

## At a Federal Resentencing, Must a New Judge Follow a Prior Judge's Initial Sentencing Findings and May the Defendant's Post-Sentencing Rehabilitation Serve as a Basis for a Reduced Sentence Under Applicable Law?

### CASE AT A GLANCE

This case is another follow-up to the Supreme Court's landmark ruling in *United States v. Booker*, 543 U.S. 220 (2005)—which declared judicial fact-finding within the mandatory federal Sentencing Guidelines unconstitutional and remedied this problem by making the Guidelines “effectively advisory.” Since *Booker*, the Supreme Court in a series of decisions has stressed that district judges now have broad discretion at initial sentencings; this case presents the Court with its first opportunity to address the scope of a district judge's discretion after an initial sentence has been reversed on appeal and remanded for resentencing.

***Pepper v. United States***  
**Docket No. 09-6822**

**Argument Date: December 6, 2010**  
**From: The Eighth Circuit**

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### ISSUES

Is a new judge, when resentencing a defendant after remand, obligated under the “law of the case” doctrine to follow sentencing findings issued by the original sentencing judge?

May a federal district judge consider a defendant's rehabilitation after his initial sentencing as a factor in support of a reduced sentence in accord with statutory sentencing instructions set forth in 18 U.S.C. § 3553(a)?

### INTRODUCTION

Though the Supreme Court has considered a variety of sentencing matters in recent terms, it has not previously had occasion to explore the unique set of issues that can arise at a federal resentencing after an initial sentence has been reversed and remanded. In this case, the Court will address whether a new judge is obligated under the “law of the case” doctrine to follow at a resentencing the findings of the original sentencing judge, and also whether a federal district judge can consider a defendant's rehabilitation after his initial sentencing as a factor in support of a reduced sentence.

This case is most obviously important and consequential because it presents the first opportunity for the Supreme Court to examine and resolve procedural and substantive issues that can often arise in resentencing proceedings. The case could also have broader impact even for all initial sentencings if the Supreme Court sets forth some additional general interpretive principles for the statutory provisions of 18 U.S.C. § 3553(a), which govern all federal sentencing proceedings.

### FACTS

The procedural story surrounding the initial sentencing and multiple resentencings of Jason Pepper is far more intricate than his basic drug crime. Pepper in 2003 got involved in methamphetamine distribution, and he was ultimately charged and pleaded guilty in the United States District Court for the Northern District of Iowa to conspiring to distribute more than 500 grams of methamphetamine.

Though his offense of conviction carried a 10-year mandatory minimum sentencing term, Pepper qualified for the statutory “safety valve” provision, making this minimum term inapplicable. Via a plea agreement, the parties determined that the applicable sentencing range under the then-still-mandatory federal Sentencing Guidelines was 97 to 121 month. But prosecutors further agreed to recommend, pursuant to Guideline § 5K1.1, a downward departure from that range based on Pepper's substantial assistance to government authorities concerning the criminal activities of others.

U.S. District Judge Mark Bennett, relying on the defendant's substantial assistance and other mitigating factors, in March 2004 initially sentenced Pepper to 24 months of imprisonment followed by five years of supervised release. The government appealed to the Eighth Circuit, which reversed on the ground that it was inappropriate for the district court to have considered factors beyond Pepper's assistance to authorities when departing down from the then-mandatory Guidelines.

By the time of resentencing, Pepper had completed the initial prison term of 24 months and had been doing well back in society; in addition, the Supreme Court's landmark ruling in *United States v. Booker*, 543 U.S. 220 (2005), had made the federal Sentencing Guidelines "effectively advisory." In May 2006, Judge Bennett resentenced Pepper and again imposed a sentence of 24 months of imprisonment. Judge Bennett reached this result by first granting a 40 percent downward departure to reward Pepper for his substantial assistance to authorities (which reduced the bottom of the advisory Guidelines range from 97 to 58 months), and then by granting a further 59 percent downward variance under 18 U.S.C. § 3553(a). This additional downward variance was based principally on Pepper's rehabilitation since his initial sentencing and his lack of a violent history. Judge Bennett relied on evidence that Pepper had completed a drug treatment program while in prison and had maintained employment and enrolled in community college since his release. In addition, Pepper's probation officer expressed the view that a 24-month sentence would be reasonable in light of Pepper's substantial assistance and post-sentencing conduct.

The government again appealed Pepper's sentence, and the Eighth Circuit again reversed. In this second reversal, the Eighth Circuit decided that Judge Bennett had not abused his discretion when granting a 40 percent downward departure for Pepper's substantial assistance to authorities, but that he had abused his discretion in granting a sizable further downward variance. In coming to this conclusion, the Eighth Circuit declared that evidence of Pepper's post-sentencing rehabilitation was an "impermissible factor to consider in granting a downward variance." The Eighth Circuit 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."

Because Judge Bennett had expressed a reluctance to sentence Pepper a third time if the case was again remanded, the Eighth Circuit directed that the case be assigned to a different judge for resentencing. Thereafter, in January 2008, the Supreme Court vacated the Eighth Circuit's judgment and remanded the case to the court of appeals for further consideration in light of the Court's decision in *Gall v. United States*, 552 U.S. 38 (2007). On remand, the Eighth Circuit ruled that *Gall* did not alter its holding that the district court had committed procedural error in failing to provide an adequate justification for its significant downward variance at resentencing.

Pepper was thereafter resentenced again, but this time before a different district judge. The parties again agreed that the applicable Guideline range was still 97 to 121 months. Chief U.S. District Judge Linda Reade decided that, in giving Pepper sentencing credit for his substantial assistance, she was not bound to grant the same 40 percent departure that had been applied by Judge Bennett in 2006. Chief Judge Reade reasoned that the Eighth Circuit had "simply indicated that a 40 percent downward departure was not an abuse of discretion," and she instead decided this time around to award Pepper with only a 20 percent reduction in his advisory guidelines range so that the range would be 77 to 97 months of imprisonment. Turning then to Pepper's request for an additional downward variance, Chief Judge Reade observed that the Eighth Circuit had ruled that post-sentencing rehabilitation is not a permissible ground for a variance, and she was unmoved by other mitigating factors stressed by Pepper.

Thus, in 2009, Chief Judge Reade resentenced Pepper to 77 months of imprisonment and forced him to return to federal prison.

Upon Pepper's appeal, the Eighth Circuit affirmed this new lengthier prison sentence. The Circuit panel ruled that the "law of the case" doctrine did not require that Chief Judge Reade give Pepper the same reduction for his substantial assistance that Judge Bennett had given him in a prior sentencing. The Eighth Circuit also affirmed Chief Judge Reade's decision to deny any further reduction to Pepper based on his positive life changes since his initial sentencing.

Pepper sought further review from the Supreme Court, and at the certiorari stage the solicitor general's office agreed with Pepper that it was a mistake for the Eighth Circuit to conclude that post-sentencing rehabilitation is not a permissible ground for a variance. Though the solicitor general urged the justices to vacate and remand the case to the Eighth Circuit, the Supreme Court decided to grant certiorari and hear full argument. Soon thereafter, the Supreme Court appointed Adam G. Ciongoli, a New York lawyer who once clerked for Justice Alito, to present a merits brief and to argue in support of the judgment below. (Upon the grant of certiorari, Pepper returned to Chief Judge Reade to request release on bail pending the Supreme Court's consideration of his case. Chief Judge Reade granted this release request over the summer.)

## CASE ANALYSIS

The justices will hear three different perspectives on what Chief Judge Reade and the Eighth Circuit did right and wrong during the final resentencing of this long-running case. Pepper contends that Chief Judge Reade was obligated under the "law of the case" doctrine to give him the same sentence reduction for his substantial assistance that Judge Bennett gave at his first resentencing and that his rehabilitation after initial sentencing is a permissible sentencing factor under applicable law. The government defends Chief Judge Reade's decision at resentencing to consider anew how much of a reduction should be given to Pepper based on his assistance to authorities, but it agrees with Pepper's claim that post-sentencing rehabilitation is a permissible sentencing factor. And the amicus appointed to defend the decision below asserts that the Eighth Circuit properly ruled that post-sentencing rehabilitation is not a permissible sentencing factor even though the federal Sentencing Guidelines are now advisory.

In support of his arguments, Pepper asserts that a defendant's post-sentencing rehabilitation is a permissible ground for varying from a guideline range. Pepper contends that the contrary ruling of the Eighth Circuit "conflicts with the governing statutes, 18 U.S.C. §§ 3661 and 3553(a)[, . . . and] is inconsistent with the abuse-of-discretion standard of appellate review established" in *Booker* and *Gall*, and lacks any sound justifications.

Pepper's strongest claims here have a statutory foundation. Stressing § 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence," Pepper argues that the Eighth Circuit's ruling creates an unlawful "limitation" on a district court's power to consider the background, character, and conduct of a defendant at sentencing.

Pepper also contends that the Eighth Circuit’s rule is inconsistent with § 3553(a)’s mandate that a district court “shall consider,” among other factors, “the history and characteristics of the defendant.”

Pepper further asserts that the adoption of a categorical rule against the consideration of post-sentencing rehabilitation is inconsistent with the deferential standard of appellate review developed by the Supreme Court in *Booker* and *Gall*. He also claims that the “Eighth Circuit’s justifications for its rule—that information about post-sentencing rehabilitation is irrelevant, that considering it creates improper disparities at sentencing, and that it interferes with the functions of the Bureau of Prisons—are simply incorrect.”

Turning to the “law of the case” issue, Pepper also argues that the Eighth Circuit erred by concluding that Chief Judge Reade was not bound by Judge Bennett’s judgments concerning the sentencing reduction to reward Pepper’s assistance to the government. Pepper explains that the “law of the case” doctrine provides, as a general rule, that a district judge “should not alter another district judge’s previous rulings in the case absent special circumstances and a compelling justification.” And in this case, continues Pepper, “the record shows no new circumstances or any compelling reason for this change, but only Chief Judge Reade’s different view of the same evidence upon which Judge Bennett relied.” Pepper contends that this doctrine is especially important in the sentencing setting because of the importance of “assuring that there be no appearance of arbitrariness or injustice in sentencing, due merely to a change in judicial personnel assigned to a case.”

The government concurs with Pepper’s contention that a defendant’s rehabilitation after his original sentencing is a permissible basis for a downward variance at resentencing. In addition to stressing the same statutory provisions noted by Pepper, the government notes some of the legal history surrounding this issue. As it explains, “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”; and though in “2000, the Sentencing Commission promulgated a policy statement providing that such rehabilitation could not provide the basis for a departure . . . the decision in *United States v. Booker*, 543 U.S. 220 (2005), and its progeny, [now mean] that policy statement is not binding, but rather is a factor to be considered by a sentencing court in determining an appropriate sentence.”

The government also explains that the Eighth Circuit’s concern with avoiding unwarranted sentencing disparities was misplaced because “distinguishing between defendants whose sentences are reversed on appeal and other defendants is not necessarily ‘unwarranted.’” The government further expresses concern that “the logic of the court of appeals approach” could problematically entail that “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.” According to the government, “[a]ll 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).”

But the government does not adopt or support Pepper’s position on the “law of the case” doctrine. In the government’s view, Chief Judge Reade’s “decision to grant only a 20 percent departure was consistent with the law of the case, because the court of appeals had not held in its previous opinions . . . that a 40 percent departure was necessary.” The Eighth Circuit’s general remand, according to the government “left the district court free to exercise its discretion differently at the 2009 resentencing.” Chief Judge Reade was therefore free to conduct “a de novo assessment of the factors set forth in the Guidelines for determining how much of a sentencing reduction should be given for a defendant’s substantial assistance.”

The appointed amicus defending the Eighth Circuit’s work on the post-sentencing rehabilitation issue also relies on statutory provisions, but he contends that the “Eighth Circuit’s holding that a district court may not consider evidence of post-sentencing rehabilitation in resentencing is not only permissible—it is compelled by Congress’ unambiguous language in 18U.S.C. § 3742(g)(2).” The amicus stresses that “the plain language of 18 U.S.C. § 3742(g)(2), which governs sentencing upon remand, clearly prohibits district courts from granting a variance based on grounds that were not ‘specifically and affirmatively included in the written statement of reasons required by § 3553(c) in connection with the previous sentencing of the defendant prior to the appeal.’” 18 U.S.C. § 3742(g)(2)(A). Post-sentencing rehabilitation necessarily cannot have been considered at the original sentencing and, therefore, according to the amici, it “cannot serve as the basis for a variance during resentencing.” Rounding out this statutory argument, the appointed amicus asserts that this statute “reflects a variety of important and permissible policy judgments by Congress, not least of which is to promote an orderly and effective appellate process by limiting district courts’ ability to circumvent appellate mandates using new information.”

Pepper and the government and some additional amici all contend that the arguments put forth by the appointed amicus are inconsistent with the advisory nature of the Guidelines after *Booker*. They suggest that the appointed amicus’s reading and application of 18 U.S.C. § 3742(g)(2) risks recreating a mandatory guideline sentencing structure for resentencing and thus raises constitutional concerns in light of the *Booker* ruling. They further argue that such a reading runs counter to the Court’s own approach to the post-*Booker* sentencing system in a series of post-*Booker* rulings.

## SIGNIFICANCE

Even though technically concerning only the procedures and substance of a federal resentencing proceeding, a variety of important constitutional, statutory, and policy issues concerning federal sentencing practice and procedure are potentially implicated in this case. If the justices issue an opinion that decisively embraces the broadest statutory or policy contentions put forth by the parties, this case could end up having a significant impact and long-term consequences for various aspects of the modern post-*Booker* federal sentencing system. But because the Court in recent years has tended toward narrower rulings in many statutory-based sentencing cases, I am inclined to predict that the Court in *Pepper* may largely seek to avoid addressing the broader constitutional and policy principles developed in some of the briefs.

Still, even if the justices seek to confine the scope and reach of their ruling in *Pepper*, this case will still be important and consequential to the hundreds of federal resentencing proceedings that take place every year. The basic ground rules for resentencings have been largely created by circuit courts; any distinctive aspects of the Supreme Court's ruling in *Pepper* might directly alter these resentencing ground rules for district courts and could even indirectly impact how circuit courts conduct and resolve sentencing appeals.

Though the precise legal issues before the Court in *Pepper* are relatively narrow, the sympathetic facts presented by the defendants and the broader sentencing policy issues raised in the briefs might well prompt some of the justices to use *Pepper* to opine more broadly on the current state and potential future direction of the federal sentencing system.

Last but not least, the case is likely to provide at least some indication of the justices' current views as to whether its landmark ruling *Booker* ought to have special applications or implications beyond initial sentencings in federal court.

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*PREVIEW of United States Supreme Court Cases*, pages 135–138.  
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