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No. 09-6822

In the Supreme Court of the United States

JASON PEPPER, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE UNITED STATES

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After the court of appeals set aside petitioner's sentence in its decision in *Pepper III*, it remanded for plenary resentencing. Petitioner and the amicus curiae appointed by this Court to support the judgment below contend that, at the 2009 resentencing, the district court's sentencing authority was limited. Petitioner claims that, under the law-of-the-case doctrine, the district court was required to grant the same percentage departure for substantial assistance that it had granted at petitioner's 2006 resentencing. Amicus claims that, under 18 U.S.C. 3742(g)(2), the district court lacked the authority to grant a downward variance on the basis of petitioner's post-sentencing rehabilitation. Neither claim is correct: petitioner's claim is inconsistent with the de novo nature of the 2009 resentencing proceeding, and amicus's claim is inconsistent with the advisory nature of the Guidelines after *United States* v. *Booker*, 543 U.S. 220 (2005).

I. THE LAW-OF-THE-CASE DOCTRINE DID NOT ENTITLE PETITIONER TO RECEIVE THE SAME 40% DEPARTURE FOR SUBSTANTIAL ASSISTANCE AT HIS 2009 RESENTENCING THAT HE HAD RECEIVED AT HIS 2006 RESENTENCING

At the certiorari stage, petitioner argued that the court of appeals' decisions in *Pepper II* and *III* required the district court to grant the same 40% departure for substantial assistance at his 2009 resentencing that it had granted at his 2006 resentencing. Pet. 18-26. The government therefore explained in its brief in opposition and its opening brief why neither the reasoning nor the mandate in *Pepper III*—which was the operative appellate decision—required the same percentage departure at petitioner's 2009 resentencing. See U.S. Br. 17-29. Petitioner responds by jettisoning both of his previous arguments and making yet a third argument: that the district court was bound under the law-of-the-case doctrine to its own earlier ruling at the 2006 resentencing. According to petitioner (Br. 50-59), that ruling was left undisturbed by *Pepper III* and the district court lacked compelling reasons to revisit it. But petitioner's new argument is incorrect for largely the same reasons that his old ones were. In *Pepper III*, the court of appeals set aside petitioner's sentence, remanded for a de novo resentencing, and directed that the case be reassigned to a different district court judge. The very point of *Pepper III* was for the district court to take a fresh look at an appropriate sentence, not to reinstate its earlier rulings—including the extent of any downward departure for substantial assistance—under the law-of-the-case doctrine.

1. At petitioner's first resentencing in May 2006, the district court granted a 40% downward departure under Guidelines § 5K1.1 for petitioner's substantial assistance during the government's investigation into drug trafficking.

In *Pepper II*, the court of appeals reversed and remanded for resentencing, but this Court then vacated and remanded the case to the court of appeals for further consideration in light of *Gall* v. *United States*, 552 U.S. 38 (2007). In *Pepper III*, the court of appeals determined that *Gall* had not altered its earlier decision; it again reversed and remanded for resentencing; and it directed that the resentencing be assigned to a different district court judge. On remand, the case was reassigned from Judge Bennett to Chief Judge Reade, who granted a 20% downward departure for substantial assistance at petitioner's second resentencing in January 2009.

Petitioner argues that when the court of appeals remanded the case in *Pepper III*, the court "did not disturb" Judge Bennett's determination that a 40% departure was appropriate. Br. 50. To the contrary, the court of appeals in *Pepper III* set aside petitioner's entire sentence. See Pet. App. 20 ("[W]e again reverse the sentence of the district court and remand for resentencing by a different judge."); *id.* at 22 ("For the foregoing reasons, we again reverse and remand [petitioner's] case for resentencing consistent with this opinion."). It is true that the court of appeals set aside petitioner's sentence because of perceived error in the district court's 59% downward variance, not its 40% downward departure. But that is irrelevant. What matters is that the court of appeals in *Pepper III* set aside petitioner's entire sentence, including the district court's 40% downward departure.

2. Because the court of appeals set aside petitioner's entire sentence, it remanded for a de novo resentencing consistent with that circuit's case law. See U.S. Br. 26-29. For those courts of appeals, including the Eighth Circuit, that have adopted a default rule of de novo resentencing, "[a] criminal sentence is a package of sanctions that the

district court utilizes to effectuate its sentencing intent." *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) (per curiam), cert. denied, 519 U.S. 1137 (1997). Under that "holistic approach," a vacated criminal sentence "becomes void in its entirety," having been "wholly nullified and the slate wiped clean." *Ibid*. (internal quotation marks and citation omitted). As a result, when a case is remanded for resentencing, "the district court is free to reconstruct the sentence utilizing any of the sentence components." *Ibid*. Accordingly, even assuming here that the district court's 40% downward departure "was, at the time, the law of the case, that sentence was wiped away" by *Pepper III*, and "the district court was free to consider" the extent of any downward departure at petitioner's resentencing. *Ibid*.

To be sure, the court of appeals could have chosen to limit petitioner's 2009 resentencing to particular issues rather than to remand for a de novo resentencing. But petitioner abandons any argument that the court of appeals' decision or mandate in *Pepper III* limited the district court to issues other than the substantial assistance departure. See Pet. Br. 58-59 & n.30 ("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."). That concession is fatal to petitioner's law-of-the-case argument. By remanding for a de novo resentencing, the court of appeals wiped the slate clean.[1] The district court thus was writing

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[1] See, *e.g.*, *United States* v. *Young*, 66 F.3d 830, 838 (7th Cir. 1995) (noting that if the court of appeals' earlier decision "vacated the entire sentence and ordered de novo resentencing," then "the district court was under no obligation to give [the defendant] the same downward departure on resentencing as it had during the original sentencing hearing"); *United States* v. *Smith*, 930 F.2d 1450, 1456 (10th Cir.) (finding

on a blank slate at petitioner's 2009 resentencing, and it permissibly exercised its discretion in granting a lesser 20% downward departure.

II. POST-SENTENCING REHABILITATION IS A PERMISSIBLE GROUND FOR A DOWNWARD VARIANCE UNDER 18 U.S.C. 3553(a) AT RESENTENCING

Sentencing courts have historically had broad discretion to consider virtually any relevant information about a defendant's background and character. U.S. Br. 30-37. In 2000, the Sentencing Commission (Commission) promulgated a then-binding policy statement, Guidelines § 5K2.19, that for the first time limited the extent to which sentencing courts could consider a particular kind of relevant information about a defendant's background—namely, evidence of a defendant's post-sentencing rehabilitative efforts. That brief limitation, however, came to an end with this Court's decision in *Booker*. In *Booker* and subsequent cases, this Court held that a mandatory Guidelines system, including policy statements that would prevent courts from imposing non-Guidelines sentences based on specified factors, violated the Sixth Amendment. See, *e.g.*, *Spears* v. *United States*, 129 S. Ct. 840 (2009) (per curiam); *Kimbrough* v. *United States*, 552 U.S. 85, 100-101 (2007); *Booker*, 543 U.S. at 244-245.

In the wake of *Booker*, district courts may impose sentences within statutory limits based on appropriate consideration of the factors listed in 18 U.S.C. 3553(a). *Booker*,

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the law-of-the-case doctrine "inapposite" when a case is remanded for de novo resentencing), cert. denied, 502 U.S. 879 (1991); see also *United States* v. *Esperance*, 165 Fed. Appx. 814, 818 n.3 (11th Cir. 2006) ("When an appellate court vacates a sentence in its entirety and remands with a general mandate, the law-of-the-case doctrine does not apply, and the district court is free to conduct a *de novo* resentencing.").

543 U.S. at 245-246. A defendant's rehabilitation since his original sentencing is potentially relevant to two of those factors: the defendant's "history and characteristics," 18 U.S.C. 3553(a)(1); and the "need for the sentence imposed" to serve the purposes of sentencing, 18 U.S.C. 3553(a)(2). In addition to its potential relevance to the particular statutory factors in Section 3553(a), information about a defendant's post-sentencing rehabilitation is also relevant to a court's overarching duty under that provision "[to] impose a sentence sufficient, but not greater than necessary," to achieve the purposes of sentencing. 18 U.S.C. 3553(a). District courts therefore have had discretion since *Booker* to consider information about a defendant's post-sentencing rehabilitation.

Amicus does not directly respond to either of the government's main points: that courts have historically considered post-sentencing rehabilitation and that *Booker* overrides the Commission's relatively recent attempt to restrict such consideration. Rather, amicus argues that "permitting district courts to consider post-sentencing rehabilitation would defeat Congress' objectives under § 3553(a)." Br. 23 (emphasis omitted). Amicus's argument lacks merit.

1. Amicus first argues that consideration of post-sentencing rehabilitation would "[c]ontravene[] 18 U.S.C. § 3553(a)(5)." Br. 31 (emphasis omitted). That argument rests on a misunderstanding of what this Court did in *Booker*. After holding that the mandatory Guidelines system was contrary to the Sixth Amendment, the Court in *Booker* "determined that the appropriate cure was to sever and excise the provision * * * that rendered the Guidelines mandatory, 18 U.S.C. § 3553(b)(1)." *Kimbrough*, 552 U.S. at 100-101. The Court in *Booker* "also severed and excised the provision * * * requiring *de novo* review of departures from the Guidelines, 18 U.S.C. § 3742(e), be-

cause that provision depended on the Guidelines' mandatory status." *Id.* at 101 n.12. Those modifications of the sentencing statutes, this Court recognized in *Booker*, "make[] the Guidelines effectively advisory." 543 U.S. at 245.

It remains true that the Commission's policy statement, Guidelines § 5K2.19, is an authoritative guide to the meaning of the Guidelines themselves. See *Williams* v. *United States*, 503 U.S. 193, 201 (1992). Under Section 5K2.19, a district court may not depart downward from the applicable Guidelines range on the basis of post-sentencing rehabilitation. But that Guidelines range is itself advisory after *Booker*. The Guidelines—and the policy statements that illuminate their meaning—are now "one factor among several" that "courts must consider in determining an appropriate sentence." *Kimbrough*, 552 U.S. at 90. District courts must give "respectful consideration" to the Guidelines, accompanying policy statements, and commentary, *id.* at 101, but they may vary from the "Guidelines based on *policy* disagreement with them," *Spears*, 129 S. Ct. at 843.

The government thus agrees with amicus about "the enduring importance of the Guidelines" and "the need for district courts to consider the Commission's policy determinations." Amicus Br. 31. There are sound reasons for district courts to find the Commission's position persuasive and to decline to impose downward variances based on defendants' post-sentencing rehabilitation, or to grant such downward variances only in unusual or exceptional cases. See U.S. Br. 45-46. But when amicus says that "the Commission's policy statement * * * should be given effect," Amicus Br. 32, he does not mean that the policy statement should be paid respectful consideration by district courts as one factor in determining an appropriate sentence on a case-by-case basis. Rather, he means that it should be

mandatory, *i.e.*, that district courts should be categorically prohibited from considering post-sentencing rehabilitation in all cases. That position is simply irreconcilable with the advisory nature of the Guidelines system after *Booker*.

Amicus's position is also inconsistent with the Guidelines themselves. Section 5K2.19 does not prohibit consideration at resentencing of post-sentencing rehabilitation. Rather, Section 5K2.19 restricts the extent of such consideration, permitting consideration of post-sentencing rehabilitation in setting a sentence within the Guidelines range, but forbidding reliance on post-sentencing rehabilitation as a basis for departing from the Guidelines range. Section 5K2.19 thus does not reflect a judgment by the Commission as to the general appropriateness of considering post-sentencing rehabilitation; it instead reflects a determination by the Commission to limit the amount of weight given to post-sentencing rehabilitation. Under an advisory Guidelines system, however, the Commission's views about the weight to be given to a sentencing factor can no longer be given binding effect.

Nor would it matter if amicus were correct in asserting that Section 5K2.19's policy statement "lie[s] at the heart of the Commission's core function" or "arise[s] from its core mission." Amicus Br. 32. Amicus seems to suggest that some of the Commission's policy statements should be binding and others not, depending on whether the statement "exemplif[ies] the Commission's exercise of its characteristic institutional role." *Id*. at 33 (quoting *Kimbrough*, 552 U.S. at 108-109). But this Court has never indicated that the authority of district courts to vary from the "Guidelines based on policy disagreement with them" depends on the extent of the expertise that the Commission brought to bear in formulating the particular policy at issue. *Spears*, 129 S. Ct. at 843 (emphasis omitted). To the

contrary, this Court has held that district courts may vary from the Guidelines "based *solely* on policy considerations," *Kimbrough*, 552 U.S. at 101 (emphasis added), and among those considerations is the significance of a defendant's post-sentencing rehabilitation in arriving at an appropriate sentence.

2. Amicus also argues that consideration of post-sentencing rehabilitation would "create unwarranted disparities that [would] frustrate the purpose of 18 U.S.C. § 3553(a)(6)." Br. 25 (emphasis omitted). That argument is incorrect for two reasons. As an initial matter, the disparity that arises from treating defendants who were sentenced in error differently from defendants who were sentenced properly is not necessarily "unwarranted" within the meaning of Section 3553(a)(6). And even assuming that it were, that unwarranted disparity would be only one factor that a district court would have to balance against the other Section 3553(a) factors in determining an appropriate sentence.

a. Section 3553(a)(6) requires district courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." In Congress's view, "[s]entencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public." S. Rep. No. 225, 98th Cong., 1st Sess. 45 (1983) (*Senate Report*). Congress thus hoped to ensure that an offender would "not receive more favorable or less favorable treatment because he happens to be sentenced by a particular judge." *Id.* at 79; see *id.* at 41 ("The absence of a comprehensive Federal sentencing law * * * creates inevitable disparity in the sentences which courts impose on similarly situated defendants."); *id.* at 38 ("These disparities * * * can be traced directly to the

unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence.").

Consideration of post-sentencing rehabilitation may result in a disparity between the treatment of defendants who are sentenced properly and the treatment of defendants who must be resentenced. But that disparity results from "differences among * * * offenders," not from differences among the courts that sentence them. *Senate Report* 45. A defendant who must be resentenced may stand before the court with additional information that potentially bears on the determination of an appropriate sentence. Moreover, that information is likely to justify a downward variance only where the defendant's post-sentencing rehabilitative efforts have been exceptional as compared to those of other defendants. See, *e.g.*, *United States* v. *Bradstreet*, 207 F.3d 76, 82 (1st Cir. 2000). In those infrequent cases, it is specific information about the defendant's reformed character—and not the court's general sentencing predilections—that creates the disparate treatment, and thus the resulting disparity is not necessarily "unwarranted" within the meaning of Section 3553(a)(6).

Amicus is correct (Br. 27) that most defendants are sentenced properly, and thus few defendants will have the opportunity to present information about post-sentencing rehabilitation at resentencing. But that does not necessarily make any resulting disparity unfair. After all, some defendants will have a longer period of time between initial custody and trial, or between trial and sentencing, and those defendants thus will have a greater opportunity to demonstrate pre-sentencing rehabilitation. See, *e.g.*, *Uni-*

ted States v. *Rudolph*, 190 F.3d 720, 724 (6th Cir. 1999).[2] Amicus does not point to any evidence that Congress was concerned with the disparities in procedural opportunity that may result from the normal trial and sentencing process.[3]

Amicus also does not respond to the government's point that, under the logic of the court of appeals' approach, district courts would be categorically barred from considering any post-sentencing information. See U.S. Br. 44. Such a categorical bar finds no support in this Court's decisions. See *North Carolina* v. *Pearce*, 395 U.S. 711, 723 (1969) (holding that district courts may increase or decrease a defendant's sentence at resentencing "in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities'") (quoting *Williams* v. *New York*, 337 U.S. 241, 245 (1949)); cf. *Wasman* v. *United States*, 468 U.S. 559, 563 (1984). Nor has Congress or the Commission adopted any such categorical prohibition.

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[2] Amicus attempts to distinguish between pre-sentencing and post-sentencing rehabilitation, on the theory that "[e]very defendant has the right to a sentencing proceeding * * * [b]ut not every defendant obtains plenary resentencing." Br. 30. A plenary resentencing proceeding, however, functions like and implicates the same interests as an original sentencing proceeding. See U.S. Br. 41; *Dillon* v. *United States*, 130 S. Ct. 2683, 2690-2692 (2010). Under 18 U.S.C. 3553(a) and 3661, a defendant can present information relevant to his background and character at any plenary sentencing proceeding, whether the defendant is being sentenced for the first time or resentenced following a remand.

[3] Sentencing outcomes can be affected by many other fortuities of timing in the criminal process, including, for example, whether a defendant happens to be sentenced before or after the date of a new Guidelines provision that changes the sentencing range and is not made retroactive.

Indeed, even the court below has not been willing to accept the logical consequences of its reasoning, because it has permitted consideration of post-sentencing information that would tend to heighten the severity of the sentence imposed at resentencing. See *United States* v. *Stapleton*, 316 F.3d 754, 757 (8th Cir. 2003) (permitting "consideration of post-sentencing obstructive conduct that occurs in the judge's presence at resentencing"). There is no basis, however, for permitting information about post-sentencing events on only one side of the ledger. Under 18 U.S.C. 3553(a) and 3661, defendants may present post-sentencing information that potentially bears on the appropriate sentence, just as the government may present post-sentencing information about additional victims, harms, or offenses. Consideration of such information does not necessarily result in an "unwarranted" disparity within the meaning of Section 3553(a)(6).

b. Even if consideration of post-sentencing rehabilitation could properly be viewed as resulting in unwarranted sentence disparity, that is only one of the factors set forth in Section 3553(a). As this Court explained in *Kimbrough*, Section 3553(a) "provides that, in determining the appropriate sentence, the court should consider *a number of factors*," including the need to avoid unwarranted sentence disparities. 552 U.S. at 101 (emphasis added). Likewise, the courts of appeals to consider the question, including the Eighth Circuit, have uniformly recognized that "the need to avoid unwarranted sentence disparities" is only "one factor that must be considered by a district court after *Booker*." *United States* v. *Red Bird*, 450 F.3d 789, 795 (8th Cir. 2006); see, *e.g.*, *United States* v. *Martinez*, 610 F.3d 1216, 1228 (10th Cir. 2010), cert. denied, No. 10-6721 (Nov. 1, 2010). Here, the district court should be permitted on remand to balance any disparity created by consideration of

post-sentencing rehabilitation against the other Section 3553(a) factors.

3. Amicus further argues that "prohibiting consideration of post-sentencing rehabilitation is not inconsistent with § 3553(a)(1) or (a)(2)." Br. 33 (emphasis omitted). Section 3553(a)(1), which requires a sentencing court to consider "the history and characteristics of the defendant," is broad enough to encompass information indicating that a defendant has reformed himself since his original sentencing. See *Senate Report* 53 (directing district courts "to impose sentence after a *comprehensive examination* of the characteristics of the particular offense and the particular offender") (emphasis added). Amicus does not address Section 3553(a)(1) on its own terms, but instead bases his argument on 18 U.S.C. 3742(g). Br. 33-35. In amicus's view, Section 3742(g) places off limits at resentencing certain kinds of information—such as post-sentencing rehabilitation—that Section 3553(a) would otherwise allow district courts to consider. At the least, amicus argues, Section 3742(g) should inform this Court's interpretation of Section 3553(a). Br. 35. For reasons set forth below, however, Section 3742(g)(2) is invalid after *Booker* and thus does not bear on the interpretation of Section 3553(a)(1). See Part III, *infra*.

Amicus does address Section 3553(a)(2) on its own terms, but his assertion that post-sentencing rehabilitation is irrelevant to the purposes of resentencing cannot withstand scrutiny. Br. 37-38. As a matter of both statutory text and common sense, information that a defendant has rehabilitated himself since his original sentencing is relevant to whether a particular sentence is "sufficient, but not greater than necessary," "to afford adequate deterrence to criminal conduct" and "to protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(2)(B)-(C); see

Gall, 552 U.S. at 59; Amicus FPCD Br. 16-17. Although Congress has prohibited courts from imposing imprisonment solely so that a defendant could be rehabilitated in the future, 18 U.S.C. 3582(a), it has never suggested that a defendant should be sentenced or resentenced without respect to whether the defendant already has been rehabilitated or made substantial progress toward rehabilitation.

4. Finally, amicus argues that there are "other procedural mechanisms," such as good time credit or a sentence reduction under Federal Rule of Criminal Procedure 35(b), that "account for post-sentencing rehabilitation." Br. 38 (emphasis omitted). But neither of those mechanisms necessarily accounts for a defendant's rehabilitation between the time of an original sentencing and a subsequent resentencing. Once a defendant has been resentenced, then the Bureau of Prisons may award good time credit based on the defendant's compliance with institutional regulations, see 18 U.S.C. 3624(b), or the government may request a sentence reduction based on the defendant's substantial assistance to authorities, see Fed. R. Crim. P. 35(b)(1)-(2). Those inquiries, however, focus on the defendant's conduct *after* resentencing. Neither inquiry addresses the defendant's appropriate sentence *at* resentencing. To determine that, the sentencing court must consider a number of factors under Section 3553(a), and it may permissibly consider the degree of the defendant's rehabilitation at the time of resentencing.

III. BECAUSE IT RENDERS THE GUIDELINES SYSTEM MANDATORY AT RESENTENCING IN CERTAIN CASES, 18 U.S.C. 3742(g)(2) IS INVALID AFTER *BOOKER*

Amicus agrees (Br. 5) with the government that, at resentencing in any case remanded pursuant to 18 U.S.C. 3742(f), Section 3742(g)(2) prohibits a district court from

granting a downward variance on the basis of a defendant's post-sentencing rehabilitation. Section 3742(g)(2) accomplishes that result by requiring the district court at resentencing after remand to sentence within the applicable Guidelines range, subject to a narrow exception for any departure that was previously granted by the district court and expressly upheld by the court of appeals. The net effect of Section 3742(g)(2) is thus to make the Guidelines mandatory at resentencing in an entire set of cases. This Court's holding in *Booker*, however, establishes that Congress may not make the Guidelines mandatory in that way.

1. Amicus argues that this Court already upheld Section 3742(g)(2) in *Booker*. As amicus notes (Br. 12), the remedial opinion in *Booker* "severed and excised the provision of the statute requiring *de novo* review of departures from the Guidelines, 18 U.S.C. § 3742(e)." *Kimbrough*, 552 U.S. at 101 n.12. Amicus maintains that by excising Section 3742(e) but not Section 3742(g)(2), this Court indicated that the latter provision is consistent with an advisory Guidelines system. But examination of the briefs and opinions in *Booker* reveals that Section 3742(g)(2) was not brought to the Court's attention. Section 3742(g) was not cited in any of the parties' briefs or even in any of the numerous amicus briefs. It is therefore unsurprising that none of the opinions in *Booker* even mentions Section 3742(g)(2), much less expresses a view on whether that provision would remain valid under an advisory Guidelines system.

2. Amicus argues that Section 3742(g)(2) "withstands constitutional scrutiny because it does not impermissibly compel a district court on remand to impose a Guidelines sentence." Br. 7. The sentencing proceeding at issue in *Booker* illustrates why that argument is incorrect. The district court treated the Guidelines as mandatory and in-

creased Booker's sentence based on a drug-quantity finding made by the judge rather than the jury. 543 U.S. at 227. After this Court held in *Booker* that the Guidelines must be treated as advisory, the Court remanded the case. *Id.* at 267. Under Section 3742(g)(2), however, the resentencing judge in *Booker* still would have been required to treat the Guidelines as mandatory, because Section 3742(g)(2) permits a sentence outside the Guidelines range at resentencing only on a ground for departure relied upon at the original sentencing. Section 3742(g)(2) thus would fail constitutional scrutiny as applied to *Booker* itself, in addition to the many other cases in which resentencings were conducted in the wake of *Booker*.[4] The government made that point in its opening brief, see U.S. Br. 49 n.12, and amicus offers no response.

Section 3742(g)(2) would also have barred imposition of a non-Guidelines sentence on remand in *Nelson* v. *United States*, 129 S. Ct. 890 (2009), where this Court vacated a sentence and remanded because the district court had erroneously treated the Guidelines range as presumptively reasonable. The same would be true as to any sentencing in which a district court refuses to impose a non-Guidelines sentence based on a misunderstanding of its authority to depart under or vary from the Guidelines. Thus, if Section 3742(g)(2) were valid, there would be no remedy at resen-

[4] Applying Section 3742(g)(2) at resentencing would not invariably be unlawful under the Sixth Amendment. That was equally true, however, of the sentencing provisions that this Court severed and excised in *Booker*. The Court in *Booker* rendered the Guidelines advisory rather than creating a system in which the Guidelines were mandatory some of the time and advisory some of the time. That same remedial approach requires severance and excision of Section 3742(g)(2). See *Dillon* v. *United States*, 130 S. Ct. 2683, 2698 n.5 (2010) (Stevens, J., dissenting).

tencing if a district court had initially imposed a Guidelines sentence based on an erroneous belief that it lacked the power to vary from the Guidelines' disparate treatment of crack and powder cocaine, but see *Kimbrough*, *supra*; or an erroneous belief that a non-Guidelines sentence must be supported by extraordinary circumstances, but see *Gall*, *supra*. In such cases, the sentencing judge will necessarily have failed to sentence outside the Guidelines, and Section 3742(g)(2) would therefore flatly preclude imposition of any non-Guidelines sentence on resentencing.

To take yet another example, consider a case in which the district court calculates a Guidelines range of 108 to 135 months, and concludes that a sentence of 108 months is appropriate in light of the factors specified in Section 3553(a). If the government successfully appealed on the ground that the court had erroneously refused to impose a four-level upward adjustment based on the defendant's role in the offense, the Guidelines range at resentencing would be 168 to 210 months (assuming no other change in the Guidelines calculations). If the district court at resentencing concluded that a downward variance to a sentence below 168 months was warranted, Section 3742(g)(2) would preclude the court from varying at all; it would require imposition of a within-Guidelines range sentence of at least 168 months. As these examples illustrate, Section 3742(g)(2) is an impermissible vestige of the mandatory Guidelines system.

3. Amicus claims that Section 3742(g) is designed to ensure "that a district court, on resentencing, may consider only information available to the court of appeals." Br. 7. To the contrary, Section 3742(g)(2) is designed to ensure something quite different: that once a departure is set aside on appeal, the district court cannot effectively impose the same sentence at resentencing on the basis of a differ-

ent departure. Section 3742(g)(2) accomplishes that result by doing what *Booker* forbids—namely, binding the district court to the applicable Guidelines range, along with any departure expressly approved by the court of appeals.

a. Section 3742(g)(2) does not prevent district courts from considering post-sentencing rehabilitation in a number of ways. As an initial matter, Section 3742(g) applies only to resentencings that are conducted after a sentence is overturned on appeal and the case is remanded. Section 3742(g) does not apply to resentencings that occur for other reasons, for instance, after a defendant's sentence is set aside on collateral review under 28 U.S.C. 2255 (Supp. II 2008). Amicus is therefore incorrect that Section 3742(g)(2) broadly aims at preventing district courts from considering post-sentencing developments.

Moreover, even at a resentencing after a remand, the district court may consider post-sentencing developments in setting the sentence within the applicable Guidelines range. Neither Section 3742(g)(2) nor the Guidelines preclude consideration of a defendant's post-sentencing rehabilitation for that purpose. Amicus's position thus amounts to saying that although a district court may consider post-sentencing rehabilitation when setting the sentence within an applicable Guidelines range, it may not consider that same information as a reason to set a sentence outside the applicable range. Leaving aside that amicus's position is no longer viable after *Booker*, Section 3742(g)(2) does not reflect a general congressional prohibition on consideration either of post-sentencing rehabilitation or more broadly of new facts at resentencing.

b. To the contrary, Section 3742(g)(2) has a quite different focus: constraining what Congress viewed as willful conduct by district court judges in the context of sentencing in sexual abuse and pornography cases. When it enacted

the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(e), 117 Stat. 671, Congress had before it evidence of "a growing trend of increasingly vague grounds of downward departure" in cases involving minor victims. *Hearing on H.R. 1104 Before the Subcomm. on Crime, Terrorism & Homeland Security of the H. Comm. on the Judiciary*, 108th Cong., 1st Sess. 18 (2003). Congress therefore wanted to ensure that district courts would grant downward departures in cases involving minor victims only on grounds specifically enumerated in the Guidelines. See H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 58-59 (2003). To that end, the PROTECT Act requires district courts "to give specific written reasons for any departure" from the Guidelines; implements a de novo standard of review "to allow appellate courts more effectively to review illegal and inappropriate downward departures"; and "prevent[s] sentencing courts, upon remand, from imposing the same illegal departure on a different theory." *Id*. at 59.

Section 3742(g)(2) thus had nothing to do with prohibiting consideration of post-sentencing developments, including a defendant's recent rehabilitation. Rather, Section 3742(g)(2) was meant to ensure that, under a then-mandatory Guidelines system, when a particular departure was reversed on appeal, the district court could not impose the same sentence on remand on the basis of a different departure. In other words, the purpose of Section 3742(g)(2) was to make the Guidelines even more mandatory: at resentencing, district courts could sentence outside the applicable Guidelines range only on the basis of a departure on which they had previously relied and which the court of appeals had previously upheld. Like the appellate review provisions that this Court excised in *Booker*,

Section 3742(g)(2) reflects a goal—"to make Guidelines sentencing even more mandatory than it ha[d] been" before the PROTECT Act—that has "ceased to be relevant." *Booker*, 543 U.S. at 261.[5]

The relevant point here is not simply that Section 3742(g)(2) restricts the authority of district courts to sentence outside the applicable Guidelines range. Amicus correctly notes (Br. 14-16) that appellate review imposes some constraints on district courts' sentencing authority. Rather, what matters is the manner in which Section 3742(g)(2) restricts the sentencing authority of district courts at resentencing, *i.e.*, by making the Guidelines mandatory, subject to a narrow exception for departures that have been previously granted by the district court and affirmed on appeal by the court of appeals. Because it in that respect renders the Guidelines mandatory at resentencing, Section 3742(g)(2) is inconsistent with *Booker*. 543 U.S. at 233, 259.

4. Finally, amicus contends (Br. 21-22) that any infirmity in Section 3742(g)(2) could be remedied by excising Section 3742(j)(1)(B) rather than Section 3742(g)(2). That

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[5] Amicus argues (Br. 19-20) that the term "departure" in Section 3742(g)(2) should be interpreted to include both departures under the Guidelines and variances under Section 3553(a). But at the time that Congress enacted Section 3742(g)(2), the Guidelines were mandatory and "departure" was a term of art that "refer[red] only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Irizarry* v. *United States*, 553 U.S. 708, 714 (2008). In any event, interpreting the term "departure" to include variances would mean only that the Guidelines would not be mandatory at resentencing in a small set of cases remanded under Sections 3742(f) and (g), *i.e.*, those cases in which a variance was granted by the district court at the original sentencing and affirmed by the court of appeals. In most cases remanded under Sections 3742(f) and (g), the Guidelines would remain mandatory, and thus amicus's implausible statutory interpretation does not resolve Section 3742(g)(2)'s fundamental defect.

would not, however, cure the infirmity. It is true that Section 3742(j)(1)(B) is problematic on its own terms, because it requires that for a "ground of departure" to be "permissible" at resentencing, that ground of departure must be "authorized under section 3553(b)." Section 3742(j)(1)(B) thus incorporates a cross-reference to Section 3553(b)(1), which is the statutory provision that rendered the Guidelines mandatory and that this Court excised in *Booker*.

But even if Section 3742(j)(1)(B) were excised and a district court could depart or vary on any ground at an original sentencing, the district court could not depart, let alone vary, on any new ground at resentencing so long as Section 3742(g)(2) remains in force. Rather, the district court would be limited to the applicable Guidelines range, along with any departure previously granted by the court and expressly upheld by the court of appeals. Because that has the effect of making the Guidelines mandatory at resentencing in an entire set of cases, amicus's proposed solution does nothing to fix the fundamental defect of Section 3742(g)(2). By contrast, excising Section 3742(g)(2) would fully address the problem, because it would render Section 3742(j)(1)(B)'s definitional provision effectively inoperative.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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