



## Office of the Attorney General

Washington, D. C. 20530

September 24, 2010

The Honorable Nancy Pelosi  
Speaker  
United States House of Representatives  
Washington, DC 20515

Re: Pepper v. United States, No. 09-6822 (S. Ct.)

Dear Madam Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that, in a case currently pending before the Supreme Court, the Department of Justice has acknowledged the invalidity of 18 U.S.C. 3742(g)(2) in light of the Court's decision in United States v. Booker, 543 U.S. 220 (2005). U.S. Br. at 46-49, Pepper v. United States, No. 09-6822 (filed Aug. 31, 2010). A copy of the brief filed by the Department of Justice in the case is enclosed with this letter.

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. It provides that at resentencing "[t]he court shall not impose 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).

Because it broadly restricts the authority of district courts to vary from the applicable Guidelines range at resentencings, Section 3742(g)(2) is invalid after the Supreme Court's decision in Booker. To remedy the constitutional defect in the mandatory Guidelines, the 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 Supreme Court did not mention Section 3742(g)(2) in Booker, but Booker's rationale applies equally to that provision. 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. Moreover, Section 3742(g)(2) is

Honorable Nancy Pelosi  
Page 2

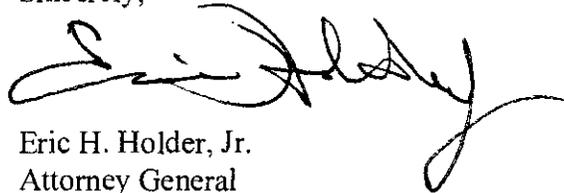
like the appellate review provisions that the Booker Court excised, in that Section 3742(g)(2)'s goal—namely, “to make Guidelines sentencing even more mandatory than it had been” before the PROTECT Act was enacted—has “ceased to be relevant.” Booker, 543 U.S. at 261.

Although the Department of Justice's conclusion that Section 3742(g)(2) is invalid flows from the Supreme Court's remedial decision in Booker, rather than from an independent decision reached by the Department of Justice that Section 3742(g)(2) would itself be unconstitutional as applied in this case, I have nevertheless determined that it would be appropriate to advise you of the matter.

The brief of the amicus curiae in support of the judgment in Pepper is currently due to be filed on September 30, 2010, and reply briefs are currently due to be filed on November 1, 2010. The case is scheduled for oral argument in the Supreme Court on December 6, 2010.

Please let me know if we can be of further assistance in this matter.

Sincerely,



Eric H. Holder, Jr.  
Attorney General

Enclosure