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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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PEPPER *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 09–6822. Argued December 6, 2010—Decided March 2, 2011

After pleading guilty to drug charges, petitioner Pepper was sentenced under the Federal Sentencing Guidelines to 24 months' imprisonment, a nearly 75 percent downward departure from the low end of the Guidelines range based in part on his substantial assistance, followed by five years of supervised release. In *Pepper I*, the Eighth Circuit reversed and remanded for resentencing in light of, *inter alia*, *United States v. Booker*, 543 U. S. 220. Pepper, who had begun serving his supervised release, testified at his resentencing hearing that he was no longer a drug addict, having completed a 500-hour drug treatment program while in prison; that he was enrolled in community college and had achieved very good grades; and that he was working part time. Pepper's father testified that he and his son were no longer estranged, and Pepper's probation officer testified that a 24-month sentence would be reasonable in light of Pepper's substantial assistance, postsentencing rehabilitation, and demonstrated low recidivism risk. The District Court again sentenced Pepper to 24 months, granting a 40 percent downward departure based on Pepper's substantial assistance and a further downward variance based on, *inter alia*, Pepper's rehabilitation since his initial sentencing. In *Pepper II*, the Eighth Circuit again reversed and remanded for resentencing, concluding that Pepper's postsentencing rehabilitation could not be considered as a factor supporting a downward variance, and directing that the case be assigned to a different district judge. After this Court vacated and remanded the *Pepper II* judgment in light of *Gall v. United States*, 552 U. S. 38, the Eighth Circuit, in *Pepper III*, reversed and remanded once more. At the second resentencing hearing, Pepper informed the new district judge that he was still in school, was about to be promoted at his job, and had married and was

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supporting his new family. Noting the nearly identical remand language of *Pepper II* and *Pepper III*, the court observed that it was not bound to reduce Pepper's range by 40 percent for substantial assistance. Instead, it found him entitled to a 20 percent reduction and refused to grant a further downward variance for, *inter alia*, postsentencing rehabilitation. It imposed a 65-month prison term and 12 months of supervised release. In *Pepper IV*, the Eighth Circuit once again rejected Pepper's postsentencing rehabilitation argument. It also rejected his claim that the law of the case from *Pepper II* and *Pepper III* required the District Court to reduce the applicable Guidelines range by at least 40 percent.

Held:

1. When a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation, and such evidence may, in appropriate cases, support a downward variance from the now-advisory Guidelines range. Pp. 9–27.

(a) Consistent with the principle that “the punishment should fit the offender and not merely the crime,” *Williams v. New York*, 337 U. S. 241, 247, this Court has observed a consistent and uniform policy “under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law,” *id.*, at 246, particularly “the fullest information possible concerning the defendant's life and characteristics,” *id.*, at 247. That principle is codified at 18 U. S. C. §3661, which provides that “[n]o limitation shall be placed on the information” a sentencing court may consider “concerning the [defendant's] background, character, and conduct,” and at §3553(a), which specifies that sentencing courts must consider, among other things, a defendant's “history and characteristics,” §3553(a)(1). The Guidelines, which *Booker* made “effectively advisory,” 543 U. S., at 245, “should be the starting point and the initial benchmark,” but district courts may impose sentences within statutory limits based on appropriate consideration of all of the §3553(a) factors, subject to appellate review for “reasonableness,” *Gall v. United States*, 552 U. S. 38, 49–51. This sentencing framework applies both at initial sentencing and at any subsequent resentencing after a sentence has been set aside on appeal. Pp. 9–12.

(b) Postsentencing rehabilitation evidence may support a downward variance from the advisory Guidelines range. The plain language of §3661 makes clear that there is “[n]o limitation . . . on . . . background, character, and conduct” information, and it makes no distinction between an initial sentencing and a subsequent resentencing. In addition, postsentencing rehabilitation evidence may be

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highly relevant to several §3553(a) factors that district courts are required to consider at sentencing. The extensive evidence of Pepper's rehabilitation since his initial sentencing is clearly relevant to the selection of an appropriate sentence here. Most fundamentally, that evidence provides the most up-to-date picture of his "history and characteristics." §3553(a)(1). At the time of his initial sentencing, he was an unemployed drug addict who was estranged from his family and sold drugs. By his second resentencing, he had been drug-free for nearly five years, was attending college, was a top employee slated for promotion, had re-established a relationship with his father, and was married and supporting a family. His postsentencing conduct also sheds light on the likelihood that he will engage in future criminal conduct, a central factor that sentencing courts must consider. See §§3553(a)(2)(B)–(C). Pp. 12–15.

(c) The contrary arguments advanced by *amicus* appointed to defend the judgment are unpersuasive. Pp. 15–26.

(1) While §3742(g)(2)—which prohibits a district court at resentencing from imposing a sentence outside the Guidelines range except upon a ground it relied upon at the prior sentencing—effectively precludes a court from considering postsentencing rehabilitation, that provision is invalid after *Booker*. Like the provisions invalidated in *Booker*—§§3553(b)(1) and 3742(e)—§3742(g)(2) requires district courts effectively to treat the Guidelines as mandatory in an entire set of cases. Thus, the proper remedy is to invalidate the provision. While applying §3742(g)(2) at resentencing would not always result in a Sixth Amendment violation, this Court rejects a partial invalidation that would leave the Guidelines effectively mandatory in some cases and advisory in others. The fact that §3742(g)(2) permits a resentencing court on remand to impose a non-Guidelines sentence where the prior sentence expressly relied on a departure upheld by the court of appeals also does not cure the constitutional infirmity. And the argument that any constitutional infirmity in §3742(g)(2) can be remedied by invalidating §3742(j)(1)(B) is rejected. Pp. 15–20.

(2) This Court finds unpersuasive *amicus*' arguments focusing on Congress' sentencing objectives under §3553(a). Contrary to *amicus*' contention, §3742(g)(2) does not reflect a congressional purpose to preclude consideration of postsentencing rehabilitation evidence. Thus, that provision has no bearing on this Court's analysis of whether §3553(a) permits consideration of such evidence. Nor is the consideration of postsentencing rehabilitation inconsistent with the sentencing factor in §3553(a)(5)—which directs sentencing courts to consider "any pertinent policy statement" of the Sentencing Commission—particularly as the pertinent policy statement in this case is

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based on unconvincing policy rationales not reflected in the relevant sentencing statutes. Consideration of postsentencing rehabilitation is also not inconsistent with §3553(a)(6)—which requires courts to consider “the need to avoid unwarranted sentenc[ing] disparities among defendants with similar records who have been found guilty of similar conduct”—as any disparity arises only from the normal trial and sentencing process. The differences in procedural opportunity that may result because some defendants are inevitably sentenced in error and must be resentenced are not the kinds of “unwarranted” sentencing disparities that Congress sought to eliminate under §3553(a)(6). Pp. 21–26.

(d) On remand, the District Court should consider and give appropriate weight to the postsentencing rehabilitation evidence, as well as any additional evidence concerning Pepper’s conduct since his last sentencing. Pp. 26–27.

2. Because the Eighth Circuit in *Pepper III* set aside Pepper’s entire sentence and remanded for *de novo* resentencing, the District Court was not bound by the law of the case doctrine to apply the same 40 percent departure applied by the original sentencing judge. To avoid undermining a district court’s original sentencing intent, an appellate court when reversing one part of a sentence “may vacate the entire sentence . . . so that, on remand, the trial court can reconfigure the sentencing plan . . . to satisfy [§3553(a)’s] sentencing factors.” *Greenlaw v. United States*, 554 U. S. 237, 253. That is what the Eighth Circuit did here. Pp. 27–30.

570 F. 3d 958, vacated in part, affirmed in part, and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and GINSBURG, JJ., joined, and in which BREYER and ALITO, JJ., joined as to Part III. BREYER, J., filed an opinion concurring in part and concurring in the judgment. ALITO, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. THOMAS, J., filed a dissenting opinion. KAGAN, J., took no part in the consideration or decision of the case.