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 The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

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

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

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

JURISDICTION

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

STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

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

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

A. Original Sentence and First Government Appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

B. First Resentencing and Second Government Appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[4] Judge Bennett had noted during the hearing that the court of appeals might once again reverse his sentencing determination, and while he acknowledged that he "w[ouldn't] like it"

(Continued on following page)

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

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

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

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

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

C. Resentencing Before Judge Reade and Pepper's Appeal

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

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

The Eighth Circuit categorically forbids district judges to consider evidence of a defendant's post-sentencing rehabilitation as a basis for varying below the guideline range. There is no statutory authority for this ad hoc rule. Indeed, the rule violates the statutes that now govern sentencing in the federal courts, 18 U.S.C. §§3661 and 3553(a). Section 3661 explicitly provides that *"[n]o limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The Eighth Circuit's rule is thus an unlawful "limitation" on a district court's power to consider the background, character and conduct of a defendant at sentencing.

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> *No limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Continued on following page)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

person who sells drugs out of sheer greed.[18] *See* 18 U.S.C. §3553(a)(2)(A).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[27] *See McGinnis v. Royster*, 410 U.S. 263, 273 (1973).

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

The Eighth Circuit's rule thus does not prevent any "unwarranted" disparity, but instead creates it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

that is plainly "sufficient" to serve the purposes of sentencing.

Respectfully submitted,

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18 U.S.C. §3553(a)

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by

the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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18 U.S.C. §3553(c)

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

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

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

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

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

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18 U.S.C. §3661

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

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21 U.S.C. §850

Except as otherwise provided in this subchapter or section 242a(a) of Title 42, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence under this subchapter or subchapter II of this chapter.