No. 09-6822

In the Supreme Court of the United States

JASON PEPPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari To United States Court of Appeals For The Eighth Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

Families Against Mandatory Minimums (FAMM) is a national nonprofit, nonpartisan organization. FAMM's mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing thousands of individuals whose lives have been affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM promotes sentencing policies that give judges discretion to distinguish among differently situated defendants and to sentence them according to their role in the offense, the seriousness of the offense, their potential for rehabilitation, and other characteristics of the offender. FAMM believes that the punishment always must fit the crime—and the criminal. FAMM's vision is a nation in which sentencing is individualized, humane, and sufficient but not greater than necessary to impose just punishment, secure public safety, and support the successful rehabilitation of offenders.

FAMM submits this brief because the Eighth Circuit's categorical rule prohibiting the consideration of post-sentencing rehabilitation on resentencing

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

is an arbitrary and unjustified limitation on the discretion of the district courts. That rule, which most other circuits have properly rejected, has no support in the laws that Congress has enacted and is at odds with the sentencing scheme put in place by this Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005), and *Gall v. United States*, 552 U.S. 38 (2007). More broadly, as the facts of this case powerfully demonstrate, the Eighth Circuit's misguided approach perversely harms the very individuals that a just and fair sentencing system ought to reward—those who have made significant and successful efforts to turn their lives around.

SUMMARY OF ARGUMENT

This case principally presents the question whether a federal district court may consider a defendant's post-sentencing rehabilitation in fashioning an appropriate sentence after the original sentence has been set aside on appeal. That is not a difficult question. As even the Government now concedes, the answer is yes. That follows from the text of 18 U.S.C. § 3553(a), from this Court's decisions in *Booker* and *Gall*, and from fundamental philosophical principles that have long been integral to the American criminal-justice system.

Since this Court rendered the sentencing guidelines advisory and made appellate review of all sentences deferential, district courts have broad discretion to vary from the guidelines as appropriate to meet the criteria set out in section 3553(a). Appellate courts do not have roving commissions to categorically preclude sentencing courts from considering particular factors. And it was especially inappropriate for the Eighth Circuit to prohibit the use of post-sentencing rehabilitation evidence.

Taking account in the sentencing process of a defendant's successful transformation into a law-abiding citizen is compelled by the principle of parsimony—a philosophical maxim with deep roots that is at the heart of the post-*Booker* sentencing regime. As distilled by Congress into federal law, the parsimony principle requires courts to "impose a sentence sufficient, *but not greater than necessary*, to comply" with the purposes of punishment enumerated in section 3553(a)(2). Each of those purposes is served when a rehabilitated defendant sees his positive strides reflected in a lesser sentence. And each is frustrated by a holding that such rehabilitation is categorically irrelevant in resentencing proceedings. The Eighth Circuit's ruling is also contrary to Congress' directive that sentencing courts must consider "the history and characteristics of the defendant." In short, there is no legal or moral reason why such rehabilitation should be ignored just because it took place after the original sentence was imposed.

But the problems with the Eighth Circuit's approach go even deeper. Requiring courts to close their eyes to the reality of a defendant's life experiences is contrary to the basic requirements of a humane system of justice, one that allows for the individualized consideration of individual circumstances and insists on the treatment of all people, including criminal defendants, as ends rather than as means. A defendant must be sentenced based on who he is, not just who he was. Those principles are part of the fabric of federal sentencing law. A sentence imposed by a court that has blinded itself to a defendant's rehabilitation is all but guaranteed to be greater than necessary to achieve its purposes—and is therefore unjust and unlawful. That is certainly so of the sentence that Mr. Pepper received in this case.

The principal justifications offered for refusing to consider post-sentencing rehabilitation do not withstand scrutiny. The idea that courts are limited to evidence available at the time of the original sentencing is simply wrong. It is contrary to this Court's cases, which make clear that intervening events can and should be considered on resentencing. It is also at odds with the Eighth Circuit's own practices and with basic notions of procedural fairness. Nor does accounting for a defendant's rehabilitation after sentencing introduce unwarranted disparity. Federal law seeks to discourage judges from giving different sentences to defendants with similar records. But that concern is not implicated by allowing sentencing courts to consider rehabilitation, whenever it occurs. To the contrary, it is the Eighth Circuit's approach that leads to improper disparity, allowing some offenders to see their rehabilitation reflected in lesser sentences while forcing courts to turn a blind eye to others' comparable efforts. That result, which excessively punishes people like Mr. Pepper in service of an artificial equality, is unjust and indefensible.

Finally, the inequity of ignoring Mr. Pepper's rehabilitation was compounded by the Eighth Circuit's unwarranted reassignment of this case to a new judge, who failed to honor Judge Bennett's prior rulings that the appellate court had not questioned. The Eighth Circuit took this case away from Judge Bennett for doing nothing more than echoing this Court's statements about the need for district court sentencing discretion. The outcome was a significantly increased sentence, which took Mr. Pepper away from his productive life and forced him to return to prison. This Court should reject a result that allows such reassignments to evade the limits on appellate review imposed by *Booker* and *Gall*.

ARGUMENT

I. Under The Advisory Guidelines Regime, Federal Courts Are Permitted To Account for Post-Sentencing Rehabilitation.

In three successive opinions in this case, the Eighth Circuit announced and applied the following rule: "Pepper's post-sentencing rehabilitation was an impermissible factor to consider in granting a downward variance." J.A. 172 (*Pepper II*); J.A. 217-18 (*Pepper III*); J.A. 376-77 (*Pepper IV*). The court of appeals did not doubt that Mr. Pepper had significantly rehabilitated himself since his release from prison. Nor did it question the sincerity of Mr. Pepper's efforts or their lasting effect. J.A. 376 ("We commend Pepper on the positive changes he has made in his life."). The Eighth Circuit instead deemed those efforts categorically irrelevant to the district court's resentencing determination.

In so holding, the court of appeals never engaged with the text of section 3553(a) or with this Court's decisions in *Booker* and *Gall*. Nor did the other cases on which the panel relied. See *United States v. McMannus*, 496 F.3d 846, 851-52 (8th Cir. 2007); *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007). That is perhaps not surprising. The Eighth Circuit's rule is at odds with the statutory text and with the broad discretion that district courts now have to fashion sentences appropriate to the particular circumstances of individual defendants. It is also contrary to the "overarching" congressional requirement of parsimony at the heart of section 3553(a). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

A. District courts now have broad discretion to make individualized sentencing determinations.

Before this Court's decision in *Booker*, federal sentencing courts faced two conflicting commands. On the one hand, they were required to "consider" an enumerated list of factors, including (but not limited to) the applicable guidelines range, and to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment set out in the statute. 18 U.S.C. § 3553(a). On the other hand, they were instructed to "impose a sentence of the kind, and within the range," provided by the applicable guidelines. § 3553(b)(1).

Booker resolved that tension decisively in favor of section 3553(a). The Remedial Opinion severed and excised section 3553(b)(1), along with section 3742(e), which mandated de novo appellate review of sentences outside the guidelines range. *Booker*, 543 U.S. at 259. Those provisions made the guidelines mandatory and used rigid appellate review to make them "even more mandatory." *Id*. at 261. *Booker* made clear that those limits on the district courts' discretion were no longer appropriate. The Court viewed a purely advisory guidelines system as the best way to avoid "excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id*. at 264-65.

In the wake of *Booker*, federal sentencing policy is governed not by the guidelines but by the broader dictates of section 3553(a). This Court explained in *Gall* how this new system works:

> As a matter of administration and to secure nationwide consistency, the Guidelines

> should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.

Gall, 552 U.S. at 49-50 (internal citations omitted).

Three aspects of this system are especially important here. First, the sentencing court must consider "all" of the section 3553(a) factors in determining the sentence. Second, that court "must make an individualized assessment based on the facts presented." Third, the sentencing court has broad leeway to determine that its individualized assessment of the various factors calls for a sentence outside the advisory guidelines range. Thus, while the guidelines continue to play a role, "there is no longer any limit comparable" to those that existed before *Booker* "on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a)." *Irizarry v. United States*, 553 U.S. 708, 128 S. Ct. 2198, 2202-03 (2008).

The district courts' newfound discretion is reinforced by the limited and deferential role allotted to the courts of appeals. Whether the sentence is inside or outside the guidelines range, "appellate review of sentencing decisions is limited to determining whether they are 'reasonable.'" *Gall*, 552 U.S. at 46. For non-guidelines sentences

> the court [of appeals] may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give *due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance*. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Id. at 51 (emphasis added).

In this new system, the factors a district court may consider in imposing a sentence are dictated by section 3553(a). So long as consideration of a given factor is supported by the statute (and not forbidden by the Constitution), the courts of appeal have no business depriving sentencing courts of their discretion to rely on that factor. Cf. *Williams v. United States*, 503 U.S. 193, 205 (1992) ("except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence'") (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983)).

These same rules apply in resentencing proceedings. The statute instructs that following a remand of an erroneous sentence, the district court "shall re-

sentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals." 18 U.S.C. § 3742(g).[2] Cf. *Dillon v. United States*, 130 S. Ct. 2683, 2690-91 (2010) (distinguishing *resentencing* under section 3742(g) from sentence *modification* under section 3582(c)). In a resentencing, the district court is bound by the procedural and substantive commands of section 3553(a), just as in any other sentencing proceeding. And the constraints that *Gall* imposes on appellate review apply equally in this context.

B. The parsimony directive requires courts to take account of rehabilitation, whenever it occurs.

These principles decide this case. Nothing in section 3553(a) bars district courts from considering post-sentencing rehabilitation in fashioning an appropriate sentence. To the contrary, considering rehabilitation, whenever it occurs, is necessary to comply with the statute's core substantive command to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in section 3553(a)(2). 18 U.S.C. § 3553(a). This provision is an elegant distillation of the philosophical idea of parsimony, a bedrock principle of American criminology from the founding era to the present day.

1. The parsimony principle can be traced back at least to Montesquieu, who wrote in 1748 that "[a]ll

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[2] Section 3742(g)(2) purports to limit district courts' discretion on remand to impose a sentence below the applicable guidelines range. But, as the Government now concedes, that provision suffers from precisely the same infirmities that led the Court in *Booker* to excise Section 3742(e). Br. for the United States 48 ("Section 3742(g)(2) is invalid after *Booker*.").

punishment which is not derived from necessity is tyrannical." BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, Bk. XIX.14 (G. Bell & Sons, Ltd. 1914). This simple but profound idea was immensely influential on generations of later thinkers. Writing in 1764, the pioneering criminologist Cesare Beccaria acknowledged his debt to Montesquieu:

> Every punishment which does not arise from absolute necessity, says the great Montesquieu, is tyrannical. A proposition which may be made more general thus. Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. It is upon this then, that the sovereign's right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.

CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 20 (Adolph Caso ed. 1984). On this basis, Beccaria argued that criminal punishments must be strictly limited to the minimum necessary to preserve public peace and security, for "all that extends beyond this, is abuse, not justice." *Id.*

The English philosopher Jeremy Bentham advocated a similar principle, which he justified in more overtly utilitarian terms. "The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore *The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here*

given." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES AND MORALS OF LEGISLATION, ch. XIV, para.13 (1781). These thinkers and their ideas had great influence on the founding generation in America. "In every colony, the ideas and writings of such social critics and reformers as Voltaire, Rousseau, Montesquieu, and Beccaria were known and often quoted." Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 813 (1975); see also *Ullmann* v. *United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting) ("Beccaria and his French and English followers influenced American thought in the critical years following our Revolution.").

In the twentieth century, influential criminal law reformers such as Norval Morris identified parsimony as one of the bedrock principles that must guide any legitimate sentencing process. In Morris's formulation, the parsimony principle required that "the least restrictive or least punitive sanction necessary to achieve a defined social purpose should be chosen." Norval Morris, *The Future of Imprisonment: Toward A Punitive Philosophy*, 72 MICH. L. REV. 1161, 1162 (1974). Punishment not limited by an idea of parsimony is immoral and wasteful—such punishment is "merely gratuitous, serving no legitimate purpose." Sharon Dolovich, *Legitimate Punishment in a Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 401 (2004). The parsimony principle thus provides an important reminder that "punishment requires moral justification" and that "more punishment than necessary to the purpose of retribution is not justifiable." Mary Ellen Gale, *Retribution, Pu-*

nishment, and Death, 18 U.C. DAVIS L. REV. 973, 1015 n.123 (1985). As Morris explained, a "system of criminal justice that is not infused with parsimony in punishment . . . creates an intolerable engine of tyranny." NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 155 (1982).

When Congress enacted the Sentencing Reform Act, it codified this philosophical idea. The requirement that courts not impose a sentence "greater than necessary" to comply with the specified purposes of punishment turns the parsimony principle into a command of federal law. The statutory purposes reflect four generally accepted justifications for criminal punishment: retribution; deterrence; incapacitation; and rehabilitation. 18 U.S.C. § 3553(a)(2)(A)-(D). Courts must ensure that no sentence exceeds the "least severe" sanction that is sufficient to comply with those purposes. *United States v. Martinez-Barragan*, 545 F 3d 894, 904 (10th Cir. 2008). As a result of *Booker*, the parsimony provision now stands as the sole substantive mandate that binds district judges when they impose sentences. See *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008) (describing section 3553(a) as "a tapestry of factors, through which runs the thread of an overarching principle * * * sometimes referred to as the 'parsimony principle'").[3] Any appellate rule that frustrates

[3] On the meaning of the parsimony provision, compare *United States v. Kikumura*, 918 F.2d 1084, 1111 (3d Cir. 1990) (what § 3553(a) requires is "minimally sufficient" sentence) (Becker, J.), with *United States v. Pruitt*, 502 F.3d 1154, 1175 (10th Cir. 2007) (concurring opinion, erroneously characterizing parsimony as evenhanded "Goldilocks principle," requiring a sentence to be "not …too high, and not … too low"), cert. granted, judgment vacated, and remanded, 552 U.S. 1306 (2008).

the overarching command of a minimally sufficient sentence is unsustainable.

2. The Eighth Circuit's categorical ban on considering a defendant's post-sentencing rehabilitation is irreconcilable with the statutory requirement of parsimony. Each of the purposes listed in section 3553(a)(2) is advanced when courts rely on a defendant's successful rehabilitation as a basis for imposing a lesser sentence. And each is frustrated when such rehabilitation is ignored. Consider each of the statutory purposes in turn:

a. ***"to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."*** As this Court recognized in *Gall*, this provision does not invariably point towards harsher sentences. Referring to the "unique facts of Gall's situation"—which included his voluntary rehabilitation—the Court agreed that "a sentence of imprisonment may work to promote not respect, but derision, of the law, if the law is viewed merely as a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Gall*, 552 U.S. at 54. Thus, when an offender has rehabilitated himself, the purposes of promoting "respect for the law" and providing "just punishment" call out for a lesser sentence. Precluding courts from taking account of such rehabilitation invites the very derision and dehumanization of the law that *Gall* condemned.

b. ***"to afford adequate deterrence to criminal conduct."*** An offender's rehabilitation is plainly relevant to determining the quantum of punishment necessary to achieve deterrence. *Gall* expressly stated that a defendant'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. See 18 U.S.C. §§ 3553(a)(2)(B), (C)." *Gall*, 552 U.S. at 59. Refusing to take account of genuine rehabilitation, whenever it occurs, makes it impossible to properly calibrate the sentence to the objective of deterrence. Indeed, that approach may be more of a deterrent to future *rehabilitation* than to crime.

c. *"to protect the public from further crimes of the defendant."* By definition, a rehabilitated offender "is not going to return to criminal behavior and is not a danger to society." *Gall*, 552 U.S. at 57. That is true regardless of whether the rehabilitation happens before or after his original sentencing.[4] And, as Judge Leval has explained, section 3553(a)(2)(C) "unquestionably envisions more severe sentences for defendants considered more likely to commit further crimes and less severe sentences for those unlikely to commit crimes." *United States v. Rodriguez*, 724 F. Supp. 1118, 1120 (S.D.N.Y. 1989). Yet the Eighth Circuit's rule makes it impossible for sentencing courts to honor that goal and mocks the parsimony directive. Congress' insistence that courts formulate the least restrictive sentence necessary to protect the public cannot be squared with a rule that precludes courts from even considering that an of-

[4] Post-sentencing rehabilitation is arguably *more* relevant than other kinds of post-offense rehabilitation. It is unlikely that an offender who has already been sentenced would engage in a show of rehabilitation in an effort to obtain a lenient sentence in the possible event of a resentencing. A court thus would have "greater justification for believing that [Pepper's] turnaround was genuine, as distinct from a transparent attempt to build a mitigation defense." *Gall*, 552 U.S. at 57.

fender has rehabilitated himself to the point where he no longer poses a realistic threat of criminal activity.

d. ***"to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."*** This factor expressly promotes rehabilitation as a proper goal of sentencing. See *United States v. Rhodes*, 145 F.3d 1375, 1381-82 (D.C. Cir. 1998). In the case of Mr. Pepper, who at the time of his resentencing was living successfully and productively outside of prison, it pointed in favor of a sentence that would have allowed him to continue that success in the outside world. A sentence that required him to give up his new life and return to prison was "greater than necessary" to ensure that he was rehabilitated "in the most effective manner."

* * *

The overarching statutory command of parsimony demands that courts take account of rehabilitation, whenever it occurs. The Eighth Circuit's categorical ban ensures that rehabilitated offenders will receive sentences greater than necessary to bring about the purposes that Congress has specified. That is certainly true of the new (65 month) sentence that Mr. Pepper received in this case—a sentence that tore him away from the successful life he had built in the community. That sentence vastly exceeds what is necessary to promote respect for the law, to deter other criminal conduct, to prevent future crimes, and to help Mr. Pepper rehabilitate. Indeed, the new sentence undermined every one of those goals. The additional punishment inflicted by the Eighth Circuit's rule thus is precisely the sort of

gratuitous punishment that the parsimony principle condemns and that section 3553(a) forbids. In Beccaria's words, that sentence is "abuse, not justice."

C. The requirement that courts consider the defendant's "history and characteristics" requires accounting for post-sentencing rehabilitation.

Section 3553(a)'s procedural requirements likewise require courts to take account of the fact that a defendant has rehabilitated himself prior to being sentenced.

The very first factor that Congress directs sentencing courts to consider is "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). This provision mandates individualized consideration of each defendant's individual circumstances. The court must treat the defendant as a unique human being with a particular set of experiences that makes him more or less in need of punishment for his offense. Whether a defendant has rehabilitated—renounced criminal activity; committed himself to family life; overcome a drug addiction; become a productive member of society—is plainly an important part of his "history and characteristics."

This provision imposes no temporal limits. It directs the court to reflect upon the life experiences of the offender *as he stands before the court*. See *United States v. Core*, 125 F.3d 74, 77 (2d Cir. 1997) ("When the trial court undertook to resentence Reyes . . . it was required to consider him as he stood before the court at that time."). Rehabilitation that takes place after the defendant is convicted is as much a part of his background as earlier rehabilitation. Si-

milarly, where a new sentencing is required, nothing in section 3553(a)(1) supports treating post-sentencing rehabilitation as irrelevant. Making the distinction that the Eighth Circuit did reads into the statute a restriction that simply is not there. See *United States v. Green*, 152 F.3d 1202, 1207 (9th Cir. 1998) ("[W]e cannot discern any meaningful distinction between post-offense and post-sentencing rehabilitation.").

If section 3553(a)(1) were not clear enough, another provision of the statute makes clear that "*[n]o limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted on an offense which a court of the United States may receive and consider for purposes of imposing an appropriate sentence." 18 U.S.C. § 3661 (emphasis added); see also 21 U.S.C. § 850 (similar provision for sentencing drug offenders). Congress wanted sentencing courts to have as much information as possible about the defendant's "character" and "conduct," so as to make a reasoned judgment about what sentence would be most appropriate to that defendant's particular circumstances. The Eighth Circuit's rigid exclusionary rule is directly at odds with that purpose and violates these controlling statutes.

In short, there is "no reason why sentencing courts' broad mandate under section 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." *Rhodes*, 145 F.3d at 1381; see also *Core*, 125 F.3d at 77 (holding that to bar departures based on post-conviction rehabilitation would "undermine the statutory requirement to consider the

characteristics of the defendant"); *United States v. Maier*, 975 F.2d 944, 948 (2d Cir. 1992) (same).

D. In a just and humane sentencing system, courts may not blind themselves to relevant facts about a defendant's life.

The statutory directives requiring wide-ranging consideration of an offender's history and character are not just command of positive law. They reflect a deep-seated understanding in the American legal tradition that to impose a just and humane sentence, a court must be able to account for the full range of the offender's life experiences.

This Court has repeatedly embraced the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247 (1949). "Highly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Ibid*. *Williams* thus rejected the idea that sentencing courts should be "denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules" and cautioned that depriving judges of "information concerning every aspect of a defendant's life" would "undermine modern penological procedural policies." *Id*. at 247-50; see also *Roberts v. United States*, 445 U.S. 552, 556 (1980).

The same principles apply to resentencing proceedings. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court approved of judges fashioning new sentences "in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental

and moral propensities.'" 395 U.S. at 723 (quoting *Williams*, 337 U.S. at 245). Likewise, in a case decided the year that Congress enacted the Sentencing Reform Act, the Court made clear that the

> sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant. * * * Allowing consideration of such a breadth of information ensures that the punishment will suit not merely the offense but the individual defendant.

Wasman v. United States, 468 U.S. 559, 563-64 (1984). *Wasman* condemned the "needless exclusion of relevant sentencing information from the very authority in whom the sentencing power is vested" and reaffirmed that the "underlying philosophy of modern sentencing is to take into account the person as well as the crime by considering 'information concerning every aspect of a defendant's life.'" *Id.* at 572 (quoting *Williams*, 337 U.S. at 250).

Reflecting on this philosophy, the Court observed: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to 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). This approach was preserved in the original Sentencing Reform Act (*ibid.*) and is even more important in the advisory guidelines regime that emerged from *Booker*. See *Gall*, 552 U.S. at 52 (quoting *Koon*). A ban on considering post-sentencing rehabilitation is antithetical to this "uniform and constant tradition."

Individualized sentencing based on full and complete information about the defendant is a moral principle, not just a legal one. It is a crucial reminder that, despite their crimes, criminal defendants are still human beings, who are entitled to be judged based on the totality of their experiences, bad and good. Requiring sentencing courts to blind themselves to so important a part of Mr. Pepper's life as his near-total rehabilitation violates that principle. In so doing, it drains sentencing of its moral force and threatens to transform it into "ritualistic punishment with a high potential for destruction." *Rodriguez*, 724 F. Supp. at 1119.

In a 2003 address to the American Bar Association, Justice Kennedy sounded this theme with particular eloquence. After condemning "a rigid egalitarian approach to sentencing uniformity" that devalues judicial discretion, Justice Kennedy discussed the importance of rehabilitation:

> We must try, however, to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose mind and spirits we are trying to reach. We should not ignore the efforts of the countless workers and teachers and counselors who are trying to instill some self-respect and self-reliance and self-discipline in convicted offenders.

Anthony M. Kennedy, *Speech At The American Bar Association Annual Meeting* 5-7 (Aug. 9, 2003). When, a convicted offender like Mr. Pepper attains enough self-reliance and self-disciple to turn his life around, that remarkable transformation should be

cherished and rewarded. To dismiss it as "irrelevant" (as the Eighth Circuit did) does not merely violate the controlling statutes, it sends precisely the wrong message about the values of our criminal justice system. As Judge Bennett observed in discussing Mr. Pepper's rehabilitation, "[a]ny sentencing scheme that ignores that is not a sentencing scheme based in the reality of the human life and human existence." J.A. 148.

II. The Eighth Circuit's Attempts To Justify Its Ban On Post-Sentencing Rehabilitation Evidence Do Not Withstand Scrutiny.

The Eighth Circuit's attempts to defend its approach to post-sentencing rehabilitation are transparently weak. The court has offered two primary reasons for its rule: first, that a resentencing court is necessarily limited to the evidence that was available when the original sentence was imposed; second, that doing otherwise creates unwarranted disparities. Neither argument has merit.[5]

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[5] Some Eighth Circuit decisions tried to justify the ban on the additional ground that for courts to consider post-sentencing rehabilitation "is inconsistent with the policies established by Congress under 18 U.S.C. § 3642(b) for reducing the time to be served by a prisoner." *United States v. Hasan*, 245 F.3d 682, 689 (8th Cir. 2001) (en banc). This rationale obviously has no application to this case, in which Mr. Pepper's rehabilitation did not take place in prison, but occurred after his release. Relying on such conduct could not even conceivably "interfere with the Bureau of Prison's statutory power to award good-time credit to prisoners." *United States v. Sims*, 174 F.3d 911, 913 (8th Cir. 1999). In any event, for reasons explained by Mr. Pepper, the interference-with-good-time-credits argument is a canard. Br. for Petitioner 48-49.

A. A defendant's good conduct is not irreverent merely because it occurs after his original sentencing.

The Eighth Circuit has suggested that banning the use of post-sentencing rehabilitation evidence is justified because "the sentencing court obviously could not have considered it at the time of the original sentencing." *United States v. Sims*, 174 F.3d 911, 913 (8th Cir. 1999); see also *United States v. Jenners*, 473 F.3d 894, 898-99 (8th Cir. 2007); *United States v. Hasan*, 245 F.3d 682, 688 (8th Cir. 2001) (en banc). Among its other problems, this artificial limit on the resentencing process cannot be squared with this Court's decisions in *Pearce* and *Wasman*.

Pearce stands for the proposition that when a court resentences a defendant whose original conviction (or sentence) was overturned on appeal, the court can—and should—consider events after the original sentence was imposed. The resentencing court thus may impose a more severe sentence "based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Pearce*, 395 U.S. at 726. The Court explained:

> The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York*, *supra*, that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."

Id. at 723 (quoting *Williams*, 337 U.S. at 247).

Wasman similarly affirmed that a resentencing occasioned by legal error in a prior proceeding is not hermetically sealed from the world as it may have changed in the interim. In particular, the Court held that "a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings." *Wasman*, 468 U.S. at 572. "Consideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial is manifestly legitimate." *Id*. at 569-70. Thus, even though the court obviously could not have considered Wasman's second conviction at the time of the original sentencing, the Court rejected any notion that the conviction was irrelevant in crafting a new sentence.

Basic fairness requires that this rule apply equally to good conduct as it does to bad conduct. If a defendant can receive a stiffer sentence in a resentencing when he continues to violate the law, it follows that a defendant who successfully rehabilitates himself during that time should be eligible to get a lesser sentence. The use of post-sentencing conduct in resentencing cannot be a one-way ratchet that allows harsher sentences but bars more lenient ones. Cf. *Booker*, 543 U.S. at 266 (rejecting argument in favor of mandatory limits on "judge's ability to *reduce* sentences" but not on "judge's ability to *increase* sentences": "We do not believe that such one-way levers are compatible with Congress' intent").

The Eighth Circuit's ban on considering post-sentencing rehabilitation is particularly perverse in this respect. The court has held that a defendant's misconduct after his original sentencing can support a *higher* sentence on resentencing. *United States v.*

Stapleton, 316 F.3d 754, 757 (8th Cir. 2003). But the court nonetheless refuses to allow defendants to benefit from positive accomplishments or any other good they do in that same period. *Ibid*. Such an obvious double-standard is unsustainable in proceedings governed by due process of law. Cf. *Green*, 152 F.3d at 1208 n.6 (relying on cases where the government benefited from post-sentencing circumstances to secure a higher sentence and holding that defendants may rely on such circumstances to support lower sentences on resentencing).

Finally, the Eighth Circuit's temporal argument has no conceivable application in this case given the court's observation in *Pepper IV* that "[u]nder the circumstances of Pepper'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." J.A. 373-74. A "complete resentencing"—that is a complete vacatur of the prior judgment, to be followed by imposition of a new and lawful sentence—would necessarily include consideration of Mr. Pepper's circumstances as they stood when his new sentence was imposed. But that is precisely what the Eighth Circuit then forbade. For the court to rely on the idea of a "complete resentencing" to (erroneously) deprive Mr. Pepper of Judge Bennett's favorable rulings while at the same time refusing to allow his recent rehabilitation to be considered is as unfair as it is illogical. It illustrates a selective deployment of procedural rules in the service of higher sentences and to the detriment of criminal defendants. Federal sentencing law, a long line of this Court's decisions, and elemental ideas of fair play forbid that approach.

B. Considering post-sentencing rehabilitation does not create unwarranted sentencing disparity.

The Eighth Circuit has also tried to justify its approach on the grounds that allowing consideration of post-sentencing rehabilitation "seriously undermines the Sentencing Reform Act's goal of 'avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.'" *Sims*, 174 F.3d at 912-13 (quoting 28 U.S.C. § 991(b)(1)(B)). The court was worried about disparity between rehabilitated defendants like Mr. Pepper and other offenders who may have rehabilitated after being sentenced but never will have a resentencing. See *Hasan*, 245 F.3d at 687-88. This concern is entirely misplaced.

As an initial matter, this argument misunderstands the kind of disparities that the federal sentencing laws seek to avoid. The statute asks sentencing courts to "consider" "unwarranted" disparities between "defendants with similar records." 18 U.S.C. § 3553(a)(6). Such disparities arise when different courts assign dramatically different values to indistinguishable aspects of defendants' records. The relevant "records" here are the records of offenders that are presented to courts in the sentencing process. The experiences of offenders that have not been put in front a court are not "records" that a sentencing judge can evaluate or consider. Invoking the experiences of such hypothetical offenders seeks to enforce an artificial kind of equality.[6]

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[6] The court's rhetoric draws heavily on the language of accident: a defendant who receives credit for his post-sentencing rehabilitation is said to be "lucky," the beneficiary of a "windfall" that

Simply put, an offender who is eligible for resentencing is not similarly situated to one who is not. Thus, as the D.C. Circuit has observed, "[d]istinguishing between prisoners whose convictions are reversed on appeal and all other prisoners hardly seems 'unwarranted.'" *Rhodes*, 145 F.3d at 1381. When a court considers a defendant's post-sentencing rehabilitation in a resentencing, it does not treat that defendant differently from any other defendant with a similar record. To the contrary, it treats that person like any other rehabilitated offender who comes before a court for sentencing.

In this respect, it is actually the Eighth Circuit's approach that leads to unfair disparity. Under the court's rule, sentencing judges can credit defendants for some acts of rehabilitation but must close their eyes to otherwise indistinguishable conduct merely because it happens later. Offenders with virtually identical records of post-offense rehabilitation thus are treated differently solely because one is being sentenced for the first time while the other is being resentenced. That makes no sense. Defendants who rehabilitate before their original sentencing are no more deserving of a lesser sentence than those whose rehabilitation comes later. Offenders like Mr. Pepper are not more likely to commit other crimes, more of a threat to society, or otherwise more in need of

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depends "on a fortuity." *Sims*, 174 F.3d at 912-13; see also *United States v. Hasan*, 205 F.3d 1072, 1078 (8th Cir. 2000) (Hansen, J., dissenting). That misses the point. As the D.C. Circuit has explained, "[a]ny disparity that might result from allowing the district court to consider post-conviction rehabilitation, however, flows not from [the defendant's] being 'lucky enough' to be resentenced, or from some 'random' event, but rather from the reversal" of his original conviction and/or sentence. *Rhodes*, 145 F.3d at 1381 (internal citation omitted).

punishment. Yet the Eighth Circuit's approach arbitrarily ensures that they receive harsher sentences. That is precisely the disparity that section 3553(a)(6) seeks to prevent.

As this case illustrates, such disparity is indefensible. The Eighth Circuit required the sentencing court to impose additional punishment on Mr. Pepper—and pretend that his exemplary conduct never happened—based on the supposed interests of a hypothetical group of other offenders. That misguided appeal to abstract "fairness" leads only to a uniform harshness of treatment; it is contrary to the imperative to treat defendants as ends rather than means, as individuals whose particular life experiences have consequence. It also leads to perverse results, singling out for harsh treatment precisely those people whose brush with the criminal process leads them to change their lives and become productive members of society. A just sentencing regime should find a way to benefit such offenders. It certainly should not go out of its way to blind itself to their efforts and undo their accomplishments.

III. The Eighth Circuit's Decision To Reassign This Case On Remand Resulted In Further Unwarranted Interference With The District Court's Discretion.

The second question presented asks whether a new judge assigned to a case on remand is required by law-of-the-case principles to follow the prior judge's sentencing findings. FAMM agrees with petitioner that the Eighth Circuit mangled the law-of-case doctrine. But something more is implicated. It would not have been necessary for the court of appeals to address the law-of-the-case issue but for its improper decision to take this case away from Judge

Bennett. The Eighth Circuit's unwarranted reassignment illustrates yet another way that a court may evade the limits on appellate review imposed by *Gall* and effectuate its own preferred sentencing outcomes despite this Court's admonitions.

A. Following the Eighth Circuit's first remand of this case for resentencing, Judge Bennett made comments that paralleled this Court's own observations about district judges' institutional superiority in determining the appropriate sentence, stating that he "just wish[ed] [the court of appeals] would give us more deference because I'm making the tough decisions based on the information that I have, my evaluation of the defendant who I've had a chance not only to sentence but resentence, to study very carefully the presentence report, to review very carefully . . . the recommendation of the probation officer." J.A. 148; cf. *Gall*, 552 U.S. at 51-52. Judge Bennett noted that the Eighth Circuit might reverse his sentencing determination, and while he acknowledged that he "w[ouldn't] like it" if the Eighth Circuit compelled him to impose a higher sentence on Mr. Pepper, he repeatedly stated that he would impose a sentence in accordance with any restrictions that the court of appeals imposed. J.A. 149 ("I won't like it, but I'll be happy to do it. . . . I'll impose it if they make me. . . . [I]f I have to do it, I have to do it.").

On appeal, the Eighth Circuit characterized Judge Bennett's comments as evincing a "reluctance to resentence Pepper again should this case be remanded" and used his statements as a basis for directing that the case be reassigned on remand. J.A. at 173. There were (and are) only two judges in regular active service in the Northern District of Iowa: Judge Bennett and Chief Judge Reade. Unsurpri-

singly, Judge Reade reassigned the case to herself. J.A. 174-76.

On resentencing, Judge Reade discarded Judge Bennett's ruling regarding the value of Pepper's substantial assistance, undertook a "de novo" review of the matter, and replaced Judge Bennett's assessment with her own, substantially lower, valuation. J.A. 201-09. She also denied all of Pepper's requests for downward variances and imposed a sentence nearly triple that imposed by Judge Bennett. J.A. 369-70. That new sentence, unlike the two sentences previously entered by Judge Bennett, was approved by the Eighth Circuit. J.A. 371-79.

B. The court of appeals' stated justification for directing that the case be reassigned was that Judge Bennett "expressed a reluctance to resentence Pepper again should this case be remanded." J.A. 173. That is belied by the record. Judge Bennett repeatedly confirmed that he would comply with the court of appeals' instructions in any future remand, even if such a remand were to require that he increase Pepper's sentence. J.A. 148-49. He acknowledged that he would not "like" to have to increase Pepper's sentence (*id*. at 149), but a district judge's personal disagreement with an appellate court's instructions provides no proper basis for reassigning the case. "[W]e accept the notion that the 'conscientious judge will, as far as possible, make himself aware of his biases [toward vindicating his prior conclusion], and, by that very self-knowledge, nullify their effect.'" *Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (2d Cir. 1943)); see also Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to*

Another District Judge, 120 F.R.D. 267, 283 (1988) ("The federal system assumes that district judges are capable of understanding and executing a mandate even when they disagree with it.").

Judge Bennett's frank acknowledgement of his distaste for imposing a higher sentence provided confirmation that he had sufficient "self-knowledge" to suppress his personal inclinations in any future remand—rather than, as the court of appeals concluded, justification for banishing him from a case he had been handling for four years. *Liteky*, 510 U.S. at 562 (Kennedy, J., concurring). The Eighth Circuit's reassignment of the case was thus plainly improper.

C. The impropriety of the reassignment is magnified here, because it opened the door to a further interference with the district court's discretion, Had the case not been reassigned, Judge Bennett's ruling regarding the value of Mr. Pepper's substantial assistance would have been undisturbed. As it was, however, the substitution of a new judge resulted in a substantially greater sentence, one that required Mr. Pepper to return to prison after years of living productively outside prison walls. In upholding this flouting of the law-of-the-case doctrine, the Eighth Circuit accomplished by indirection what this Court's rulings forbade it from doing directly.

The result was not only in tension with *Booker*, *Gall*, and *Kimbrough*, it undermines the systemic interests served by law-of-the case principles. "[T]he doctrine increases confidence in the adjudicatory process: reconsideration of previously litigated issues, absent strong justification, spawns inconsistency and threatens the reputation of the judicial system." *Ellis v. United States*, 313 F.3d 636, 647 (1st Cir. 2002) (citing Geoffrey C. Hazard, Jr., *Preclusion*

as to Issues of Law: The Legal System's Interest, 70 IOWA L. REV. 81, 88 (1984). Moreover, "judges who too liberally second-guess their co-equals effectively usurp the appellate function and embolden litigants to engage in judge-shopping and similar forms of arbitrage." *Ibid*. Such "judge-shopping" is no more appropriate when it comes from the unwarranted removal of a conscientious district judge who worked hard to fashion an appropriate sentence in an exceptional case. The replacement of Judge Bennett for doing nothing more than echoing this Court's message about the need for appellate deference to district court sentencing discretion was unnecessary and improper. This Court should not ignore the effect of the Eighth Circuit's maneuver on Mr. Pepper or on the federal sentencing process more broadly.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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