No. 09-6822

In the Supreme Court of the United States

JASON PEPPER, PETITIONER

v.

UNITED STATES OF AMERICA

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

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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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.[1]

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

[1] 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.[2] 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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[2] 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 resentenced 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 resentencing 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.[3]

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[3] 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.[4]

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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[4] 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*").[5] To the con-

[5] 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. *Walterman*, 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. *Walterman*, 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.[6]

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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[6] 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.[7]

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

[7] 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 *Ashe*, 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").[8]

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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[8] 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*.[9]

[9] 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.[10]

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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[10] 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").[11] 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*.[12] 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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[11] 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.

[12] 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.[13] "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).

[13] 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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AUGUST 2010

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—

(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).)