months

**Figure 3: Table Representation of Mean Sentences in Drug Trafficking Cases in Selected Jurisdictions- Fiscal Year 2009 \***

<b>Jurisdiction</b>	<b>Average Sentence</b>
Northern District Iowa	148.20 months
Southern District Iowa	167 months
South Dakota	75.2 months
Nebraska	95.7 months
Missouri Western Division	99.9 months
Minnesota	74.1 months
National Average	81.2 months

\*Source; United States Sentencing Commission, *Statistical Information Packet, Fiscal Year 2003, 2007 and 2009*

[<http://www.ussc.gov/ANNRPT/2009/SBTOC03.htm>][<http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm>] [<http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm>]

( This information is available at the U.S.S.G. website under the pull down menu “Publications.” Click on the “Publications” pull down menu and click “Annual Reports and Statistical Sourcebooks” Each year is listed. For the selected year, click on “Sourcebook of Federal Sentencing Statistics.” Each federal district is listed with comparable sentencing data. )

**MOCK SUPREME  
COURT ARGUMENT  
U.S. V. PEPPER**

**PRESENTED BY  
ALFREDO PARRISH  
CJA ATTORNEY  
DES MOINES, IOWA**

**PANEL:  
JOHN MESSINA, JOE HERROLD  
AND JANE KELLY**

## PEPPER STATEMENT OF THE CASE

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

II. Whether, when a new judge is assigned to resentence a defendant after remand, the new judge is obligated under the law of the case doctrine to follow the original judge's sentencing findings left undisturbed on appeal.

### A. Offense Conduct, Original Sentencing and First Appeal by Government

1. October 22, 2003, Pepper and three codefendants were charged in a one count indictment with conspiracy to distribute methamphetamine. The offense carried a minimum of ten years, and a maximum of life.

Pepper plead guilty. His total offense level was 30 and criminal history category I. His Guideline imprisonment range was 97 to 121 months. Pepper was safety-valve eligible.

The probation officer noted that (1) Pepper graduated from high school in June, 1997, with a 3.4 grade point average, (2) worked sporadically after graduation, (3) his brother died in a car accident in 1998, and his mother died of colon cancer in the summer of 2002, (4) he had a strained relationship with his father, (5) following his brother's car accident, Pepper attempted suicide and was admitted to a mental health ward, (6) he did not take any anti-depression medication, and (7) following his mother's death, he was by and large homeless.

Pepper had a significant history of substance abuse from age 18, and he became addicted, sold methamphetamine to support his habit and never received counseling. Pepper's father had noticed a change in attitude and maturity from his son since his incarceration.

2. March 10, 2004, during sentencing the government made a 15% motion for departure for substantial assistance. Pepper, based on his good academic background, the impact

of the deaths in his family, his drug addiction, his homelessness, his desire for drug treatment, requested a downward departure so he could be placed in the federal boot camp. The PO agreed with this recommendation.

Judge Bennett was concerned that Pepper would not get the 500-hour residential drug treatment from boot camp. He said that the 500-hour drug treatment program at the federal prison camp in Yankton, South Dakota, was the best, but that there was a trade-off: Pepper would do more time in prison at Yankton, than he would at the boot camp. Pepper requested that he be sent to Yankton anyway, so that he could get the drug treatment. After calling Yankton, the judge determined that in light of their waiting list he needed to impose at least a 24-month sentence to ensure that Pepper received drug treatment.

The judge based on the substantial assistance motion and the factors under § 5K1.1, committed Pepper to the prison camp in Yankton for 24 months, and requested that he be placed in the 500-hour residential drug treatment program. Supervised release would be five years. The judge explained the sentence, noting Pepper's strong family support, that Pepper had a lot of promise and potential, and that he expected Pepper to do very well on supervised release.

3. April 12, 2004, Pepper arrived at the Yankton prison camp.

4. April 19, 2004, the government appealed.

5. March 10, 2005, Pepper was released from Yankton to a halfway house in Council Bluffs, Iowa.

6. June 24, 2005, the court of appeals remanded the case for resentencing. *United States v. Pepper*, 412 F.3d 995 (8th Cir. 2005) (*Pepper I*). The court determined it was improper for Judge Bennett to consider a matter unrelated to Pepper's substantial assistance when determining how far to depart below the Guidelines range. This "matter" was identified as the

judge's desire to sentence Pepper to the shortest possible term of imprisonment that would allow him to participate in the intensive drug treatment program at Yankton. The case was remanded for resentencing with instructions to follow the principles set forth in *Booker*.

7. June 27, 2005, Pepper left the halfway house and moved to an apartment in Sioux City, Iowa.

**B. Resentencing in Front of Judge Bennett and Second Appeal by Government**

1. May 5, 2006, Pepper (who had discharged his sentence and been on supervised release for 10 months) returned for resentencing. Two issues were addressed: (1) a revised departure for substantial assistance, and (2) a request by Pepper for a downward variance for post-offense and post-sentencing rehabilitation.

The probation officer filed an updated report. In light of mitigating factors, the officer requested a downward variance to the original 24-sentence, finding it "reasonable in conjunction with the substantial assistance reduction." He found that Pepper (1) had no history of violence, (2) he had significant alcohol and drug abuse since age 18 and sold drugs to support his addiction, but had no substance abuse treatment prior to the instant offense, (3) he had been drug free since his arrest in October, 2003, (4) he had attempted suicide after his brother's death in 1998, (5) he had been unemployed in order to take care of his ailing mother, who suffered from cancer, (6) he was homeless after his mother died in 2002, (7) he had a distant relationship with his father, and (8) this was a "unique remand sentencing because the defendant appears to have post-release mitigating factors since his release on June 27, 2005. The defendant has taken positive steps in becoming a law abiding citizen. He maintained employment and is a full-time college student where he achieved a 4.0 last semester, making the President's List. The defendant has also reunited his relationship with his father. Although the defendant had a serious

drug addiction, it appears he has taken the appropriate steps to maintain a lifestyle of sobriety by completing the Bureau of Prison's 500-hour drug treatment program; however he did not receive any reduction off his sentence because he did not have enough time to serve. The defendant has also complied with all conditions of his supervision. Although each offender is unique, I do not believe the defendant has the demeanor to commit future crimes and, therefore, his risk to the community appears to be minimal."<sup>1</sup>

Judge Bennett departed 40 percent for substantial assistance to a new sentence of 58 months. He adopted as his findings of fact the recommendations contained in the probation officer's report and the testimony of Pepper and his father. He then moved to the issue of whether the facts and circumstances of the case warranted a variance from the 58-month sentence. He decided that they did, and varied downward to 24 months. He found that Pepper's case (1) was "exceptional," (2) he had no history of violence, (3) he had been attending school and getting A's, and (4) that there would be a sentencing disparity between Pepper and his codefendants if Pepper did not receive a variance. He found that Pepper had an "extremely low risk of recidivism" based on all the defendants he had seen. He felt obliged to consider Pepper's post-release conduct the prior year and how well Pepper had done since his release from prison. He justified this consideration by recognizing the other side of the argument: if Pepper had been out committing crimes, this would be an important factor to consider during resentencing, and the government would advocate such a position.

2. June 5, 2006, the government appealed.

3. May 21, 2007, the court of appeals issued its second opinion. *United States v. Pepper*, 486 F.3d 408 (8th Cir. 2007) (*Pepper II*). The government raised two issues on appeal:

---

<sup>1</sup> Pepper and his father testified during the resentencing and echoed the probation officer.

(1) abuse of discretion in granting a 40% downward departure; and, (2) discretion in granting a 59% variance.

The court found that “reasonable proportionality” existed between Pepper's assistance and the downward departure. The court found that Judge Bennett properly identified only assistance-related factors, that he considered the § 5K1.1 factors, including the government's recommendation, that he considered Eighth Circuit precedent, and that a 40% reduction was warranted. The court ruled that Judge Bennett did not abuse his discretion in the extent of his § 5K1.1 departure.

The court addressed the 59 percent, or 34 month downward variance to 24 months. The court found that Judge Bennett considered an improper factor when considering the absence of violence in Pepper's life, that he did not adequately explain the disparity between Pepper's co-defendants to justify any reduction, and that he considered an “impermissible factor” in granting a downward variance for post-sentencing rehabilitation.

The court reversed and remanded the case for resentencing consistent with its opinion, and, since Judge Bennett “expressed a reluctance to resentence Pepper again should this case be remanded,” required re-sentencing by a different judge.

4. May 21, 2007, Chief Judge Linda Reade took the case.

5. July 18, 2007, Judge Reade ruled that during the second resentencing hearing she would “not consider” herself “bound to reduce Pepper's advisory Sentencing Guidelines range by 40 percent, pursuant to USSG § 5K1.1.”

6. August 27, 2007, Pepper filed his first petition for writ of certiorari.

7. February 12, 2008, the Supreme Court granted the petition, vacated the judgment, and ordered the case remanded to the Eighth Circuit for further consideration in light of *Gall v. United States*.

8. March 11, 2008, the court of appeals issued its third opinion. *United States v. Pepper*, 518 F.3d 949 (8th Cir. 2008) (*Pepper III*). After considering *Gall's* impact on *Pepper's* case, it reversed and remanded for resentencing. The court began by recognizing its finding that Judge Bennett had not abused his discretion regarding the 5K1.1 departure. The court found that Judge Bennett committed procedural error in failing to adequately explain with sufficient justifications his conclusion that a 59 percent variance after the § 5K1.1 downward departure was warranted. The court found that the judge provided insufficient explanation of the “no history of violence” factor. It also found that the judge did not adequately explain and support his rationale for sentencing *Pepper* to 24 months of imprisonment in contrast to *Pepper's* co-defendants. Finally, the court found that “*Gall* does not alter our circuit precedent or our conclusion in *Pepper II* that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance,” and that the judge gave significant weight to *Pepper's* post-sentence rehabilitation, which is an impermissible factor to consider in granting a downward variance.

9. June 9, 2008, *Pepper* filed his second petition for writ of certiorari which was denied.

### **C. Resentencing in Front of Judge Reade and First Appeal by *Pepper***

1. October 17, 2008, *Pepper's* second resentencing began. *Pepper* had been out of prison for nearly three and a half years. He had been on supervised release and had exhibited exemplary behavior.

During the hearing Pepper and his father testified that Pepper (1) was 29 years old and had been married in May, 2007, (2) his wife had a seven-year-old daughter who considered him her father, (3) was the primary source of the family's support, (4) was attending school full-time and studying business management at Parkland College in Champaign-Urbana, Illinois, and (5) had been employed at Sam's Club the past two years, was an exemplary employee and was considered for promotion to manager, and was named associate of the year at the Sam's Club and was working as the night supervisor.

2. December 22, 2008, Judge Reade filed her sealed sentencing memorandum. Based on the exact facts that Judge Bennett had relied on to award a 40 percent reduction for substantial assistance, Judge Reade awarded a 20 percent reduction for assistance. She denied every downward variance request, which included a variance for post-sentencing rehabilitation.

3. January 5, 2009, more than five years after Pepper's arrest, the final resentencing hearing began. Pepper was sentenced to 77 months in the BOP and 12 months of supervised release. The court granted the Rule 35(b) motion and departed 15 percent to a final sentence of 65 months. The court requested that the BOP give Pepper credit for his completion of the drug treatment program. Pepper self-surrendered.

4. January 16, 2009, Pepper appealed.

5. April 2, 2009, Pepper self-reported to the federal prison camp in Florence, Colorado.

6. July 2, 2009, the court of appeals affirmed. *United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009). The court determined that Judge Bennett's findings regarding departure were not the law of the case and that Judge Reade did not abuse her discretion in departing downward

20 percent based on Pepper's substantial assistance. The court commended Pepper for his positive changes but held post-sentencing rehabilitation was not a permissible factor.

7. September 29, 2009, Pepper filed his third petition for writ of certiorari.

8. June 28, 2010, the Supreme Court granted the petition.

9. June 29, 2010, Pepper filed a request in the district court to be released from prison pending the Supreme Court's disposition of the case.

10. July 22, 2010, Judge Reade granted Pepper's supervised release effective July 23, 2010, at 5:00 p.m. Pepper is now back with his wife and her daughter and began working at Sam's Club on August 5, 2010.

11. December 6, 2010, Supreme Court oral argument.

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 FOR PETITIONER**  
—◆—

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## **QUESTIONS PRESENTED**

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

2. Whether, when a new judge is assigned to resentence a defendant after remand, the new judge is obligated under the law of the case doctrine to follow the original judge's sentencing findings left undisturbed on appeal.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reprinted in the Joint Appendix at J.A. 364 and is published as *United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009). The opinions of the United States District Court for the Northern District of Iowa are reprinted at J.A. 201 and in the Sealed Joint Appendix at S.J.A. 24.



## JURISDICTION

The district court had jurisdiction over this case pursuant to 18 U.S.C. §3231. The United States Court of Appeals for the Eighth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742. The court of appeals issued its opinion on July 2, 2009. J.A. 364. On September 29, 2009, Pepper filed his petition for a writ of certiorari, which the Court granted on June 28, 2010. J.A. 380. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).



## STATUTORY PROVISIONS

The relevant statutory provisions, 18 U.S.C. §§3553(a) and (c), 18 U.S.C. §3661, and 21 U.S.C. §850, are reprinted in an appendix to this brief.



## STATEMENT OF THE CASE

Jason Pepper pled guilty to a federal drug conspiracy charge for which he was sentenced in 2004 and again in 2006 to a term of 24 months of imprisonment. After receiving drug treatment in prison and completing his term of imprisonment, Pepper attended college full time, achieved top grades, held a steady job, was promoted, married, and supported a family. The government appealed each sentence. The Eighth Circuit reversed each sentence on a different ground, and found it “just” to assign the case to a new judge. Notwithstanding the undisputed evidence that Pepper was rehabilitated and living a productive life, the new judge increased Pepper’s term of imprisonment from 24 to 65 months, and – nearly four years after completing the original term – Pepper returned to the Bureau of Prisons to serve an additional 41 months.

This case presents two issues: whether a court of appeals may prohibit a sentencing judge from considering evidence of post-sentencing rehabilitation in support of a variance under 18 U.S.C. §3553(a) at resentencing; and, whether a judge who has been substituted by the court of appeals for the original judge may reduce the extent of the original judge’s substantial assistance departure finding left undisturbed by the court of appeals.

### **A. Original Sentence and First Government Appeal**

In 2003, at age 24, Jason Pepper had been addicted to methamphetamine and alcohol for six years. J.A. 24-25; S.J.A. 16. Pepper had done well in high school, earning a 3.4 grade point average. S.J.A. 17. After graduating from high school, in 1998, Pepper lost his brother in a car accident, after which he attempted suicide. S.J.A. 16. In 2002, he lost his mother to colon cancer, after which he was virtually homeless. J.A. 36; S.J.A. 15. His relationship with his father was strained. S.J.A. 15. He received no treatment for his addictions. S.J.A. 16.

In October 2003, still suffering from untreated depression resulting from the deaths of his brother and mother, Pepper was charged with conspiring to distribute methamphetamine in violation of 21 U.S.C. §846. J.A. 21, 25-26. Immediately upon arrest, Pepper admitted his guilt, cooperated, and provided useful assistance to law enforcement. S.J.A. 9-11. He pled guilty to the offense, which carried a mandatory minimum term of ten years' imprisonment. The mandatory minimum subsequently became inapplicable because Pepper qualified for "safety-valve" relief from the minimum, due to his lack of any prior criminal record, and lack of violence or aggravating role in the offense. 18 U.S.C. §3553(f); USSG §5C1.2.

The probation officer, consistent with the parties' plea agreement, found that Pepper's base offense level under the U.S. Sentencing Guidelines was 34

based on the quantity of methamphetamine. S.J.A. 3-4, 8, 13. The officer added one level for occurrence of the offense near a protected location (some transactions took place at an acquaintance's apartment located near a park), subtracted two levels for safety-valve eligibility, and subtracted three levels for acceptance of responsibility, resulting in an adjusted offense level of 30. S.J.A. 10, 13-14. Pepper had no convictions, placing him in Criminal History Category I. S.J.A. 18. With a total offense level of 30 and criminal history category of I, the guideline range was 97 to 121 months. The probation officer noted that, absent the parties' stipulations under the plea agreement, he might have rejected the one-level enhancement for a protected location and applied a two-level decrease for minor role. S.J.A. 18. Those changes would have resulted in an adjusted offense level of 27 and a range of 70 to 87 months of imprisonment. The probation officer noted that Pepper's father reported seeing significant improvement in his son's attitude and maturity since his arrest. S.J.A. 15.

Pepper appeared for sentencing before then-Chief Judge Mark Bennett in March of 2004. After agreement by the parties that Pepper's guideline range was 97 to 121 months, the government moved for a substantial assistance departure, recommending a 15% reduction based on the following: (1) upon arrest, Pepper timely provided a post-*Miranda* statement without counsel; (2) he provided a proffer statement with his counsel present; (3) the government was able to use his information before the grand jury; (4) he

was a corroborating witness against one defendant who was his source, and was a main witness against a second defendant, both of whom were indicted; (5) he was a witness on a firearms count; and (6) he was truthful and reliable. J.A. 28, 30-35. Defense counsel added that Pepper had provided information regarding ten or eleven people involved in trafficking drugs. J.A. 37-38.

Defense counsel reviewed Pepper's background, covering his strong academic record, the misfortune of losing close family members, his homelessness, his drug addiction and his desire for treatment, and his relief that his arrest got him away from methamphetamine. J.A. 36-38. Counsel additionally noted that Pepper's father was in the courtroom to support his son.<sup>1</sup> Based on these factors, and consistent with the probation officer's recommendation, counsel requested a downward departure so that Pepper could be placed in the federal boot camp at Lewisburg, Pennsylvania. J.A. 38.

Although willing to make that recommendation, Judge Bennett expressed concern that Pepper would not receive the comprehensive drug treatment he needed at boot camp. J.A. 38-39. The judge had previously recommended placement of other defendants

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<sup>1</sup> The judge noted that Pepper's father had written a "very thoughtful letter," and of the thousands of letters the judge had received over the years, it was clearly one of the most thoughtful. J.A. 36.

at the federal prison camp in Yankton, South Dakota, where he spoke bi-monthly with inmates in the facility's 500-hour intensive drug treatment program. J.A. 39. Observing that Yankton's treatment program was the best, the judge noted that there was a trade-off, in that Pepper would serve more time at Yankton than he would at Lewisburg. J.A. 40. Pepper asked that he be sent to Yankton so that he could obtain the drug treatment he desired. The government made no objection and stood by its initial recommendation. J.A. 41. After telephoning Yankton, the judge determined, in light of the facility's waiting list, that he would have to impose a sentence of at least 24 months to ensure that Pepper would receive treatment. J.A. 42-43.

Based on the government's substantial assistance motion and the factors listed in USSG §5K1.1, the judge committed Pepper to the Bureau of Prisons for 24 months, recommending designation to Yankton with placement in the 500-hour residential drug treatment program. J.A. 45, 52. The court also imposed a five-year term of supervised release. J.A. 45, 53. The judge explained his reasons for the sentence, noting Pepper's strong family support, his great promise and potential, and the court's expectation that Pepper would succeed on supervised release. J.A. 47-49.

The government appealed the sentence to the Eighth Circuit, which ruled that the district court erred when it considered a matter unrelated to Pepper's substantial assistance under USSG §5K1.1.

*United States v. Pepper*, 412 F.3d 995, 996-99 (8th Cir. 2005) (*Pepper I*); J.A. 64-69. The Eighth Circuit remanded for resentencing in accordance with its opinion and *United States v. Booker*, 543 U.S. 220 (2005). J.A. 70. Three days after the decision issued, Pepper was released and began his five-year term of supervised release. J.A. 102.

### **B. First Resentencing and Second Government Appeal**

In May of 2006, having been on supervised release for over ten months, Pepper appeared before Judge Bennett for resentencing. J.A. 102-03. The probation officer had updated the presentence investigation report, recommending that in light of the “unique” post-release mitigating factors in the case, a downward variance from the guideline range to the original 24-month sentence would be “reasonable in conjunction with the substantial assistance reduction.” S.J.A. 23. The officer carefully analyzed the factors required to be considered under 18 U.S.C. §3553(a). S.J.A. 20-23. The officer found, in relation to §3553(a)(1) (history and characteristics of defendant), Pepper had no history of violence; he had a significant long-term alcohol and drug abuse problem for which he had received no treatment; he had been drug-free since his arrest in October of 2003; he had attempted suicide after his brother’s death in 1998; he had taken care of his dying mother and was left homeless after her death; he had had a distant relationship with his father; and he had complied with all

conditions of supervised release, maintained employment, was a model full-time college student, and had reunited with his father. S.J.A. 20, 23. The officer further found, based on §3553(a)(2) (need for sentence imposed to satisfy sentencing purposes), Pepper had a minimal criminal history and a low probability of committing future crimes. S.J.A. 20. Finally, with regard to §3553(a)(6) (need to avoid disparities among similar defendants), the officer noted that one of Pepper's co-defendants received a 26% reduction, another received a 70% reduction that the government did not appeal, and a third received a 50% reduction as to which the government withdrew its appeal. S.J.A. 21.

Pepper, through counsel, requested a variance from the guideline range based on post-sentencing rehabilitation. J.A. 71, 73. Counsel also filed a transcript of Pepper's grades from the community college he attended (all As) and a congratulatory letter from the dean of students. J.A. 93-95. The government opposed a variance based on post-sentencing rehabilitation, relying on Eighth Circuit precedent prohibiting "departure" on that basis. J.A. 86-90.

At the hearing, Judge Bennett first heard statements from the parties regarding the departure for substantial assistance, then evidence concerning the request for variance. Tr. Resentencing 1-15 (May 5, 2006, Dist. Docket 134). Pepper testified that he had gotten his life back on track after his arrest and drug treatment, and that he would never return to using or selling drugs. J.A. 104-05, 111-12. While at Yankton,

he completed the drug treatment program, but was released before he could receive a reduction in sentence as provided by 18 U.S.C. §3621(e). J.A. 105-06. After release, Pepper found employment, worked part-time while attending college full-time, and complied with all conditions of supervised release. J.A. 106-11.

Pepper's father also testified. He described his previously strained relationship with his son, and said that they had reestablished a communicative, closer relationship. J.A. 116-19. He testified that Pepper no longer used drugs or alcohol, had matured, and was planning for the future. J.A. 119-20. He believed that his son's successful completion of the drug treatment program at Yankton truly sobered him and changed his thinking. J.A. 120-21.

The probation officer testified, echoing his memorandum. The officer told Judge Bennett that, based on his experience and his discussions with Pepper's supervising probation officer, Pepper had learned his lesson, already demonstrated that he would do well on supervision, and was at low risk of re-offending. J.A. 122, 124-31, 133-34.

Judge Bennett made his findings, pursuant to 18 U.S.C. §3553(c), regarding the substantial-assistance departure and post-sentencing rehabilitation. Regarding the former, Judge Bennett, noting the Eighth Circuit's description of Pepper's assistance as "pedestrian," *see Pepper I*, 412 F.3d at 999; J.A. 69, and interpreting "pedestrian" to mean average, departed

to 58 months. J.A. 138-43.<sup>2</sup> The judge explained that he relied on Eighth Circuit precedent, on his discussions with other federal district court judges around the country, and on the facts that Pepper had been timely with his cooperation, was entirely truthful and candid, had been debriefed, gave a proffer, and provided grand jury testimony. J.A. 141-43.

The judge then addressed the variance request, adopting as his findings of fact the information contained in the probation officer's memorandum and Pepper's and his father's testimony. J.A. 143-45. The judge considered whether those findings warranted a variance from the 58-month sentence. Deciding that they did, the judge reduced the sentence to 24 months. J.A. 143, 146. Judge Bennett, who had sentenced about 1,400 defendants in approximately ten years on the federal bench, J.A. 47, 149, found that Pepper's case was "exceptional," that he had no history of violence, had been attending school and earning all As, and that there would be disparity between Pepper and his co-defendants if Pepper did not receive a variance. J.A. 144-47, 149. The judge found that Pepper had an "extremely low risk of recidivism" as compared to the many other defendants he had sentenced.<sup>3</sup> J.A. 146. The

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<sup>2</sup> The judge noted recent data from the Sentencing Commission showing that the average departure nationwide in federal drug cases was 46.5%. J.A. 139.

<sup>3</sup> Earlier, during the hearing, the judge referred to Pepper's current schooling and employment, noting that very few defendants followed this path. J.A. 136.

court deemed it appropriate to consider Pepper's exemplary conduct following his release from prison. He explained that post-sentencing conduct is relevant, noting that if Pepper had committed new crimes following his release, that would be an important factor to consider during resentencing, and the government would advocate such consideration. J.A. 146-47. The judge explained at length why the final sentence of 24 months (and specifically, the 34-month variance) was warranted in Pepper's "exceptional" case. J.A. 143-50.

The government again appealed Pepper's sentence and, in May 2007, the Eighth Circuit reversed Judge Bennett's downward variance. *United States v. Pepper*, 486 F.3d 408 (8th Cir. 2007) (*Pepper II*); J.A. 164. It first determined that "reasonable proportionality" existed between Pepper's cooperation and Judge Bennett's 40% substantial assistance departure. *Id.* at 411; J.A. 167. The appellate court found that Judge Bennett properly identified only assistance-related factors, that he considered the §5K1.1 factors, including the government's recommendation, that he considered Eighth Circuit precedent, and that a 40% reduction was warranted. *Id.*; J.A. 167-68. Based on this ruling, Pepper's sentence was 58 months.

The court of appeals, however, found error in the variance from 58 months to 24 months. It stated that "[t]he lack of clarity regarding the extent to which

the district court relied on any one factor notwithstanding, we conclude the district court abused its discretion in granting the downward variance.” *Id.* at 413; J.A. 172. Specifically, the court of appeals noted:

The district court failed to balance the other factors in §3553(a), such as the need to impose a sentence reflecting the seriousness of Pepper’s offense, which involved between 1,500 and 5,000 grams of methamphetamine mixture and ten to fifteen people, or how, in this case, a sentence of 24 months would promote respect for the law. The district court impermissibly considered Pepper’s post-sentence rehabilitation, and further erred by considering Pepper’s lack of violent history, which history had already been accounted for in the sentencing Guidelines calculation, and by considering sentencing disparity among Pepper’s co-defendants without adequate foundation and explanation.

*Id.*; J.A. 172. The court reversed and remanded for resentencing consistent with its opinion, and, because Judge Bennett “expressed a reluctance to resentence Pepper again should this case be remanded,” required resentencing by a different judge, to be assigned by the chief judge of the district.<sup>4</sup> *Id.*; J.A. 173.

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<sup>4</sup> Judge Bennett had noted during the hearing that the court of appeals might once again reverse his sentencing determination, and while he acknowledged that he “w[ouldn’t] like it”

(Continued on following page)

On the day the Eighth Circuit's decision issued, Chief District Judge Linda Reade reassigned the case to herself for resentencing. J.A. 4 (docket 147). Judge Reade first ordered the parties to address the legal issue of the scope of the remand from *Pepper II*. J.A. 174. Regarding the departure for substantial assistance, the government initially argued that while Pepper had provided additional assistance since the previous sentencing by Judge Bennett, it did "not believe that the additional assistance merits a departure beyond the 40% reduction awarded at the last sentencing hearing." J.A. 178. Five days later, the government argued that "the Court of Appeals placed no explicit limitations on the district court with regard to the substantial assistance departure, other than to preclude an argument that a 40% departure is unreasonable." J.A. 196. The government also argued that there could be no variance for lack of violent history, disparity between co-defendants, or post-sentencing rehabilitation. J.A. 199. Defense counsel argued that Judge Reade was bound to follow Judge Bennett's 40% departure to 58 months imprisonment and again argued for a variance based on post-sentencing rehabilitation. J.A. 191-93.

Judge Reade ruled that she would "not consider" herself "bound to reduce the Defendant's advisory

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if the appellate court compelled him to impose a higher sentence, he repeatedly stated that he would sentence Pepper in accordance with any subsequent instructions from the court of appeals. J.A. 147-50.

Sentencing Guidelines range by 40%, pursuant to USSG §5K1.1.” J.A. 209. She continued the resentencing hearing pending the disposition of Pepper’s petition for a writ of certiorari seeking review of the *Pepper II* decision. J.A. 7 (docket 171).

This Court vacated the Eighth Circuit’s judgment and remanded for reconsideration in light of *Gall v. United States*, 552 U.S. 38 (2007). J.A. 210. The Eighth Circuit issued its third opinion in March of 2008. *United States v. Pepper*, 518 F.3d 949 (8th Cir. 2008) (*Pepper III*); J.A. 211. It again reversed Judge Bennett’s judgment and remanded for resentencing by a different judge. *Id.* at 950, 953; J.A. 212, 219. The court of appeals began by reaffirming its previous finding that Judge Bennett had not abused his discretion regarding the §5K1.1 departure. *Id.* at 951; J.A. 213-14. The court, however, found that Judge Bennett had committed procedural error by not sufficiently explaining his reliance on Pepper’s lack of violence and on the comparison of Pepper’s case to that of his co-defendants. *Id.* at 952; J.A. 215-17. Further, the Eighth Circuit found that “*Gall* does not alter our circuit precedent or our conclusion in *Pepper II* that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance,” and that the judge had “procedurally erred” by relying on this “improper” factor. *Id.* at 952-53; J.A. 218. Pepper sought certiorari review of *Pepper III*, which was denied. J.A. 9, 10 (docket 183, docket 191).

### **C. Resentencing Before Judge Reade and Pepper's Appeal**

On October 17, 2008, Judge Reade began Pepper's second resentencing. J.A. 10 (docket 195). By then, Pepper had been out of prison for nearly three and a half years, exhibiting exemplary behavior throughout that time on supervision. Prior to the hearing, the government urged Judge Reade to ignore Judge Bennett's findings regarding Pepper's cooperation and impose a smaller departure based on the same facts, and to ignore Pepper's post-sentencing rehabilitation. J.A. 268. Pepper urged Judge Reade to follow the law of the case and impose the same substantial assistance departure, and to impose a downward variance for post-sentencing rehabilitation. J.A. 220, 265.

Judge Reade began by explaining that because the case was very difficult, she would delay the imposition of the sentence until a later date, after she had considered the evidence and arguments and issued a written sentencing opinion. J.A. 280. The government offered no evidence. J.A. 282-85. To inform the court of Pepper's up-to-date history, defense counsel called Pepper's father and Pepper made a statement. Pepper was then 29 years old and had married in May of 2007. J.A. 302, 305, 321. His wife had a seven-year-old daughter who considered Pepper her father. J.A. 302, 321. Pepper had been employed by Sam's Club for the past two years, working as a night supervisor. According to the store manager and overnight assistant manager, Pepper was an

exemplary employee. He had been named associate of the year, and was being considered for promotion to manager in January 2009. J.A. 301-02, 320, 323-26. While working, he attended college full-time to study business management. J.A. 301-04, 320, 327-28. Defense counsel requested a variance to the original 24-month sentence. J.A. 316-18.

Judge Reade filed a sealed sentencing memorandum two months later. S.J.A. 24. Based on the same facts that Judge Bennett had relied on to award a 40% reduction for substantial assistance, Judge Reade awarded Pepper only a 20% reduction. S.J.A. 31-33, 49. She denied every other request for downward variance, including the one for post-sentencing rehabilitation. S.J.A. 33-49.

On January 5, 2009, nearly five years after Pepper's original sentencing, Judge Reade imposed a new sentence. Based on Pepper's cooperation with the government, she departed to 77 months of imprisonment, instead of Judge Bennett's departure on the same facts to 58 months. J.A. 333-34. She then departed another 15% based on the government's motion pursuant to Fed. R. Crim. P. 35(b), acknowledging Pepper's additional cooperation following the prior sentencing, for a final sentence of 65 months. S.J.A. 59-60. Finding that Pepper was not a threat to the community or a flight risk, she permitted him to self-surrender, which he did in early April 2009. J.A. 337-39.

On Pepper's appeal, the Eighth Circuit – in its fourth opinion in this case – affirmed Judge Reade's sentence. *United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009) (*Pepper IV*); J.A. 364. The court of appeals determined that Judge Bennett's findings regarding Pepper's cooperation did not constitute the law of the case and that Judge Reade did not abuse her discretion in departing downward by only 20% for substantial assistance. *Id.* at 963-64; J.A. 371-74. Additionally, the court of appeals commended Pepper for his positive life changes, but affirmed Judge Reade's denial of a variance on that basis because evidence of post-sentencing rehabilitation is an impermissible consideration for downward variance under Eighth Circuit precedent. *Id.* at 964-65; J.A. 375-77.

In light of this Court's grant of certiorari in *Pepper IV*, Judge Reade ordered Pepper's release from prison in late July of 2010. J.A. 13-14 (docket 232, docket 237).



## SUMMARY OF THE ARGUMENT

I. A defendant's post-sentencing rehabilitation is undoubtedly, as the government agrees, a permissible ground for varying from a guideline range. *See* Brief in Opp. to Cert. at 8, 10-11, 13-16. The contrary ruling of the Eighth Circuit is incorrect because it conflicts with the governing statutes, 18 U.S.C. §§3661 and 3553(a); because it is inconsistent with

the abuse-of-discretion standard of appellate review established in *United States v. Booker*, 543 U.S. 220 (2005), and *Gall v. United States*, 552 U.S. 38 (2007); and because the Eighth Circuit’s justifications for the creation of a blanket rule forbidding consideration of this factor are without merit.

The Eighth Circuit categorically forbids district judges to consider evidence of a defendant’s post-sentencing rehabilitation as a basis for varying below the guideline range. There is no statutory authority for this ad hoc rule. Indeed, the rule violates the statutes that now govern sentencing in the federal courts, 18 U.S.C. §§3661 and 3553(a). Section 3661 explicitly 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.” The Eighth Circuit’s rule is thus an unlawful “limitation” on a district court’s power to consider the background, character and conduct of a defendant at sentencing.

The Circuit’s rule is also inconsistent with 18 U.S.C. §3553(a), which mandates that a district court “shall consider,” among other factors, “the *history and characteristics* of the defendant.” *Id.* (emphasis supplied). The statute includes no exception to this requirement, and the Eighth Circuit’s rule is directly contrary to its mandate.

In addition, the Circuit's adoption of its categorical rule is inconsistent with the standard of review for "reasonableness" or "abuse-of-discretion," applicable on appeal. This deferential standard, made applicable in *Booker*, 543 U.S. at 260-62, was explained in *Gall* to result from the fact that the "sentencing judge," not the appellate court, "is in a superior position to find facts and judge their import under §3553(a)." *Gall*, 552 U.S. at 51-52. For an appellate court to determine categorically which facts about defendants may be considered, and which may not, is thus the antithesis of "abuse-of-discretion" review. *See id.*

The Eighth Circuit's justifications for its rule – that information about post-sentencing rehabilitation is irrelevant, that considering it creates improper disparities at sentencing, and that it interferes with the functions of the Bureau of Prisons – are simply incorrect. First, factors such as Pepper's having overcome a long addiction, having established, and reestablished, close family ties, having succeeded both at work and in his education, and having avoided all criminal activity, are self-evidently relevant to the statutory aims of providing adequate specific deterrence, protecting the public, effectively achieving rehabilitation, and assuring respect for the law. 18 U.S.C. §3553(a)(2); *see Gall*, 552 U.S. at 54 (excessive punishment may decrease respect for the law). Second, the Eighth Circuit's concern with "disparity," because few defendants have the opportunity to show post-sentencing rehabilitation, reflects nothing more than the truism that the course of litigation may

affect outcomes. A rule prohibiting consideration of evidence based on such “disparity” would prove too much, for it would, if consistently applied, invalidate sentences based on all manner of commonplace disparities – for example, between those released on bail, who can most easily show pre-sentencing rehabilitation, and those who are not released, or between those who have full knowledge about the extent of their crimes, and thus can reduce their sentences by cooperation with the government, and those who do not have that knowledge and cannot obtain a reduction. Indeed, the Eighth Circuit does not apply its rule consistently, for it has approved consideration of post-sentence conduct when it supports a higher sentence on remand. Finally, the concern that permitting consideration of post-sentencing rehabilitation would somehow interfere with the prerogatives of the Bureau of Prisons is wholly without merit, since such consideration in imposing sentence is entirely separate from the functions of the Bureau.

There is, in short, no legal authority or policy justification for the Eighth Circuit’s rule against consideration of post-sentencing rehabilitation. Therefore, the Eighth Circuit’s judgment precluding the consideration of post-sentencing rehabilitation should be vacated.

II. The Eighth Circuit also erred by concluding that Chief Judge Reade was not bound by the law of the case in the circumstances here. Following the Eighth Circuit’s initial remand in this case, Judge Bennett reconsidered the value of Pepper’s assistance to the government and found that it alone warranted

a reduced sentence of 58 months' imprisonment, characterized as a 40% departure. This finding was undisturbed on the government's second appeal. On remand on other grounds, Chief Judge Reade, newly assigned to the case after Judge Bennett's removal, revisited the question and, with no new evidence, concluded that Pepper's substantial assistance warranted a departure only to 77 months of imprisonment, rather than the 58-month term Judge Bennett had found sufficient.

In these circumstances, the sentence imposed by Chief Judge Reade violated the law of the case doctrine. That doctrine provides that, as a general rule, a district judge should not alter another district judge's previous rulings in the case absent special circumstances and a compelling justification. Here, the record shows no new circumstances or any compelling reason for this change, but only Chief Judge Reade's different view of the same evidence upon which Judge Bennett relied. Such a change in sentencing by a judge newly assigned following appeal is of particular concern because it strongly implicates the purposes of the law of the case doctrine in achieving finality and consistency in litigation and, particularly in these circumstances, in assuring that there be no appearance of arbitrariness or injustice in sentencing, due merely to a change in judicial personnel assigned to a case.

This Court should accordingly vacate the judgment below, which was based on the Eighth Circuit's misunderstanding of the law of the case doctrine.

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## ARGUMENT

### **I. THE EIGHTH CIRCUIT'S BLANKET PROHIBITION AGAINST CONSIDERATION OF EVIDENCE OF POST-SENTENCING REHABILITATION AS A BASIS FOR VARIANCE IS CONTRARY TO THE APPLICABLE SENTENCING STATUTES AND THE ABUSE-OF-DISCRETION STANDARD OF REVIEW.**

The Eighth Circuit forbids judges, categorically and as a matter of circuit law, from considering post-sentencing rehabilitation as a basis for varying below the guideline range. The Eighth Circuit applies this rule in the guise of abuse-of-discretion review, but the rule functions in the same way that the Sentencing Commission's restrictions on "departures" did when the Guidelines were mandatory: it prohibits judges from considering matters otherwise properly considered under 18 U.S.C. §§3661 and 3553(a) for purposes of varying outside the guideline range.

The Eighth Circuit first declared that evidence of post-sentencing rehabilitation was "not relevant" for purposes of "downward departure" in *United States v. Sims*, 174 F.3d 911 (8th Cir. 1999). The seven other circuits to address the issue held that post-sentencing rehabilitation was an appropriate and relevant basis

for downward departure.<sup>5</sup> The Sentencing Commission resolved the circuit conflict by requiring all courts to follow the Eighth Circuit’s rule. See USSG §5K2.19, p.s. (post-sentencing rehabilitation, “even if exceptional,” is “not an appropriate basis for a downward departure”); USSG App. C, amend. 602 (Nov. 1, 2000).

Following this Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), the Eighth Circuit extended its prohibition against consideration of evidence of post-sentencing rehabilitation from a prohibition applicable to “departures” to a broad prohibition applicable to variances under §3553(a). See *Pepper II*, 486 F.3d at 411, 413 (citing *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007), and *Sims*, 174 F.3d at 913); J.A. 171-72.

Subsequently, in *Gall v. United States*, 552 U.S. 38 (2007), this Court explained that after correctly calculating the guideline range, “the district judge should then consider *all* of the § 3553(a) factors.” *Id.* at 49-50 (emphasis supplied). The Court held that it would constitute “significant procedural error” for a judge to “fail[] to consider the § 3553(a) factors,” *id.*

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<sup>5</sup> See *United States v. Rhodes*, 145 F.3d 1375 (D.C. Cir. 1998); *United States v. Bradstreet*, 207 F.3d 76 (1st Cir. 2000); *United States v. Core*, 125 F.3d 74 (2d Cir. 1997); *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997); *United States v. Rudolph*, 190 F.3d 720 (6th Cir. 1999); *United States v. Green*, 152 F.3d 1202 (9th Cir. 1998); *United States v. Roberts*, No. 98-8037, 1999 WL 13073 (10th Cir. Jan. 14, 1999).

at 51, and that courts of appeals “must review all sentences . . . under a deferential abuse-of-discretion standard,” *id.* at 41. The Court then granted Pepper’s petition for writ of certiorari in *Pepper II*, vacated the judgment, and remanded the case for further consideration in light of *Gall. Pepper v. United States*, 552 U.S. 1089 (2008); J.A. 210.

On remand, the Eighth Circuit declared that “*Gall* does not alter our circuit precedent or our conclusion . . . that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance.” *Pepper III*, 518 F.3d at 953; J.A. 218. Applying its own “abuse of discretion” standard, the Eighth Circuit held that in sentencing Pepper, Judge Bennett had committed “procedural error” by considering “improper factors.” *Id.* at 952-53; J.A. 215.

On remand, Chief Judge Reade agreed that Pepper had “made substantial positive changes in his life after his original sentencing hearing,” but declined to vary on that basis because the court of appeals had “expressly foreclosed Defendant’s post-sentencing rehabilitation and behavior from consideration.” S.J.A. 39. The court of appeals affirmed based on its precedent: “[E]vidence of [a defendant’s] post-sentence rehabilitation is not relevant and will not be permitted at resentencing.” *Pepper IV*, 570 F.3d at 965 (internal citations omitted); J.A. 376-77. This Court granted certiorari.

Of the eight circuits that have addressed the issue after *Booker* and *Gall*, only the Eighth and

Eleventh Circuits forbid consideration of post-sentencing rehabilitation.<sup>6</sup> The Eleventh Circuit has questioned the continuing validity of its rule in light of this Court's recent decisions.<sup>7</sup>

The Eighth Circuit's rule conflicts with the fundamental statutes governing sentencing. *See* 18

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<sup>6</sup> *See United States v. Lorenzo*, 471 F.3d 1219, 1221 (11th Cir. 2006) (reversing variance based on post-sentencing rehabilitation in part based on USSG §5K2.19, p.s.). The other circuits to address the issue require or permit, and do not prohibit, consideration of post-sentencing rehabilitation. *See United States v. Hernandez*, 604 F.3d 48, 53-55 (2d Cir. 2010) (district court procedurally erred by failing to consider post-sentencing rehabilitation); *United States v. Arenas*, 340 Fed. Appx. 384, 386 & n.2 (9th Cir. 2009) (district court permitted but not required to consider post-sentencing rehabilitation); *United States v. Jones*, 489 F.3d 243, 252-53 (6th Cir. 2007) (evidence of post-sentencing rehabilitation lends support to downward variance but district court gave it sufficient weight in sentencing at bottom of guideline range); *United States v. Lloyd*, 469 F.3d 319, 324-25 & n.5 (3d Cir. 2006) (district court may consider post-sentencing rehabilitation even on limited *Booker* remand under narrow circumstances; not addressing issue for purposes of an ordinary resentencing); *United States v. Aitoro*, 446 F.3d 246, 255 n.10 (1st Cir. 2006) (district court may consider post-sentencing rehabilitative efforts such as enrollment in employment classes on ordinary remand, though "skeptical" whether appropriate on limited *Booker* remand); *United States v. Scott*, 194 Fed. Appx. 138, 140 (4th Cir. 2006) (affirming sentence imposed on *Booker* remand; noting that district court considered defendant's post-sentencing rehabilitation).

<sup>7</sup> *See United States v. Smith*, 370 Fed. Appx. 59 (11th Cir. 2010) (per curiam) (defendant is "correct that there is a question as to whether *Lorenzo* continues to be good law," but "our circuit's prior precedent rule bars us from overruling *Lorenzo* without en banc consideration").

U.S.C. §§3661, 3553(a). The Eighth Circuit’s designation of a sentencing factor as categorically “impermissible” constitutes an improper application of “abuse of discretion” review. Moreover, the Eighth Circuit’s justifications for its rule – that post-sentencing rehabilitation is “not relevant” to sentencing, and that considering it would create “disparity” and interfere with the Bureau of Prisons’ award of good time credit – are without merit. Accordingly, the Eighth Circuit’s judgment should be vacated.

**A. The Eighth Circuit’s Blanket Rule Against Consideration Of Evidence Of Post-Sentencing Rehabilitation Directly Conflicts With The Controlling Sentencing Statutes.**

In *Booker*, this Court held that judicial factfinding under the United States Sentencing Guidelines that enhanced a sentence above the maximum sentence authorized by a jury verdict or guilty plea violated the Sixth Amendment because the Guidelines were mandatory. *Booker*, 543 U.S. at 233-34, 243-44. To remedy the constitutional defect while preserving judicial factfinding, the Court severed and excised two statutory provisions that had made the Guidelines mandatory. *Id.* at 245-65. As a result of the Court’s remedial decision, the statutes that now govern sentencing are 18 U.S.C. §§3661 and 3553(a). The Eighth Circuit’s rule forbidding judges from considering post-sentencing rehabilitation squarely violates these statutes.

The first statute that governs the question here, and that establishes a district court's authority to consider all facts about a criminal defendant, is §3661. The language of that statute could not be clearer:

*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.

*Id.* (emphasis supplied); *see also* 21 U.S.C. §850 (same with reference to Controlled Substance Act cases). By its very terms, §3661 forbids the rule adopted by the Eighth Circuit, because the Eighth Circuit's rule is a court-made "limitation" on the ability of a sentencing judge to consider "the background, character, and conduct of a person convicted of an offense" at the point at which the judge is charged with "imposing an appropriate sentence." The Eighth Circuit had no authority to defy the statute by forbidding a sentencing judge from considering information about a defendant that demonstrates his post-sentencing rehabilitation.

Section 3661 codified a principle articulated in *Williams v. New York*, 337 U.S. 241 (1949), where this Court said: "Highly relevant – if not essential – to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Id.* at 247. This Court later applied this principle to

information that arose after a prior conviction and sentencing: “The freedom of a sentencing judge to consider the defendant’s conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York* . . . that a State may adopt the ‘prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.’” *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (quoting *Williams*, 337 U.S. at 245, 247), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). Congress specifically chose to include §3661 in the Sentencing Reform Act.<sup>8</sup>

The second statute that invalidates the Eighth Circuit’s rule is 18 U.S.C. §3553(a). This Court excised 18 U.S.C. §3553(b)(1) because it imposed binding requirements on sentencing judges. *Booker*, 543 U.S. at 259. This excision left §3553(a) as the governing law in all cases. *Id.* at 266-67 (rejecting proposals in which §3553(a) would control in some cases and §3553(b) would control in others). The Court specified: “Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those

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<sup>8</sup> Congress initially codified *Williams* in 1970 as 18 U.S.C. §3577 (repealed and renumbered by Pub. L. No. 98-473, Title II, §212(a)(2), Oct. 12, 1984, 98 Stat. 1987), then recodified it in 18 U.S.C. §3661 in the Sentencing Reform Act of 1984. Congress “specifically inserted [§3661] into the [Sentencing Reform] Act.” *Booker*, 543 U.S. at 251; *see also id.* at 247 (Congress wrote judicial factfinding “into the Act in 18 U.S.C. §§3553(a) and 3661.”).

factors in turn will guide appellate courts . . . in determining whether a sentence is unreasonable.” *Id.* at 261. After *Booker*, therefore, all courts must comply with §3553(a) in sentencing proceedings, on direct appeal, and in resentencings upon remand. *Id.* at 267-68.

A sentencing judge must “consider all of the §3553(a) factors” and “make an individualized assessment based on the facts presented.” *Gall*, 552 U.S. at 49-50; see also *Rita v. United States*, 551 U.S. 338, 351, 356-57 (2007). The sentencing factors that, under §3553(a), a court “shall consider” plainly include facts about a defendant’s rehabilitation after a previous sentencing. Section 3553(a) provides: “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*.” 18 U.S.C. §3553(a) (emphases supplied). The requirement that a court consider a defendant’s history and characteristics is mandatory and contains no limitation. Paragraph (1) is a “broad command,” *Gall*, 552 U.S. at 50 n.6, with no exception for “history and characteristics” relating to post-sentencing rehabilitation. Accordingly, sentencing judges are required to consider evidence of post-sentencing rehabilitation under the statute. The Eighth Circuit’s prohibition is entirely contrary to the plain language of the statute.

As a historical matter, exceptions to the commands of 18 U.S.C. §§3661 and 3553(a), which require courts to consider a defendant’s “background,

character and conduct” and “history and characteristics,” have been few, and have been imposed by the Constitution or the pre-*Booker* mandatory Guidelines. It is well-established, for example, that as a constitutional matter, a sentence may not be imposed because of the race of the defendant. *See United States v. Leung*, 40 F.3d 577, 586-87 (2d Cir. 1994). In addition, there were, and still are, a number of policy statements in the Guidelines Manual prohibiting consideration of various aspects of a defendant’s life for purposes of “departure,” including “[p]ost sentencing rehabilitative efforts, even if exceptional.” USSG §5K2.19, p.s.<sup>9</sup>

With the excision of §3553(b), such policy statements, if “pertinent,” are just one factor a court may consider under §3553(a).<sup>10</sup> They do not bind the court in imposing a sentence based on the purposes, factors and parsimony principle set forth in §3553(a), often

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<sup>9</sup> *See* USSG §5K2.0(d), p.s. (courts “may not depart” based on lack of youthful guidance and similar circumstances, gambling addiction, personal financial difficulties, economic pressures on a trade or business, acceptance of responsibility, aggravating or mitigating role in the offense, decision to plead guilty or enter into a plea agreement, fulfillment of restitution obligations to the extent required by law, or any other circumstance specifically prohibited as a ground for departure in the guidelines).

<sup>10</sup> The parties may make, and the court may consider, arguments for “departure,” or arguments that the factors set forth in §3553(a) warrant a non-Guidelines sentence. *See Rita*, 551 U.S. at 344, 350.

called a “variance.”<sup>11</sup> A judge may vary from the guideline range based on factors that the Commission deems never or not ordinarily relevant for purposes of “departure.”<sup>12</sup> Apparently recognizing this, the Eighth Circuit does not rely on the Commission’s policy statement prohibiting “departure” based on post-sentencing rehabilitation, but rather on its own appellate rule prohibiting not only “departures,” but also “variances,” on that basis.

In short, the Eighth Circuit’s appellate rule purports to do what the Commission’s policy statements no longer can. This Court excised §3553(b)(1) specifically because it “ma[de] the Guidelines mandatory.” *Booker*, 543 U.S. at 245. The remaining statutory scheme, 18 U.S.C. §§3661 and 3553(a), permits a sentencing judge to consider, without limitation, a defendant’s background, character and conduct. The

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<sup>11</sup> See *Irizarry v. United States*, 128 S. Ct. 2198, 2202-03 (2008); 75 Fed. Reg. 27,388, 27,392 (May 14, 2010) (“a sentence that is outside the guidelines framework . . . is considered a ‘variance,’” citing *Irizarry*, 128 S. Ct. at 2200-03) (notice of submission to Congress of amendments to Sentencing Guidelines effective Nov. 1, 2010).

<sup>12</sup> In *Gall*, this Court approved a variance based on the defendant’s drug abuse at the time of the offense, a prohibited ground for departure, USSG §5H1.4, p.s.; the defendant’s voluntary withdrawal from the conspiracy, a basis for an adjustment under USSG §3E1.1 but a prohibited ground for departure, USSG §5K2.0(d)(2), p.s.; and a number of other factors that the Commission’s policy statements deemed “not ordinarily relevant” for purposes of departure. See USSG §§5H1.1, p.s. (age), 5H1.2, p.s. (education), 5H1.5, p.s. (employment).

purpose of §3661 is on its face to preclude any “limitation” on a judge’s power to do so. While there remain invidious factors that are impermissible under the Constitution, they are the only factors that a sentencing court may not consider. The Eighth Circuit had no power to prohibit the district court from considering Jason Pepper’s post-sentencing rehabilitation.

**B. The Eighth Circuit’s Blanket Rule Against Consideration Of Evidence Of Post-Sentencing Rehabilitation Amounts To *De Novo* Review In The Guise Of Abuse-Of-Discretion Review.**

To ensure that the guidelines and policy statements would not be made effectively mandatory through appellate review, this Court also excised §3742(e), because it contained “critical cross-references to the (now-excised) §3553(b)(1)” and “depend[ed] upon the Guidelines’ mandatory nature.” *Booker*, 543 U.S. at 245, 259, 260.<sup>13</sup> The Court replaced §3742(e) with

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<sup>13</sup> In 2003, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, §401(d)(1), 117 Stat. 670 (PROTECT Act), had added *de novo* review of departures and cross-references to §3553(b). The reasons for these revisions, “to make Guidelines sentencing even more mandatory than it had been,” had “ceased to be relevant.” *Booker*, 543 U.S. at 261. Section 3742 includes a provision regarding resentencing after remand, also added by the PROTECT Act, which provides that “[t]he court shall not impose a sentence outside the applicable guidelines range except upon a ground that – (A) was specifically and affirmatively included in the

(Continued on following page)

an abuse-of-discretion standard called “reasonable-ness” review.<sup>14</sup> The standard directs “appellate courts to determine whether the sentence ‘is unreasonable’ with regard to §3553(a),” bearing in mind that “[s]ection 3553(a) . . . sets forth numerous factors that guide sentencing,” and “in turn will guide appellate courts . . . in determining whether a sentence is unreasonable.” *Booker*, 543 U.S. at 261. Courts of appeals now “must review all sentences – whether

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written statement of reasons required by section 3553(c) in connection with the previous sentencing . . . and (B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure,” 18 U.S.C. §3742(g)(2), with “permissible ground of departure” defined as one that “(B) is authorized under section 3553(b); and (C) is justified by the facts of the case.” 18 U.S.C. §3742(j)(1). The government did not rely on §3742(g)(2) in the court of appeals or in its Brief in Opposition to the Petition for Certiorari, with good reason. Although *Booker* did not explicitly excise it, §3742(g)(2) cross-references §3553(b) and contains the same language as §3742(e). As the Court noted, “statutory cross-references to the two sections” that were excised were “consequently invalidated.” *Booker*, 543 U.S. at 259. *Booker* made clear that its Sixth Amendment and remedial holdings apply to all cases on direct appeal and on remand for resentencing. *Id.* at 267-68.

<sup>14</sup> See *Gall*, 552 U.S. at 46 (“Our explanation of ‘reasonable-ness’ review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.”) (citing *Booker*, 543 U.S. at 260-62); *Rita*, 551 U.S. at 351 (stating that “appellate ‘reasonableness’ review merely asks whether the trial court abused its discretion”); *id.* at 361 (“*Booker* replaced the *de novo* standard of review . . . with an abuse-of-discretion standard that we called ‘reasonableness’ review.”) (Stevens, J., joined by Ginsburg, J., concurring).

outside, just outside, or significantly outside the Guidelines range – under [this] deferential abuse-of-discretion standard.” *Gall*, 552 U.S. at 41. The Eighth Circuit’s ad hoc creation of categorical exceptions to §3553(a) is directly at odds with this Court’s rulings and the discretion they bestow on district courts.

Nothing in this Court’s decisions suggests that in applying abuse-of-discretion review, a court of appeals may deem any factor encompassed by §3553(a) to be “not relevant,” “improper,” or “not permitted.” Indeed, it constitutes “significant procedural error” for a district court to “fail[] to consider the §3553(a) factors.” *Gall*, 552 U.S. at 51 (emphasis supplied); *see also Rita*, 551 U.S. at 366 (Stevens, J., joined by Ginsburg, J., concurring) (the “standard of review allows – indeed, requires – district judges to consider *all* of the factors listed in § 3553(a).”).

An appellate rule declaring that a §3553(a) factor is “not relevant and will not be permitted” under any set of facts, *Pepper IV*, 570 F.3d at 965; J.A. 377, conflicts with the very reasons this Court adopted a deferential abuse-of-discretion standard.<sup>15</sup> The

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<sup>15</sup> The Court adopted this standard based on the structure of §3553(a); on practical considerations regarding the judicial actor best suited to decide the issues under §3553(a); and on the pre-2003 standard of review for departures and sentences with no applicable guideline, 18 U.S.C. §3742(e) (2000 ed.). *Booker*, 543 U.S. at 260-62 (citing *Pierce v. Underwood*, 487 U.S. 552, 558-60 (1988); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403-05 (1990); and *Koon v. United States*, 518 U.S. 81, 99 (1996)).

“[p]ractical considerations” that “underlie this legal principle” are that the “sentencing judge is in a superior position to find facts and judge their import under §3553(a),” because he “sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record,” “has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court,” and has “an institutional advantage over appellate courts in making these sorts of determinations, especially as [district courts] see so many more Guidelines sentences than appellate courts do.” *Gall*, 552 U.S. at 51-52 (internal citations and quotation marks omitted); see also *Rita*, 551 U.S. at 357-58.

The Eighth Circuit’s rule contradicts this rationale. Here, as in *Gall*, the Eighth Circuit “stated that the appropriate standard of review was abuse of discretion,” but “engaged in an analysis that more closely resembled *de novo* review . . . and determined that, in its view, the . . . variance was not warranted.” *Gall*, 552 U.S. at 56. It did so this time by ruling as a matter of circuit law that the facts of Pepper’s post-sentencing rehabilitation were categorically not relevant, completely usurping the sentencing judge’s factfinding role. The Eighth Circuit was not free to invent this exception to §3553(a) in the guise of applying abuse-of-discretion review. This is not a proper application of the abuse-of-discretion standard described in *Booker*, *Rita*, and *Gall*.

**C. Even If The Eighth Circuit Had The Power To Deem Factors Within The Scope Of §§3661 And 3553(a) Impermissible, Its Justifications For Prohibiting Consideration Of Post-Sentencing Rehabilitation Are Without Merit.**

In *Sims*, the Eighth Circuit posited three reasons for prohibiting downward departures based on post-sentencing rehabilitation: (1) evidence that did not exist at the time of the initial sentencing is “not relevant”; (2) such departures would create “disparity” between “lucky defendants” who receive resentencings and those who do not; and (3) such departures “may interfere” with the Bureau of Prisons’ authority to calculate good time credit. *Sims*, 174 F.3d at 912-13. Before the Sentencing Commission issued a policy statement making the Eighth Circuit’s rule mandatory on sentencing judges across the country, all other courts of appeals to consider these rationales had found them to be without merit.<sup>16</sup> The Eighth Circuit has offered no further or different justifications since then.

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<sup>16</sup> See *Bradstreet*, 207 F.3d at 81-83; *Rudolph*, 190 F.3d at 723-25; *Roberts*, 1999 WL 13073, at \*6; *Green*, 152 F.3d at 1207-08; *Rhodes*, 145 F.3d at 1381-82; *Core*, 125 F.3d at 77-78; see also *Sally*, 116 F.3d at 79-80 (upholding consideration of post-sentence rehabilitation solely on the basis of *Koon* without addressing these arguments).

### **1. Pepper's Post-Sentencing Rehabilitation Is Highly Relevant To The Statutory Sentencing Factors.**

The Eighth Circuit declared that rehabilitation that “takes place behind the prison walls after the original sentencing . . . is not relevant, since the sentencing court obviously could not have considered it at the time of the original sentencing.” *Sims*, 174 F.3d at 913. This remains the primary rationale for the Eighth Circuit’s rule, whether the rehabilitation takes place in prison or in the community. *See Pepper IV*, 570 F.3d at 965 (evidence of post-sentencing rehabilitation is “not relevant and will not be permitted at resentencing because the district court could not have considered that evidence at the time of the original sentencing.”); J.A. 376-77.

This rationale cannot withstand scrutiny, first because it is not accurate as a factual matter, and second because it is without support in the circuit’s own case law and is contrary to this Court’s decisions and the law of other circuits.

First, contrary to the Eighth Circuit’s conclusion, evidence of post-sentencing rehabilitation is highly relevant to the purposes of sentencing set forth in §3553(a)(2). In this case, Pepper successfully conquered the drug addiction that motivated his offense, completed college courses for which he earned top grades, excelled in his job and was promoted, reunited with his father, married, and supported his wife and her young daughter. J.A. 94-95, 104-12, 116-21,

124-31, 133-34, 143-50, 301-05, 320-21, 323-28; S.J.A. 19-23. In doing so, he far exceeded the minimum requirements of his supervised release. J.A. 53-57, 155-59. That he achieved these goals constitutes powerful evidence that a sentence of 24 months was “sufficient” to satisfy the need for the sentence imposed to effectuate specific deterrence, protect the public from further crimes of the defendant, and achieve his rehabilitation in the most effective manner. See 18 U.S.C. §3553(a)(2)(B), (C), (D). Indeed, the Sentencing Commission’s empirical research confirms that several of the factors implicated in Pepper’s post-sentencing rehabilitation – abstinence from drugs, college education, stable employment, and marriage – predict a greatly reduced risk of recidivism.<sup>17</sup> “[T]here would seem to be no better evidence” for a sentencing court to consider in “assessing at least three of the Section 3553(a) factors, deterrence, protection of the public and rehabilitation.” *United States v. McMannus*, 496 F.3d 846, 853 (8th Cir. 2007) (Melloy & Smith, JJ., concurring). In addition, Pepper’s rehabilitation is evidence of his basic good character, that his offense was driven by difficult personal circumstances, and that he was less culpable than a

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<sup>17</sup> U.S. Sent’g Comm’n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & exh. 10 (May 2004).

person who sells drugs out of sheer greed.<sup>18</sup> See 18 U.S.C. §3553(a)(2)(A).

Pepper's rehabilitation obviously is relevant to the fundamental question of what sentence is "sufficient, but not greater than necessary" to achieve the purposes of sentencing. 18 U.S.C. §3553(a). The clear import of Pepper's actions is that he is highly unlikely to recidivate, is not a danger to society, and has been rehabilitated in the most effective manner. J.A. 124-31, 133-34, 145-47, 149-50; S.J.A. 20-23. "The successful rehabilitation of a criminal . . . is a valuable achievement of the criminal process," *Core*, 125 F.3d at 78, which judges must now take into account, see 18 U.S.C. §3553(a)(1), (a)(2)(B), (C), (D).

Returning Pepper to prison now would be entirely counterproductive. As one perceptive district judge put it in a similar case in the early days of the Guidelines:

The rehabilitation of a drug addict by his act of will is no mean accomplishment. Because of it, his children and wife have recovered

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<sup>18</sup> Adequate retribution should reflect not only the "nature and seriousness of the harm caused or threatened by the crime," but also the "offender's degree of culpability in committing the crime, in particular, his degree of intent (*mens rea*), motives, role in the offense, and mental illness or other diminished capacity." Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590 (2005).

their father, husband and provider, and society has regained a productive citizen. It appears society has nothing to fear from him, as it seems most unlikely he will now throw away his rehabilitation and return to drugs. The imposition of a year's jail sentence would serve no end, but ritualistic punishment with a high potential for destruction. Indeed, putting the defendant in jail for a year would be the cause most likely to undo his rehabilitation.

*United States v. Rodriguez*, 724 F. Supp. 1118, 1119 (S.D.N.Y. 1989) (Leval, J.). To prohibit consideration of these important factors in Pepper's case is inconsistent with the purposes of §3553(a), and "may work to promote not respect, but derision, of the law," which may then be "viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Gall*, 552 U.S. at 54.

Second, the only reason the Eighth Circuit gave for deciding that evidence that did not exist at the original sentencing is "not relevant" is without support in the circuit's own case law and is contrary to this Court's decisions and the law of other circuits.

The reason for this rule, the Eighth Circuit said, was that two of its prior decisions permit a court to hear on remand any relevant evidence that it could have heard at the first sentencing on an issue that was reversed. *Sims*, 174 F.3d at 913. The cases cited, however, do not stand for the negative implication

that the *Sims* court drew, that district courts may *not* consider evidence that did *not* exist at the original sentencing, much less on an issue that was not decided on appeal. Instead, they address the law of the case and the scope of arguments and evidence that a district court may consider regarding issues that were actually *decided* by the court of appeals. See *United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992); *United States v. Behler*, 100 F.3d 632 (8th Cir. 1996).<sup>19</sup> Neither case addresses whether a district court may consider evidence that did not exist at the time of the initial sentencing, much less evidence regarding an issue that was not (and could not have been) decided by the court of appeals. See *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (“The doctrine of law of the case comes into play only with respect to issues previously

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<sup>19</sup> Specifically, these cases stand for the proposition that a district court may reconsider *de novo* any issue left open by the court of appeals, including any new evidence and arguments that it could have heard at the initial sentencing *on that issue*, but that it may not hear fresh evidence or argument on an issue that was decided by the court of appeals. See *Cornelius*, 968 F.2d at 705-06 (holding that district court could consider on remand any evidence regarding whether defendant qualified as an Armed Career Criminal because district court’s previous determination on that issue had been reversed and remanded for reconsideration, but it could not hear new evidence and arguments regarding whether defendant qualified as a career offender, as district court’s determination on that issue had been affirmed); *Behler*, 100 F.3d at 635 (holding that district court could not, under law of the case and scope of the remand, consider fresh evidence and arguments regarding drug quantity calculation, which had been affirmed).

determined.”); *United States v. Vanhorn*, 344 F.3d 729, 731-32 (8th Cir. 2003) (same). Indeed, other Eighth Circuit decisions allow a district court to consider evidence that did not exist at the time of the initial sentencing,<sup>20</sup> in keeping with the broad principle that a sentencing judge is free “to consider the defendant’s conduct subsequent to the first conviction in imposing a new sentence.” *Pearce*, 395 U.S. at 723; see also *Wasman v. United States*, 468 U.S. 559, 572 (1984) (“[F]ollowing a defendant’s successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings.”).

Finally, the rule the Eighth Circuit inferred in *Sims* is inconsistent with the law of other circuits that at a resentencing, a “court’s duty is always to sentence the defendant as he stands before the court on the day of sentencing.” *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000). In *United States v. Quintieri*, 306 F.3d 1217, 1230 (2d Cir. 2002), for

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<sup>20</sup> See *United States v. Stapleton*, 316 F.3d 754, 757 (8th Cir. 2003) (allowing consideration of “post-sentencing obstructive conduct” as basis for obstruction-of-justice enhancement); *United States v. Walker*, 920 F.2d 513, 518 (8th Cir. 1995) (describing district court’s consideration at resentencing of evidence of defendant’s rehabilitation in prison); *United States v. Durbin*, 542 F.2d 486, 489-90 (8th Cir. 1976) (“[I]t was within the discretion of the district court to consider events occurring subsequent to the appellant’s original sentencing.”) (citing *Williams*, 337 U.S. at 247).

example, the Second Circuit made clear that even within the constraints of a limited remand, a district court may consider events occurring after the initial sentencing, such as the death of a spouse, that implicate issues not decided at the initial sentencing – *e.g.*, the appropriateness of a departure based on extraordinary family circumstances.<sup>21</sup> Similarly, in *United States v. Buckley*, 251 F.3d 668 (7th Cir. 2001), the Seventh Circuit emphasized that even its limited remand order “did not preclude the judge’s consideration of extraordinary unforeseen events occurring after the original sentencing, events not before us when we remanded the case, to the extent they bore on the sentence.” *Id.* at 670 (citing *Pearce*).<sup>22</sup> Decisions in virtually every other circuit confirm

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<sup>21</sup> See also *Hernandez*, 604 F.3d at 54 (even under a limited remand, district court may consider “an issue [that] became relevant only after the initial appellate review,” such as defendant’s rehabilitation since original sentencing); *United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002) (upholding district court’s consideration on remand of evidence that defendant murdered confidential informant to prevent him from testifying, stating that “even where the appellate court remands a case with specific limiting instructions, such a mandate does not ‘preclude’ a departure based on intervening circumstances”); *Bryson*, 229 F.3d at 426 (district court erred in declining to consider rehabilitation between first and second sentencing); *Core*, 125 F.3d at 78 (district court may consider post-sentencing rehabilitation).

<sup>22</sup> See also *United States v. Bell*, 280 Fed. Appx. 548, 550 (7th Cir. 2008) (affirming district court’s consideration of evidence of events occurring while case was on appeal for purposes of finding aggravating factor that did not previously exist).

this principle.<sup>23</sup> These courts, unlike the Eighth Circuit, correctly recognize that consideration of evidence not available at the initial sentencing is consistent with the principle that “the punishment should fit the offender and not merely the crime.” *Pearce*, 395 U.S. at 723 (internal quotation marks omitted).

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<sup>23</sup> See, e.g., *Aitoro*, 446 F.3d at 255 n.10 (district court may consider post-sentencing rehabilitation at ordinary resentencing); *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001) (same); *Bradstreet*, 207 F.3d at 81-83 (same); *Lloyd*, 469 F.3d at 324 (same); *Sally*, 116 F.3d at 80 (same); *Scott*, 194 Fed. Appx. at 140 (same); *United States v. Reinhart*, 442 F.3d 857, 859 (5th Cir. 2006) (affirming higher sentence on remand based in part on defendant’s conduct while incarcerated); *Puente v. United States*, 676 F.2d 141, 145 (5th Cir. 1982) (“[I]t is common practice in resentencing to take into consideration events and conduct occurring subsequent to the original sentence.”) (citing *Pearce*) (internal quotation marks omitted); *Jones*, 489 F.3d at 252-53 (district court may consider post-sentencing rehabilitation on remand); *Rudolph*, 190 F.3d at 723-27 (same); *United States v. Butler*, 221 Fed. Appx. 616, 617-18 (9th Cir. 2007) (same); *Green*, 152 F.3d at 1207 (same); *United States v. Jones*, 114 F.3d 896, 897 (9th Cir. 1997) (upholding consideration of evidence that did not exist at time of initial sentencing showing that defendant’s financial situation had improved) (citing *Pearce*); *Roberts*, 1999 WL 13073, at \*\*6-7 (district court may consider post-sentencing rehabilitation); *Rhodes*, 145 F.3d at 1381 (same); *id.* at 1377-78 (unless expressly directed otherwise, at resentencing district courts may consider “only such new arguments or new facts as are made newly relevant by the court of appeals’ decision – whether by the reasoning or by the result,” but a defendant is not held to have “waived an issue if he did not have reason to raise it at his original sentencing”).

## 2. Permitting Consideration Of Post-Sentencing Rehabilitation Does Not Create Unwarranted Disparity.

Another of the Eighth Circuit's justifications for prohibiting consideration of post-sentencing rehabilitation was that such consideration would create "disparity" because "lucky defendants," through the "fortuity" of a "legal error in their original sentencing, receive a windfall," while other defendants "with identical or even superior prison records" receive "only the limited good-time credits available under 18 U.S.C. § 3624." *Sims*, 174 F.3d at 912-13. The Eighth Circuit continues to cite this rationale. *See Pepper IV*, 570 F.3d at 965; J.A. 376-77. But the rule, rather than *preventing* unwarranted disparity, creates it.

Differences in sentencing that arise because of the ordinary operation of the criminal justice system are quite common and accepted. For example, disparity arising from the ordinary exercise of prosecutorial discretion is not unwarranted. *United States v. LaBonte*, 520 U.S. 751, 761-62 (1997). That more culpable defendants have greater knowledge with which to obtain credit for substantial assistance to the government than do less culpable defendants is not deemed unfair.<sup>24</sup> Defendants sentenced or resentenced on remand after *Booker* are entitled to be

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<sup>24</sup> *See, e.g., United States v. Lindo*, 335 Fed. Appx. 663, 664-65 (8th Cir. 2009); *United States v. Due*, 205 F.3d 1030, 1033-34 (8th Cir. 2000); *United States v. Polanco*, 53 F.3d 893 (8th Cir. 1995).

sentenced under the *Booker* remedy, *Booker*, 543 U.S. at 267-68, while those whose sentences became final before *Booker* are not. *Dillon v. United States*, 130 S. Ct. 2683 (2010). Likewise, the fact that one defendant, because of a successful appeal by one side or the other, has an opportunity to present evidence of rehabilitation that occurred after a previous sentencing, is not unfair simply because another defendant's case was not appealed at all or was affirmed. See *Bradstreet*, 207 F.3d at 82-83; *Rudolph*, 190 F.3d at 724; *Green*, 152 F.3d at 1207 & n.6; *Rhodes*, 145 F.3d at 1381. Indeed, it is appropriate for sentencing courts to consider "the need to avoid unwarranted similarities" where different defendants are "not similarly situated." *Gall*, 552 U.S. at 55 (emphasis in original).

The Eighth Circuit's blanket rule not only prohibits judges from finding relevant facts and judging their import under §3553(a), see *Gall*, 552 U.S. at 51, including assessing any disparities in light of those facts, see *Kimbrough v. United States*, 552 U.S. 85, 108 (2007), but actually promotes unwarranted disparity in at least two ways.

First, the Eighth Circuit's rule operates as a one-way ratchet, prohibiting consideration of evidence of *good* post-sentencing conduct, while permitting courts to consider evidence of *bad* post-sentencing conduct. See *Stapleton*, 316 F.3d at 757 ("Although our precedent 'prohibits consideration of post-sentencing rehabilitation at resentencing' as the basis for a downward departure . . . we . . . allow consideration

of post-sentencing obstructive conduct” to enhance a defendant’s sentence) (citation omitted).

Second, the rule draws an arbitrary distinction between quite similar conduct, rehabilitation that occurs before sentencing and rehabilitation that occurs after sentencing, based on an alleged “disparity” of little significance.<sup>25</sup> The Eighth Circuit has always permitted judges to consider post-*offense* (but pre-initial-sentencing) rehabilitation. *See Sims*, 174 F.3d at 913; *United States v. McMannus*, 262 Fed. Appx. 732 (8th Cir. 2008). Unlike other circuits, however,<sup>26</sup> the Eighth Circuit continues to prohibit consideration of post-*sentencing* rehabilitation, because of the alleged “disparity” it causes. But there is an equivalent “disparity” in the case of post-*offense* rehabilitation that the Eighth Circuit appropriately treats as insignificant. The opportunity to show post-offense rehabilitation depends largely on whether the defendant is released to the community, where rehabilitative efforts are most easily accomplished, or is instead detained in a pretrial detention facility, where opportunities for rehabilitation are virtually non-existent.<sup>27</sup> For example, in *Gall*, this Court upheld a

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<sup>25</sup> *See Rudolph*, 190 F.3d at 723 (rejecting rationale); *Roberts*, 1999 WL 13073, at \*6 n.1 (same); *Green*, 152 F.3d at 1207 (same); *Sally*, 116 F.3d at 80 (same).

<sup>26</sup> *See Hernandez*, 604 F.3d at 53-55; *Arenas*, 340 Fed. Appx. at 386 & n.2; *Jones*, 489 F.3d at 252-53; *Lloyd*, 469 F.3d at 324-25; *Aitoro*, 446 F.3d at 255 n.10; *Scott*, 194 Fed. Appx. at 138.

<sup>27</sup> *See McGinnis v. Royster*, 410 U.S. 263, 273 (1973).

variance based on post-offense rehabilitation, some of which took place while Gall was on pretrial release, 552 U.S. at 41-42, 44, a status many of those charged with crime never enjoy. Because the availability of pretrial release is no less “fortuitous” than the presence of a legal error in the original sentencing that results in resentencing, the Eighth Circuit’s designation of the latter condition as an unfair “windfall” creating “disparity,” even as it agrees that the former condition may be permitted to affect the sentence, cannot be sustained. Common distinctions in the situations of different defendants simply do not create unwarranted disparities that mandate that all defendants be treated equally harshly.

The Eighth Circuit’s rule thus does not prevent any “unwarranted” disparity, but instead creates it.

### **3. Consideration Of Post-Sentencing Rehabilitation Does Not Interfere With The Bureau Of Prisons’ Authority To Award Good Time Credit.**

Contrary to the Eighth Circuit’s final justification, judicial consideration of post-sentencing rehabilitation in no way interferes with the Bureau of Prisons’ authority to award good time credit for “exemplary compliance with institutional disciplinary regulations.” *Sims*, 174 F.3d at 913 (quoting 18 U.S.C. §3624(b)(1)). The Bureau of Prisons has no power to award good time credit for conduct that exceeds compliance with its disciplinary regulations,

much less for conduct that occurs after a sentence is served. *Barber v. Thomas*, 130 S. Ct. 2499, 2505 (2010). Pepper was awarded good time credit for complying with the Bureau of Prisons' regulations. The evidence of rehabilitation that should have been permitted to be taken into account at his resentencing was that he engaged in substantial rehabilitative efforts after he completed his term of imprisonment. "Upon resentencing, the district court pronounces a firm, unadjustable sentence that the Bureau of Prisons is to carry out; that the court took into account post-sentence rehabilitation is irrelevant to the Bureau's function." *Bradstreet*, 207 F.3d at 83; *see also Rhodes*, 145 F.3d at 1380-81.

In sum, not one of the Eighth Circuit's rationales for its blanket rule forbidding consideration of post-sentencing rehabilitation is sound. Because the rule violates the controlling statutes as well as the important principles set forth in *Booker*, *Rita*, *Kimbrough*, and *Gall*, the rule should be definitively rejected and the Eighth Circuit's judgment vacated.

**II. THE COURT OF APPEALS ERRED IN UPHOLDING CHIEF JUDGE READE'S OVERRULING OF JUDGE BENNETT'S FINDING REGARDING PEPPER'S SUBSTANTIAL ASSISTANCE; A WELL-ESTABLISHED COMPONENT OF THE LAW OF THE CASE DOCTRINE BARS A DISTRICT JUDGE FROM OVERTURNING A RULING ISSUED BY ANOTHER DISTRICT JUDGE IN THE SAME CASE EXCEPT IN SPECIAL CIRCUMSTANCES AND FOR COMPELLING REASONS.**

Following the Eighth Circuit's initial remand in this case, then-Chief Judge Bennett carefully reconsidered all of the pertinent sentencing factors, including the value of the substantial assistance that Pepper had provided to law enforcement. He found that this last factor alone warranted a downward departure to a sentence of 58 months' imprisonment, which he characterized as a 40% departure. J.A. 139-44. This was a finding in essence that, without considering other factors, a 58-month sentence was "sufficient" to carry out the purposes of §3553(a). Although the Eighth Circuit remanded the case on other grounds, it did not disturb this finding, concluding that it was "reasonable." *Pepper II*, 486 F.3d at 411, J.A. 167-68; *Pepper III*, 518 F.3d at 951, J.A. 213. At the subsequent resentencing, however, Chief Judge Reade, to whom the case had been reassigned, rejected Judge Bennett's finding. She held, without any apparent consideration of Judge Bennett's rationale or any finding that compelling circumstances

warranted a deviation from his ruling, that a departure to 58 months' imprisonment on this basis was excessive under §3553(a), because Pepper's assistance had not been "extraordinary."<sup>28</sup> S.J.A. 32-33. Departing solely on the basis of substantial assistance, Chief Judge Reade found that a sentence of 77 months' imprisonment was appropriate under §3553(a).<sup>29</sup> J.A. 331-34.

In light of these circumstances, Chief Judge Reade's sentence was imposed in violation of the law of the case doctrine. That doctrine provides that, as a general rule, a district judge should not alter another district judge's previous rulings in the case without a compelling justification for doing so. Here, however, Chief Judge Reade found that a substantially higher sentence was required for the sentence to be "sufficient," §3553(a), given Pepper's cooperation, than Judge Bennett had. The record shows no reason for this change, other than Chief Judge Reade's apparent disagreement with Judge Bennett's ruling.

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<sup>28</sup> Nothing in the Commission's policy statement advises judges to evaluate the extent of substantial assistance departures according to whether cooperation was "extraordinary." USSG §5K1.1, p.s. The Eighth Circuit, in light of *Gall*, overruled its former standard of review of the extent of substantial assistance departures, which had asked whether a defendant's cooperation was "extraordinary." *United States v. Burns*, 577 F.3d 887, 896 (8th Cir. 2009) (en banc).

<sup>29</sup> Chief Judge Reade applied a further departure pursuant to Fed. R. Crim. P. 35(b) for additional assistance to law enforcement that Pepper had provided following his prior sentencing, for a total sentence of 65 months' imprisonment.

The law of the case doctrine generally provides that “a court should not reopen issues decided in earlier stages of the same litigation.” *Agostini v. Felton*, 521 U.S. 203, 236 (1997). Pursuant to this doctrine, parties to litigation are normally entitled to expect that “[t]he *same* issue presented a second time in the *same* case in the *same* court should lead to the *same* result.” *PNC Fin. Servs. Group, Inc. v. Comm’r of Internal Revenue Serv.*, 503 F.3d 119, 126 (D.C. Cir. 2007) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc)).

Federal courts have long recognized that an important component of this doctrine directs district judges to refrain from overturning rulings issued by a fellow district judge in the same case except in “special circumstances,” *Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002), and for “compelling reasons,” *Best v. Shell Oil Co.*, 107 F.3d 544, 546 (7th Cir. 1997). *Accord Dictograph Prods. Co. v. Sonotone Corp.*, 230 F.2d 131, 134-36 (2d Cir. 1956) (L. Hand, J.); *Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3d Cir. 1994); *Prack v. Weissinger*, 276 F.2d 446, 450 (4th Cir. 1960); *Stevenson v. Four Winds Travel, Inc.*, 462 F.2d 899, 904-05 & n.4 (5th Cir. 1972); *Gillig v. Advanced Cardiovascular Sys., Inc.*, 67 F.3d 586, 589-90 (6th Cir. 1995); *Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 220 (8th Cir. 1941); *United States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970); *Travelers Indem. Co. v. United States*, 382 F.2d 103, 106-07 (10th Cir. 1967); *Technical Res. Servs., Inc. v. Dornier Med. Sys., Inc.*, 134 F.3d 1458, 1465 n.9 (11th Cir.

1998); *Guerrieri v. Herter*, 186 F. Supp. 588, 590 (D.D.C. 1960); see also John A. Glenn, Annotation, *Propriety of Federal District Judge's Overruling or Reconsidering Decision or Order Previously Made in Same Case by Another District Judge*, 20 A.L.R. FED. 13 (Westlaw 2009) (hereinafter "*Glenn Annotation*") (citing cases); 18B Charles A. Wright *et al.*, *Federal Practice and Procedure* §4478.1 (Westlaw 2010) (hereinafter "*Federal Practice and Procedure*").

This facet of the law of the case doctrine advances a number of important policies. It “reflects the rightful expectation of litigants that a change of judge midway through a case will not mean going back to square one.” *Brengettcy v. Horton*, 423 F.3d 674, 680 (7th Cir. 2005) (quoting *Best*, 107 F.3d at 546, and citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). It protects the “orderly functioning of the judicial process.” *Ellis*, 313 F.3d at 646 (citing *Stevenson*, 462 F.2d at 904-05). It “affords litigants a high degree of certainty as to what claims are – and are not – still open for adjudication.” *Id.* at 647 (citing *Best*, 107 F.3d at 546, and *Christianson*, 486 U.S. at 816-17). It “furthers the abiding interest shared by both litigants and the public in finality and repose.” *Id.* (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992)). And it recognizes that “judges who too liberally second-guess their co-equals effectively usurp the appellate function and embolden litigants to engage in judge-shopping and similar forms of arbitrage.” *Id.* (citing *United States v. Erwin*, 155 F.3d 818, 825 (6th Cir. 1998), *White v. Higgins*, 116 F.2d

312, 317-18 (1st Cir. 1940), and *Federal Practice and Procedure* §4478.1, at 695); accord *Dictograph Prods.*, 230 F.2d at 135 (noting that, absent the rule, “the defeated party may shop about in the hope of finding a judge more favorably disposed”); see also *Glenn Annotation* §4. The Eighth Circuit itself has eloquently described the rule as “essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration of the law.” *Plattner Implement Co. v. Int’l Harvester Co. of America*, 133 F. 376, 378-79 (8th Cir. 1904).

As with the remainder of the law of the case doctrine, the rule is not a limitation on courts’ power, *Messinger v. Anderson*, 225 U.S. 436, 444 (1912), nor is it inflexible. Courts have recognized that the rule is not breached, for example, when a district judge revisits an earlier judge’s ruling where that ruling was “made on an inadequate record or was designed to be preliminary or tentative,” *Ellis*, 313 F.3d at 647 (citing *Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985)), where there has been a “material change in controlling law,” *id.* at 648 (citing *Tracey v. United States*, 739 F.2d 679, 682 (1st Cir. 1984), and *Crane Co. v. Am. Standard, Inc.*, 603 F.2d 244, 248 (2d Cir. 1979)), where “newly discovered evidence bears on the question,” *id.* (citing *Fisher v. Trainor*, 242 F.3d 24, 29 n.5 (1st Cir. 2001), and *Pit River Home & Agric. Coop. Ass’n v. United States*, 30 F.3d 1088, 1096 (9th Cir. 1994)), and where reconsideration is appropriate “to avoid manifest injustice,” *id.* (citing *Christianson*, 486 U.S. at 817). The introduction

of new evidence respecting a defendant's post-sentencing rehabilitation, for example, would constitute a proper ground for modifying an earlier sentencing determination regardless of whether there has been a change of judge, both because the issue was not actually ruled on at the initial sentencing, and because the new evidence bears on the appropriate sentence and the need to avoid a manifest injustice. *Id.*; cf. *Burrell v. United States*, 467 F.3d 160, 165 n.3 (2d Cir. 2006) (Sotomayor, J.) (noting that court's reconsideration of prior rulings may be appropriate in circumstances involving change of law, new evidence, or need to correct clear error or prevent manifest injustice).

But the rule's essence is that a mere "doubt about the correctness of a predecessor judge's rulings," a "belief that the litigant may be able to make a more convincing argument the second time around," or a "'doctrinal disposition' to decide the issue differently" does not constitute an adequate ground for a district judge to jettison another district judge's ruling. *Ellis*, 313 F.3d at 648-49 (quoting *Agostini*, 521 U.S. at 236); accord *Williams v. Comm'r of Internal Revenue*, 1 F.3d 502, 503 (7th Cir. 1993) (Posner, J.) (noting that district judge is not free to alter earlier judge's ruling "merely because he has a different view of the law or facts from the first judge").

Here, Chief Judge Reade's basis for deviating from Judge Bennett's finding was at best a mere "doubt about the correctness of [her] predecessor's ruling." *Ellis*, 313 F.3d at 648-49. The record here is

devoid of any justification, beyond Chief Judge Reade's disagreement with Judge Bennett's ruling regarding the value of Pepper's substantial assistance, for Chief Judge Reade to discard Judge Bennett's ruling and consider the matter "de novo." J.A. 207. Chief Judge Reade noted that the court of appeals' remand order did not obligate her to leave that ruling in place, J.A. 206-08, S.J.A. 29-30, but she identified no special or compelling justification for overturning it. *Ellis*, 313 F.3d at 646; *Best*, 107 F.3d at 546. Indeed, Chief Judge Reade gave no indication that she even *considered* Judge Bennett's careful evaluation of the value of Pepper's substantial assistance when she arrived at her new, and substantially lower, valuation. S.J.A. 32-33. The law of the case doctrine is designed to prevent precisely this sort of blithe expungement of a co-equal judge's carefully-reasoned conclusion. *Glenn Annotation* §4 (citing cases).

In addition, Chief Judge Reade's unexplained deviation from Judge Bennett's ruling conflicts with other important policies behind the law of the case doctrine. One such purpose of the rule is to ensure public "confidence in the adjudicatory process" by eliminating the appearance of arbitrariness that would result from readily permitting courts to deviate from prior rulings in the same case. *Ellis*, 313 F.3d at 647 (citing Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 Iowa L. Rev. 81, 88 (1984) (hereinafter "*Hazard*")). Chief Judge Reade's casual deviation from a prior ruling of

a fellow district judge undermined public confidence in judicial proceedings, for “reconsideration of previously litigated issues, absent strong justification, spawns inconsistency and threatens the reputation of the judicial system.” *Id.* (citing *Hazard* at 88). A district judge’s deviation from a prior sentence, which had been fully justified by the original sentencing judge, without any compelling explanation for the alteration, suggests that criminal sentencing can depend on a mere change in judicial personnel. Such a result not only taints the appearance of justice, but may impair the actuality of justice as well.

The need for adhering to the law of the case to preserve the appearance of justice is particularly acute where, as here, a successor judge is sentencing a defendant after the original sentencing judge has been removed from the case by the court of appeals. In some cases, the reasons for reassignment are clear. *See, e.g., Leung*, 40 F.3d at 586-87 (reassignment required to preserve appearance of justice where original judge’s statements suggested race played an improper role in sentencing). But in others, the reasons for reassignment are less obvious. In this case, for example, although Judge Bennett expressed unhappiness with the prospect of being required to impose a higher sentence by the court of appeals, he repeatedly emphasized that he would be able and willing to conduct a resentencing in accord with the appellate court’s instructions, should a resentencing be ordered. J.A. 148-50 (“I won’t like it, but I’ll be happy to do it. . . . I’ll impose it if they make me. . . .

[I]f I have to do it, I have to do it.”); *cf. Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring in the judgment) (“[W]e accept the notion that the ‘conscientious judge will, as far as possible, make himself aware of his biases [toward vindicating his prior conclusion], and, by that very self-knowledge, nullify their effect.’”) (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (2d Cir. 1943)). In this latter type of case, there should be a real concern that a “reasonable observer,” *Leung*, 40 F.3d at 586-87, might conclude that the reassignment was arbitrary or reflected appellate displeasure with the manner in which the district court exercised, or might exercise, the substantial discretion that this Court’s rulings confer on him at sentencing. *See Gall*, 552 U.S. at 41, 51-52, 56. The law of the case doctrine is designed to dispel any concerns that criminal sentences may be arbitrarily affected by the choice of judicial personnel.

In rejecting Pepper’s argument that this aspect of Chief Judge Reade’s ruling violated the law of the case doctrine, the Eighth Circuit relied solely on the fact that its remand order did not require Chief Judge Reade to leave this part of Judge Bennett’s ruling in place. *Pepper IV*, 570 F.3d at 963-64; J.A. 372-74. The appellate court failed to understand that, even if *its remand order* did not obligate Chief Judge Reade to leave Judge Bennett’s ruling in place, the *law of the case doctrine* did, at least in the absence of special

and compelling reasons to overturn that ruling.<sup>30</sup> Nor may the Eighth Circuit's error be dismissed as immaterial on the theory that it was entitled to affirm Chief Judge Reade's ruling as long as it was correct, notwithstanding the law of the case doctrine. This argument would carry some weight if the standard of appellate review were plenary, *cf. Peterson*, 765 F.2d at 704, but this Court made plain in *Gall* that district court exercises of sentencing discretion are entitled to substantial deference. *Gall*, 552 U.S. at 41. With respect to a discretionary ruling such as this, even if both judges' determinations qualify as reasonable, "the law of the case doctrine . . . require[s] the court of appeals to defer to the *first* judge's ruling." *Williams*, 1 F.3d at 503-04 (citing *Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1137-38 (6th Cir. 1991)) (emphasis supplied).

This Court should accordingly reverse the Eighth Circuit's affirmance of Chief Judge Reade's overturning of Judge Bennett's valuation of Pepper's substantial assistance to law enforcement.



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<sup>30</sup> The government made the same error in its Brief in Opposition to the Petition for Certiorari. *See* Brief in Opp. to Cert. at 9-10. The question here is not whether Chief Judge Reade's decision violated the Eighth Circuit's remand order; it is whether it violated the law of the case doctrine, which under the circumstances required it to adhere to Judge Bennett's decision on the appropriate sentence in light of Pepper's assistance to law enforcement.

## CONCLUSION

This Court has broad power to “set aside or reverse” the judgment brought before it and to “direct the entry of such appropriate judgment, decree, or order . . . as may be just under the circumstances.” 28 U.S.C. §2106. Based on Issues I and II, the Court should exercise this power to set aside the judgment of the Eighth Circuit in *Pepper IV*.

In this unusual case, the Court should also issue an order, “just under the circumstances,” to reinstate the second 24-month sentence imposed by Judge Bennett. Following Judge Bennett’s imposition of his second 24-month sentence, the Eighth Circuit reversed, and this Court vacated the Eighth Circuit’s judgment and remanded in light of *Gall*. Every proceeding since the Court’s remand has, as shown above, been inconsistent with the principles set forth in *Gall*. The Court should reinstitute that 24-month sentence, the only judgment consistent with *Gall* and this Court’s precedents. *Cf. Grosso v. United States*, 390 U.S. 62, 71-72 (1968) (where reversal of petitioner’s conviction was “inevitable” in view of Court’s holding, case should be “finally disposed of at this level,” under 28 U.S.C. §2106); *Tinder v. United States*, 345 U.S. 565, 570 (1953) (remanding case “to the District Court to correct the sentence” where petitioner was improperly convicted of a felony; citing 28 U.S.C. §2106 and Court’s power “to do justice as the case requires”). It would not be “just under the

circumstances” to allow Pepper to be returned to prison, when he fully served the only sentence in this case imposed consistently with this Court’s precedents.

In the alternative, the Court should direct that no sentence imposed on remand require Pepper to serve additional time in prison. Pepper has already served the equivalent of a 42-month sentence (including good time).<sup>31</sup> Pepper has served nearly the term that a proper application of the law of the case doctrine would require. Based on Judge Bennett’s decision, the highest appropriate sentence under 18 U.S.C. §3553(a), given Pepper’s original cooperation with the government, is 58 months. Chief Judge Reade then deducted another twelve months for additional cooperation. This results in an established sentence, under the law of the case, of a maximum term of 46 months’ imprisonment. Given Pepper’s remarkable rehabilitation, he has now served a term

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<sup>31</sup> Pepper has served roughly 1,112 days, or 37 months, imprisonment, and he is entitled to 54 days of good time credit for each year served, or a little more than 162 days of credit for his three years in prison. *See Barber*, 130 S. Ct. at 2502-03 (citing 18 U.S.C. §3624(b)). No credit has been denied him by the Bureau of Prisons, and he has accordingly served the equivalent of a 42-month sentence.

that is plainly “sufficient” to serve the purposes of sentencing.

Respectfully submitted,

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App. 1

18 U.S.C. §3553(a)

(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 –

App. 2

(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.

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18 U.S.C. §3553(c)

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the

extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

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18 U.S.C. §3661

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.

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21 U.S.C. §850

Except as otherwise provided in this subchapter or section 242a(a) of Title 42, 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 under this subchapter or subchapter II of this chapter.

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No. 09-6822

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**In the Supreme Court of the United States**

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JASON PEPPER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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## QUESTIONS PRESENTED

1. Whether, at petitioner's resentencing on remand following the government's appeal, the district court was required, under the law-of-the-case doctrine, to apply the same percentage departure from the Guidelines range for substantial assistance that had been applied at a prior sentencing.

2. Whether post-sentencing rehabilitation is an impermissible basis under 18 U.S.C. 3553(a) for varying downward at resentencing from the advisory Guidelines range.

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**In the Supreme Court of the United States**

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No. 09-6822

JASON PEPPER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-6) is reported at 570 F.3d 958. Prior opinions of the court of appeals (Pet. App. 19-22, 27-30, 31-34) are reported at 518 F.3d 949, 486 F.3d 408, and 412 F.3d 995.

**JURISDICTION**

The judgment of the court of appeals was entered on July 2, 2009. The petition for a writ of certiorari was filed on September 29, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**STATUTORY PROVISIONS INVOLVED**

The pertinent statutory and Guidelines provisions are reprinted in an appendix to this brief. App., *infra*, 1a-9a.

## STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted of conspiring to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. 846. The district court initially sentenced petitioner to 24 months of imprisonment, to be followed by five years of supervised release, but that sentence was set aside on appeal. Pet. App. 31-34 (*Pepper I*). On remand, the district court resentenced petitioner to 24 months of imprisonment, to be followed by five years of supervised release, and the court of appeals again reversed. *Id.* at 27-30 (*Pepper II*). This Court vacated the court of appeals' judgment and remanded the case for further consideration in light of *Gall v. United States*, 552 U.S. 38 (2007). Pet. App. 23. On remand from this Court, the court of appeals again reversed the 24-month sentence imposed by the district court and remanded for resentencing, *id.* at 19-22 (*Pepper III*), and this Court denied review, 129 S. Ct. 138. The district court thereafter resentenced petitioner to 77 months of imprisonment, to be followed by 12 months of supervised release. Pet. App. 8-9. The court subsequently reduced the term of imprisonment to 65 months pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure. *Id.* at 13-14. The court of appeals affirmed that sentence. *Id.* at 1-6 (*Pepper IV*).

1. In 2003, law enforcement officers arrested petitioner for his participation in a methamphetamine trafficking operation. Sealed J.A. (S.J.A.) 9. He pleaded guilty to one count of conspiracy to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. 846. Pet. App. 32.

a. At petitioner's initial sentencing in March 2004, the district court determined, under 18 U.S.C. 3553(f), that petitioner was not subject to any statutory minimum sentence based on his criminal history, the nature of his offense, and his cooperation with governmental authorities. J.A. 28, 45. The court also determined that petitioner's sentencing range under the Sentencing Guidelines (Guidelines) was 97 to 121 months of imprisonment, based on a total offense level of 30 and a criminal history category of I. *Ibid.*

The government moved for a downward departure of 15% from that range pursuant to Guidelines § 5K1.1. Pet. App. 32. Section 5K1.1 provides that a court may depart from the Guidelines "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." *Ibid.* Section 5K1.1 states that in determining an "appropriate reduction," the court may consider several factors that "include, but are not limited to," "the significance and usefulness of the defendant's assistance"; "the truthfulness, completeness, and reliability" of the defendant's information; "the nature and extent of the defendant's assistance"; "any injury suffered, or any danger or risk of injury to the defendant or his family[,] resulting from his assistance"; and "the timeliness of the defendant's assistance." *Id.* § 5K1.1(a)(1)-(5).

During the government's investigation into petitioner's drug trafficking, petitioner provided information to investigators and a grand jury about two other individuals' involvement with illegal drugs and guns. J.A. 31-33. The government therefore moved for a downward departure based on petitioner's "substantial assistance" in its investigation. The government advised

the court that, based on the factors listed in Guidelines § 5K1.1(a)(1)-(5), a 15% reduction would be appropriate. J.A. 35, 45. The district court, however, granted a significantly greater departure from the Guidelines range and imposed a sentence of 24 months of imprisonment, to be followed by five years of supervised release. J.A. 45. The court arrived at that sentence after calling officials at the Bureau of Prisons to determine the minimum term of imprisonment that petitioner could serve and still qualify for the residential drug abuse program at the federal prison in Yankton, South Dakota. J.A. 38-44; see Pet. App. 32.

b. The government appealed, and on June 24, 2005, the court of appeals reversed. Pet. App. 31-34. The court of appeals held that “the extent of a downward departure made pursuant to § 5K1.1 can be based only on assistance-related considerations.” *Id.* at 33. The court concluded that the district court had “considered a matter unrelated to [petitioner’s] assistance, namely its desire to sentence [petitioner] to the shortest possible term of imprisonment that would allow him to participate in the intensive drug treatment program at the federal prison in Yankton.” *Ibid.* The court could not find that the error was harmless, because “given the pedestrian nature of [petitioner’s] assistance,” it was “far from certain” that the district court “would have arrived at the same guidelines sentence had it considered only assistance-related elements.” *Id.* at 34. Accordingly, the court of appeals remanded “for resentencing in accordance with [its] opinion and with the principles

set forth by the Supreme Court in [*United States v. Booker*, 543 U.S. 220 (2005)].” Pet. App. 34.<sup>1</sup>

2. a. In May 2006, after this Court’s decision in *Booker* rendering the Guidelines advisory, the district court resentenced petitioner and again imposed a sentence of 24 months of imprisonment. The parties agreed that petitioner’s recommended sentencing range under the Guidelines remained 97 to 121 months of imprisonment. 5/5/06 Tr. 2. Petitioner presented evidence about his rehabilitation since his initial sentencing, testifying that he had completed a drug treatment program while in prison and had maintained employment and enrolled in community college after his release. J.A. 102-112. Petitioner’s father also testified that petitioner had made substantial progress, J.A. 116-121, and petitioner’s probation officer expressed the view that a 24-month sentence would be reasonable in light of petitioner’s substantial assistance and post-sentencing conduct, J.A. 126-131.

The district court first granted a 40% downward departure under Guidelines § 5K1.1 for petitioner’s assistance. According to the court, although petitioner had offered “a pedestrian or average amount of substantial assistance,” national statistics suggested that petitioner should receive “a 50 percent reduction.” J.A. 141-142; J.A. 138-140. The court recognized, however, that under then-existing circuit precedent, a downward departure of 50% for substantial assistance was permissible only in extraordinary circumstances. J.A. 136-141, 146-148; see *United States v. Dalton*, 404 F.3d 1029, 1033-1034 (8th

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<sup>1</sup> On June 27, 2005, petitioner was released from custody after serving his 24-month sentence, less credit awarded for good conduct. Pet. App. 5; see 18 U.S.C. 3624(a). Petitioner began serving his five-year period of supervised release at that time.

Cir. 2005). The court therefore granted a downward departure of 40% “given how timely [petitioner] was and how truthful and honest he was” in assisting the government. J.A. 143. That departure reduced the bottom of the advisory Guidelines range from 97 to 58 months of imprisonment.

The court then granted a further 59% downward variance under 18 U.S.C. 3553(a) based on petitioner’s rehabilitation since his initial sentencing; his lack of a violent history; and, to a lesser degree, the need to avoid unwarranted sentencing disparity with coconspirators in the case. J.A. 143-148; see Pet. App. 28-29. The court concluded that “it would [not] advance any purpose of federal sentencing policy or any other policy behind the federal sentencing guidelines to send this defendant back to prison.” J.A. 149-150. The court’s 59% variance from the 58-month bottom of the advisory Guidelines range resulted in a sentence of 24 months of imprisonment. J.A. 149.

b. The government again appealed petitioner’s sentence, and the court of appeals again reversed. Pet. App. 27-30. The court of appeals stated that, although it was a “close call,” the district court had not abused its discretion in granting a 40% downward departure for substantial assistance. *Id.* at 28. The court of appeals concluded, however, that the district court had abused its discretion in granting a further 59% downward variance under 18 U.S.C. 3553(a). Pet. App. 28-30. In reaching that conclusion, the court of appeals ruled that evidence of petitioner’s post-sentencing rehabilitation was an “impermissible factor to consider in granting a

downward variance” under Section 3553(a). *Id.* at 30.<sup>2</sup> The court reasoned that evidence of post-sentencing rehabilitation could not have been considered at the original sentencing and thus permitting its consideration upon resentencing “would create unwarranted disparities and inject blatant inequities into the sentencing process.” *Id.* at 29-30. The court therefore remanded for resentencing “consistent with [its] opinion.” *Id.* at 30. Because the district judge who had sentenced petitioner in 2004 and 2006 had expressed a reluctance to sentence petitioner a third time if the case was again remanded, the court of appeals directed that the case be assigned to a different judge for resentencing. *Ibid.*

3. On January 7, 2008, this Court vacated the judgment in *Pepper II* and remanded the case to the court of appeals for further consideration in light of *Gall*. Pet. App. 23. On remand, the court of appeals concluded that *Gall* did not alter its holding that the district court had committed procedural error in failing to provide an adequate justification for a 59% downward variance under Section 3553(a). *Id.* at 19-22. As relevant here, the court of appeals concluded that *Gall* did not alter the rule that evidence of a defendant’s post-sentencing rehabilitation “is an impermissible factor to consider in granting a downward variance.” *Id.* at 21. The court further found that the district court had “given signifi-

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<sup>2</sup> The court of appeals found that the district court had erred with respect to the variance in two additional respects. First, the district court had considered petitioner’s lack of a violent history, which had been accounted for in the court of appeals’ view by petitioner’s criminal history category and his eligibility for “safety-valve relief” under 18 U.S.C. 3553(f). Pet. App. 29. Second, the court of appeals found that the district court had considered unwarranted sentencing disparity among co-conspirators “without adequate foundation and explanation.” *Id.* at 30.

cant weight, and possibly overwhelming weight,” to that impermissible factor in imposing sentence. *Ibid.* Accordingly, the court of appeals reversed the 24-month sentence imposed by the district court and remanded the case for resentencing. *Id.* at 22. As it had done in its vacated decision in *Pepper II*, the court of appeals again directed that the resentencing be assigned to a different judge in the district court. *Ibid.* This Court denied a petition for a writ of certiorari. 129 S. Ct. 138.

4. a. Following *Pepper III*, petitioner was resentedenced before a different district judge. The parties agreed that petitioner’s recommended sentencing range under the Guidelines remained 97 to 121 months of imprisonment. J.A. 279; S.J.A. 27-28. The district court determined that, in departing from that range under Guidelines § 5K1.1 to account for petitioner’s substantial assistance, it was not bound to grant petitioner the same 40% departure that had been applied by the judge who had sentenced him in 2006. Pet. App. 24-26; see S.J.A. 30. The district court reasoned that, in *Pepper II*, the court of appeals had “simply indicated that a 40% downward departure was not an abuse of discretion.” Pet. App. 26. The court of appeals had not held “that a 40% downward departure is the only reasonable outcome” or “that the [district] court must impose a 40% downward departure on remand pursuant to USSG § 5K1.1.” *Ibid.* Moreover, the district court noted that if the court of appeals “had wanted to narrow the scope of the remand in such a fashion, it would have so stated.” *Ibid.* “Instead of affirming and reversing in part,” the district court explained that the court of appeals “reversed and remanded” and “did not [give] any specific instructions to the court on the USSG § 5K1.1 issue.” *Ibid.*

Exercising its discretion, the district court concluded that, based on “the applicable factors enumerated in USSG § 5K1.1, \* \* \* [petitioner] is entitled to a 20% reduction in his advisory Sentencing Guidelines range.” S.J.A. 33. In the court’s view, petitioner provided “substantial assistance” that “was timely, helpful and important,” but that “was in no way extraordinary.” S.J.A. 32-33. In addition, the court based its conclusion solely on the record compiled at petitioner’s initial sentencing. The district court stated that “[a]lthough four years have elapsed since the initial sentencing hearing and the parties indicate [petitioner] has provided further assistance, ‘evidence of [petitioner’s] post-sentencing rehabilitation is not relevant and will not be permitted at re-sentencing because the district court could not have considered that evidence at the time of the original sentencing.’” S.J.A. 32 (quoting *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007)). As a result of the court’s 20% downward departure, petitioner’s advisory Guidelines range was 77 to 97 months of imprisonment. *Id.* at 33.

The district court then turned to petitioner’s request for a downward variance based on his “exemplary behavior” since his release from prison. J.A. 221. After considering the sentencing factors set out in Section 3553(a), the district court found that no variance from the advisory Guidelines range was warranted. S.J.A. 33-49. The court agreed that petitioner had made “substantial positive changes in his life,” S.J.A. 39, and it noted that since his release petitioner had “been employed, sober, enrolled in college, married and ha[d] taken on parental responsibilities,” S.J.A. 37. The district court observed, however, that the court of appeals had ruled in *Pepper II* and *Pepper III* that post-

sentencing rehabilitation is not a permissible ground for a variance at resentencing. S.J.A. 39. The district court also declined to vary downward based on petitioner's personal characteristics and history, the sentencing disparity among coconspirators, or the costs of incarceration. S.J.A. 34-37, 40-49.

On January 5, 2009, the district court sentenced petitioner to 77 months of imprisonment, to be followed by 12 months of supervised release. Pet. App. 8-9. The court recommended that petitioner receive credit against his sentence for his previous completion of the Bureau of Prisons' residential drug abuse treatment program. *Id.* at 8. The court then granted the government's motion under Rule 35(b) of the Federal Rules of Criminal Procedure and reduced petitioner's term of imprisonment to 65 months to account for investigative assistance petitioner had provided after his initial sentencing. *Id.* at 13-14; see *id.* at 3.

b. The court of appeals affirmed petitioner's sentence. Pet. App. 1-6. As relevant here, the court rejected petitioner's claim that the scope of the prior remand and the law-of-the-case doctrine required the district court at the 2009 resentencing to grant petitioner the same 40% departure for substantial assistance that the district court had granted him at the 2006 initial sentencing. *Id.* at 3-4. The court of appeals noted that a sentencing court on remand is bound to proceed within the scope of any limitations imposed by the appellate court, but the court of appeals found that its decisions in *Pepper II* and *Pepper III* did not restrict the district court's discretion in determining the extent of any substantial assistance departure at resentencing. *Ibid.* The court of appeals concluded that it had ordered a "general remand for resentencing" that "did not place any

limitations on the discretion of the newly assigned district court judge in resentencing [petitioner].” *Id.* at 4. In reaching that conclusion, the court noted that its earlier decisions had not specified that the district court would be bound by the 40% downward departure for substantial assistance previously granted but had merely found that a 40% departure was “within the range of reasonableness.” *Ibid.*

The court of appeals also rejected petitioner’s argument that the district court had erred in refusing to consider his post-sentencing rehabilitation as a basis for a downward variance under Section 3553(a). Pet. App. 4-5. The court of appeals acknowledged that petitioner had “made significant progress during and following his initial period of imprisonment” by enrolling in community college, marrying and becoming a stepfather to his wife’s daughter, and working as a night crew supervisor at Sam’s Club. *Id.* at 5. The court of appeals commended petitioner on the “positive changes he has made in his life.” *Ibid.* The court ruled, however, that petitioner’s claim was foreclosed by circuit precedent holding that “post-sentencing rehabilitation is not a permissible factor to consider in granting a downward variance.” *Ibid.* The court of appeals therefore affirmed petitioner’s sentence in all respects.<sup>3</sup>

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<sup>3</sup> Petitioner was released from federal custody on June 27, 2005, after serving his original 24-month sentence. See n.1, *supra*. After the district court resentenced petitioner to 65 months of imprisonment, petitioner was returned to federal custody. On July 22, 2010, after this Court had granted the petition for a writ of certiorari, the district court granted petitioner’s motion for release pending disposition of this appeal. 03-cr-4113 Docket entry No. 237.

**SUMMARY OF ARGUMENT**

I. The law-of-the-case doctrine did not entitle petitioner to receive the same 40% downward departure for substantial assistance at his 2009 resentencing that he had received at his 2006 resentencing. The district court's decision to grant only a 20% departure was consistent with the law of the case, because the court of appeals had not held in its previous opinions (in *Pepper II* and *Pepper III*) that a 40% departure was necessary. Rather, the court of appeals had held simply that a 40% departure was not an abuse of the district court's discretion. That holding left the district court free to exercise its discretion differently at the 2009 resentencing. Moreover, following its general practice, the court of appeals remanded the case for a general resentencing, without limiting the scope of remand to particular issues. The district court therefore permissibly conducted a de novo assessment of the factors in Guidelines § 5K1.1, and its exercise of discretion in that regard did not violate any previous instruction from the court of appeals.

II. A. A defendant's rehabilitation after his original sentencing is a permissible basis for a downward variance from the applicable Guidelines range at resentencing. Courts have long considered a wide range of evidence concerning a defendant's personal history and characteristics in order to select an appropriate sentence. For the past 40 years, that principle has been codified in Section 3661, which provides that "[n]o limitation shall be placed on the information concerning the [defendant's] background, character, and conduct" that courts "may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. There is no basis in the text or purpose of Section 3661 for the

court of appeals' categorical prohibition against the consideration of post-sentencing rehabilitation.

Nor did the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, alter this aspect of sentencing courts' discretion. Congress specified seven factors that courts must consider in imposing sentence, see 18 U.S.C. 3553(a), but those factors indicate that courts have discretion to consider post-sentencing rehabilitation. Such rehabilitation is potentially relevant to a defendant's "history and characteristics," 18 U.S.C. 3553(a)(1), as well as to the "need for the sentence imposed" to serve the purposes of sentencing, 18 U.S.C. 3553(a)(2). In addition to its potential relevance to the particular statutory factors in Section 3553(a), evidence of a defendant's post-sentencing rehabilitation is relevant to a court's broad duty under that provision: "[to] impose a sentence sufficient, but not greater than necessary," to achieve the purposes of sentencing. 18 U.S.C. 3553(a).

Pursuant to Sections 3553(a) and 3661, this Court and the lower courts consistently have held that, subject to constitutional constraints, sentencing courts have discretion to consider any relevant information about a defendant's background, character, and conduct. Indeed, before 2000, every court of appeals to consider the question other than the Eighth Circuit had held that post-sentencing rehabilitation could provide an appropriate basis for a downward departure at resentencing. In 2000, the Sentencing Commission promulgated a policy statement providing that such rehabilitation could not provide the basis for a departure. See Guidelines § 5K2.19. But after this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and its progeny, that policy statement is not binding, but rather is a fac-

tor to be considered by a sentencing court in determining an appropriate sentence.

B. The court of appeals erred in categorically prohibiting consideration of post-sentencing rehabilitation. The court relied primarily on “the need to avoid unwarranted sentencing disparities among defendants,” 18 U.S.C. 3553(a)(6), but distinguishing between defendants whose sentences are reversed on appeal and other defendants is not necessarily “unwarranted.” That distinction results from the fact that a defendant’s sentence was imposed in legal error, not from some random or fortuitous circumstance. Moreover, the logic of the court of appeals’ approach requires sentencing courts to ignore post-sentencing information more generally. For instance, courts could not consider evidence about a defendant’s changed health or additional assistance to authorities; evidence of additional victims, harms, or offenses that were unknown at the time of sentencing; or even evidence that a defendant had committed post-sentencing offenses while released or in federal custody. All of those types of information can bear on the type and extent of the sentence that ought to be imposed at resentencing under Section 3553(a). In any event, the need to avoid sentencing disparities is only one of the factors in Section 3553(a), and district courts’ task is to balance all of those factors in a given case. See, *e.g.*, *Kimbrough v. United States*, 552 U.S. 85, 90 (2007). The remaining possible rationales for the court of appeals’ decision are equally unpersuasive.

III. The judgment of the court of appeals should be vacated. At petitioner’s resentencing, the district court observed that petitioner had made substantial positive changes in his life since his original sentencing. The court further observed, however, that circuit precedent

foreclosed a downward variance based on petitioner's post-sentencing rehabilitation. The district court's erroneous refusal to consider post-sentencing rehabilitation as a possible basis for downward variance would not require vacatur of petitioner's sentence if the record established that the error was harmless. See Fed. R. Crim. P. 52(a); *Williams v. United States*, 503 U.S. 193, 203 (1992). The court of appeals did not address that issue, and, consistent with its normal practice, this Court should vacate the judgment of the court of appeals and remand the case to that court to consider the issue in the first instance. See *Neder v. United States*, 527 U.S. 1, 25 (1999).

#### ARGUMENT

Petitioner contends that the judgment below should be vacated for two reasons. The second of those reasons is correct. First, petitioner claims (Pet. 18-26) that the law-of-the-case doctrine and the court of appeals' 2008 remand order in *Pepper III* compelled the district court to grant him a 40% downward departure for substantial assistance at his 2009 resentencing. That claim is incorrect, because previous orders in this case did not require the district court to grant at resentencing the same substantial assistance departure that petitioner had been granted at his earlier sentencing.

Second, petitioner claims (Pet. 27-39) that the court of appeals erred in holding that, at his resentencing, the district court could not vary downward from the advisory Guidelines range under 18 U.S.C. 3553(a) based on petitioner's rehabilitation since his initial sentencing. That claim is correct, because post-sentencing rehabilitation is a permissible ground for a downward variance under Section 3553(a) at a general resentencing. See

U.S. Response Br. 11-15. The judgment of the court of appeals therefore should be vacated and the case should be remanded for further proceedings.

**I. THE COURT OF APPEALS' DECISION IN *PEPPER III* DID NOT ENTITLE PETITIONER TO RECEIVE THE SAME 40% DEPARTURE FOR SUBSTANTIAL ASSISTANCE AT HIS 2009 RESENTENCING THAT HE HAD RECEIVED AT HIS 2006 RESENTENCING**

Petitioner was initially sentenced in 2004, but it is his two resentencings in 2006 and 2009 that are at issue before this Court. At petitioner's first resentencing in May 2006, the district court granted a 40% downward departure under Guidelines § 5K1.1 for petitioner's substantial assistance during the government's investigation into drug trafficking. In *Pepper II*, the court of appeals reversed and remanded for resentencing, but this Court then vacated and remanded the case to the court of appeals for further consideration in light of *Gall v. United States*, 552 U.S. 38 (2007). In *Pepper III*, the court of appeals determined that *Gall* had not altered its earlier decision, and it again reversed and remanded for resentencing. At petitioner's second resentencing in January 2009, the district court granted only a 20% downward departure for substantial assistance. In *Pepper IV*, the court of appeals affirmed petitioner's sentence, including the 20% departure.

Petitioner incorrectly contends (Pet. 18-26) that, under the law-of-the-case doctrine, he was entitled to receive the same 40% downward departure at his 2009 resentencing that he had received at his 2006 resentencing. The district court's decision to grant only a 20% departure was consistent with the law of the case, because the court of appeals did not hold in *Pepper II* or

*Pepper III* that a 40% departure was necessary. Rather, the court of appeals held simply that a 40% departure was not an abuse of the district court's discretion, while leaving the district court free to exercise its discretion differently at the 2009 resentencing. The court of appeals then remanded the case for a general resentencing, without limiting the scope of remand to particular issues. The district court therefore permissibly conducted a de novo assessment of the factors in Guidelines § 5K1.1, and its exercise of discretion in that regard did not violate any instruction from the court of appeals in *Pepper III*.

**A. The Law-Of-The-Case Doctrine Did Not Compel The Lower Courts To Grant A 40% Departure For Substantial Assistance**

Petitioner claims (Pet. 19-21) that the law-of-the-case doctrine required the lower courts to grant a 40% departure for substantial assistance at his 2009 resentencing. Petitioner's reliance on that doctrine is misplaced. "As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); see *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1005 (8th Cir. 2010). The law of the case did not demand a 40% departure at petitioner's 2009 resentencing, because in *Pepper III* the court of appeals had decided as a "rule of law" only that a 40% departure was reasonable, not that it was required. Moreover, because *Pepper II*'s holding on the departure issue was vacated by this Court and never reinstated by the court of appeals, the law-of-the-case doctrine did not constrain

the district court's discretion to grant a different departure at resentencing.

1. During the first resentencing in 2006, the district court granted petitioner a 40% departure for his substantial assistance with the government's investigation. The government appealed the extent of that departure, and in *Pepper II* the court of appeals reviewed the departure under an abuse of discretion standard. Pet. App. 28 ("We review for abuse of discretion the extent of a reduction for substantial assistance."). The court of appeals reasoned that "there is no bright line percentage or mathematical formula to determine when the extent of a substantial assistance departure becomes unreasonable," but "some proportionality must exist between the defendant's assistance and the extent of the departure." *Ibid.* The court concluded that although the issue was "a close call," the court could not say that "the district court [had] abused its discretion by the extent of the § 5K1.1 departure." *Ibid.*

The court of appeals held in *Pepper II* only that a 40% departure was not an abuse of the district court's discretion under the Guidelines. The court did not hold that "a 40% downward departure [was] the only reasonable outcome" or that "the [district] court [had to] impose a 40% downward departure on remand." Pet. App. 26. Certainly by declaring that it was a "close call" whether the district court had abused its discretion, *id.* at 28, the court of appeals "suggested [that] a 40% departure was at the outer boundary of the range of reasonableness," *id.* at 4 n.2. See *id.* at 34 (referring to the "pedestrian" nature of petitioner's assistance). But the court of appeals did not limit the district court's discretion to grant some other departure within that "range of

reasonableness,” and it implicitly indicated that a departure of less than 40% could fall within that range.

Petitioner himself concedes that *Pepper II* upheld the 40% departure under an abuse of discretion standard: “When the Eighth Circuit ruled that the original sentencing judge (Judge Bennett) did not abuse his discretion by the 40% 5K1.1 departure, this became the law of the case and should have been followed.” Pet. 20. That concession is fatal to petitioner’s law-of-the-case argument. As petitioner recognizes, the “rule of law” that resulted from *Pepper II* was that a 40% departure constituted a reasonable exercise of the district court’s decision. *Arizona*, 460 U.S. at 618. But that holding did not constrain the district court’s discretion to grant a different departure that was also reasonable. And when the district court granted a 20% departure, *Pepper IV* was entirely consistent with *Pepper II* in holding that a 20% departure also was within the range of reasonableness.

2. In any event, *Pepper II* is not the operative appellate decision. The court of appeals’ decision in *Pepper II* was subsequently vacated and remanded by this Court. Pet. App. 23. Because *Pepper II*’s holding on the substantial assistance departure was vacated, that holding did not bind the district court at resentencing. See *County of L.A. v. Davis*, 440 U.S. 625, 634 n.6 (1979) (“Of necessity our decision ‘vacating the judgment of the Court of Appeals deprives that court’s opinion of precedential effect.’”) (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975)); see also *United States v. Atkinson*, 15 F.3d 715, 718-719 (7th Cir. 1994) (holding that because previous appeal resulted in vacatur of the defendant’s sentence, the district court “[was not] bound

on remand to give the same U.S.S.G. § 5K1.1 downward departure that it gave in its original sentence”).

The district court was bound by *Pepper III*, but that decision did not address the departure issue. Pet. App. 19-22. To be sure, when the court of appeals in *Pepper III* described the procedural history of the case, it noted its earlier finding that “the district court did not abuse its discretion by the extent of the § 5K1.1 downward departure.” *Id.* at 20. But the court did not adopt or incorporate that portion of the vacated decision in *Pepper II*. Rather, the court proceeded to address the effect of *Gall* only on the district court’s 59% downward variance—not the 40% downward departure. *Id.* at 19-22. After finding that the variance remained impermissible, the court of appeals concluded: “For the foregoing reasons, we again reverse and remand [petitioner’s] case for resentencing consistent with this opinion.” *Id.* at 22. That disposition did not require the district court to grant any particular departure at resentencing.<sup>4</sup>

Petitioner argues that *Pepper III* effectively ratified the 40% departure, because “*Pepper III* never ruled that Judge Bennett’s findings regarding the 40% 5K1.1 downward departure were error as it had in *Pepper I*.” Pet. 22. As a threshold matter, petitioner focuses on the wrong decision. *Pepper II* addressed the permissibility

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<sup>4</sup> In *Pepper III*, when the court of appeals instructed the district court to conduct the 2009 resentencing “consistent with this opinion,” Pet. App. 22, that instruction did not mandate a 40% substantial assistance departure. After all, the *Pepper III* opinion had not addressed the departure’s validity. To the contrary, it provided that “[t]he chief judge of the district court shall reassign this case, in the ordinary case, for resentencing by another judge,” without any suggestion that the newly assigned judge would be limited in her authority to resentence petitioner. *Ibid.*

of the 40% departure, and that decision was vacated by this Court and never reinstated by the court of appeals. Setting aside that *Pepper III* said nothing about the departure's validity, petitioner's argument is cast at too high a level of generality: it ignores *why* the court of appeals found no error in the 40% departure. The court of appeals found no error in the departure because it represented a reasonable exercise of the district court's sentencing discretion. Pet. App. 28. The court of appeals did not say that a 40% downward departure was the only reasonable response to petitioner's assistance, and thus that any other departure would be in error.

**B. The Court Of Appeals' Mandate In *Pepper III* Did Not Compel The District Court To Grant A 40% Departure For Substantial Assistance**

Petitioner also claims (Pet. 19-21) that the court of appeals' mandate in *Pepper III* either expressly or implicitly compelled the district court to grant a 40% departure at resentencing. See Pet. 19 (asserting that a 20% departure "was inconsistent with either the express terms or the spirit of the remand of *Pepper III*"); Pet. 21 ("The mandate to the new sentencing judge from *Pepper III* was specifically limited to resentencing regarding appropriate variances under 18 U.S.C. § 3553(a) and *Gall*."); Pet. 22 (asserting that under "*Pepper III* \* \* \* the only issue to be decided on remand was the variances under 18 U.S.C. § 3553(a) and *Gall*").<sup>5</sup> To the con-

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<sup>5</sup> The relevant question presented refers only to the law-of-the-case doctrine. See Pet. i. To the extent, however, that petitioner argues that "[t]he mandate to the new sentencing judge from *Pepper III* was specifically limited to resentencing regarding appropriate variances," Pet. 21, he appears to be invoking the so-called "mandate rule." See, e.g., *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir.) ("The basic tenet

trary, under the law of the Eighth Circuit, the reversal and remand in *Pepper III* was for a de novo resentencing. *Pepper III* did not place any limits on the district court's authority to determine the extent of petitioner's departure at resentencing.

1. A court of appeals has the authority to “modify, vacate, set aside or reverse any judgment \* \* \* of a court lawfully brought before it for review.” 28 U.S.C. 2106. When a court of appeals alters or overturns any portion of a lower court's judgment, it has the authority either to “remand the cause and direct the entry of [an] appropriate judgment” or to “require such further proceedings to be had as may be just under the circumstances.” *Ibid.* In addition, in criminal cases when either the defendant or the government successfully appeals the sentence imposed by the district court, the court of appeals is required to “remand the case for further sentencing proceedings with such instructions as the court considers appropriate.” 18 U.S.C. 3742(f)(1); see 18 U.S.C. 3742(f)(2)(A) and (B). On remand, the district court is required to “resentence a defendant in accordance with [18 U.S.C.] 3553 and with such instruc-

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of the mandate rule is that the district court is bound to the scope of the remand issued by the court of appeals.”), cert. denied, 528 U.S. 882 (1999); *United States v. Polland*, 56 F.3d 776, 777 (7th Cir. 1995) (“The mandate rule requires a lower court to adhere to the commands of a higher court.”). The Court could view the question as to the scope of the mandate as “fairly included” within the question presented. Sup. Ct. R. 14.1(a); see *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 481 (4th Cir. 2007) (“The mandate rule is a specific application of the law of the case doctrine.”); but cf. *Foskett v. Great Wolf Resorts, Inc.*, 340 Fed. Appx. 329, 331 (7th Cir. 2009) (per curiam) (contrasting the mandate rule with the law-of-the-case doctrine).

tions as may have been given by the court of appeals.” 18 U.S.C. 3742(g).

Under those statutes, when a court of appeals determines that a defendant’s sentence was imposed in error, the court has two options. It may issue a general remand that requires the district court to resentence the defendant de novo, or it may issue a limited remand that requires the district court to resentence the defendant only on particular issues. Pet. App. 3; see *United States v. Moore*, 131 F.3d 595, 597-598 (6th Cir. 1997) (discussing the difference between general and limited sentencing remands); *United States v. Polland*, 56 F.3d 776, 777 (7th Cir. 1995) (“[W]e have the power to limit a remand to specific issues or to order complete resentencing.”). Whether the court of appeals orders a general or a limited resentencing, the district court must conduct resentencing according to the court of appeals’ mandate, absent unusual circumstances. See, e.g., *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir.), cert. denied, 528 U.S. 882 (1999); *Polland*, 56 F.3d at 777.

2. In *Pepper II*, the court of appeals reversed and remanded for resentencing. This Court then vacated and remanded the case to the court of appeals for further consideration in light of its intervening decision in *Gall*. In *Pepper III*, the court of appeals determined that its earlier opinion was consistent with *Gall*, and it again reversed and remanded in the following terms:

[W]e again reverse and remand [petitioner’s] case for resentencing consistent with this opinion. As the district court expressed a reluctance to resentence [petitioner] again should the case be remanded, we again remand this case for resentencing by a differ-

ent judge, pursuant to our authority under 28 U.S.C. § 2106.

Pet. App. 22. The court of appeals did not specify whether its remand was general or limited in nature, but it also did not expressly limit the district court's authority on remand to resentence petitioner.

In that circumstance, several courts of appeals, including the Eighth Circuit, hold that the remand is general in nature: the sentencing court has authority on remand to resentence the defendant anew. See *United States v. Cornelius*, 968 F.2d 703, 705-706 (8th Cir. 1992); see also *United States v. Jennings*, 83 F.3d 145, 151 (6th Cir.), amended by 96 F.3d 799 (6th Cir.), cert. denied, 519 U.S. 975 (1996); *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995); *United States v. Keifer*, 198 F.3d 798, 801 (10th Cir. 1999); *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) (per curiam), cert. denied, 519 U.S. 1137 (1997). Those courts presume that unless a remand is "limited to the resolution of specific issues," the remand permits resentencing de novo. *United States v. Waltermann*, 408 F.3d 1084, 1085 (8th Cir. 2005); see *ibid.* (prior remand was limited because it "remand[ed] for resentencing without application of the career offender enhancement") (quoting *United States v. Waltermann*, 343 F.3d 938, 943 (8th Cir. 2003)) (brackets in original).

By contrast, several other courts of appeals have adopted a default rule of limited resentencing. See *United States v. Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997) ("[U]pon a resentencing occasioned by a remand, unless the court of appeals expressly directs otherwise, the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the

result.”), cert. denied, 522 U.S. 1119 (1998); *United States v. Ticchiarelli*, 171 F.3d 24, 32 (1st Cir.) (same), cert. denied, 528 U.S. 850 (1999); *United States v. Marmolejo*, 139 F.3d 528, 530-531 (5th Cir.) (same); *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) (same), cert. denied, 522 U.S. 1119 (1998). And one court of appeals distinguishes “between conviction errors, for which de novo resentencing [is] the ‘default rule,’ and sentencing errors, for which limited resentencing [is] the default rule.” *United States v. Rigas*, 583 F.3d 108, 115 (2d Cir. 2009) (emphases omitted), petition for cert. pending, No. 09-1456 (filed May 28, 2010); see *United States v. Quintieri*, 306 F.3d 1217, 1228 n.6 (2d Cir. 2002), cert. denied, 539 U.S. 902 (2003).

This case does not require the Court to decide among those approaches. In his petition, petitioner argues only that, under its own circuit precedent, the court of appeals incorrectly interpreted its previous mandate in *Pepper III*. See Pet. i; Pet. 18 (“The Eighth Circuit failed to require the district court to follow its own remand and the law of the case.”) (capitalization and emphasis omitted). Similarly, before the court of appeals, petitioner argued only that the district court had incorrectly interpreted the mandate in *Pepper III*. Pet. C.A. Br. 20, 22-30. Petitioner has never argued that the court of appeals lacks the authority to establish a presumption governing the interpretation of its own mandates, see *Thomas v. Arn*, 474 U.S. 140, 146-148 (1985); that the court of appeals’ approach conflicts with any constitutional or statutory provisions, see *id.* at 148; or that there must be “uniformity among the circuits in their approach” to a mandate that remands for resentencing but does not expressly limit the district court’s authority on remand to conduct the resentencing, see *Ortega-*

*Rodriguez v. United States*, 507 U.S. 234, 251 n.24 (1993). As a result, none of those issues was passed upon below. See, e.g., *Hayes v. Florida*, 470 U.S. 811, 814-815 n.1 (1985) (declining to address an argument that “was not presented to or passed upon” by the lower courts). The only question here is whether the court of appeals correctly construed its own mandate under its own case law.

3. The answer to that question is yes. In *Pepper III*, the court of appeals remanded without limiting the resentencing to particular issues. Pet. App. 22. Under that court’s longstanding case law, the district court therefore had authority on remand to resentence petitioner de novo. As the court of appeals explained in *Pepper IV*:

Our remand was a general remand for resentencing. Our opinions in *Pepper II* and *Pepper III* did not place any limitations on the discretion of the newly assigned district court judge in resentencing [petitioner]. We did not specify the district court’s discretion would be restricted to considering whether a downward variance was warranted, nor did we specify the district court would be bound by the 40% downward departure previously granted.

*Id.* at 4. Simply put, the court of appeals decided in *Pepper III* that “[u]nder the circumstances of [petitioner’s] case, a complete resentencing without any restrictions on the district court’s discretion was preferable, in contrast to a partial, piecemeal resentencing limiting the sentencing judge’s discretion.” *Ibid.*

It should not be surprising that the court of appeals correctly interpreted the mandate of its earlier decision. “[T]he court that issues a mandate is normally the best

judge of its content,” even if that interpretation does not strictly bind this Court. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940); see *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 227 (1947) (“We have recognized that ‘the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes.’”) (quoting *Pottsville Broad. Co.*, 309 U.S. at 141). Petitioner does not advance (Pet. 20-21) any reason why this Court is better placed than the court of appeals to interpret that court’s mandate. On its face, the *Pepper III* mandate “reverse[d] and remanded” the case “for resentencing,” without specifying that resentencing would be limited to the variance issue. Pet. App. 22.

Accordingly, the district court did not err in revisiting the extent of petitioner’s departure for substantial assistance at his 2009 resentencing. The district court’s decision to grant only a 20% departure reflected its de novo assessment of the factors in Guidelines § 5K1.1, following the court of appeals’ general remand for resentencing. The district court’s exercise of its discretion in that respect did not violate any previous order in this case, because, as the court of appeals itself explained, “[its] opinions in *Pepper II* and *Pepper III* did not place any limitations on the discretion of the newly assigned district court judge in resentencing [petitioner].” Pet. App. 4. By issuing a general remand and reassigning the case, the court of appeals left the district court free on remand to exercise its discretion on a clean slate. That is precisely what the district court did in granting a 20% downward departure, which was more than the government requested at the 2009 resentencing

but less than petitioner previously had received at the 2006 resentencing.

4. Petitioner notes (Pet. 25) that by relitigating the issue before a different district court judge, the government was able to secure a different result. That possibility exists whenever a court of appeals remands for a general resentencing, not solely when the court of appeals reassigns the case on remand to a different judge. It may be true that the original district court judge “would [not] have entertained any argument regarding the 5K1.1 departure being any less or more than what he had already determined.” Pet. 25. But it was the original judge’s “reluctance to resentence [petitioner] again should the case be remanded” that led the court of appeals to reassign the case. Pet. App. 22. Petitioner did not challenge that reassignment before the court of appeals or this Court, and in any event he was not entitled to be resentenced by the same judge who had conducted his earlier sentencings. See *Liteky v. United States*, 510 U.S. 540, 554 (1994) (“Federal appellate courts’ ability to assign a case to a different judge on remand rests \* \* \* [in part] on the appellate courts’ statutory power to ‘require such further proceedings to be had as may be just under the circumstances.’”) (quoting 28 U.S.C. 2106).

Finally, petitioner contends that “[i]f the government was not happy with the *Pepper II* decision regarding the 40% departure, it could have challenged the reduction” before the court of appeals or this Court. Pet. 25. That argument rests on a faulty premise: namely, that the court of appeals either declared the 40% downward departure to be necessary or limited the scope of its remand only to the variance issue. Because the government was not precluded from litigating on remand the

extent of any substantial assistance departure, it had no reason to seek further review following *Pepper II* or *Pepper III*. If anything, petitioner should have challenged the court of appeals' decision to "reverse and remand [his] case for resentencing consistent with this opinion." Pet. App. 22. Nothing in that disposition limited the scope of the "resentencing by a different judge." *Ibid*. If petitioner felt otherwise, it was his responsibility—not the government's—to seek further review of *Pepper III* by the court of appeals or this Court.<sup>6</sup>

**II. POST-SENTENCING REHABILITATION IS A PERMISSIBLE GROUND FOR A DOWNWARD VARIANCE UNDER 18 U.S.C. 3553(a) AT RESENTENCING**

Under *United States v. Booker*, 543 U.S. 220 (2005), the mandatory application of the federal Sentencing Guidelines violates the Sixth Amendment. To remedy that constitutional defect, this Court severed the provisions of the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.*, that made the Guidelines mandatory,

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<sup>6</sup> If the Court were to decide that petitioner was entitled under *Pepper III* to receive a 40% departure at resentencing, then the Court should vacate and remand for further proceedings. As petitioner acknowledges (Pet. 19), the law-of-the-case doctrine is discretionary and does not necessarily foreclose reconsideration of a previously decided issue. *Arizona*, 460 U.S. at 618 ("Law of the case directs a court's discretion, it does not limit the tribunal's power."); 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4478, at 667-668 (2d ed. 2002). The court of appeals therefore should be given the opportunity to apply the law-of-the-case doctrine in the first instance and determine whether to reconsider its ruling in *Pepper III*. Similarly, if the court of appeals misinterpreted its own mandate, it would be free to determine whether to reconsider that mandate and permit a general resentencing. See, e.g., *Indu Craft, Inc. v. Bank of Baroda*, 87 F.3d 614, 620 (2d Cir.) ("Even if we were to reconsider our earlier mandate, Indu Craft would fare no better."), cert. denied, 519 U.S. 1041 (1996).

and thereby rendered the Guidelines “effectively advisory.” *Booker*, 543 U.S. at 245. After *Booker*, district courts may impose sentences within statutory limits based on appropriate consideration of the factors listed in 18 U.S.C. 3553(a). 543 U.S. at 245-246; see *Kimbrough v. United States*, 552 U.S. 85, 90 (2007). A defendant’s rehabilitation after his original sentencing may be relevant to the Section 3553(a) factors as a basis for a variance from the advisory Guidelines range. The court of appeals therefore erred in holding that post-sentencing rehabilitation is an impermissible basis for varying downward at resentencing.<sup>7</sup>

**A. At Resentencing, The Court May Consider Information Concerning A Defendant’s Character And Conduct, Including Evidence Of Post-Sentencing Rehabilitation**

1. It has been a “uniform and constant” principle of the federal sentencing tradition that the sentencing court will “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, 113 (1996); see *Lockett v. Ohio*, 438 U.S. 586, 602 (1978) (opinion of Burger, C.J.) (“[T]he concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country.”); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) (“For the determination of sentences, justice generally requires

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<sup>7</sup> Whether post-sentencing rehabilitation can provide an appropriate basis for a downward variance at a resentencing is a question of law that this Court reviews de novo. Cf. *Koon v. United States*, 518 U.S. 81, 100 (1996) (“[W]hether a factor is a permissible basis for departure under any circumstances is a question of law.”).

\* \* \* that there be taken into account \* \* \* the character and propensities of the offender.”); *United States v. Doyle*, 348 F.2d 715, 721 (2d Cir.) (“The aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it.”), cert. denied, 382 U.S. 843 (1965).

Consistent with that principle, sentencing courts have long enjoyed broad discretion to consider various kinds of information about a defendant’s character and conduct. As this Court has described that historical practice,

both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

*Williams v. New York*, 337 U.S. 241, 246 (1949); see Note, *The Admissibility of Character Evidence In Determining Sentence*, 9 U. Chi. L. Rev. 715, 717 (1942) (“Under the common law system, \* \* \* [t]he court, after the jury returned a verdict of guilty, heard additional character evidence before determining the sentence.”); *id.* at 717 n.11 (collecting English cases).

In *Williams*, for instance, after a state court jury found the defendant guilty of murder but recommended life imprisonment, the trial judge imposed a death sentence in part on the basis of evidence in the presentence investigation report about the defendant’s previous criminal conduct. 337 U.S. at 243-244. That conduct had not resulted in conviction and had not been before the jury, but this Court held that the judge’s reliance on

such information at sentencing comported with principles of due process. *Id.* at 245. After surveying the historical practice of permitting courts to “exercise a wide discretion in the sources and types of evidence” to be considered in fixing an appropriate sentence, the Court noted the “sound practical reasons” for that historical practice. *Id.* at 246. It explained that a sentencing judge’s “task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.” *Id.* at 247. “Highly relevant—if not essential—to his selection of an appropriate sentence,” the Court reasoned, “is the possession of the fullest information possible concerning the defendant’s life and characteristics.” *Ibid.*

2. a. In 1970, Congress codified that “longstanding principle that sentencing courts have broad discretion to consider various kinds of information” in 18 U.S.C. 3577 (1970) (current version at 18 U.S.C. 3661). *United States v. Watts*, 519 U.S. 148, 151 (1997) (per curiam). Section 3577 provided 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. 3577 (1970). Subject to constitutional constraints, Section 3577 permitted a sentencing judge in determining the appropriate punishment to “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.” *United States v. Tucker*, 404 U.S. 443, 446 (1972); see *United States v. Baylin*, 535 F. Supp. 1145, 1151 (D. Del.) (“It is now well settled

that, subject to very few limitations, a court has almost unfettered discretion in determining what information it will hear and rely upon in sentencing deliberations.”), vacated, 696 F.2d 1030 (3d Cir. 1982).

b. The advent of the Sentencing Guidelines with the SRA did not alter this aspect of a sentencing court’s discretion. See *Watts*, 519 U.S. at 152 (1997). The SRA, in addition to establishing the Sentencing Commission (Commission) and the Guidelines system, renumbered Section 3577, without any change, as 18 U.S.C. 3661. Moreover, in promulgating the Guidelines, the Commission incorporated Section 3661:

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

Guidelines § 1B1.4. Accordingly, both before and after the Guidelines’ enactment, Congress and the Commission intended “[n]o limitation” “on the information concerning the background, character, and conduct” of a defendant that a court could “receive and consider for the purpose of imposing an appropriate sentence.” 18 U.S.C. 3661.

To be sure, the SRA sets forth general considerations that district courts must take into account in exercising their sentencing discretion. Specifically, Section 3553(a) directs courts, “in determining the particular sentence to be imposed,” to consider seven factors: (1) “the nature and circumstances of the offense and the history and characteristics of the defendant”; (2) “the

need for the sentence imposed” to serve purposes of the criminal laws; (3) “the kinds of sentences available”; (4) “the kinds of sentence and the sentencing range” established by the Guidelines; (5) “any pertinent policy statement” issued by the Commission; (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.” 18 U.S.C. 3553(a)(1)-(7).

Those statutory factors indicate that courts have discretion to consider a defendant’s post-sentencing rehabilitation. A defendant’s rehabilitation since his original sentencing, no less than his rehabilitation from the time of his offense to his original sentencing, is potentially relevant to his “history and characteristics.” 18 U.S.C. 3553(a)(1). A defendant’s rehabilitation is also potentially relevant to the “need for the sentence imposed” to serve the purposes of sentencing. 18 U.S.C. 3553(a)(2). For instance, a defendant’s rehabilitation can affect whether a particular sentence is necessary “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 treatment \* \* \* or other correctional treatment in the most effective manner.” 18 U.S.C. 3553(a)(2)(B)-(D). See *Gall*, 552 U.S. at 59 (“Gall’s self-motivated rehabilitation \* \* \* lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts.”) (citing 18 U.S.C. 3553(a)(2)(B) and (C)).

In addition to its potential relevance to the particular statutory factors in Section 3553(a), evidence of a defendant’s post-sentencing rehabilitation is relevant to a

court's broad duty under 3553(a) "[to] impose a sentence sufficient, but not greater than necessary," to achieve the purposes of sentencing. 18 U.S.C. 3553(a). A defendant's rehabilitation, whether before or after his initial sentencing, potentially bears on the type and extent of the sentence that ought to be imposed upon him. See *Ash*, 302 U.S. at 55 ("[A defendant's] past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him."); see also *Gall*, 552 U.S. at 49-50 (noting that a sentencing court must "consider all of the § 3553(a) factors" and "make an individualized assessment" of the appropriate sentence "based on the facts presented").<sup>8</sup>

3. This Court has held that, pursuant to Sections 3553(a) and 3661, a wide range of information about a defendant's character and conduct may be considered at

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<sup>8</sup> Just as Section 3553 requires sentencing courts to consider a broad number of factors in determining a particular sentence, Section 1B1.3 of the Guidelines requires those courts to consider a broad array of "[r]elevant [c]onduct" in determining the appropriate Guidelines range. See *Watts*, 519 U.S. at 152-153 ("Section 1B1.3, in turn, describes in sweeping language the conduct that a sentencing court may consider in determining the applicable guideline range."). Although Section 3553 and Section 1B1.3 require sentencing courts to consider certain factors and relevant conduct, they are intended to capture, not to displace, traditional sentencing considerations. See *Witte v. United States*, 515 U.S. 389, 402 (1995) ("[V]ery roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment.") (quoting *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.)) (second set of brackets in original). Moreover, Section 3553 and Section 1B1.3 complement Section 3661 and Section 1B1.4: in selecting the appropriate Guidelines range and sentence, courts may consider "any information concerning the background, character and conduct of the defendant." Guidelines § 1B1.4.

sentencing. In *Watts*, for example, this Court rejected the argument that sentencing courts may not consider conduct underlying a charge of which the defendant has been acquitted. 519 U.S. at 149. The Court reasoned that “the broad language of § 3661” does not provide “any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.” *Id.* at 152. The Court further noted that “sentencing courts have traditionally and constitutionally ‘considered a defendant’s past criminal behavior, even if no conviction resulted from that behavior,’” and “[t]he Guidelines did not alter this aspect of the sentencing court’s discretion.” *Ibid.* (quoting *Nichols v. United States*, 511 U.S. 738, 747 (1994)).

Similarly, the courts of appeals consistently have held that, subject to constitutional constraints, sentencing courts have discretion to consider any relevant information about a defendant’s background, character, and conduct. See, e.g., *United States v. Stewart*, 590 F.3d 93, 167 (2d Cir. 2009) (Walker, J., concurring in part and dissenting in part) (“We do not categorically proscribe any factor ‘concerning the [defendant’s] background, character, and conduct,’ with the exception of invidious factors.”) (quoting 18 U.S.C. 3661), cert. denied, 130 S. Ct. 1924 (2010); *United States v. Burns*, 577 F.3d 887, 904 (8th Cir. 2009) (“The district court has discretion to consider virtually unlimited information.”); *United States v. Berry*, 553 F.3d 273, 279 (3d Cir. 2009) (en banc) (“Sentencing courts have historically been afforded wide latitude in considering a defendant’s background at sentencing,” and “Congress has codified this discretion at 18 U.S.C. § 3661.”); *United States v. Gamma Tech Indus., Inc.*, 265 F.3d 917, 924 (9th Cir. 2001) (“[T]he district court has virtually unfettered dis-

cretion in allowing affected individuals to present sentencing information to the court.”).

4. In light of the broad discretion afforded to sentencing courts to consider information about a defendant’s background, the vast majority of the courts of appeals had held before 2000 that post-sentencing rehabilitation could provide an appropriate basis for a downward departure at a resentencing. See *United States v. Core*, 125 F.3d 74, 75 (2d Cir. 1997) (“We find nothing in the pertinent statutes or the Sentencing Guidelines that prevents a sentencing judge from considering post-conviction rehabilitation in prison as a basis for departure if resentencing becomes necessary.”), cert. denied, 522 U.S. 1067 (1998); see also *United States v. Bradstreet*, 207 F.3d 76, 82 (1st Cir. 2000); *United States v. Rudolph*, 190 F.3d 720, 723 (6th Cir. 1999); *United States v. Whitaker*, 152 F.3d 1238, 1240 (10th Cir. 1998); *United States v. Green*, 152 F.3d 1202, 1207-1208 (9th Cir. 1998) (per curiam); *United States v. Rhodes*, 145 F.3d 1375, 1379 (D.C. Cir. 1998); *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997). Indeed, only the Eighth Circuit had held that post-sentencing rehabilitation could not provide an appropriate basis for a downward departure at a resentencing. See *United States v. Sims*, 174 F.3d 911, 912 (8th Cir. 1999).

Beginning November 1, 2000, however, the Guidelines contained a policy statement providing that “[p]ost-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense.” Guidelines § 5K2.19; see Guidelines App. C, amend. 602 (Amend. 602) (effective Nov. 1, 2000) (adding § 5K2.19 to the Guidelines).

Before this Court's decision in *Booker*, sentencing courts were required to adhere to that policy statement, just as they were required to adhere to the Guidelines themselves. See *Williams v. United States*, 503 U.S. 193, 201 (1992). Accordingly, from November 2000 (when the Commission promulgated the policy statement) to January 2005 (when this Court issued *Booker*), post-sentencing rehabilitation was an impermissible ground for sentencing outside the applicable Guidelines range. See Guidelines Ch. 5, Pt. K.2.

This Court in *Booker*, however, held that the mandatory Guidelines system violated the Sixth Amendment, and it remedied that violation by severing certain provisions of the SRA and thus rendering the Guidelines “effectively advisory.” 543 U.S. at 245. After *Booker*, although “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range,” “the district judge should then consider all of the § 3553(a) factors” to determine the appropriate sentence. *Gall*, 552 U.S. at 49-50. As the Court clarified in *Kimbrough*, the Guidelines are now just “one factor among several” that “courts must consider in determining an appropriate sentence.” 552 U.S. at 90; see *id.* at 91 (“A district judge must include the Guidelines range in the array of factors warranting consideration.”); *id.* at 101 (“[W]hile the statute still requires a court to give respectful consideration to the Guidelines, *Booker* permits the court to tailor the sentence in light of other statutory concerns as well.”) (citations and internal quotation marks omitted).

Although sentencing courts must give “respectful consideration” to the applicable Guidelines ranges, they “may vary [from those ranges] based solely on policy considerations, including disagreements with the Guide-

lines.” *Kimbrough*, 552 U.S. at 101 (citation omitted). The Court recently reaffirmed that holding in *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam), reiterating that district courts generally have authority to vary from the “Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.” *Id.* at 843. As the Court made clear in *Kimbrough* and *Spears*, policy statements prohibiting courts from imposing non-Guidelines sentences based on specified factors are no longer binding, and courts generally may vary from Guidelines ranges, as long as they do so based on considerations that are permissible under Sections 3553(a) and 3661 and not otherwise prohibited by law. Accordingly, the Commission’s policy statement prohibiting consideration of post-sentencing rehabilitation is not binding, but rather is a factor to be considered by a sentencing court in determining an appropriate sentence.

**B. The Court Of Appeals Erred In Categorically Prohibiting Consideration Of Post-Sentencing Rehabilitation**

The court of appeals erred in holding that post-sentencing rehabilitation is not a permissible factor to consider in granting a downward variance. Pet. App. 5. The rationales for its holding are inconsistent with *Booker*.<sup>9</sup>

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<sup>9</sup> At the time of its decision in *Pepper IV*, the law of the Eighth Circuit was clear that post-sentencing rehabilitation is not an appropriate basis for a downward variance at resentencing. See Pet. App. 5 (citing cases); Gov’t C.A. Br. 18 (same). Petitioner argued that circuit precedent was inconsistent with *Gall*, and that evidence of post-sentencing rehabilitation should be considered as relevant to some of the factors in Section 3553(a). Pet. C.A. Br. 40-41, 44, 47-48; Pet. C.A. Reply Br. 4-5. But petitioner’s argument was squarely foreclosed by

1. Under Eighth Circuit law, petitioner’s resentencing was a plenary sentencing proceeding, and petitioner was therefore entitled, like any defendant at such a proceeding, to an “individualized assessment” of his background, character, and conduct in light of all of Section 3553(a)’s factors. *Gall*, 552 U.S. at 50. As explained earlier, when the court of appeals remanded to the district court in *Pepper III*, it ordered a “general remand for resentencing” that “did not place any limitations on the discretion of the newly assigned district court judge in resentencing petitioner.” Pet. App. 4; see p. 26, *supra*. As a result, petitioner’s resentencing was a plenary sentencing proceeding at which the district court considered anew whether to grant either a downward departure or a downward variance. Pet. App. 26.

Because petitioner’s resentencing hearing was plenary, petitioner was entitled to the full benefit of *Booker*. Section 3742(g) of Title 18 instructs as relevant that “[a] district court to which a case is remanded \* \* \* shall resentence a defendant in accordance with section 3553.” 18 U.S.C. 3742(g). The district court therefore was required to consider Section 3553(a)’s factors, and nothing in Section 3553(a) suggests that consideration of those factors differs depending on whether the defendant is being sentenced initially or

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*Pepper III*, as the government noted in its brief. See Gov’t C.A. Br. 19-20; Pet. App. 21 (“*Gall* does not alter our circuit precedent \* \* \* that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance.”). *Pepper III* was decided on remand from this Court without briefing from the parties. Moreover, petitioner did not seek rehearing en banc after the panel decision in *Pepper IV*. As a result, until the certiorari stage before this Court, the government had not addressed the combined effect of *Gall* and *Kimbrough* on Eighth Circuit precedent prohibiting consideration of post-sentencing rehabilitation.

following a remand for resentencing. To the contrary, this Court recently indicated that *Booker* applies at any plenary sentencing hearing. In *Dillon v. United States*, 130 S. Ct. 2683 (2010), the Court held that “sentence-modification proceedings” under 18 U.S.C. 3582(c)(2) “do not implicate the interests identified in *Booker*,” and it distinguished a sentence-modification proceeding from “a sentencing or resentencing proceeding,” including a “plenary resentencing proceeding.” 130 S. Ct. at 2690, 2691, 2692. The import of *Dillon* is that information relevant to the Section 3553(a) factors may be considered at any plenary sentencing hearing, whether the defendant is being sentenced for the first time or resentenced following a remand.<sup>10</sup>

2. The court of appeals relied on “the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. 3553(a)(6); see Pet. App. 29-30 (“The practice of allowing consideration of post-sentencing rehabilitation would create unwarranted sentencing disparities and inject blatant inequities into the

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<sup>10</sup> In *United States v. Bernando Sanchez*, 569 F.3d 995 (9th Cir.), cert. denied, 130 S. Ct. 761 (2009), the court of appeals held that a district court did not err in declining to consider post-sentencing rehabilitation on a limited remand under *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc). *Bernando Sanchez*, 569 F.3d at 999. That holding is fully consistent with the government’s position here. In cases remanded under *Ameline*, the purpose of the remand is solely to determine whether the district court committed reversible plain error in a pre-*Booker* sentencing by failing to treat the Guidelines as advisory. *Id.* at 998. Under Ninth Circuit law, that inquiry depends only on whether the district court would have imposed a materially different sentence at the original sentencing if it had known that the Guidelines were advisory. *Ameline*, 409 F.3d at 1084-1085. Post-sentencing developments do not bear on that inquiry.

sentencing process.”); *id.* at 5. The court reasoned that consideration of post-sentencing rehabilitation would create unfairness for the vast bulk of defendants who are not resentenced and thus have no opportunity to seek more lenient sentences based on such rehabilitation. *Ibid.*; see *United States v. McMannus*, 496 F.3d 846, 852 n.4 (8th Cir. 2007) (“[A]llowing this evidence [of post-sentencing rehabilitation] \* \* \* would be grossly unfair to the vast majority of defendants who receive no sentencing-court review of any positive post-sentencing rehabilitative efforts.”).

a. It is certainly true that a defendant who receives resentencing will have an opportunity to present evidence of rehabilitation to the sentencing court that many other defendants will not. That distinction, however, results not from some random or fortuitous circumstance, but because a defendant’s sentence was imposed in legal error. See *Rhodes*, 145 F.3d at 1381 (“Any disparity that might result from allowing the district court to consider post-conviction rehabilitation \* \* \* flows not from Rhodes being ‘lucky enough’ to be resentenced, or from some ‘random’ event, but rather from the reversal of his section 924(c) conviction.”) (citation omitted). As the District of Columbia Circuit has explained, “[d]istinguishing between prisoners whose convictions are reversed on appeal and all other prisoners hardly seems ‘unwarranted.’” *Ibid.*

Even before *Booker*, sentencing courts were permitted to depart from the applicable Guidelines range based on a defendant’s *pre-sentencing* rehabilitation, *i.e.*, rehabilitation after commission of the offense but before sentencing. See, *e.g.*, *United States v. Brock*, 108 F.3d 31, 35 (4th Cir. 1997); see also Amend. 602, comment. (reason for amendment) (“[D]epartures based on extraordi-

nary post-offense rehabilitative efforts prior to sentencing \* \* \* have been allowed by every circuit that has ruled on the matter.”). Of course, consideration of pre-sentencing rehabilitation also can create differences in outcome: a defendant who is tried and sentenced quickly has less of an opportunity to demonstrate rehabilitation than a defendant who is sentenced after a longer interval. See *Rudolph*, 190 F.3d at 724 (“[O]ne defendant may have no chance to rehabilitate himself before sentencing (*e.g.*, his case might rapidly proceed to trial and sentence), whereas another defendant might face lengthy (yet constitutionally acceptable) pre-trial and pre-sentence delays that permit her to avail herself of many rehabilitative services before her sentencing.”).

The differences in outcome that may result because some defendants are tried and sentenced more rapidly than others, or because some defendants are sentenced in error and must be resentenced, are not necessarily “unwarranted” within the meaning of Section 3553(a)(6). Congress generally intended courts to consider available personal information about the defendants who stand before them for sentencing. See *Rhodes*, 145 F.3d at 1381 (“We know of no reason why sentencing courts’ broad mandate under sections 3553(a) and 3661 to sentence defendants as they stand before the court—whether after plea bargaining, trial, or appeal—should exclude consideration of post-conviction rehabilitation.”); *Core*, 125 F.3d at 77 (At resentencing, district courts must consider defendants as they stand before the court “at that time.”).

Moreover, the logic of the court of appeals’ approach requires not only that sentencing courts categorically ignore information about a defendant’s post-sentencing rehabilitation, but also that they categorically ignore

any new post-sentencing information. For instance, courts could not consider that, after sentencing, the defendant had provided additional assistance to authorities, see Guidelines § 5K1.1; had shown signs of diminished capacity that would not have been apparent at sentencing, *id.* § 5K2.13; or had encountered significant health issues requiring medical or psychological treatment, see *United States v. Statman*, 604 F.3d 529, 534-535 (8th Cir. 2010) (district court sufficiently considered defendants’ serious physical illnesses at sentencing). Likewise, courts could not consider evidence of additional victims, harms, or offenses that were unknown at the time of sentencing. Courts could not even consider that a defendant had committed post-sentencing offenses, whether while released or while in federal custody. Consideration of any of those factors—all of which bear directly on the type and extent of the punishment that ought to be imposed at resentencing—does not necessarily result in an “unwarranted” disparity, because any difference in outcome results from the desire for greater accuracy at sentencing rather than from some random or fortuitous circumstance.

b. In any event, “the need to avoid unwarranted sentencing disparities” is only one of the factors in Section 3553(a). Even if consideration of a defendant’s post-sentencing rehabilitation could be viewed as resulting in a disparity that is “unwarranted,” the district court may balance that factor against the remaining Section 3553(a) factors in the context of a particular case. In *Kimbrough*, for example, this Court rejected the argument “that if district courts are free to deviate from the Guidelines based on disagreements with the crack/ powder [cocaine] ratio, unwarranted disparities \* \* \* will ensue.” 552 U.S. at 106-107. The Court reasoned that to

the extent such disparities might arise, “the proper solution is not to treat the crack/powder ratio as mandatory” but for “district courts to consider the need to avoid unwarranted disparities—along with other § 3553(a) factors—when imposing sentences.” *Id.* at 108 (emphasis omitted).

Similarly here, the proper solution is not to foreclose district courts from considering post-sentencing rehabilitation altogether, but to allow them to weigh the risk of any disparity against the other Section 3553(a) factors in a given case. See *Kimbrough*, 552 U.S. at 108 (“To reach an appropriate sentence, these disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by the crack/powder ratio itself.”). Here, the court of appeals replaced that case-by-case balancing process with a categorical rule: district courts may never consider post-sentencing rehabilitation because the need to avoid disparity among defendants always weighs more heavily than other Section 3553(a) factors. But neither Section 3553(a) nor Section 3661 “suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.” *Watts*, 519 U.S. at 152.

That is not to say that a district court is required to reduce a defendant’s sentence based on even a strong showing of post-sentencing rehabilitation. A district court may find persuasive, for example, the Guidelines policy statement that post-sentencing rehabilitation does not justify a below-Guidelines sentence. See Guidelines § 5K2.19; see also *Kimbrough*, 552 U.S. at 101 (stating that courts are required to give “respectful consideration to the Guidelines”). The court also might find in a particular case that the defendant’s rehabilitative efforts had been adequately addressed through an

award of good time credit. See pp. 49-51, *infra*. Alternatively, the court simply might be skeptical about the authenticity of a defendant's efforts at rehabilitation while the sentence is on appeal. For all of those reasons, it is likely that a district court would impose a downward variance based on a defendant's post-sentencing rehabilitation only in "an unusual case." *United States v. Lloyd*, 469 F.3d 319, 324 (3d Cir. 2006), cert. denied, 552 U.S. 822 (2007); see *Bradstreet*, 207 F.3d at 82 (holding that post-sentencing rehabilitation could be a ground for departure "in a sufficiently exceptional case"); *Rhodes*, 145 F.3d at 1383 (holding that a defendant's rehabilitation must exceed "to an exceptional degree the rehabilitative efforts of all defendants") (internal quotation marks and citation omitted). Those judgments, however, are largely the province of the district court, see *Gall*, 552 U.S. at 51-52, and the court of appeals erred in adopting a flat prohibition on consideration of a defendant's rehabilitation after initial sentencing.

3. The court of appeals held that a sentencing court may not consider at resentencing any evidence that the court "could not have considered \* \* \* at the time of the original sentencing." Pet. App. 5 (quoting *id.* at 21). The conclusion that evidence that was not available at a defendant's initial sentencing is outside of the court's purview at resentencing finds some support in 18 U.S.C. 3742(g)(2). Section 3742(g)(2) was enacted in 2003 as part of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act), Pub. L. No. 108-21, § 401(e), 117 Stat. 671. Section 3742(g)(2) provides that at resentencing

[t]he court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

18 U.S.C. 3742(g). The purpose of Section 3742(g) was to “prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory.” H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 59 (2003); see *United States v. Jackson*, 346 F.3d 22, 26 n.4 (2d Cir. 2003), adhered to on reh’g, 362 F.3d 160 (2d Cir.), cert. denied, 541 U.S. 1044 (2004), reh’g granted, vacated, and remanded, 543 U.S. 1097 (2005).

On its face, Section 3742(g) forecloses a district court from granting a downward variance at resentencing based on a defendant’s post-sentencing rehabilitation. It prohibits imposition of a “sentence outside the applicable guidelines range” except on a ground that was “specifically and affirmatively included in the written statement of reasons \* \* \* in connection with the previous sentencing” and that was “held by the court of appeals, in remanding the case, to be a permissible ground of departure.” 18 U.S.C. 3742(g)(2)(A)-(B). By definition, “the written statement of reasons” for a defendant’s initial sentence will not include the defendant’s subsequent efforts at rehabilitation, 18 U.S.C. 3742(g)(2)(A), and the court of appeals therefore will not pass on the permissibility of post-sentencing rehabilitation as a ground for reducing the defendant’s sentence

below the applicable Guidelines range, see 18 U.S.C. 3742(g)(2)(B).

The court of appeals did not rely on Section 3742(g)(2), and the government is not aware of any post-*Booker* decision holding that Section 3742(g)(2) limits a district court's authority at resentencing to vary from the advisory Guidelines range based on the factors in Section 3553(a). By restricting the authority of district courts to vary from the applicable Guidelines range at resentencing, Section 3742(g)(2) is invalid after *Booker*. To remedy the constitutional defect in the mandatory Guidelines, this Court in *Booker* severed and excised 18 U.S.C. 3553(b), the provision that required courts to impose a sentence within the Guidelines range unless there were circumstances that justified a departure. 543 U.S. at 259-260. The Court also excised 18 U.S.C. 3742(e), which had served to reinforce mandatory guidelines by "set[ting] forth standards for review on appeal, including *de novo* review of departures from the applicable Guidelines range." 543 U.S. at 259. "With these two sections excised (and statutory cross-references to the two sections consequently invalidated)," the Court held that "the remainder of the Act satisfies" constitutional requirements. *Ibid.*

The Court did not mention Section 3742(g)(2) in *Booker*. See 543 U.S. at 258 (listing other sentencing provisions that remain "perfectly valid"). But its rationale applies equally to that provision. See *Dillon*, 130 S. Ct. at 2698 n.5 (Stevens, J., dissenting) (citing Section 3742(g)(2) as "one additional provision of the Sentencing Reform Act [that] should have been excised, but was

not, in order to accomplish the Court’s remedy”).<sup>11</sup> As an initial matter, Section 3742 provides that a “ground of departure” is “permissible” at resentencing only if it “is authorized under section 3553(b).” 18 U.S.C. 3742(g)(2)(B) and (j)(1)(B). Section 3742(g)(2) thus incorporates a cross-reference to Section 3553(b), one of the provisions that the Court excised in *Booker*.<sup>12</sup> Moreover, Section 3742(g)(2) is like the appellate review provisions that the Court excised, in that Section 3742(g)(2)’s goal—namely, “to make Guidelines sentencing even more mandatory than it had been” before the PROTECT Act was enacted—has “ceased to be relevant.” *Booker*, 543 U.S. at 261.

4. Finally, the court of appeals relied on circuit precedent holding that consideration of post-sentencing rehabilitation at resentencing “may interfere with the Bureau of Prisons’s statutory power to award good-time credits to prisoners.” *Sims*, 174 F.3d at 913; see Pet. App. 5 (citing *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007), which in turn cited *Sims*); see also *Rhodes*, 145 F.3d at 1384 (Silberman, J., dissenting). As a threshold matter, it is equally true that for a defendant who is held in federal custody pending trial and sentencing, both the Bureau of Prisons and the sentenc-

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<sup>11</sup> The continuing validity of Section 3742(g)(2) after *Booker* was not at issue in *Dillon*, and the majority in *Dillon* therefore had no occasion to address that question.

<sup>12</sup> Indeed, the Court’s disposition of the cases before it in *Booker*—by remanding for resentencing under an advisory Guidelines system, see 543 U.S. at 267—would have violated Section 3742(g)(2), had that provision remained valid. See *Nelson v. United States*, 129 S. Ct. 890, 892 (2009) (per curiam) (holding that sentencing court erroneously presumed that applicable Guidelines range was reasonable and remanding for “further proceedings consistent with this opinion”).

ing court consider his conduct during the time that he is incarcerated. As noted above, every court of appeals to consider the question, including the Eighth Circuit, has held that sentencing courts may consider evidence of a defendant's pre-sentencing rehabilitation. See pp. 42-43, *supra*; see also *United States v. Chapman*, 356 F.3d 843, 847-848 (8th Cir. 2004) (holding that "post-offense, pre-sentencing rehabilitation" can provide an appropriate basis for a downward departure at sentencing). None of those courts has suggested that sentencing courts' consideration of pre-sentencing rehabilitation interferes with the authority of the Bureau of Prisons to award good time credit for the period of time between the commission of the offense and sentencing.

In any event, although it is true that a defendant's post-sentencing conduct could result both in an award of good time credit and a reduction in his sentence at a resentencing, those two methods of decreasing the amount of time that the defendant can spend in prison are different in important respects. See *Rhodes*, 145 F.3d at 1380. First, good time credit does not affect the length of a prisoner's court-imposed sentence. Such credit is an "administrative reward for compliance with prison regulations," *Sash v. Zenk*, 428 F.3d 132, 134 (2d Cir. 2005) (Sotomayor, J.), cert. denied, 549 U.S. 920 (2006), and it does not vest until the date of a prisoner's release, see 18 U.S.C. 3624(b)(2). By contrast, a reduction in a prisoner's sentence recognizes that the prisoner's conduct since his initial sentencing warrants a less severe criminal punishment, and once imposed, the reduction generally is not revocable. See *Rhodes*, 145 F.3d at 1380 ("[D]epartures based on rehabilitation alter the very terms of imprisonment."). Second, although prisoners typically comply with statutory conditions and

thus receive available good time credit, *ibid.*, a reduction for post-sentencing rehabilitation lies in the discretion of the sentencing court. Depending on that court's view of the evidence of rehabilitation, it could decline to grant any reduction, just as it could find that in an exceptional case a defendant's rehabilitation has not been adequately addressed through an award of good time credit.

### III. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE VACATED

At petitioner's 2009 resentencing, the district court considered petitioner's request for a downward variance based on his "exemplary behavior" since his release from prison. J.A. 221. After considering the sentencing factors set out in Section 3553(a), the district court found that no variance from the advisory Guidelines range was warranted. S.J.A. 33-49. The court agreed that petitioner had made "substantial positive changes in his life," S.J.A. 39, and it noted that in the three and a half years since his release petitioner had "been employed, sober, enrolled in college, married and ha[d] taken on parental responsibilities," S.J.A. 37. See Pet. App. 5 ("We agree [petitioner] made significant progress during and following his initial period of imprisonment."). The district court observed, however, that under binding circuit precedent, it lacked the authority to grant a downward variance based on petitioner's post-sentencing rehabilitation. S.J.A. 16.

Although the district court misunderstood the extent of its authority to grant a downward variance from the advisory Guidelines range, that error would not warrant vacatur of petitioner's sentence if the district court would have imposed the same sentence absent the error. See Fed. R. Crim. P. 52(a); *Williams v. United States*,

503 U.S. 193, 203 (1992) (“[O]nce the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court’s selection of the sentence imposed.”). The court of appeals did not address whether the district court’s refusal to consider post-sentencing rehabilitation as a possible basis for downward variance was harmless.<sup>13</sup> “Consistent with [its] normal practice,” this Court should therefore “remand this case to the Court of Appeals for it to consider in the first instance whether the . . . error was harmless.” *Neder v. United States*, 527 U.S. 1, 25 (1999).

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<sup>13</sup> In granting petitioner release pending appeal after this Court granted review, the district court recently stated that it would not have exercised its discretion to grant petitioner a downward variance based on post-sentencing rehabilitation. 7/22/10 Tr. 5-6, 10-11. If this Court finds error, the significance of the district court’s statements can be addressed by the court of appeals on remand, in light of this Court’s decision and the entire record, and with the benefit of briefing by the parties.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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## APPENDIX

1. 18 U.S.C. 3553(a) provides:

### **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—

(1a)

(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 incorpo-

rated 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.

2. 18 U.S.C. 3661 provides:

**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.

3. 18 U.S.C. 3742 provides in pertinent part:

**Review of a sentence**

\* \* \* \* \*

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

\* \* \* \* \*

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a “permissible” ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an “impermissible” ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

4. U.S. Sentencing Guidelines § 1B1.3 provides:

**Relevant Conduct (Factors that Determine the Guideline Range)**

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
  - (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
  - (4) any other information specified in the applicable guideline.
- (b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

5. U.S. Sentencing Guidelines § 1B1.4 provides:

**Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)**

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

6. U.S. Sentencing Guidelines § 1B1.5 provides:

**Interpretation of References to Other Offense Guidelines**

- (a) A cross reference (an instruction to apply another offense guideline) refers to the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions).
- (b) (1) An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions), except as provided in subdivision (2) below.
  - (2) An instruction to use a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline.
- (c) If the offense level is determined by a reference to another guideline under subsection (a) or (b)(1) above, the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.
- (d) A reference to another guideline under subsection (a) or (b)(1) above may direct that it be applied only if it results in the greater offense level. In such case, the greater offense level means the greater Chapter Two offense level, except as otherwise expressly provided.

7. U.S. Sentencing Guidelines § 5K1.1 provides:

**Substantial Assistance to Authorities (Policy Statement)**

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
  - (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
  - (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
  - (3) the nature and extent of the defendant's assistance;
  - (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
  - (5) the timeliness of the defendant's assistance.

8. U.S. Sentencing Guidelines § 5K2.19 provides:

**Post-Sentencing Rehabilitative Efforts (Policy Statement)**

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. 3583(e)(1).)

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 *AMICUS CURIAE*  
IN SUPPORT OF THE JUDGMENT BELOW**

—◆—  
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**QUESTIONS PRESENTED**

1. Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. §3553(a) after *Gall v. United States*?
2. Whether as a sentencing consideration under 18 U.S.C. §3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation?
3. When a district court judge is removed from resentencing a defendant after remand, and a new judge is assigned, is the new judge obligated under the doctrine of the "law of the case" to follow sentencing findings issued by the original judge that had been previously affirmed on appeal?

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**INTEREST OF *AMICUS CURIAE***

This brief is submitted by Adam G. Ciongoli, *Amicus Curiae* in support of the judgment below, under the Court’s order of July 22, 2010.<sup>1</sup> *Amicus* addresses the first two Questions Presented, on which the Government concedes error. *Amicus* adopts the Government’s arguments in support of the judgment below on the third Question Presented.

**SUMMARY OF THE ARGUMENT**

The Eighth Circuit’s holding that a district court may not consider evidence of post-sentencing rehabilitation in resentencing is not only permissible—it is compelled by Congress’ unambiguous language in 18 U.S.C. §3742(g)(2). As conceded by the Government, see Gov’t Br. 47, the plain language of 18 U.S.C. §3742(g)(2), which governs sentencing upon remand, clearly prohibits district courts from granting a variance based on grounds that were not “specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal.” 18 U.S.C. §3742(g)(2)(A). By definition, post-sentencing rehabilitation could not have been

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<sup>1</sup> Under Supreme Court Rule 37.6, *Amicus* affirms that no counsel for a party authored any part of this brief, and no person other than *Amicus* and his co-counsel made a monetary contribution to fund its preparation or submission.

considered at the original sentencing and, therefore, cannot serve as the basis for a variance during resentencing. See *id.* This statute reflects a variety of important and permissible policy judgments by Congress, not least of which is to promote an orderly and effective appellate process by limiting district courts' ability to circumvent appellate mandates using new information.

Nonetheless, Petitioner and the Government urge the Court to reverse the Eighth Circuit's holding and, in so doing, they ask the Court—for the first time since its decision in *United States v. Booker*, 543 U.S. 220 (2005)—to use *Booker* to invalidate a duly enacted federal statute. Pet'r Br. 32 n.13; Gov't Br. 48. The customary reluctance to conclude that a duly enacted statute violates the Constitution does not appear to have figured into the Government's confession of error; the brief confessing error does not even acknowledge the statute. See generally Br. Opp'n.

The Court should decline this invitation, as §3742(g) survives *Booker*. Indeed, the Court fully reviewed §3742 in *Booker* and did not excise §3742(g). Nor does the statute in any way implicate the Sixth Amendment concerns raised in *Booker*, or make the Guidelines otherwise impermissibly mandatory. To the contrary, §3742(g) permits district courts to vary from the Guidelines based on any and all grounds that were considered in the original sentencing and that were not held to be impermissible by the court of appeals. See 18 U.S.C. §3742(g)(2)(A), (B).

In addition to preserving a meaningful role for appellate courts in sentencing cases—a role reaffirmed by *Booker*, 543 U.S., at 260-262, and its progeny—§3742(g)(2) ensures the mechanism of an effective appeal by both the Government and defendants, which is particularly important given the broad sentencing latitude left to district courts post-*Booker*. It also serves Congress’ “basic goal in passing the Sentencing Act” of reducing sentencing disparities between defendants convicted of similar offenses. *Id.*, at 253. Unlike policy statements made by the Sentencing Commission in the Guidelines, these are congressional policy choices embodied in statutes that district courts are not free to disregard. *E.g.*, *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 493 (2001) (emphasizing courts’ inability to “override a legislative determination manifest in the statute”).

Even if §3742(g) were read to make the Guidelines impermissibly mandatory, the Court can and should construe it, or, alternatively, excise other portions of §3742, to avoid any constitutional problems.

Regardless, consideration of post-sentencing rehabilitation by the sentencing court is improper because it defeats the objectives Congress requires courts to consider in 18 U.S.C. §3553(a). In particular, allowing variances based on post-sentencing rehabilitation would create unwarranted disparities in sentences for defendants convicted of similar conduct—only a handful of whom fortuitously would obtain

resentencings in which to present such evidence—*id.*, at §3553(a)(6), and it would thwart the Sentencing Commission’s core function of promoting orderly and just sentencing through policy determinations that Congress requires district courts to consider. *Id.*, at §3553(a)(5). Sections 3553(a)(1) and (a)(2), on which the Government and Petitioner heavily rely, do not authorize district courts to disregard the objectives Congress articulated in §§3553(a)(5) and (a)(6). Nor, on their own, do these §3553(a) factors render post-sentencing rehabilitation a proper consideration.

Post-sentencing rehabilitation may play a valid role in determining how a defendant ultimately serves his sentence, but Congress—recognizing the procedural problems of allowing courts to consider this factor during resentencing—instead designed mechanisms under 18 U.S.C. §§3583 and 3624 to effectuate adjustments based on post-sentencing rehabilitation through good time credits and revisions to periods of supervised release. Allowing courts to consider post-sentencing rehabilitation during resentencing would defeat the scheme Congress envisioned and implemented through the interplay of §3742(g) and §§3583 and 3624, frustrating the Sentencing Reform Act’s goal of moving away from indeterminate sentencing and unwarranted sentencing disparities.

Because the Eighth Circuit’s holding complies with Congress’ statutory directives and the reasoned

policy determination of the Sentencing Commission, the Court should affirm the judgment below.



## ARGUMENT

### **I. 18 U.S.C. §3742(g) PROHIBITS DISTRICT COURTS FROM CONSIDERING POST-SENTENCING REHABILITATION DURING RESENTENCING PROCEEDINGS.**

The language of 18 U.S.C. §3742(g) is clear: “A district court to which a case is remanded<sup>2</sup> . . . shall not impose a sentence outside the applicable guidelines range except upon a ground that was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal.” 18 U.S.C. §3742(g)(2)(A). The district court, bound by statute to consider only the grounds “in connection with the previous sentencing of the defendant,” *id.*, is therefore necessarily foreclosed from considering post-sentencing rehabilitation during resentencing proceedings.

The Government and *amicus curiae* the National Association of Criminal Defense Lawyers (NACDL)

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<sup>2</sup> Section 3742(g) governs remands following a determination by a court of appeals that the sentencing court imposed a sentence in violation of law, incorrectly applied the Guidelines, or unreasonably imposed a sentence outside the applicable Guidelines range. 18 U.S.C. §§3742(f)(1)-(2), (g).

both concede that §3742(g) forecloses consideration of post-sentencing rehabilitation “on its face.” See Gov’t Br. 47; NACDL Br. 4.<sup>3</sup> Indeed, throughout the resentencing proceedings below, the Government consistently argued, post-*Booker*, that “18 U.S.C. §3742(g) requires that only issues raised before at the original sentencing . . . shall be considered at sentencing upon remand.” J.A. 82 (March 13, 2006 Resistance to Defendant’s Sentencing Memorandum); see also J.A. 178-179 (“As to any other grounds for variance, if they were not raised at the previous sentencing or in the opinion from the Court of Appeals, they may not be considered.”) (July 12, 2007 Sentencing Memorandum).<sup>4</sup>

Petitioner, the Government, and NACDL now seek to avoid the plain language of §3742(g), contending that the statute must be invalidated as unconstitutional because it renders the Guidelines impermissibly mandatory in violation of *Booker*. See Pet’r Br. 33; Gov’t Br. 48; NACDL Br. 12-20. No such constitutional infirmity exists, as the Court’s analysis in *Booker* confirms. See 543 U.S., at 259-264 (examining

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<sup>3</sup> Petitioner claims that “[t]here is no statutory authority for [the Eighth Circuit’s] rule,” Pet’r Br. 18, but, as the Government and NACDL acknowledge, the plain language of §3742(g) not only supports but compels the Eighth Circuit’s ruling. Gov’t Br. 47; NACDL Br. 4.

<sup>4</sup> Although the Government and NACDL note that the Eighth Circuit did not expressly rely on 18 U.S.C. §3742(g) in prohibiting consideration of post-sentencing rehabilitation on remand for resentencing, see Gov’t Br. 48; NACDL Br. 4, the effect of §3742(g) on Petitioner’s resentencing proceedings was litigated and is reflected in the record below. J.A. 82, 178-179.

§3742 in particular and excising §3742(e) while leaving §3742(g) intact).

However, even if *Booker* had not already resolved the fate of §3742(g), the statute withstands constitutional scrutiny because it does not impermissibly compel a district court on remand to impose a Guidelines sentence. The statute simply reflects Congress' view that a district court, on resentencing, may consider only information available to the court of appeals—a limitation that promotes compliance with the appellate court's mandate and ensures sentencing based on the conduct of conviction. See 18 U.S.C. §3742(g)(2)(A)-(B). Section 3742(g)(2) provides no opportunity for increasing punishment based on facts not found by a jury and therefore implicates no Sixth Amendment concerns.

The Court should not lightly embark down a path that would lead it, for the first time since *Booker*, to invalidate a congressional sentencing statute, the policy objective and plain terms of which do not violate the Sixth Amendment. See *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (“In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people.”); *El Paso & N.E. Ry. Co. v. Gutierrez*, 215 U.S. 87, 97 (1909) (noting “the reluctance with which this court interferes with the action of a co-ordinate branch of government, and its duty, no less than its disposition, to sustain the enactments of the national legislature, except in clear cases of invalidity”).

Should the Court nonetheless re-examine §3742 and determine that subsection (g) yields unconstitutional results, the Court, as in *Booker*, should sever only the portion of §3742 necessary to prevent mandatory imposition of a Guidelines sentence on remand for resentencing. If the Court pursues this approach, *Amicus* urges the Court to preserve §3742(g) in its entirety and to excise, at most, the definitional provision in §3742(j)(1)(B) that informs the circumstances under which a non-Guidelines sentence may be imposed during resentencing under §3742(g)(2)(B). This remedy would minimize injury to Congress' objective to promote fairness and uniformity in all phases of criminal sentencing proceedings, including remands from courts of appeals.

**A. The Plain Language of §3742(g)(2) Expressly Forecloses Consideration of Post-Sentencing Rehabilitation.**

Because the meaning of §3742(g)(2) is clear, the Court need not engage in statutory interpretation. See, e.g., *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.”). The plain text of §3742(g) expressly prohibits a district court from considering, on plenary resentencing, any ground for a sentence outside the Guidelines range unless it “was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal.” 18 U.S.C.

§3742(g)(2)(A). As the Government concedes, the statute’s clear terms render any conduct or circumstances arising post-sentencing—including post-sentencing rehabilitation—impermissible grounds for a downward variance. Gov’t Br. 47; see also *United States v. Mills*, 491 F.3d 738, 742 (CA8 2007) (reversing district court for violation of §3742(g) for considering criminal history overrepresentation that did not appear as an original ground for departure); *United States v. Andrews*, 390 F.3d 840, 852 (CA5 2004) (“[T]he plain language of §3742(g) appears to handcuff any court on remand.”).

The Court must presume that Congress “‘says in a statute what it means and means in a statute what it says there.’” *Dodd v. United States*, 545 U.S. 353, 357 (2005) (refusing to rewrite statute despite potential for harsh results arising from interplay of two paragraphs within 28 U.S.C. §2255) (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992)); see also *Tyler v. Cain*, 533 U.S. 656, 663, n.5 (2001) (“[E]ven if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds.”); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (“[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”) (internal quotation marks omitted).

Section 3742(g)(2)(A)’s prohibition against considering new information unavailable at the original sentencing will deny defendants like Petitioner an

opportunity to demonstrate rehabilitation success to a district court following imposition of their original sentences. But this result does not rise to a constitutional defect or render the Guidelines mandatory. It simply limits a district court on remand to a variance based on grounds that were available and considered in connection with the original sentence. In other words, it puts the defendant in the same position as the vast majority of other defendants convicted of similar conduct whose sentences were not vacated and remanded for resentencing and who must use the administrative process established by Congress, see 18 U.S.C. §3624(b), to receive credit for such conduct. See also *infra* Part II.A (discussing the congressional directive to avoid unwarranted sentencing disparities).

Section 3742(g) includes another important feature that affects the grounds a district court may consider on remand for resentencing. In addition to limiting the sentencing court to grounds raised “in connection with the previous sentencing of the defendant prior to the appeal,” 18 U.S.C. §3742(g)(2)(A), the statute also precludes imposition of a non-Guidelines sentence based on a ground that was disapproved by the court of appeals in remanding the case for resentencing. *Id.* §3742(g)(2)(B) (“The court shall not impose a sentence outside the applicable guidelines range except upon a ground that . . . was held by the court of appeals, in remanding the case, to be a permissible ground of departure.”). Although the Government and NACDL cast this provision as an

impermissible attempt to require a Guidelines sentence in substance, §3742(g)(2)(B) is merely a procedural safeguard imposed by Congress to prevent circumvention of the appellate mandate. Indeed, as the Government acknowledges, see Gov't Br. 47, §§3742(g)(2)(A) and (B) work together to further Congress' intent "to prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory." H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess., 59 (2003).

### **B. Section 3742(g)(2) Is Valid Post-*Booker*.**

Just last term, the Court reaffirmed that §3742(g) "establish[es] the terms of 'sentencing upon remand.'" *Dillon v. United States*, 130 S.Ct. 2683, 2691 (2010) (considering applicability of *Booker* to modification proceedings). This recognition of the continuing validity of §3742(g) is unsurprising following *Booker*, in which the Court carefully "examined the [Sentencing Reform Act (SRA)] in depth to determine Congress' likely intent in light of [*Booker*'s] holding," 543 U.S., at 265, and, in a remedial response, excised only two statutory provisions: 18 U.S.C. §§3553(b)(1) and 3742(e). 543 U.S., at 259. The Court emphasized that most of the SRA was "perfectly valid" and that, with these two provisions removed, "the remainder of

the Act satisfies the Court’s constitutional requirements.” *Id.*, at 258, 259.<sup>5</sup>

The Government, Petitioner, and NACDL cannot credibly argue that the Court in *Booker* somehow overlooked §3742(g), particularly when the Court excised §3742(e) but left §3742(g) in place. See *United States v. Williams*, 411 F.3d 675, 677-678 (CA6 2005) (“Although *Booker* excised 18 U.S.C. 3742(e) in its remedy opinion, it left 18 U.S.C. §§3742(f) and (g) intact . . . the remedial majority did not excise [them] and both remain valid law.”); cf. *United States v. Tanner*, 544 F.3d 793, 797 (CA7 2008) (holding post-*Booker* that §3742(g)(1) requires a sentencing judge to apply the sentencing guidelines in effect at the time of the first sentencing); *United States v. Andrews*, 447 F.3d 806, 812, n.2 (CA10 2006) (same). Arguments that §3742(g) is invalid in light of *Booker* are unavailing, and the Court should not revisit the constitutionality of the statute.

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<sup>5</sup> The Government cites Justice Stevens’ dissent in *Dillon* in arguing that §3742(g) should have been excised in *Booker* along with §3742(e) and §3553(b)(1). Gov’t Br. 48-49 (citing *Dillon*, 130 S.Ct., at 2698 n.5) (Stevens, J., dissenting). The fact remains, however, that the Court carefully scrutinized §3742 in *Booker* and excised only subsection (e). 543 U.S., at 259. Justice Stevens’ view regarding §3742(g) failed to elicit comment, much less agreement, from other members of the Court.

**1. Section 3742(g)(2) Advances Congressional Sentencing Policy and Preserves the Role of Appellate Courts Without Implicating Sixth Amendment Concerns.**

Even if the Court re-examines §3742(g) in light of *Booker*, it is clear that the Sixth Amendment concerns that led the Court to excise §3553(b)(1) and §3742(e) are not triggered by §3742(g)(2). *Booker* held that it was a violation of the Sixth Amendment for a court to increase a defendant's sentence beyond the maximum punishment authorized by the facts established by a guilty plea or a jury verdict. 543 U.S., at 244 (building on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)). As a remedial measure, the Court excised those statutory provisions that would require a district court to impose a Guidelines sentence rather than merely consider the Guidelines as an advisory factor along with all other sentencing objectives defined by Congress in 18 U.S.C. §§3553(a)(1)-(7). *Booker*, 543 U.S., at 265.

Unlike §3553(b)(1) and §3742(e), which the Court eliminated in *Booker*, §3742(g)(2) does not mandate that a district court impose a Guidelines sentence. It merely prohibits a district court from identifying new grounds to grant a variance at resentencing that were not previously considered in the pre-appeal sentencing proceeding. See 18 U.S.C. §3742(g)(2)(A), (B). Section 3742(g)(2), therefore, promotes orderly administration of resentencing proceedings and

reflects Congress' intent that appellate courts retain a meaningful role in criminal sentencing, see 18 U.S.C. §§3742(f), (g), ensuring that district courts on remand cannot circumvent the appellate court's mandate by citing new grounds to reimpose a previously reversed sentence.

Although, in *Booker*, this Court excised §3742(e), the statute that prescribed the scope of appellate review, 18 U.S.C. §3742(e), the Court made clear that it intended to preserve "Congress' intent to provide appellate review." 543 U.S., at 262. To eliminate appellate review altogether, the Court observed, would "cut the statute loose from its moorings in congressional purpose." *Ibid.* By retaining the remaining provisions of §3742 and the mechanism of appellate review, albeit under the Court-defined "reasonableness" standard, *id.*, at 226, the carefully-fashioned *Booker* remedy properly served the overarching objective of Congress to "iron out sentencing differences" and "avoid excessive sentencing disparities." *Id.*, at 263-264.

The Government argues that §3742(g)(2) is "invalid after *Booker*" because it "restrict[s] the authority of district courts to vary from the applicable Guidelines range at resentencing." Gov't Br. 48 (emphasis added). But this criticism overstates the Court's holding in *Booker* and fails to acknowledge the Court's repeated, subsequent affirmations of meaningful appellate review. Although an appellate court cannot require a district court to impose a Guidelines sentence, appellate courts routinely—consistent with

*Booker*—make a variety of determinations regarding the procedural or substantive reasonableness of a sentence that necessarily “restrict” district courts’ ability to vary from the applicable Guidelines range at resentencing. See, e.g., *Gall v. United States*, 552 U.S. 38, 51 (2007) (authorizing appellate courts to review sentences for substantive reasonableness after “tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range”).

As the Court has observed, “[i]n sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur.” *Rita v. United States*, 551 U.S. 338, 354 (2007). Restrictions on resentencing will occur in every remand in which the appellate court determines the district court imposed a non-Guidelines sentence that was procedurally or substantively unreasonable. See, e.g., *United States v. Irely*, 612 F.3d 1160, 1225 (CA11 2010) (en banc) (reversing sentence because district court unreasonably varied downward from the advisory guidelines sentence); *United States v. Henry*, 545 F.3d 367 (CA6 2008) (remanding because district court failed to explain why sentence was substantially below Guidelines range despite amount of drugs and role in crime); *United States v. Goff*, 501 F.3d 250, 262 (CA3 2007) (remanding because district court failed to properly consider the Guidelines or §3553(a) factors and imposed a “drastic,” lenient sentence); *United States v. Pugh*, 515 F.3d 1179, 1192 (CA11

2008) (remanding despite appreciation of “the thoughtfulness and care” of the district court, because non-custodial sentence was unreasonably lenient in child pornography case). This unsurprising and routine consequence of appellate review is by no means “invalid after *Booker*.” See Gov’t Br. 48.

To the contrary, §3742(g)(2) is critical to effectuating Congress’ intent to “prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory.” H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess., 59 (2003). The instant case is illustrative. The district court originally sentenced Petitioner to 24 months to enable Petitioner to qualify for a drug rehabilitation program. J.A. 43. After the Eighth Circuit determined that this consideration was not a valid ground for quantifying a Guidelines departure for substantial assistance to the Government, J.A. 66-68, the district court on remand imposed the same 24-month sentence based on a new ground not raised in the original sentencing proceeding: post-sentencing rehabilitation. J.A. 69-70, 145. The judge even acknowledged that his decision may have been against prevailing Eighth Circuit law, J.A. 146-147, and, following a second reversal, the court of appeals reassigned the case consistent with the original sentencing judge’s reluctance to participate in a third resentencing. J.A. 149, 173.

Section 3742(g) was designed to keep this phenomenon in check and to promote orderly administration of remand proceedings. Despite the post-*Booker* advisory nature of the Guidelines and the enhanced discretion of sentencing judges, judicial discretion

“hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.” *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). Section 3742(g) preserves the role of appellate courts in the criminal sentencing system, promotes fairness and uniformity in sentencing, and remains valid after *Booker* by restricting, but not eliminating, the grounds on which a district court can impose a non-Guidelines sentence on remand for resentencing.

Indeed, appellate review is particularly important now that district courts have broad sentencing discretion. Pre-*Booker*, appeals courts reviewed sentences largely to ascertain that district courts correctly applied mandatory Guidelines. See *Booker*, 543 U.S., at 261. Under the post-*Booker* discretionary sentencing regime, a robust role for appeals courts furthers Congress’ goal to reduce unwarranted disparities and implement a more uniform and just sentencing scheme. See *id.*, at 263-264 (noting that Congress would favor meaningful appellate review, which “tend[s] to iron out sentencing differences”); S. Rep. No. 98-225, p. 52 (1983); 28 U.S.C. §991(b)(1)(B). Section 3742(g)(2) reflects a policy determination regarding the role of appellate review that was made by Congress, not the Sentencing Commission. Courts are not free to disregard congressional policy or to substitute their judgment for a clear, statutory directive. Compare, *e.g.*, *Oakland Cannabis*, 532 U.S., at 493 (emphasizing that a court may not “override a legislative determination manifest in the

statute”), with *Kimbrough v. United States*, 552 U.S. 85, at 109-110 (2007) (permitting disagreement with Sentencing Commission’s policy determination regarding crack/powder cocaine ratio).

## **2. Section 3742(g) Requires No Remedial Excision in Whole or in Part.**

The Government, Petitioner, and NACDL cite various portions of §3742, arguing that they impermissibly require district courts to impose a Guidelines sentence on remand. The plain language of the statute, however, clearly permits district courts on remand to resentence outside the applicable Guidelines range and to rely on any and all factors, provided the factors were identified at the original sentencing (as required by §3553(c)) and were not held to be unlawful by the court of appeals. To the extent certain words or cross-references in §3742(g) might be found to reflect vestiges of the mandatory Guidelines regime, the Court should not invalidate any part of §3742(g)(2), instead using the doctrine of constitutional avoidance to read isolated portions of the statute in a manner consistent with *Booker*.

For example, the introductory paragraph of §3742(g) requires district courts to “resentence a defendant in accordance with section 3553.” 18 U.S.C. §3742(g). Although the broad reference to §3553 could be read to impermissibly encompass §3553(b)(1), which this Court excised in *Booker*, that reading is not inescapably compelled by the text. Rather, the

Court can and should construe the reference to §3553 to exclude §3553(b)(1), thereby avoiding any constitutional concern. See, e.g., *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909) (“[I]f the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.”).

Similarly, NACDL emphasizes that §3742(g)(2)(B) requires a non-Guidelines sentence to be based on a ground “held by the court of appeals . . . to be a permissible ground of *departure*.” NACDL Br. 11-12 (quoting 18 U.S.C. §3742(g)(2)). The term “departure,” NACDL contends, is a term of art that specifically refers to Guidelines-authorized grounds to sentence outside the applicable range and thus excludes “variances” based instead on the factors in 18 U.S.C. §3553(a). NACDL Br. 11 (citing *Irizarry v. United States*, 553 U.S. 708 (2008) (defining “departure” as a Guidelines-specific term of art in context of Rule 32(h) notice requirement).<sup>6</sup> Under NACDL’s reasoning, therefore, no §3553(a) “variance” sentence ever could

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<sup>6</sup> The Court’s interpretation of Federal Rule of Criminal Procedure 32(h) does not compel a similarly confined reading of “departure” in §3742(g)(2)(B). As the Court observed, the Rule 32(h) notice requirement was linked to a pre-*Booker* expectation of a Guidelines sentence. *Irizarry*, 553 U.S., at 713-714. By contrast, the Court has emphasized, post-*Booker*, that there is an enduring—if not enhanced—need for meaningful appellate review, and a reading of §3742(g)(2)(B) to include both variances and Guidelines-authorized departures furthers that objective.

be imposed on remand. The Court should reject this hypertechnical construction of §3742(g)(2)(B) for several reasons.

First, §3742(g) was enacted in 2003 as part of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act), which predates the Court's 2005 decision in *Booker*. Pub. L. No. 108-21, §401(e), 117 Stat. 671 (2003). Congress therefore did not include, and could not have included, the term “variance” in drafting §3742(g)(2)(B), even though its intent to effectuate meaningful appellate review of sentences is clearly applicable to both departures and variances. See *supra* Part I.B.1. The use of the term “departure,” therefore, should be read as any sentence outside the applicable guidelines range, whether through a Guidelines-defined departure or a §3553(a) variance.

Indeed, this Court's own use of the terms “departure” and “variance” following *Booker* underscores why NACDL's hypertechnical reading should be rejected. Until crystallizing the distinction in *Irizarry* while discussing Rule 32(h), 553 U.S., at 714, the Court treated the term “variance” as virtually indistinct from “departure,” with both terms merely signifying a sentence outside the applicable Guidelines range for the underlying conviction. See, e.g., *Gall*, 552 U.S., at 46-47 (interchangeably using “departure” and “variance” to describe an “outside-Guidelines sentence”); *Rita*, 551 U.S., at 350 (“[S]entencing courts . . . may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence).”).

To the extent the Court determines that the meaning of “departure” leaves room for debate, it should apply the doctrine of constitutional avoidance and construe the term as signifying any sentence outside the applicable Guidelines range. Reading §3742(g)(2)(B) in this manner would avoid constitutional concerns, see, e.g., *Delaware & Hudson Co.*, 213 U.S., at 407; *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 120-121 (1948), and fulfill Congress’ overall goal of preserving a meaningful role for appellate courts, even in the post-*Booker* sentencing regime.

**3. Section 3742(j)(1)(B)’s Definition of “Permissible Ground of Departure” Does Not Require Invalidation of §3742(g)(2).**

Looking beyond the text of §3742(g) itself, Petitioner, the Government, and NACDL contend that §3742(j)(1), which defines a “‘permissible’ ground of departure,” works in conjunction with §3742(g)(2)(B) to require a Guidelines sentence, rendering §3742(g)(2)(B) invalid after *Booker*. Gov’t Br. 49; Pet’r Br. 33, n.13; NACDL Br. 10. They cite, in particular, §3742(j)(1)(B), which defines a permissible ground of departure, in part, as one “authorized under section 3553(b)” —which includes §3553(b)(1), one of the two provisions the Court excised in *Booker*. 543 U.S., at 259. If the Court agrees that the cross-reference in §3742(j)(1)(B) to §3553(b) raises constitutional concerns, it should nonetheless reject the invitation to excise §3742(g)(2), because a less drastic remedy exists. At most, the Court should excise §3742(j)(1)(B), leaving intact the remaining components of the definition

of “‘permissible’ ground of departure,” see 18 U.S.C. §§3742(j)(1)(A), (C),<sup>7</sup> as well as the totality of §3742(g), which includes that defined phrase. See 18 U.S.C. §3742(g)(2)(B).

As in *Booker*, the Court should seek to determine “what Congress would have intended in light of the Court’s constitutional holding,” 543 U.S., at 246, and “refrain from invalidating more of the statute than is necessary.” *Id.*, at 258 (quoting *Regan*, 468 U.S., at 652). Because the remaining portions of §3742(j), as well as the totality of §3742(g), are constitutionally valid and capable of functioning independently and in a manner consistent with Congress’ basic objectives in enacting the statute, the Court should not unnecessarily thwart congressional intent by striking these provisions. See *Booker*, 543 U.S., at 223-224, 246 (“We answer the remedial question by looking to legislative intent.”). Adopting this limited remedy would permit appellate reasonableness review to remain meaningful and binding, *id.*, at 261-262, while also ensuring that the mandatory Guidelines scheme dismantled in *Booker* remains inoperative.

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<sup>7</sup> Section 3742(j)(1)(A) requires a permissible ground of departure to “advanc[e] the objectives set forth in section 3553(a)(2),” and §3742(j)(1)(C) demands that a non-Guidelines sentence be “justified by the facts of the case.” 18 U.S.C. §§3742(j)(1)(A), (C).

## II. PERMITTING DISTRICT COURTS TO CONSIDER POST-SENTENCING REHABILITATION WOULD DEFEAT CONGRESS' OBJECTIVES UNDER §3553(a).

Even if the Court were to find that §3742(g)(2) yields an unconstitutional result under *Booker* requiring its complete invalidation, the Court nonetheless should give weight to Congress' underlying intent in enacting that provision to preserve a meaningful role for appellate review in the sentencing scheme, thereby promoting the Sentencing Reform Act's overall goal of increased fairness and uniformity in sentencing. See, e.g., *Booker*, 543 U.S., at 263-264 (retaining appellate review despite excision of §3742(e), because it “tend[s] to iron out sentencing differences” and furthers Congress' goal of reducing unwarranted disparities). This can be achieved by requiring district courts, on remand, to evaluate the §3553(a) factors in light of the information available at the time of the original sentencing proceeding. This approach is warranted based not only on congressional intent reflected in §3742(g)(2), but also on the plain text of §3553(a) itself. Specifically, permitting consideration of post-sentencing rehabilitation on resentencing would defeat Congress' directive that courts consider the Sentencing Commission's policy statements, 18 U.S.C. §3553(a)(5)(A), and it would create unwarranted sentencing disparities, directly contravening §3553(a)(6). See *United States v. Lorenzo*, 471 F.3d 1219, 1221 (CA11 2006) (per curiam).

Although the Government and Petitioner advocate that two other subsections of §3553(a)—§3553(a)(1) and §3553(a)(2)—should be read to authorize consideration of post-sentencing rehabilitation, that

construction is belied by Congress' subsequent enactment of §3742(g), which confirms that Congress never intended §3553(a)(1) and §3553(a)(2) to expand the temporal scope of information to be considered on resentencing. See 18 U.S.C. §3742(g)(2)(A); *Lorenzo*, 471 F.3d, at 1221 (“[W]e are not persuaded that §3553(a)(1) contemplates post-sentencing history and characteristics.”); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (“The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.”) (internal quotation marks omitted); *infra* Part II.C.

While a trial court enjoys broad discretion during sentencing proceedings, it nonetheless is required by statute to take all §3553(a) factors into account, see, e.g., *Rita*, 551 U.S., at 347-348, and it must be reversed if it ignored or slighted a factor that Congress has deemed pertinent. Cf. *United States v. Taylor*, 487 U.S. 326, 337 (1988) (emphasizing district court's obligation to exercise discretion under Speedy Trial Act in light of particular factors required by Congress); see also *Oakland Cannabis*, 532 U.S., at 493 (prohibiting disregard for statutorily expressed congressional judgment); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (finding an abuse of discretion when the National Labor Relations Board sought to fulfill one congressional objective but “wholly ignore[d] other and equally important Congressional

objectives”).<sup>8</sup> Because consideration of post-sentencing rehabilitation would unduly slight §3553(a)(5) and (6), the Court should reject the Government’s and Petitioner’s §3553(a) analysis.

**A. Considering Post-Sentencing Rehabilitation During Resentencing Would Create Unwarranted Disparities That Frustrate the Purpose of 18 U.S.C. §3553(a)(6).**

In many ways, §3553(a)(6) most clearly embodies the overarching goals of the Sentencing Reform Act. See, e.g., *Rita*, 551 U.S., at 354 (“Congress sought to diminish unwarranted sentencing disparity.”); *Booker*, 543 U.S., at 253 (“Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.”). Prior to the enactment of the SRA, indeterminate sentencing was roundly criticized for its “arbitrary and capricious” nature and for creating the “shameful disparity in criminal sentences” that was the criminal justice system’s “major flaw.” S. Rep. No. 98-225, p. 38; see also *Mistretta v. United States*, 488 U.S. 361, 365 (1989) (“Serious disparities in sentences . . . were common.”). Congress was concerned not only that disparate sentencing was unfair to both defendants and to the public, but that “sentences that are

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<sup>8</sup> While district courts must consider all §3553(a) factors, e.g., *Rita*, 551 U.S., at 347, the proper construction and relevance to Petitioner’s sentence of factors (a)(3) (the kind of sentences available), (a)(4) (consideration of the applicable Guidelines range), and (a)(7) (restitution) are not disputed before the Court.

disproportionate to the seriousness of the offense create a disrespect for the law.” S. Rep. No. 98-225, p. 45-46. Eliminating unwarranted sentencing disparity, therefore, was a “primary goal” of Congress in undertaking sentencing reform and in the ensuing Guidelines system. S. Rep. No. 98-225, p. 52; 28 U.S.C. §991(b)(1)(B) (specifying Commission’s objective to “avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.”); see also *Mistretta*, 488 U.S., at 366-367.

The language of §3553(a)(6) plainly reflects this goal, requiring sentencing courts to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. §3553(a)(6). Because permitting courts to consider post-sentencing rehabilitation would create precisely the type of unwarranted disparities that the SRA was designed to eradicate, prohibiting courts from considering this factor not only would fulfill Congress’ directive in §3553(a)(6), but also realize the larger goal of increased certainty and consistency in the federal system so as to “retain the confidence of American society and . . . be an effective deterrent against crime.” S. Rep. No. 98-225, p. 49-50.

The plain language of §3553(a)(6) and legislative history of the SRA both demonstrate that Congress redesigned the sentencing system to address the problem of unwarranted sentencing disparity by refocusing the bases of a proportionate sentence to (1) the prior records of offenders and (2) the criminal conduct for which they are to be sentenced. S. Rep.

No. 98-225, p. 65 (criticizing the “unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances”); 18 U.S.C. §3553(a)(6) (focusing on “defendants with similar records” who are found “guilty of similar conduct”); *Booker*, 543 U.S., at 250 (linking Congress’ goal of diminishing sentencing disparity to “judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction”). Post-sentencing rehabilitation, which by definition occurs after an offender commits the criminal conduct for which he or she is to be sentenced, does not factor into either of these criteria.

Allowing courts to consider post-sentencing rehabilitation would further contravene §3553(a)(6) because it would inequitably benefit only those who fortuitously gain the opportunity to be resentenced due to procedural happenstance unrelated to the offense itself; that is, only when the sentencing court metes out a legally erroneous or otherwise unreasonable sentence in the first instance. See *United States v. Lloyd*, 469 F.3d 319, 325 (CA3 2006) (“[A]n approach permitting a defendant’s post-sentencing rehabilitation efforts to impact on a resentence would unfairly disadvantage defendants who were ineligible for re-sentencing and therefore had no opportunity to bring their rehabilitative efforts before the sentencing court.”) (internal quotation marks omitted). The resulting disparity would be “grossly unfair.” *United States v. McMannus*, 496 F.3d 846, 852, n.4 (CA8 2007) (noting that the “vast majority” of defendants receive no sentencing-court review of post-sentencing rehabilitation); *United States v. Rhodes*, 145 F.3d 1375, 1384 (CADDC 1998) (Silberman, J.,

dissenting) (“Only those prisoners who are lucky enough to have a sentencing judge who commits legal error can benefit from their postconviction conduct.”). While every defendant has the opportunity to exhibit rehabilitative efforts post-sentencing, only those who benefit from plenary resentencing following reversal of their original sentence will have the opportunity to present post-sentencing rehabilitative efforts as a basis for downward variance. See *McMannus*, 496 F.3d, at 852, n.4; *Lloyd*, 469 F.3d, at 325; *United States v. Sims*, 174 F.3d 911, 912-913 (CA8 1999); *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting).

This procedural phenomenon necessarily creates unwarranted disparities between similarly situated defendants, because other defendants convicted of similar conduct who have post-sentencing rehabilitation success but are not “lucky” enough to be resentenced will not have the opportunity to have that success influence the sentence imposed. See *McMannus*, 496 F.3d, at 852, n.4; *Lloyd*, 469 F.3d, at 325; *Sims*, 174 F.3d, at 912; *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting); 18 U.S.C. §3742. Even a defendant with superlative rehabilitative efforts cannot earn a downward variance on that basis if his original sentence was legally “reasonable.” 18 U.S.C. §3742(f)(3) (requiring affirmance of lawful sentences). Such disparity in sentencing and, more fundamentally, in procedural opportunity, exemplifies the very unwarranted disparities that Congress sought to eradicate in the SRA. S. Rep. No. 98-225, p. 53-54; 28 U.S.C. §991(b)(1)(B). Indeed, when the Commission considered this very issue, it determined that “such a

departure would . . . inequitably benefit only those who gain the opportunity to be resentenced *de novo*.” U.S.S.G. §5K2.19 cmt. background (2000); see *infra* Part II.B.

Procedural happenstance is an unjustifiable basis to authorize district courts to contravene §3553(a)(6). Even circuits that have permitted consideration of post-sentencing rehabilitation have acknowledged the problematic disparities that arise. See *Lloyd*, 469 F.3d, at 325 (doubting that a district court would ever be able permissibly to consider post-sentencing rehabilitation during resentencing); *Quesada Mosquera v. United States*, 243 F.3d 685, 686-687 (CA2 2001) (per curiam) (noting the inequity eliminated by §5K2.19).

The Government erroneously contends that *Rhodes*, 145 F.3d, at 1381, illustrates why any resulting disparity from resentencing is warranted. See Gov’t Br. 42. *Rhodes* is inapposite, however, because the defendant was resentenced after reversal of his *conviction*, changing the nature of the criminal conduct for which he was to be resentenced. 145 F.3d, at 1381. By contrast, nothing about Petitioner’s criminal conduct changed from one sentencing proceeding to the next. Compare S.J.A. 1 (Petitioner’s Plea Agreement), with S.J.A. 7-13 (March 18, 2004 Presentencing Investigation Report). Petitioner had the opportunity to benefit from additional sentencing proceedings solely because the Eighth Circuit repeatedly had to correct the erroneous sentences Petitioner received for the same underlying conduct. The distinct nature of a remand for sentencing error

was highlighted in *Rhodes*, in which the D.C. Circuit contrasted that defendant's resentencing following reversal of his conviction with what would have been a "random" event if he were merely "lucky enough" to be resentenced based on the same criminal conduct. 145 F.3d, at 1381.

Distinctions also exist between post-offense, pre-sentencing rehabilitation and post-sentencing rehabilitation, undermining the arguments of the Government and Petitioner that universal acceptance of the former compels adoption of the latter. See Gov't Br. 42-43; Pet'r Br. 47. This attempted analogy ignores crucial procedural differences between the two factors. Every defendant has the right to a sentencing proceeding, in which pre-sentencing rehabilitation, if any exists, can be assessed. But not every defendant obtains plenary resentencing. See *McMannus*, 496 F.3d, at 852, n.4 (noting that the "vast majority" of defendants receive no sentencing-court review of post-sentencing rehabilitation); *Quesada Mosquera*, 243 F.3d, at 686-687; *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting). Unlike pre-sentencing rehabilitation, therefore, whether a downward variance or departure is granted to a defendant on the basis of post-sentencing rehabilitation depends entirely on whether his original sentence was lawfully determined. See 18 U.S.C. §3742(f). Because the resulting disparities are unwarranted, the plain text of §3553(a)(6) precludes consideration of post-sentencing rehabilitation.

**B. Considering Post-Sentencing Rehabilitation Contravenes 18 U.S.C. §3553(a)(5).**

Congress required sentencing courts to “consider . . . any pertinent policy statement issued by the Sentencing Commission . . . that . . . is in effect on the date the defendant is sentenced.” 18 U.S.C. §3553(a)(5). In *Booker*, the Court underscored the importance of the Sentencing Commission’s determinations, emphasizing that “[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.” 543 U.S., at 264 (citing 18 U.S.C. §§3553(a)(4), (5)); see, e.g., *United States v. Martin*, 371 Fed.Appx. 602, 604-605 (CA6 2010) (unpublished) (remanding because district court failed to reference Guideline §5G1.3 or its application notes). Neither the Government nor Petitioner disputes the enduring importance of the Guidelines or the need for district courts to consider the Commission’s policy determinations, as required by §3553(a)(5).

The Commission’s policy statement on post-sentencing rehabilitation is clear and unequivocal: “Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense.” U.S.S.G. §5K2.19. The Commission articulated several reasons for this prohibition, including the inequitable benefit to “only those who gain the opportunity to be

resentenced *de novo*,” as well as “inconsisten[cy] with the policies established by Congress under 18 U.S.C. §3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person,” U.S.S.G. §5K2.19 cmt. background—a factor that further militates against consideration of post-sentencing rehabilitation, as discussed *infra* Part III.

The procedural concerns identified by the Commission should be given special weight, as they lie at the heart of the Commission’s core function. Congress expressly created the Sentencing Commission to fashion procedural mechanisms to promote certainty and fairness in the sentencing system. 28 U.S.C. §991(b) (emphasizing the Commission’s purpose is to “establish sentencing policies and practices of the Federal Criminal justice system”). While Congress retained the legislative prerogative of articulating the substantive objectives for sentencing, see 18 U.S.C. §3553(a)(2), it delegated to the Commission the authority to craft and develop a system to meet those objectives, regularly reevaluating federal sentencing procedures to prevent unwarranted nationwide sentencing disparities. 28 U.S.C. §991(b)(1); 18 U.S.C. §3553(a)(2); see also *Rita*, 551 U.S., at 348 (“Congressional statutes then tell the *Commission* to write the Guidelines that will carry out these same §3553(a) objectives.”); *Mistretta*, 488 U.S., at 374-375.

Because the Commission’s policy statement, commentary, and considerations regarding §5K2.19 arise from its core mission as defined by Congress, §5K2.19 should be given effect. Cf. *Kimbrough*, 552

U.S., at 108-109 (holding that court permissibly could vary from the Guidelines based on a policy disagreement with the crack/powder sentencing ratio, which did not “exemplify the Commission’s exercise of its characteristic institutional role”: “to formulate and constantly refine national sentencing standards”); accord *Spears v. United States*, 129 S.Ct. 840, 842-843 (2009).

**C. Prohibiting Consideration of Post-Sentencing Rehabilitation Is Not Inconsistent with §3553(a)(1) or (a)(2).**

Preventing courts from considering post-sentencing rehabilitation does not impermissibly slight the other §3553(a) factors on which the Government and Petitioner rely. Despite attempts to shoe-horn post-sentencing rehabilitation into §3553(a)(1), congressional action subsequent to the SRA and legislative history confirm that post-sentencing rehabilitation is not part of the “history and characteristics of the defendant” described in §3553(a)(1). 18 U.S.C. §3553(a)(1); see *Lorenzo*, 471 F.3d, at 1221 (expressing doubt that post-sentencing behavior falls within §3553(a)(1)).

As previously noted, the subsequent passage of the PROTECT Act and §3742(g) demonstrates that Congress did not contemplate expanding the temporal scope of §3553(a)(1) on resentencing to permit consideration of post-sentencing rehabilitation, a factor that, by its nature, could not have been

raised in the original sentencing proceeding. Pub. L. No. 108-21, §401(e), 117 Stat. 671, 18 U.S.C. §3742(g)(2); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 308 (1911) (“[S]ubsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.”). It is a basic canon of statutory construction that courts should interpret statutory provisions consistently when possible. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S.Ct. 2433, 2447 (2010); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 143-144 (2001) (“[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”) (internal quotation marks omitted). Section 3742(g) expressly instructs district courts to contemplate the §3553(a) factors when sentencing upon remand, 18 U.S.C. §3742(g), yet it also confines grounds for a variance to those that (1) were included in the previous sentencing proceeding and (2) were not rejected by the court of appeals. *Id.* §§3742(g)(2)(A), (B).

If the “history and characteristics” of §3553(a)(1) were read to include post-sentencing rehabilitation—a factor that did not exist when the defendant was first sentenced—that impermissibly would render meaningless the procedural mechanism established in §3742(g). Cf. *Bilski v. Kappos*, 130 S.Ct. 3218, 3228-3229 (2010) (interpreting two separate statutory provisions to avoid rendering one superfluous, even though enacted at different times); see also *Brown &*

*Williamson Tobacco*, 529 U.S., at 133 (“A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.”) (internal quotations marks omitted). This analysis should not change even if the Court were to invalidate §3742(g) under *Booker*. Congress made a permissible policy determination regarding the temporal scope of information to be considered on remand for resentencing, and that policy determination should inform the Court’s analysis of §3553(a)(1), even if Congress’ chosen vehicle in §3742(g)(2) is held to be infirm. Cf. *Booker*, 543 U.S., at 263-264 (effectuating congressional preference for appellate review despite excision of §3742(e)); *Oakland Cannabis*, 532 U.S., at 497-498 (prohibiting courts from ignoring Congress’ statutorily expressed judgment).

The Government’s and Petitioner’s invocation of 18 U.S.C. §3661 does not provide the necessary support to include post-sentencing rehabilitation in the “history and characteristics” of the defendant. 18 U.S.C. §3553(a)(1); Gov’t Br. 32-37; Pet’r Br. 26-30. Although §3661 states that “no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense” that a court may consider during sentencing, 18 U.S.C. §3661, courts regularly uphold such limitations in a variety of ways. See, e.g., *United States v. Dean*, 604 F.3d 169, 174-175 (CA4 2010) (noting impropriety of collateral attacks during sentencing on validity of prior convictions); *United States v. Luna*, 332 Fed. Appx. 778, 783 (CA3 2009) (unpublished)

(holding that, despite *Booker*, cultural heritage is not a proper ground for downward variance); *United States v. Guzman*, 236 F.3d 830, 832 (CA7 2001) (reversing departure based on cultural heritage).

Moreover, U.S.S.G. §1B1.4, which is derived from §3661, specifies that §3661 must give way to contravening law. U.S.S.G. §1B1.4 (“[T]he court may consider, without limitation, any information concerning the background, character and conduct of the defendant, *unless otherwise prohibited by law.*”) (citing 18 U.S.C. §3661) (emphasis added). Because §3742(g) plainly prohibits consideration of post-sentencing rehabilitation, see *supra* Part II.A, §3661 cannot be used to backdoor such evidence in a remand for resentencing.

Additionally, the legislative history of the predecessor to §3661, 18 U.S.C. §3577,<sup>9</sup> demonstrates that the “no limitation” language was intended to enhance judges’ authority to consider a broader scope of evidence relating to the past conduct of defendants, driven by concerns over the spread of organized crime and a perceived need for greater flexibility to impose higher sentences. See Pub. L. No. 91-452, 84 Stat. 922 (1970).

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<sup>9</sup> 18 U.S.C. §3577 was renumbered as 18 U.S.C. §3661, without comment, as part of the SRA. Pub. L. No. 98-473, §212(a)(1), 98 Stat. 1987 (1984).

The Government and Petitioner also rely on §3553(a)(2), which articulates overall sentencing objectives, but that provision similarly fails to authorize consideration of post-sentencing rehabilitation. See 18 U.S.C. §§3553(a)(2)(A)-(D). A critical factor under §3553(a)(2) is “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.” 18 U.S.C. §3553(a)(2)(A). The plain language of this provision associates the need to impose an appropriate sentence with the criminal conduct of conviction, rendering irrelevant post-sentencing rehabilitative efforts. *Id.*; see also *Irey*, 612 F.3d, at 1225 (reversing sentence that failed to reflect seriousness of offense or to provide just punishment).

Post-sentencing rehabilitation is likewise an inappropriate fit under §3553(a)(2)’s directives to consider deterrence and the need to protect the public from further crimes of the defendant. 18 U.S.C. §§3553(a)(2)(B), (C). The Court discussed these factors in *Gall*, distinguishing the defendant’s self-motivated rehabilitation—which occurred not only pre-sentencing, but also significantly pre-arrest—from rehabilitation that would have been “at the direction of, or under supervision by, any court.” *Gall*, 552 U.S., at 59. The Court concluded that the district court’s reliance on the defendant’s pre-sentencing rehabilitation as a §§3553(a)(2)(B) and (C) factor was justified because it was undertaken “on [Gall’s] own initiative.” *Ibid.* Post-sentencing rehabilitation, by

contrast, as demonstrated by Petitioner’s case, comes at the direction or under the supervision of the Court, even if thoroughly embraced by the defendant at that juncture, as occurred in Petitioner’s case. For that reason, it is not a valid consideration under §3553(a)(2) and should be considered, when relevant, under other procedural mechanisms Congress designed for this purpose. See *infra* Part III.<sup>10</sup>

### **III. OTHER PROCEDURAL MECHANISMS EXIST TO ACCOUNT FOR POST-SENTENCING REHABILITATION.**

Post-sentencing rehabilitation can be a relevant factor in determining how a defendant serves his or her sentence, but the grave procedural inequities in allowing courts to consider such evidence at resentencing compel consideration of this factor at different stages. See U.S.S.G. §5K2.19 cmt. background.

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<sup>10</sup> Nor does subsection (D) of §3553(a)(2), which discusses “needed educational or vocational training, medical care, or other correctional treatment,” 18 U.S.C. §3553(a)(2)(D), support consideration of post-sentencing rehabilitation. These “treatment” factors, by their plain terms, would not authorize a reduced sentence on remand to reward a defendant who has already completed a rehabilitation program and for whom further substance-abuse education and care is not a “needed” sentencing consideration. *Id.* Regardless, as previously discussed with other §3553(a) factors, the subsequent passage of §3742(g)(2) confirms that Congress did not intend to expand the temporal scope of resentencing proceedings to include factors like post-sentencing rehabilitative success that were unavailable at the original sentencing.

Indeed, Congress saw fit to enact several procedural mechanisms that allow every defendant—not only those who get the benefit of resentencing proceedings—the opportunity to benefit from exemplary post-sentencing rehabilitative efforts. See *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting) (describing how Congress’ passage of the SRA “chose to take account of a defendant’s rehabilitative efforts in a different and more limited way than it had under the parole system”).

First, a defendant can earn “good time” credit as evaluated by the Bureau of Prisons (BOP). Pursuant to 18 U.S.C. §3624, the BOP may reduce the term of imprisonment of a defendant who has shown “exemplary compliance with institutional disciplinary regulations,” including progress toward earning a degree. 18 U.S.C. §3624(b). The BOP, being closer to the actual conduct and behavior of the defendants in its custody, is in a better position than the courts to incentivize prisoners to comply with institutional regulations and earn good time credit for rehabilitative efforts. See *Barber v. Thomas*, 130 S.Ct. 2499 (2010) (holding that the intent of §3624(b) was to allow BOP to enforce the connection between good behavior and the award of good time); *Sims*, 174 F.3d, at 913 (determining that consideration of post-sentencing rehabilitation would encroach on the authority of the BOP). The Government itself acknowledges that allowing courts to consider post-sentencing rehabilitation as a basis for downward

variance could duplicate the BOP's evaluation and render §3624(b) redundant. See Gov't Br. 50; see also *United States v. Hasan*, 245 F.3d 682 (CA8 2001) (finding that permitting a downward departure at resentencing based on post-sentencing rehabilitation would lead to "double counting" of the same efforts).

Petitioner correctly observes that the BOP cannot consider post-release conduct, see Pet'r Br. 48-49, however, Congress also designed a mechanism that allows sentencing courts to consider post-release, post-sentencing rehabilitation. That occurs in §3583(e)(1), which instructs courts to consider the §3553(a) factors when considering early termination of a term of supervised release. 18 U.S.C. §3583(e)(1); see also *United States v. Lussier*, 104 F.3d 32, 34-35 (CA2 1997) (holding that court may terminate, extend, or alter the conditions of the term of supervised release prior to its expiration pursuant to §3583(e)); *Gozlon-Peretz v. United States*, 498 U.S. 395, 400-401 (1991) (same). Because every defendant is eligible to benefit from a court's consideration of post-sentencing rehabilitative efforts in terms of supervised release, §3583(e) does not present the same procedural inequities that militate against permitting courts to consider post-sentencing rehabilitation at resentencing.

Finally, pursuant to the Federal Rules of Criminal Procedure, courts are authorized to reduce a defendant's sentence by considering post-sentencing

substantial assistance through a motion by the Government. FED. R. CRIM. P. 35(b). The Eighth Circuit has held that such Rule 35 motions are consistent with 18 U.S.C. §3742(g); moreover, the court may reduce a sentence beyond the statutory minimum under 18 U.S.C. §3553(e) and Rule 35(b)(4). See *Mills*, 491 F.3d, at 742 (considering plain language of §3742(g) and holding that the government retained authority to make recommendations under §3553(e)); see also *United States v. Poole*, 550 F.3d 676, 680-681 (CA7 2008) (consideration of a Rule 35(b) motion should take the statutory sentencing factors into account). Indeed Petitioner's sentence was reduced after his second resentencing proceeding through the district court's consideration of the Government's post-sentencing Rule 35 motion. S.J.A. 60-61.

Far from overlooking the role post-sentencing rehabilitation has to play in a rational and individualized sentencing system, Congress carefully designed mechanisms that expressly allow consideration of this factor by multiple branches of the penal system. The Court should decline the invitation to judicially interject an additional stage at which to consider post-sentencing rehabilitation that would render Congress' objectives in §§3624(b) and 3583(e)(1) redundant or superfluous at best, and, at worst, magnify unwarranted sentencing disparities and inequitable sentencing procedures in the criminal justice system.



**CONCLUSION**

The Court should affirm the Eighth Circuit's judgment.

Respectfully submitted,

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in Support of the Judgment  
Below*

October 8, 2010

**EYEWITNESS  
IDENTIFICATION**

**PRESENTED BY**

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ASSOCIATE PROFESSOR  
UNIVERSITY OF NORTHERN IOWA**



# identification experts

Dr. Otto H. MacLin  
Eyewitness Laboratory  
University of Northern Iowa  
[Eyewitness-Identification.com](http://Eyewitness-Identification.com)

# experts

- **what can you expect from a scientific expert?**
  - **Guide You to Relevant Literature**
  - **Help Anticipate Prosecutor Responses**
  - **Evaluate Benefit of Expert Testimony**
  - **Suppress or Not Suppress Evidence**
  - **Help with Direct and Cross-Examination**
  - **Educate Judge and Jury on Process Issues**

# background

- **PhD in psychology**
  - **Social or Experimental**
  - **Typically NOT Clinical**
- **conduct related research**
- **teach related courses**

# scientific basis

- **witness variables**
  - Occur Prior to Police Arrival
  - Race, Weapon, Exposure time...
- **system variables**
  - Occur Once Police Arrive (911)
  - Separating & Interviewing Witnesses, Locating Suspects, Line-up Construction...

# eyewitness evidence

- **US department of justice guide**
  - **Procedural Guidelines**
  - **Based on Science**
- **treat as trace evidence**
  - **Example – Fingerprint Evidence**
  - **Susceptible to Contamination**
  - **DOJ Guidelines Reduce Contamination**

# trace evidence

- **secure scene**
- **collect & preserve evidence**
- **chain of physical custody**
  - **Bag, Tag, & Follow the Evidence**
  - **Avoid Tampering & Contamination**
  - **Example – Fingerprint Evidence**

# trace evidence

- **eyewitness evidence is trace**
  - **Cannot Bag, Tag, & Follow**
  - **EW Evidence Easily Contaminated**
  - **Many 'Handlers'**
- **poor paper trail**
  - **Need to Go Back & Follow Evidence**
  - **Possible Sources of Contamination**

# defense hypothesis

- If the defendant is innocent then why was he identified?
- The memory evidence was contaminated
- How did the contamination occur?
- How did the defendant become the suspect?

# DOJ Guide

- **DOJ guide lays out process to reduce contamination**
  - **Tells How to Go About It**
  - **Doesn't Say What Can Go Wrong**
    - **How Evidence is Contaminated**

# **that's evidence!**

- **Who handles the evidence?**
- **911 operators, police**
- **paramedics**
- **defense investigators & attorneys**
- **judges**

# evidentiary process

- **within scope of the investigation  
what are the possible sources of  
contamination?**
- **how to detect potential  
contamination from spontaneous  
recovery of memory evidence?**

# **contamination or spontaneous recovery**

- **Follow the witness reports and descriptions**
- **When do they change?**
- **Did procedure occur just before to contaminate memory?**
- **Converges on institutional memory**

# memory test

- **Lineups are a memory test**
  - Like a multiple choice test
  - Was it a biased test?
- **Be careful of identifications that are not a test of memory**
- **Non-identifications tell us something**

thank you

**STORYTELLING  
FOR  
LAWYERS**

**PRESENTED BY**

**MAUREEN KORTE, STORYTELLER  
DES MOINES, IOWA**

# Storytelling For Lawyers

November 16, 2010

Maureen J. Korte  
2:30 to 3:15

## Outline of Presentation

1. History of Storytelling  
5 minutes
2. Story of Hunter and discussion on using one story to prove innocence and guilt.  
10 minutes
3. The Six Senses  
15 minutes  
Exercise
4. Look for the Unusual  
10 Minutes – Story of Japanese Baker
5. Closing  
Question and Answer

Submitted by Maureen Korte

**ETHICS**

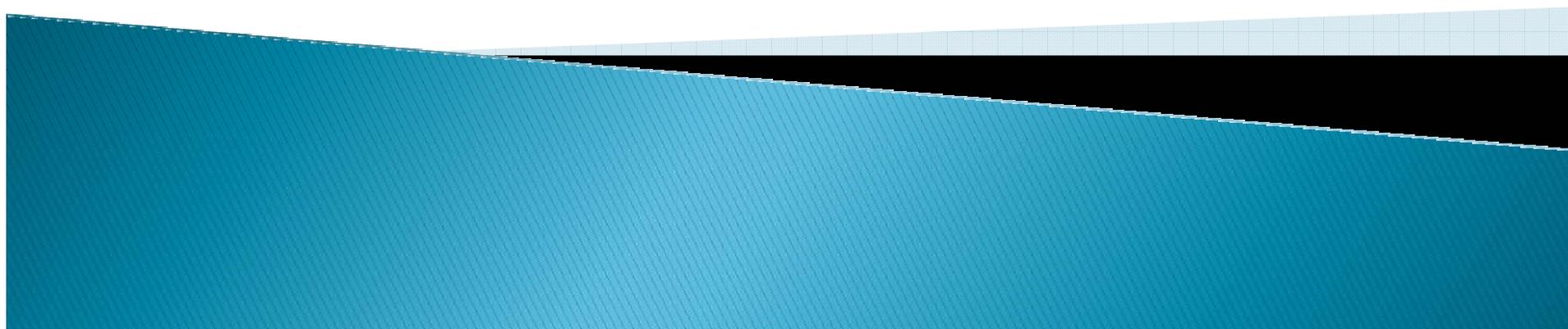
**DEALING WITH  
LAWYERS ASSISTANCE  
PROGRAM**

**PRESENTED BY**

**HUGH GRADY, DIRECTOR  
IOWA LAWYERS ASSISTANCE  
PROGRAM**

# Lawyers In Need of Assistance: The Impact on the Person, Ethics and the Profession

Hugh Grady  
ILAP Executive Director

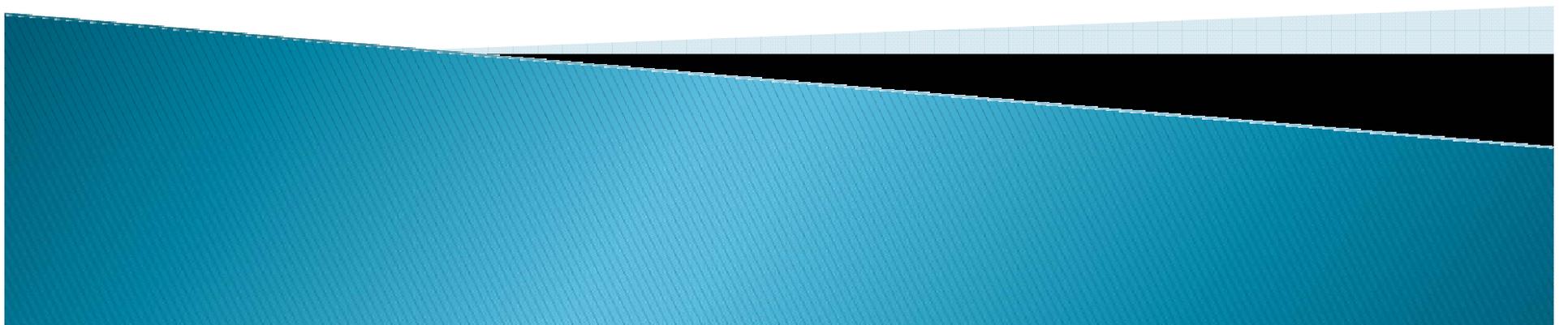


# Today's Outline

- Some facts about the profession
- What exactly is an impaired lawyer?
- Correlations between lawyer impairment and disciplinary chaos
- Balance – some materials provided by Linda Albert of WISLAP
- Golden Rules



# Scope of The Impairment Problem

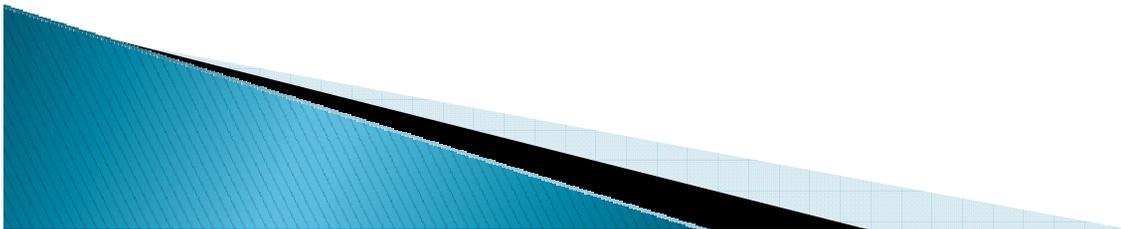


# Some Data

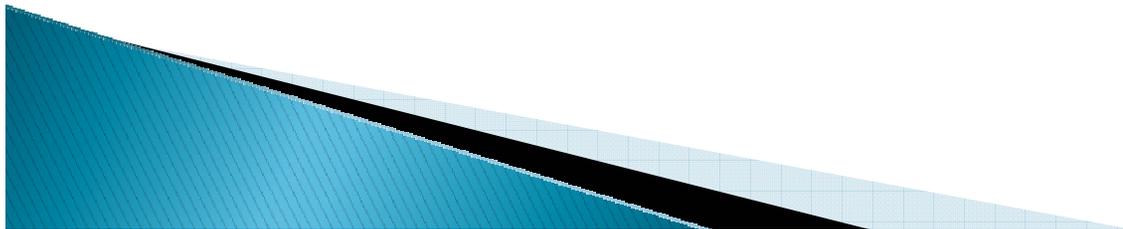
(International Journal of Law and Psychiatry)

## 1990 Sample of Washington Lawyers

- 19% suffered from depression compared to 3%–9% nationally
- 18% were drinkers, nearly double the national rate
- 26% reported cocaine use at some point in their lives
- Similar to results found in previous Arizona study

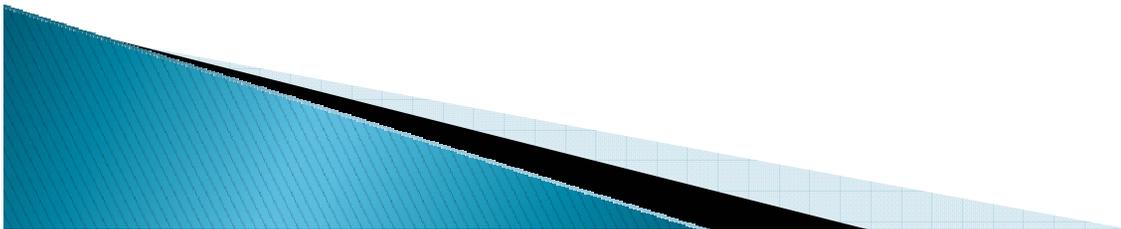


# SIGNS AND SYMPTOMS OF IMPAIRMENT



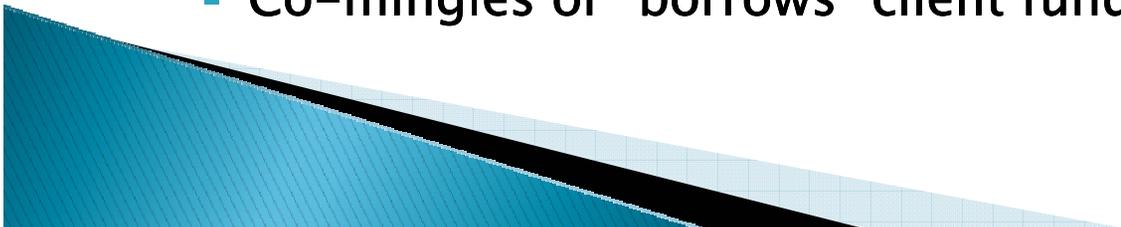
# Attendance

- Routinely arrives late or leaves early
- Regularly returns late from or fails to return from lunch
- Fails to keep scheduled appointments
- Fails to appear at depositions or court hearings
- Decreased productivity
- Has frequent sick days and unexplained absences



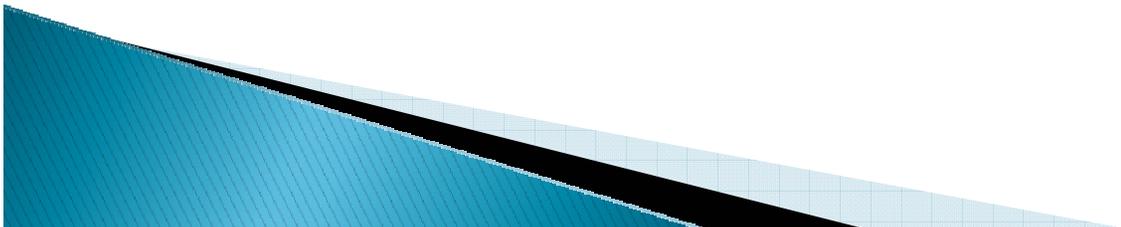
# Job Performance

- Procrastinates, pattern of missed deadlines
- Neglects prompt processing of mail or timely return of calls
- Decline of productivity
- Quality of work declines
- Overreacts to criticism, shifts blame to others, withdraws
- Smells of ETOH in office or during court appearances
- Client complaints
- Co-mingles or “borrows” client funds

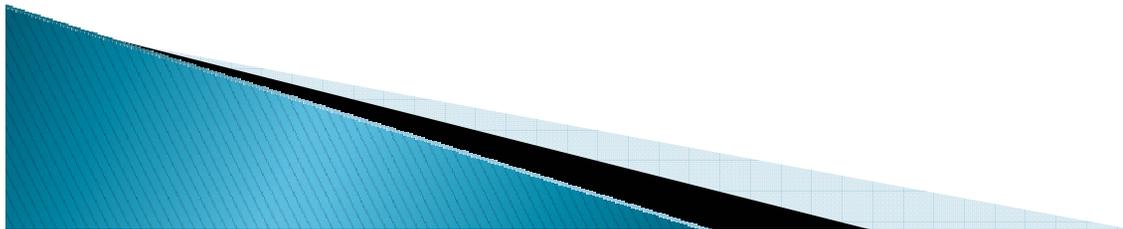


# Personal Behavior

- Gradual deterioration of personal appearance/hygiene/health
- Loses control at social gatherings or where professional decorum is expected
- Distorts the truth, is dishonest
- OMVI, public intoxication arrest or possession of illegal drug
- Poor time management, failure to timely file tax payments
- Pattern of family crisis
- Pattern of mood swings

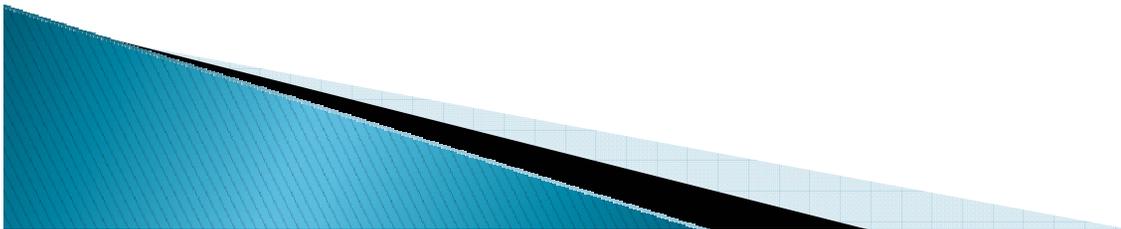


# IMPAIRMENT AND DISCIPLINE



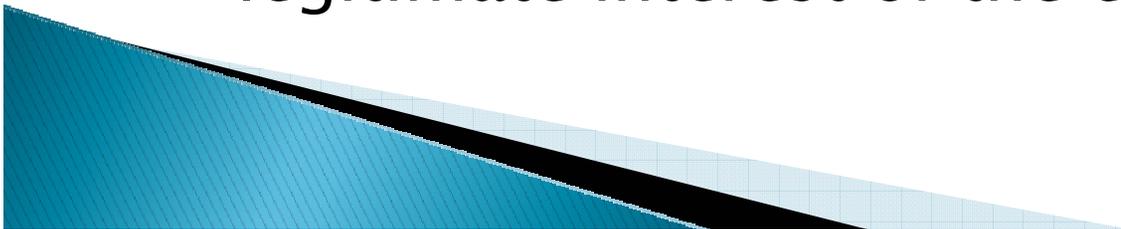
## Rule 32:1.3 Diligence

- A lawyers work must be controlled so that each matter can be handled competently.
- Perhaps no professional shortcoming is more widely resented than procrastination.



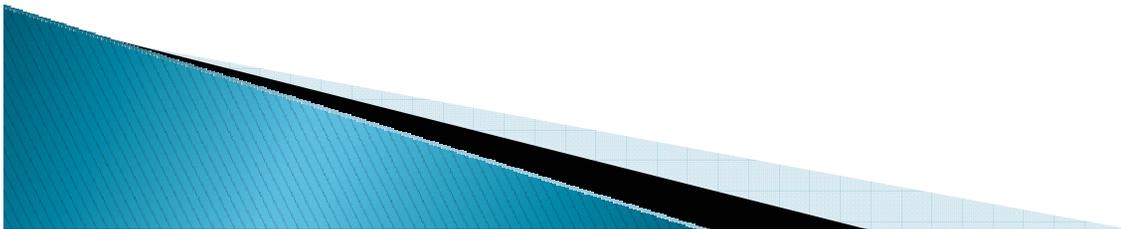
## Rule 32:3.2 Expediting Litigation

- Reasonable efforts to expedite litigation
- Consistent with interests of client
- Dilatory practices bring the administration of justice into disrepute
- Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client



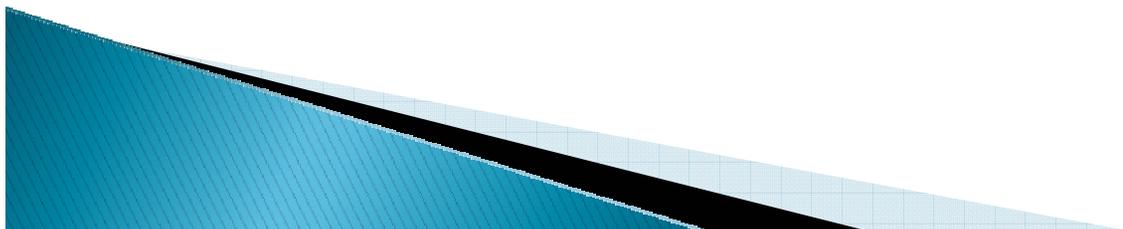
# Rule 32:3.3: Candor Toward The Tribunal

- A lawyer shall not knowingly make a false statement of fact or law to a tribunal.
- Or fail to correct a false statement of material fact or law previously made.



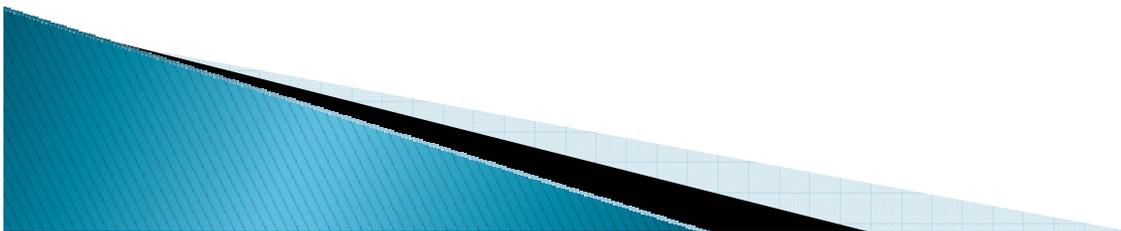
# Rule 32:5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

- Reasonable efforts to ensure compliance with Rules of Professional Conduct
- Knowledge and ratification of specific conduct
- Failure to take remedial action

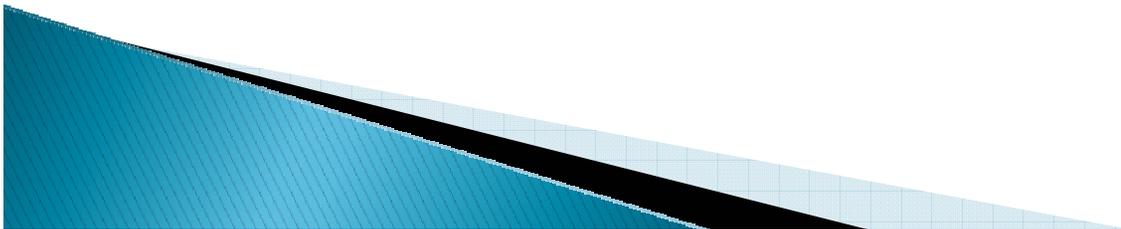


# Rule 32:8.3 Reporting Professional Misconduct

- Knowledge requires reporting when one lawyer has knowledge of another
- Judges
- Iowa Lawyers Assistance Program exception
- Confidentiality



**Yes, lawyers do need balance.**



# Balance is Worthwhile Work

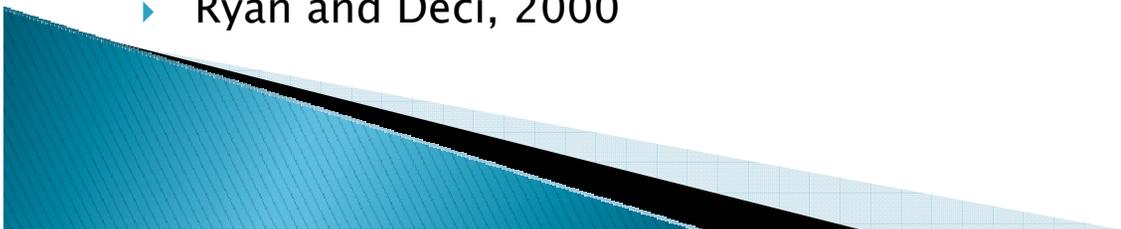


# LAWYERS ARE HUMAN BEINGS TOO

SDT = Three Basic Human Needs for Well-Being

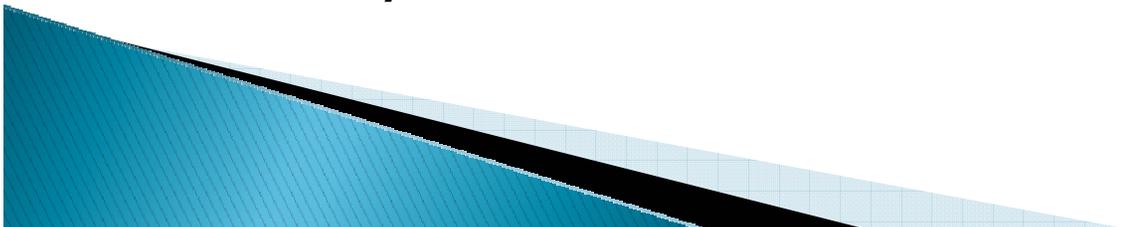
- Competence (What I do I do well)
- Good interpersonal relationships
- Autonomy (I have control over what I do)

▶ Ryan and Deci, 2000



# Influence of the Work Environment on Quality of Life

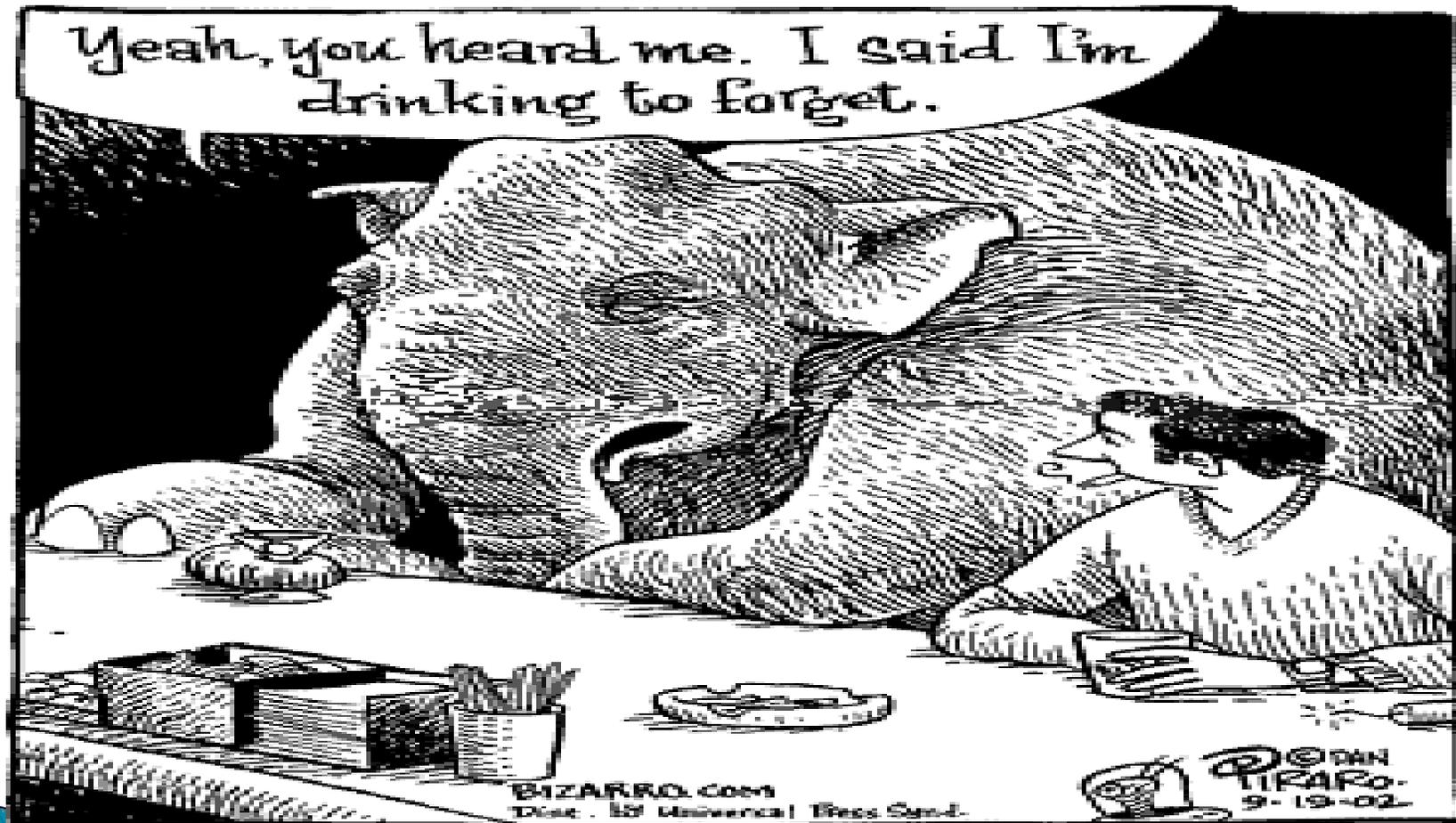
- Workload?
- Balance of demands?
- Responsibility versus authority?
- Financial balance?
- Is it “never enough”?
- Civility versus adversarial?



# Look/Feel Familiar?



# Feeling out of control?



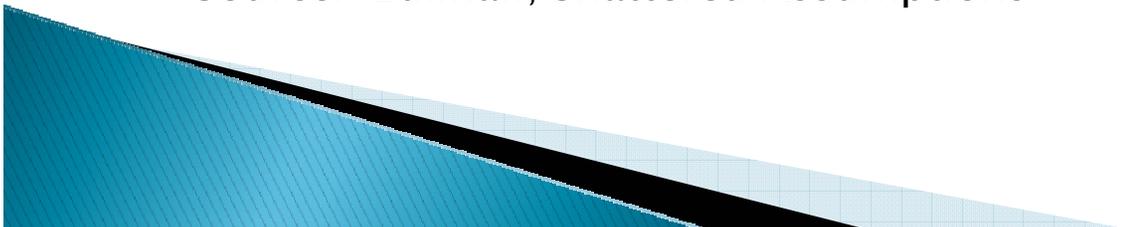
# WHAT DID YOU EXPECT?

- Are you doing what you expected to be doing at this time in your life?
- Is your work as an attorney what you thought it would be? Are you satisfied?
- Is your marriage/partnership what you assumed it would be? Satisfied? Happy?
- Are your children happy, healthy individuals making a contribution to society?

# The World is Benevolent

- The world is primarily a good place
- Optimism about the future
- Individuals distinguish themselves from the larger population; bad things happen but primarily to other people

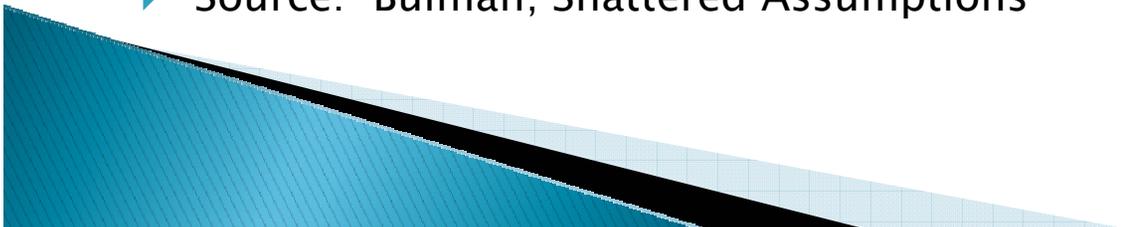
- Source: Bulman; Shattered Assumptions



# The World is Meaningful

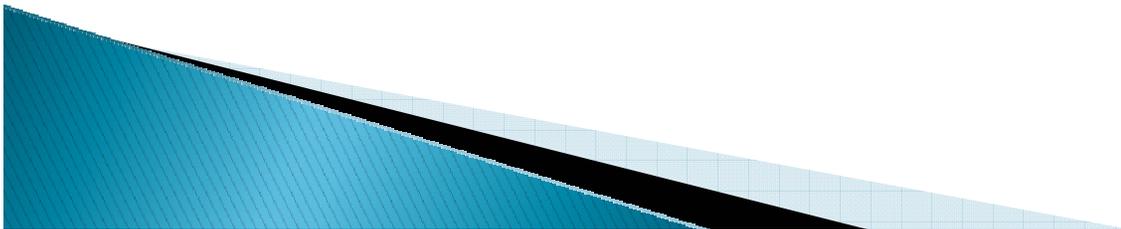
- There is a relationship between a person and what happens to them
- Principle of personal deservingness
- Melvin Lerner; the “just world hypothesis”
- Action–outcome contingency

▶ Source: Bulman; Shattered Assumptions



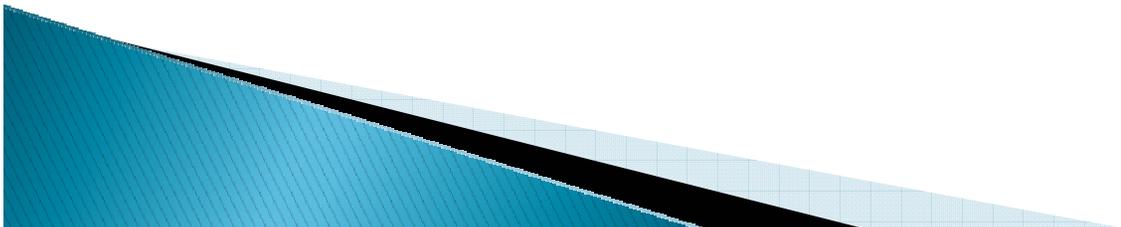
# The Self is Worthy

- Perceive ourselves as good, moral and capable individuals
- Due to being a reasonably good person bad things should not happen to me
- Source: Bulman; Shattered Assumptions



# How Does that Translate?

- Law School: I will achieve and do well
- Later: I will find a job that I excel at and enjoy (intrinsic)
- I will make a good living and have good things due to my achievements (extrinsic)
- I will be a good partner and have a good relationship/family
- Children will enrich my life



# Hum...Law School–the Other Bar (after first semester grades come out)





**“They didn’t teach us in law school that people are crazy!”**

# Your Partnership/Family



MIKE SHAPIRO

Of course I love you and the kids more than I love my job. I thought I sent you a memo on that.

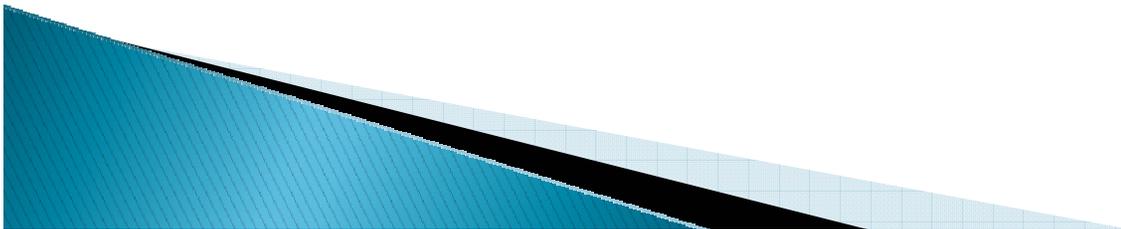
# Desperate for Balance



*"If I follow your advice and give up smoking, drinking, and men, will I really live longer, or will it just seem longer?"*

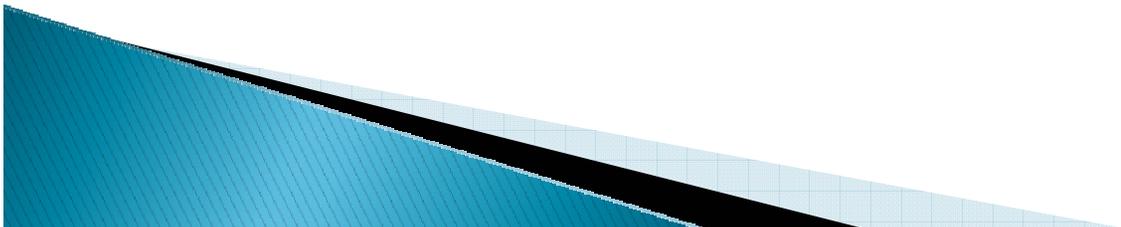
# Working Towards Acceptance

Acceptance doesn't mean I like it, it means "I get it" and I move to put a plan in place for survival and even to thrive



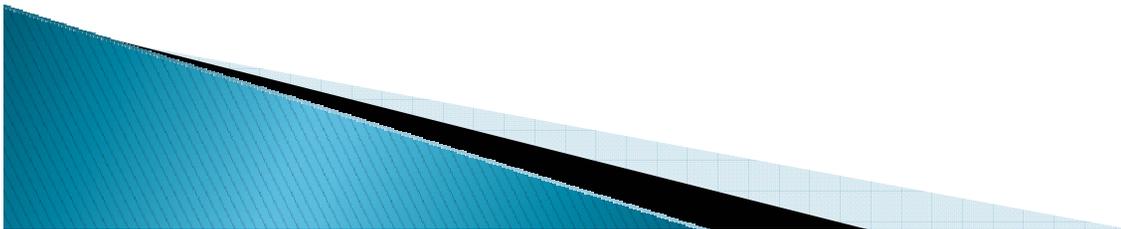
# What Hurts More than Helps?

- Alcohol or Drug abuse or dependence
- Gambling or other addictions
- Depression or other mental illness
- General sense of imbalance which decreases intrinsic motivation—may lead to the above
- Lack of purpose or connectedness



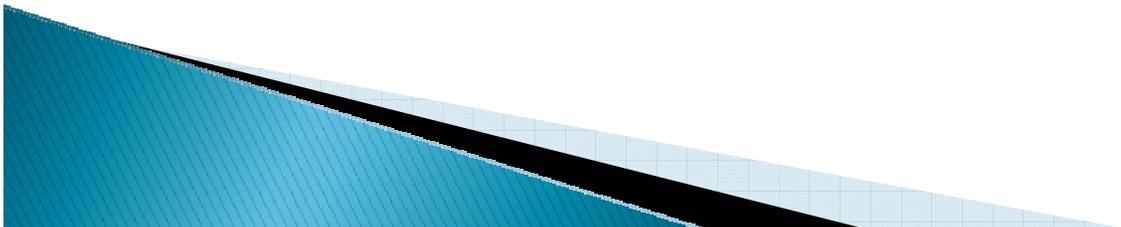
# Impact of Stress=Imbalance

- Substance abuse is a factor in 80% of disciplinary complaints... Sells, 1996
- Oregon 2001 study impaired attorneys had 28% discipline complaint rate versus 7% following treatment.



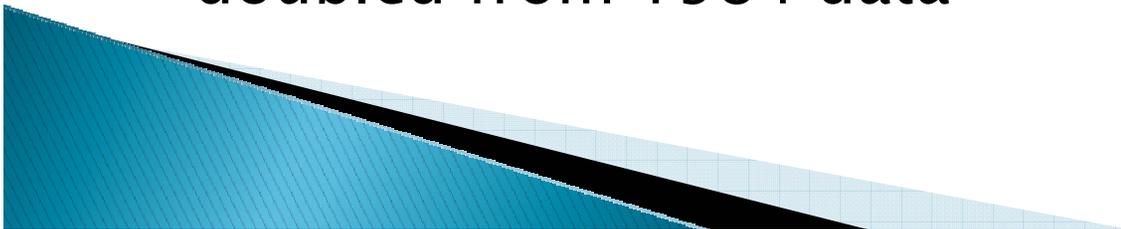
# Impact of Stress=Imbalance

- Georgetown Journal of Legal Ethics 2001 cited depression as a significant factor in lawyer discipline
- Louisiana study found 80% of their Client Protection Fund cases involved addictions including gambling.



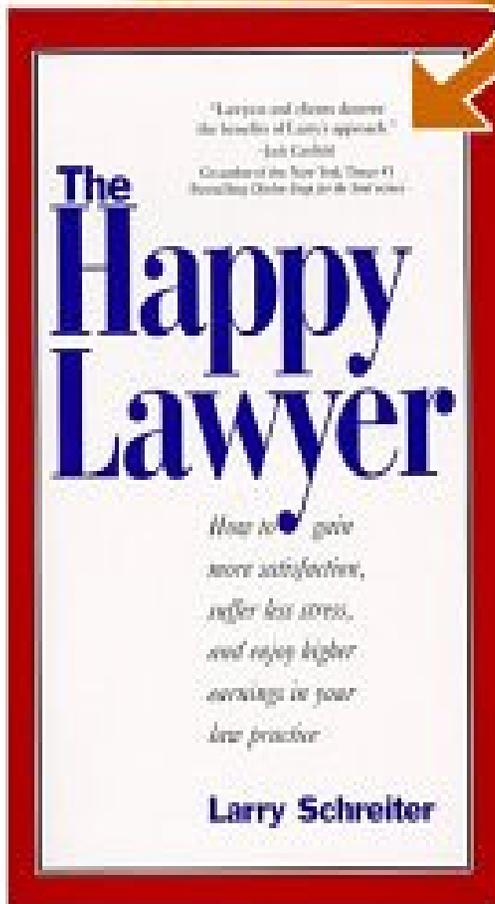
# Lawyering: An “At Risk Profession” – Seems to imply that “it’s hard”

- 1990 Johns Hopkins study ranked lawyers first in experiencing depression
- 44% of lawyers feel they don’t have enough time with families
- 54 % feel they don’t have enough time for themselves
- 1990 study illustrated job dissatisfaction data doubled from 1984 data



# There is No Magic

LOOK INSIDE!™



▶ Happiness is a by-product of personal interests, so look inside

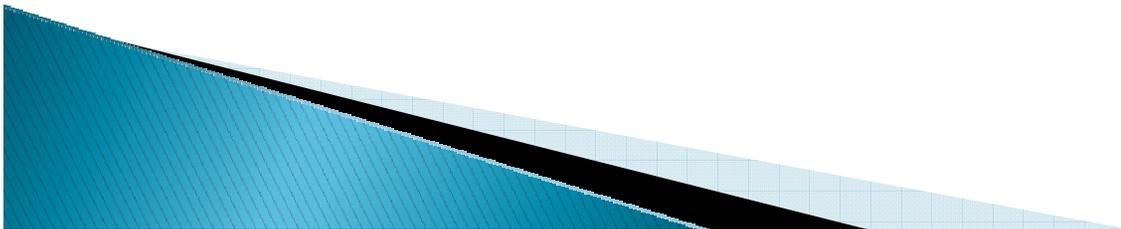
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# Lawyer Know Thyself

- “It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is most adaptable to change”.
- Charles Darwin



# Balance is Hard but Worthwhile Work



# The 20 Golden Rules

*Richard S. Massington, Miami Fl.*

1. Behave yourself
2. Answer the phone
3. Return your phone calls
4. Pay your bills
5. Hands off clients money
6. Tell the truth
7. Admit ignorance
8. Be honorable
9. Defend the honor of your fellow attorneys
10. Be gracious and thoughtful
11. Value the time of your fellow attorneys
12. Give straight answers
13. Avoid the need to go to court
14. Think first
15. Define your goals
16. There is no such thing as billing 3000 hours a year
17. Tell your clients how to behave
18. Solve problems – don't become one
19. Have ideals you believe in
20. Call your mother