SUPREME COURT OF THE UNITED STATES

No. 09–6822

JASON PEPPER, PETITIONER *v.* UNITED STATES

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

[March 2, 2011]

JUSTICE THOMAS, dissenting.

I would affirm the Court of Appeals and uphold Pepper's sentence. As written, the Federal Sentencing Guidelines do not permit district courts to impose a sentence below the Guidelines range based on the defendant's postsentencing rehabilitation.[1] See United States Sentencing Commission, Guidelines Manual §5K2.19 (Nov. 2010) (USSG). Therefore, I respectfully dissent.

In *United States* v. *Booker*, 543 U. S. 220, 258–265 (2005), the Court rendered the entire Guidelines scheme advisory, a remedy that was "far broader than necessary to correct constitutional error." *Kimbrough* v. *United States*, 552 U. S. 85, 114 (2007) (THOMAS, J., dissenting). Because there is "no principled way to apply the *Booker* remedy," I have explained that it is "best to apply the statute as written, including 18 U. S. C. §3553(b), which makes the Guidelines mandatory," unless doing so would actually violate the Sixth Amendment. *Id.,* at 116; see *Booker*, *supra,* at 313–326 (THOMAS, J., dissenting in part); *Gall* v. *United States*, 552 U. S. 38, 61 (2007) (THOMAS, J., dissenting); *Irizarry* v. *United States*, 553 U. S. 708, 717 (2008) (THOMAS, J., concurring).

I would apply the Guidelines as written in this case

[1] I agree with the Court that the law of the case doctrine did not control Pepper's resentencing. See *ante*, at 29–31.

because doing so would not violate the Sixth Amendment. The constitutional problem arises only when a judge makes "a finding that raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." *Booker*, *supra,* at 313 (opinion of THOMAS, J.). Pepper admitted in his plea agreement to involvement with between 1,500 and 5,000 grams of methamphetamine mixture, which carries a sentence of 10 years to life under 21 U. S. C. §841(b)(1)(A)(viii).[2] *United States* v. *Pepper*, 412 F. 3d 995, 996 (CA8 2005). Because Pepper has admitted facts that would support a much longer sentence than the 65 months he received, there is no Sixth Amendment problem in this case.

Under a mandatory Guidelines regime, Pepper's sentence was proper. The District Court correctly calculated the Guidelines range, incorporated a USSG §5K1.1 departure and the Government's motion under Federal Rule of Criminal Procedure 35(b), and settled on a 65-month sentence. Guideline §5K2.19 expressly prohibits downward departures based on "[p]ost-sentencing rehabilitative efforts, even if exceptional." Nor is there any provision in the Guidelines for the "variance" Pepper seeks, as such variances are creations of the *Booker* remedy. I would therefore affirm the Court of Appeals' decision to uphold Pepper's sentence.

Although this outcome would not represent my own policy choice, I am bound by the choices made by Congress and the Federal Sentencing Commission. Like the majority, I believe that postsentencing rehabilitation can be highly relevant to meaningful resentencing. See *ante*, at 13–15. In light of Pepper's success in escaping drug addic-

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[2] Pepper also stated that he understood both the 10-year statutory minimum and that the Government was making no promises about any exceptions.

tion and becoming a productive member of society, I do not see what purpose further incarceration would serve. But Congress made the Guidelines mandatory, see 18 U. S. C. §3553(b)(1), and authorized USSG §5K2.19. I am constrained to apply those provisions unless the Constitution prohibits me from doing so, and it does not here.