No. 09-622

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2008

Jason Pepper,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

The Petitioner has been previously granted leave to proceed *in forma pauperis* five different times in relation to his criminal case and appeals.

On October 23, 2003, and July 8, 2005, the United States District Court for the Northern District of Iowa appointed counsel under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. On May 4, 2004, and June 7, 2006, the Eighth Circuit Court of Appeals appointed appellate counsel under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

On February 12, 2008, the Supreme Court granted Pepper's motion to proceed *in forma pauperis*.

On March 16, 2009, the United States District Court issued the following order regarding Mr. Pepper's fourth appeal to the Eighth Circuit Court of Appeals (*United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009)): "This matter comes before the court on the defendant's motion to appeal in forma pauperis. The defendant filed such motion on February 10, 2009. Based on the financial affidavit submitted by the defendant, the court concludes that waiver of the appellate filing fee is appropriate. To the extent that the defendant now seeks in forma pauperis status because he desires court appointed counsel, the record reflects that defense counsel agreed to represent the defendant on a pro bono basis. Accordingly, the motion to appeal in forma pauperis is granted in part and denied in part."

The undersigned counsel agreed to represent Mr. Pepper on a pro bona basis for his fourth appeal to the Eight Circuit Court of Appeals. It is from the Eighth Circuit's opinion in *United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009) that Mr. Pepper is seeking review form this Court. The petition for a writ of certiorari is being prepared pro bono.

PARRISH KRUIDENIER DUNN BOLES GRIBBLE
PARRISH GENTRY & FISHER, L.L.P.

BY: Alfredo Parrish (by DWG)

Alfredo Parrish
Counsel of Record
Parrish Kruidenier Law Firm
2910 Grand Avenue
Des Moines, Iowa 50312
TELEPHONE: (515) 284-5737
FACSIMILE: (515) 284-1704
EMAIL: Aparrish@parrishlaw.com

MELLON AND SPIES – ATTORNEYS AT LAW
BY: Leon Spies (BWG)
Leon F. Spies
Counsel of Record
Mellon & Spies
312 E. College Street, Suite 216
Iowa City, Iowa 52240
TELEPHONE: (319) 337-4193
FACSIMILE: (319) 337-2396
EMAIL: spieslegal@aol.com
ATTORNEYS FOR PETITIONER

F:\USERDATA\CLIENTS\Pepper, Jason\3rd Writ - 2009\motion in forma pauperis.doc

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2008

JASON PEPPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

PARRISH KRUIDENIER DUNN BOLES GRIBBLE
PARRISH GENTRY & FISHER, L.L.P.

Alfredo Parrish
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
TELEPHONE: (515) 284-5737
FACSIMILE: (515) 284-1704
EMAIL: Aparrish@parrishlaw.com

Leon F. Spies
Counsel of Record
312 E. College Street, Suite 216
Iowa City, Iowa 52240
TELEPHONE: (319) 337-4193
FACSIMILE: (319) 337-2396
EMAIL: spieslegal@aol.com
ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

There is a conflict among the United States Courts of Appeals regarding a defendant's post-sentencing rehabilitation and whether it can support a downward sentencing variance under 18 U.S.C. § 3553(a).

Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. § 3553(a) after *Gall v. United States*?

Whether as a sentencing consideration under 18 U.S.C. § 3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation.

When a district court judge is removed from resentencing a defendant after remand, and a new judge is assigned, is the new judge obligated under the doctrine of the "law of the case" to follow sentencing findings issued by the original judge that had been previously affirmed on appeal?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes **Page(s)**

OPINIONS BELOW

On June 24, 2005, the Eighth Circuit Court of Appeals reversed the judgment of the District Court for the Northern District of Iowa and remanded for resentencing. *United States v. Pepper*, 412 F.3d 995 (8th Cir. 2005) (*Pepper I*). App. 31.[1]

On May 21, 2007, the Eighth Circuit again reversed the judgment of the District Court for the Northern District of Iowa and remanded for resentencing. *United States v. Pepper*, 486 F.3d 408 (8th Cir. 2007) (*Pepper II*). App. 27.

Following the Eighth Circuit's opinion, on or about August 8, 2007, Pepper filed his petition for writ of certiorari in the Supreme Court.

On February 12, 2008, the Supreme Court granted Pepper's petition for writ of certiorari. *Pepper v. United States*, ---- U.S. ----, 128 S.Ct. 871, 169 L.Ed.2d 715 (2008). App. 23. The Court ordered the Eighth Circuit's judgment vacated and the case was remanded to the Eighth Circuit for further consideration in light of *Gall v. United States*, 552 U.S. ----, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

Following the remand, On March 11, 2008, the Eighth Circuit again reversed the judgment of the District Court for the Northern District of Iowa and remanded for resentencing. *United States v. Pepper*, 518 F.3d 949 (8th Cir. 2008) (*Pepper III*). App. 19.

On June 9, 2008, Pepper filed his second petition for writ of certiorari.

On October 6, 2008, the Supreme Court denied his second petition for writ of certiorari. *Pepper v. United States*, __ U.S. __, 129 S.Ct. 138, 172 L.Ed.2d 105 (2008).

On July 2, 2009, the Eighth Circuit affirmed the sentence and judgment of the

District Court for the Northern District of Iowa. *United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009) (*Pepper IV*). App. 1.

JURISDICTION

There were two amended judgments in a criminal case entered by the Honorable Chief Judge Linda R Reade in the United States District Court for the Northern District of Iowa, Western Division, on January 5, 2009. App. 7 & 13. Jurisdiction was pursuant to 18 U.S.C. § 3231.

On June 24, 2005, the Eighth Circuit Court of Appeals reversed the judgment of the District Court for the Northern District of Iowa. *Pepper I*, 412 F.3d 995. App. 31.

On May 21, 2007, the Eighth Circuit again reversed the judgment of the District Court for the Northern District of Iowa. *Pepper II*, 486 F.3d 408. App. 27.

On March 11, 2008, the Eighth Circuit again reversed the judgment of the District Court for the Northern District of Iowa. *Pepper III*, 518 F.3d 949. App. 19.

On July 2, 2009, the Eighth Circuit affirmed the sentence and judgment of the District Court for the Northern District of Iowa. *Pepper IV*, 570 F.3d 958. App. 1.

Jurisdiction for the Eighth Circuit was pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

Jurisdiction for the Supreme Court is pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 3231

---

[1] "App. __" refers to the attached appendix.

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

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.

18 U.S.C. § 3742(a)

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

21 U.S.C. § 841(a)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance ...

21 U.S.C. § 841(b)(1)(A)

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—
(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers...

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life ...

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of

> Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

This is one unique case.

On June 27, 2005, Mr. Pepper satisfied his federal 24 month term of imprisonment and began his five years on supervised release. His exemplary conduct on supervised release ranged from college courses and full-time managerial employment, to marriage and the responsibilities of a father, to living a law abiding life.

On January 5, 2009--after three resentencing hearings, two appeals by the government, one appeal by Mr. Pepper, four different opinions by the Eighth Circuit Court of Appeals, and this Court's ruling granting Pepper's petition for writ of certiorari which vacated the Eighth Circuit's judgment and remanded his case for further consideration in light of *Gall*–the district court increased Mr. Pepper's punishment and ordered him back to prison for an additional 41 months. He may finish his additional term of imprisonment before his appeal is decided.

This petition will refer to three different sentencing transcripts and four different appeals to the Eighth Circuit. Throughout this petition the following abbreviations will be used.

"Sentencing Tr." references Pepper's first sentencing in front of Judge Bennett on March 10, 2004.

"Resentencing Tr." references Pepper's resentencing on May 5, 2006, in front of Judge Bennett following *Pepper I*, 412 F.3d 995.

"Second Resentencing Tr." references Pepper's second resentencing on October 17, 2008, and January 5, 2009, in front of Chief Judge Reade following *Pepper II*, 486 F.3d 408 and *Pepper III*, 518 F.3d 949.

On October 1, 2003, Jason Pepper (DOB 4/30/79) was arrested and placed in custody for conspiring to distribute methamphetamine. (Resentencing Tr. p. 19).

Following the filing of the Indictment, and pleading guilty, Pepper appeared for sentencing on March 10, 2004, in front of Judge Bennett.

All parties agreed Pepper had a Guideline offense level of 30 and a Criminal History Category I. Because he was safety valve eligible (and the statutory minimum sentence of ten years did not apply) his Guideline range was 97 to 121 months. (Sentencing Tr. p. 2).

The government filed a substantial assistance motion under U.S.S.G. § 5K1.1 and requested a 15 percent reduction based on the following: (1) upon Pepper's arrest, he 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, he was a corroborative witness on one defendant that was his source and was a main witness against a second defendant; both defendants were indicted, (4) he was a witness on a gun count, and (5) he was truthful and reliable. *Id.* at 2, 5, 6-9. Also, he had provided information regarding 10 or 11 people involved in drug activity. *Id.*, at 11.

Through defense counsel (and with no objection by the government), Pepper's

background was explained to the judge: When Pepper was 19, his brother passed away; when he was 23, his mother passed away; his parents were divorced; he was somewhat homeless when he became involved in the criminal activity; he very much wanted drug treatment; he was glad he was arrested because it got him away from methamphetamine; and, he had a good academic background and was in the top third of his class. *Id.*, at 9-12, 22. His father was in the courtroom and the judge noted that the father wrote a "very thoughtful letter" and of the thousands of letters the judge had received, it was one of the most thoughtful. *Id.*, at 10. In conclusion, counsel requested a departure so Pepper could get into a boot camp program. *Id.*, at 12. The United States Probation Office also recommended boot camp. *Id.*

The judge replied if Pepper was interested in drug treatment, the 500-hour program at the prison in Yankton, South Dakota, was the best, but Pepper would do more prison time in Yankton then at a boot camp. *Id.*, at 12-14. Pepper requested that he be sent to Yankton so he could get drug treatment. *Id.*, at 15. The government did not object to this request and stood by its initial recommendation. *Id.*

The judge, after placing a call to Yankton, determined he would need to impose at least a 24 month sentence (which would include Pepper's time in custody since October 1, 2003) in order to ensure that Pepper would get drug treatment: anything lower, based on the waiting list, he may not get treatment. *Id.*, at 16-17.

The judge then proceeded to sentencing. Based on the substantial assistance motion and the factors under § 5K1.1, the judge granted the motion, committed Pepper to the federal prison camp in Yankton for 24 months, and requested that he be placed in the

500-hour residential drug treatment program. *Id.*, at 18-19. He would then be on supervised release for five years. *Id.*, at 19. The judge noted Pepper had strong family support, had a lot of promise and potential, and expected him to do very well on supervised release. *Id.*, at 21-22.

On April 12, 2004, Pepper was delivered to the prison at Yankton, South Dakota.

On April 19, 2004, the government appealed Pepper's sentence.

On March 10, 2005, Pepper was released from the prison at Yankton. He immediately went to a halfway house in Council Bluffs, Iowa. (Resentencing Tr. pp. 19-20).

On June 24, 2005, the Eighth Circuit reversed Judge Bennett. The Court found the judge considered a matter unrelated to Pepper's assistance, namely his desire to sentence Pepper to the shortest possible term of imprisonment that would allow him to participate in the intensive drug treatment program at the federal prison in Yankton. *Pepper I*, 412 F.3d at 996, 999; App. 33. The case was remanded for resentencing with instructions to follow the principles set forth in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). *Id.*

On June 27, 2005, Pepper was released from the halfway house and moved to an apartment. (Resentencing Tr. pp. 19-20). He then began serving his five years of supervised release.

On May 5, 2006, the case returned for resentencing in front of Judge Bennett.

Prior to resentencing, counsel for Pepper filed a motion with the district court requesting a deviation from the advisory Guidelines sentence based on *Booker*. Counsel requested a deviation from the Guideline sentence based on Pepper's post-offense

rehabilitation, his substance abuse issues were resolved, he was no longer a risk to the community, and the sentencing disparities that occur due to the availability of the drug treatment programs in the BOP.

At the resentencing hearing three witnesses testified, Pepper, his father, and his United States probation officer.

Pepper testified his life had turned around after receiving drug treatment and after his release from prison. (Resentencing Tr. pp. 19-28). He had started work at MCI, but had to stop due to lack of transportation. *Id.*, at 25-26. He found another job. *Id.*, at 23, 25-26. In the fall of 2005, he enrolled and attended a community college. *Id.*, at 23. He was working part-time and was a full-time student. *Id.*, at 26. He received straight A's in the fall semester and had received a congratulatory letter from the dean of students. *Id.* at 24-25. He had no problems while on pretrial release. *Id.*, at 26-27. While at Yankton, he participated in the drug treatment program, but never received the one-year credit off his sentence because he was not there long enough. *Id.*, at 20-23.

Pepper's father testified he had a very strained relationship with his son the five years prior to his arrest. *Id.*, at 32. Following his son's arrest, they began communicating again and reestablished their relationship. *Id.*, at 33. He testified his son no longer uses drugs or alcohol. *Id.*, at 34. His son had matured and was making plans for the future. *Id.* In addition, the drug treatment program at Yankton truly sobered him up and changed his way of thinking. *Id.*, at 34-35.

Finally, Probation Officer Chad Zach testified. To help prepare the judge for resentencing he had prepared a confidential "Memorandum" regarding the sentencing

factors of 18 U.S.C. § 3553(a) and he recommended a 24 month sentence. *Id.*, at 37, 39. The judge adopted as his findings of fact the recommendations contained in the "Memorandum" and the testimony of Pepper and his father. *Id.*, at 85, 87.

Through his testimony and "Memorandum" Mr. Zach explained why a 24 month sentence was reasonable and identified the mitigating factors that warranted his recommendation for a limited downward variance under 18 U.S.C. § 3553(a) in conjunction with the substantial assistance reduction. *Id.*, at 40-44. Based on his experience, Mr. Zach believed a 24 month sentence was sufficient to protect the community and that Pepper had learned his lesson. *Id.*, at 44. The sentence was justified because since his release from prison over the preceding year, Pepper had shown the judge he could do remarkably well in the community. *Id.*, at 44.

Through his testimony and "Memorandum" Mr. Zach explained Pepper had: (1) been cooperative and compliant with all conditions of release, (2) had been actively employed, (3) had been enrolled in college courses, achieved a 4.0 grade point average and was placed on the President's List, (4) had been subject to random urinalysis and all tests had been negative, and, (5) had reestablished his relationship with his father. (Memorandum pp. 1, 5).

Mr. Zach evaluated for the judge and parties the 18 U.S.C. § 3553(a) sentencing factors that warranted a variance. Mr. Zach found pursuant to 18 U.S.C. § 3553(a)(1) (history and characteristics of defendant) that Pepper had no history of violence. (Memorandum p. 1). He had significant alcohol and drug abuse since age 18 and sold drugs to support his addiction, but had no substance abuse treatment prior to the instant

offense. *Id.* He had been drug free since his arrest in October 2003. *Id.* He had attempted suicide after his brother's death in 1998. *Id.* He was unemployed in 2000 to help take care of his ailing mother who suffered from cancer. *Id.* He was homeless after his mother died in 2002. *Id.* He had a distant relationship with his father. *Id.* In addition, he had been compliant while on supervised release by maintaining employment, had no positive drug tests, and was a model full-time college student. *Id.*

Mr. Zach found pursuant to 18 U.S.C. § 3553(a)(2) that Pepper had a minimal criminal history and had a low probability to commit future crimes. *Id.* Based on his experience, and discussions with Pepper's supervising probation officer, Pepper was considered a low-risk offender. (Resentencing Tr. p. 41).

Mr. Zach found pursuant to 18 U.S.C. § 3553(a)(6) (need to avoid disparities among defendants) that one of Pepper's codefendants received a 26% reduction in his sentence, one codefendant received a 70% reduction and the government withdrew its appeal regarding his sentence, and one codefendant received a 50% reduction in his sentence and the government did not appeal. (Memorandum pp. 3-4).

Mr. Zach concluded:

> When considering the pre-sentencing variance factors, the Court may look to several mitigating factors such as: the defendant has no history of violence; he was a drug addict who sold drugs to support his addiction; the two main supports in his life passed away (brother passed away in 1998 and his mother passed away in 2002) and it appears the defendant became unstable, which fueled his drug addiction; and sentencing disparities with two of the codefendants (Alexander Blankenship received a 70% substantial assistance reduction, which the government initially appealed but later dismissed and, Felipe Sandoval received a 50% substantial assistance reduction that was not appealed by the government).
>
> In addition to the pre-sentencing variance factors, this is a unique remand

> sentencing because the defendant appears to have post-release mitigating factors since his release on June 27, 2005. Since his release, the defendant has taken positive steps in becoming a law abiding citizen. He has maintained employment and is a full-time college student where he achieved a 4.0 last semester, making the President's List. The defendant has also reunited his relationship with his father. Although the defendant had a serious drug addiction, it appears he has taken the appropriate steps to maintain a lifestyle of sobriety by completing the Bureau of Prison's 500-hour drug treatment program; however he did not receive any reduction off his sentence because he did not have enough time to serve and was released to a halfway house after he completed the program. The defendant has also complied with all conditions of his supervision. Although each offender is unique, I do not believe the defendant has the demeanor to commit future crimes and, therefore, his risk to the community appears to be minimal.
>
> In light of the noted mitigation factors, it appears that a limited downward variance may be warranted under 18 U.S.C. § 3553(a). If the Court concurs, a 24 month sentence (same as original sentence) would appear reasonable in conjunction with the substantial assistance reduction.

Id., at 5.

Judge Bennett then imposed Pepper's sentence. The judge concluded he would depart 40% for substantial assistance, which would take Pepper's sentence down to 58 months. (Resentencing Tr. pp. 83-84). To arrive at the 40% reduction the judge explained how he was relying on Eighth Circuit precedent, how he relied on his discussions with other federal district court judges from around the country, that Pepper was very timely, was incredibly truthful and candid, had been debriefed, engaged in a proffer, and had engaged in grand jury work. *Id.*

The judge then moved to the issue whether the facts and circumstances of Pepper's case warranted a variance from the 58 month sentence. The judge decided he did and varied down to 24 months. *Id.*, at 85, 87. The judge took seven transcript pages to explain the specific reasons the 34 month variance was warranted for Pepper's "exceptional" case.

(Resentencing Tr. pp. 85-91).

The judge found Pepper's case was "exceptional," that he had no history of violence, and that there would be a sentencing disparity between Pepper and his codefendants if Pepper did not receive a variance. *Id.*, at 85-86. Specifically referencing the purpose of 18 U.S.C. § 3553(a)(2), the judge was convinced that Pepper had an "extremely low risk of recidivism" based on all the defendants he had seen. *Id.*, at 87. The judge felt obliged to consider Pepper's post-release conduct and how well Pepper had done since his release from prison. *Id.*, at 88-89. The judge justified this consideration by recognizing the other side of the argument, if Pepper had been out committing crimes it would be an important sentencing factor to consider during resentencing and believed that the government would advocate such a position. *Id.*

On June 5, 2006, the government appealed Pepper's sentence.

On May 21, 2007, the Eighth Circuit Court of Appeals again reversed and remanded Pepper's sentence. *Pepper II*, 486 F.3d 408; App. 27. The Court found Judge Bennett did not abuse his discretion by departing 40% for substantial assistance. *Id.*, at 411; App. 28. The Court reversed and remanded because it did not agree with the judge's 34 month downward variance and the judge failed to balance the other factors in § 3553(a). *Id.*, at 413; App. 29-30. Additionally, since Judge Bennett expressed a reluctance to resentence Pepper again if the case was remanded, the case was to be reassigned to a different sentencing judge. *Id.*, at 413; App. 30.

On May 21, 2007, the case was reassigned from Judge Bennett to Chief Judge Reade.

On July 18, 2007, Judge Reade ruled that during the second resentencing hearing the "court will not consider itself bound to reduce the Defendant's advisory Sentencing Guidelines range by 40%, pursuant to USSG § 5K1.1." *United States v. Pepper*, 2007 WL 2076041 *4 (N.D. Iowa 2007); App. 24.

On February 12, 2008, the Supreme Court granted Pepper's petition for writ of certiorari and ordered the case remanded for further consideration in light of *Gall*. *Pepper*, 128 S.Ct. 871; App. 23

On March 11, 2008, the Eighth Circuit again reversed Judge Bennett and remanded for resentencing in front of a different judge. *Pepper III*, 518 F.3d 949; App. 19. In light of *Gall*, the Court found Judge Bennett committed procedural error in failing to adequately explain with sufficient justifications his conclusion that a 59% variance after the § 5K1.1 downward departure was warranted. *Id.*, at 952; App. 21-22. The Court found the judge provided insufficient explanation of the "no history of violence" factor. *Id.* The Court found the judge did not adequately explain and support his rationale for sentencing Pepper to 24 months' imprisonment in contrast to Pepper's co-defendants. *Id.* In addition, the Court found the judge gave significant weight to Pepper's post-sentence rehabilitation, which is an impermissible factor to consider in granting a downward variance. *Id.*, at 952-53; App. 21.

On October 17, 2008, the second resentencing began. Pepper had been out of prison for nearly three and a half years. He had been on supervised release and had exhibited exemplary behavior.

At the start of the hearing Judge Reade told the parties of her intention to hold off on

the imposition of the sentence until a later date:

> I just would like to clarify for all of you so you kind of know what my thinking is about how to attack this very difficult resentencing, difficult because of the number of prior sentencings, difficult because of the number of prior Eighth Circuit opinions on this case, and difficult because, as you know, this is the only case out of the related cases that I'm going to be sentencing which raises some other issues when you apply the 3553 (a) factors.
>
> So I think the fairest thing to do today is to take all the argument, all the evidence, and then I do intend to write on this one because it is so complicated, and I do want an opportunity to weigh, sift, and evaluate everything I hear today, everything I've read. That would require that we get back together for the actual imposition of sentence. And I know that is an inconvenience, but I think it's worth the extra effort so that this Court can do the very best job possible in trying to reach a disposition.

(Second Resentencing Tr. pp. 4-5).

During the hearing it was established Pepper was 29 years old and had been married in May 2007. *Id.*, at 28, 44. His wife had a seven-year-old daughter, who was in the second grade, and she considers him the only father she has ever known. *Id.*, at 44-45. He is a primary source of family support.

Pepper was attending school full-time and studying business management at Parkland College in Champaign-Urbana, Illinois. *Id.*, at 22, 24-27, 44, Exhibits D & E. He was employed at Sam's Club the past two years and according to the Club Manager and Overnight Assistant Manager, Pepper was an exemplary employee and considered for promotion to manager in January 2009. *Id.*, at 22, 24-27, 44, Exhibits A & B. He was named associate of the year at the Sam's Club and had been working as the night supervisor. *Id*

Pepper requested a downward variance to a term of 24 months' imprisonment. This was Pepper's original term of imprisonment which he had served. In his "Request for

Variance" and in his "Second Resentencing Memorandum" pp. 2-3, 15-28, he requested a variance because of (1) his age at the time of the offense, (2) his lack of a criminal record, (3) his lack of a violent history, (4) his drug addiction at the time of the offense, (5) his extra-ordinary and genuine post-offense and sentencing rehabilitation, (6) the need to avoid disparity among co-defendants, (7) the costs of incarceration, (8) his exemplary behavior on supervised release, (9) his continued cooperation, (10) his remorse, (11) his family obligations, and (12) what is just.

On December 22, 2008, Judge Reade filed her sealed sentencing memorandum. Based on the exact same facts that Judge Bennett had relied on to award a 40% reduction for substantial assistance, Judge Reade only awarded Pepper a 20% reduction for assistance. (Second Resentencing Tr. pp. 8-10; Sealed Sentencing Memo pp. 8-10, 26). She also denied every downward variance request. (Sealed Sentencing Memo p. 26).

On January 5, 2009, more than five years after his arrest, Judge Reade imposed Pepper's sentence. First, the judge addressed the remand and sentenced Pepper to 77 months in the BOP and 12 months of supervised release. (Amended Judgment p. 2); App. 7-8. Then the judge granted the government's Rule 35(b) motion and departed 15% from the 77 month sentence to a final sentence of 65 months. (Amended Judgment p. 8); App. 13-14. The judge requested that the BOP give him credit for his completion of the drug treatment program. *Id.* The judge permitted him to self-surrender to the BOP. *Id.*

Pepper appealed the judgment. On July 2, 2009, the Eighth Circuit affirmed the district court. *Pepper IV*, 570 F.3d 958; App. 1.

This petition follows.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THE EIGHTH CIRCUIT FAILED TO REQUIRE THE DISTRICT COURT TO FOLLOW ITS OWN REMAND AND THE LAW OF THE CASE.

The Eighth Circuit ruled that during Pepper's third resentencing the newly assigned judge was not bound to follow the original sentencing judge's findings regarding a departure for substantial assistance even thou the Eighth Circuit twice before affirmed the original sentencing judge's findings on this issue.

The Eighth Circuit ruled:

> We used the following remand language in the conclusion of Pepper III: "For the foregoing reasons, we again reverse and remand Pepper's case for resentencing consistent with this opinion. As the district court expressed a reluctance to resentence Pepper again should the case be remanded, we again remand this case for resentencing by a different judge." *Pepper III, 518 F.3d at 953*. Pepper III's remand language is nearly identical to the remand language in Pepper II. See *Pepper II, 486 F.3d at 413* ("For the reasons stated, we reverse and remand this case for resentencing consistent with this opinion. The district court expressed a reluctance to resentence Pepper again should this case be remanded. Thus, we remand Pepper's case for re-sentencing by a different judge.").
>
> In the district court's Remand Order, which was reaffirmed by the district court in the Sentencing Order, the district court explained, "The only specific restrictions on the court's decision on remand were (1) the second resentencing hearing should take place before a different judge and (2) such judge's decision should be 'consistent with [*Pepper II*].'" The district court observed that while our court "indicated that a 40% downward departure was not an abuse of discretion[,]" we did not "hold that a 40% downward departure [wa]s the only reasonable outcome for [Pepper] or that the [district] court must impose a 40% downward departure on remand pursuant to *USSG §5K1.1*."
>
> We agree with the reasoning of the district court. Our remand was a general remand for resentencing. Our opinions in Pepper II and Pepper III did not place any limitations on the discretion of the newly assigned district court judge in resentencing Pepper. We did not specify the district court's

> discretion would be restricted to considering whether a downward variance was warranted, nor did we specify the district court would be bound by the 40% downward departure previously granted. We concluded a 40% downward departure was not an abuse of discretion. In other words, a 40% downward departure was within the range of reasonableness. Under the circumstances of Pepper's case, a complete resentencing without any restrictions on the district court's discretion was preferable, in contrast to a partial, piecemeal resentencing limiting the sentencing judge's discretion. We conclude neither the scope of our remand, nor the law of the case doctrine, required the district court to grant Pepper a 40% downward departure for substantial assistance.

Pepper IV, 570 F.3d at 963-64; App. 3-4.

When tracing the way the departure issue progressed through two sentencing hearings and three opinions by the Eighth Circuit, it is clear the Circuit failed to follow the "law of the case" doctrine when it affirmed the district court's 20% downward departure. This was inconsistent with either the express terms or the spirit of the remand of *Pepper III*.

The law of the case is an amorphous concept. *Arizona v. California*, 460 U.S. 605, 618 (1983). As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Id.* Law of the case directs a court's discretion, it does not limit the tribunal's power. *Id.* The law of the case doctrine was understandably crafted with the course of ordinary litigation in mind. *Id.*, at 618-19. Such litigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which, after appeal, the binding finality of res judicata and collateral estoppel will attach. *Id.* Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice. *Id.*, at 618, n.8.

The controversy here focused on the obligation of the newly assigned judge (Judge Reade) on remand. Based on the scope of the remand by the Eighth Circuit in *Pepper III*, and the law of the case, the new judge was obligated to reduce Pepper's advisory Sentencing Guidelines range by 40% pursuant to U.S.S.G. § 5K1.1 and not make her own independent findings regarding the substantial assistance issue. When the Eighth Circuit ruled that the original sentencing judge (Judge Bennett) did not abuse his discretion by the 40% 5K1.1 departure, this became the law of the case and should have been followed. *Pepper II*, 486 F.3d at 411; App. 28.

On remand, Chief Judge Reade ruled that it would not consider herself bound to reduce Pepper's advisory Sentencing Guidelines range by 40% pursuant to U.S.S.G. § 5K1.1 (*Pepper*, 2007 WL 2076041 *4; App. 25-26) and only reduced his sentence by 20%. Her departure finding was based on the exact same facts and considerations that Judge Bennett had already used to arrive at a 40% 5K1.1 reduction. Judge Bennett's findings were affirmed by the Eighth Circuit in *Pepper II*, 486 F.3d at 411; App. 28.

Judge Reade's independent findings to award a 20% 5K1.1 reduction was inconsistent with the express terms or spirit of the remand and contrary to the law of the case. The judge relitigated and reopened a settled issue. The Eighth Circuit affirmed these actions. The "law of the case" was not followed. The law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *Messenger v. Anderson*, 225 U.S. 436, 444 (1912).

The remand by *Pepper II* and *Pepper III* did not permit Judge Reade to operate on a

clean slate, opening up every issue on resentencing. *See United States v. Santonelli,* 128 F.3d 1233, 1237 (8th Cir. 1997). Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue that it could have heard at the first hearing. *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992). To determine the scope of the remand, the Eighth Circuit's conclusory statements regarding the remand must be read with the analysis offered in the opinion. *Santonelli*, 128 F.3d at 1237.

In *Pepper III*, the conclusion of the Court was:

> For the foregoing reasons, we again reverse and remand Pepper's case for resentencing consistent with this opinion As the district court expressed a reluctance to resentence Pepper again should the case be remanded, we again remand this case for resentencing by a different judge, pursuant to our authority under 28 U.S.C. § 2106. The chief judge of the district court shall reassign this case, in the ordinary course, for resentencing by another judge.

Pepper III, 518 F.3d at 953 (internal citations omitted); App. 22.

Pepper III found Judge Bennett considered improper variance factors at sentencing and committed procedural error in failing to adequately explain with sufficient justifications his conclusion that a 59% variance was warranted after the § 5K1.1 downward departure. *Pepper III*, 518 F.3d at 952; App. 21. Thus, *Pepper III* affirmed Judge Bennett had properly calculated the Guideline range and made the proper 5K1.1 departure. It was only after this point that Judge Bennett committed the procedural error with his justifications for the variance.

The mandate to the new sentencing judge from *Pepper III* was specifically limited to resentencing regarding appropriate variances under 18 U.S.C. § 3553(a) and *Gall*, not to relitigate the 5K1.1 downward departure. The only issue in *Pepper III* was *Gall*'s impact on

Pepper's case (*Pepper III*, 518 F.3d at 950), not the propriety of Judge Bennett's 5K1.1 downward departure.

Pepper III twice affirmed that the 40% 5K1.1 downward departure was the law of the case and the only issue to be decided on remand was the variances under 18 U.S.C. § 3553(a) and *Gall*. The *Pepper III* Court discussed *Pepper II*, 486 F.3d at 410, 411, 413, and stated:

> From *Pepper II* we know ...[o]n remand, the district court found Pepper's assistance merited a 40% § 5K1.1 downward departure, which reduced the bottom of the advisory sentencing Guidelines range to 58 months. Then, under 18 U.S.C. § 3553(a), the district court granted a downward variance of 59%, based on Pepper's post-sentencing rehabilitation, lack of violent history, and, to a lesser degree, on the need to avoid unwarranted sentencing disparity among co-defendants. The district court again imposed a sentence of 24 months imprisonment. We found the district court did not abuse its discretion by the extent of the § 5K1.1 downward departure. We did find "[t]he 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."

Pepper III, 518 F.3d at 950-51(internal citations omitted) (emphasis added); App. 20. Then when discussing Judge Bennett's sentencing findings the Court stated:

> The district court erred because, to the extent the district court explained Pepper's sentence at all, the district court predominantly considered improper factors. Put another way, the district court committed procedural error in failing adequately to explain with sufficient justifications the court's conclusion that a 59% variance after the § 5K1.1 downward departure was warranted in this case.

Id., at 952 (emphasis added); App. 21.

Pepper III never ruled that Judge Bennett's findings regarding the 40% 5K1.1 downward departure were error as it had in *Pepper I*. *See id.*, 412 F.3d at 996, 998-99;

App. 32-33.

It is from the resentencing on May 5, 2006, following *Pepper I*, that Judge Bennett awarded the 40% 5K1.1 downward departure which became the law of the case. On remand Judge Bennett concluded that he would depart 40% for substantial assistance, which would take Pepper's sentence down to 58 months. (Resentencing Tr. pp. 83-84). To arrive at the 40% reduction the Judge explained how he was relying on Eighth Circuit precedent, how he relied on his discussions with other federal district court judges from around the country, that Pepper was very timely, was incredibly truthful and candid, had been debriefed, engaged in a proffer, and had engaged in grand jury work. *Id.*

The government appealed following the resentencing. The Court of Appeals in *Pepper II* stated:

> This case returns after a remand to the district court for resentencing. In *United States v. Pepper*, 412 F.3d 995, 999 (8th Cir. 2005) (*Pepper I*), we held the district court erred by granting a 75% downward departure for substantial assistance and imposing a sentence of 24 months' imprisonment, because the district court erroneously based the extent of the departure on matters unrelated to Jason Pepper's (Pepper) assistance. On remand, the district court granted a 40% downward departure (five offense levels) for substantial assistance, followed by a 59% downward variance (eight offense levels), and again imposed a sentence of 24 months' imprisonment. The government appeals. We reverse.

Pepper II, 486 F.3d at 410; App. 27-28.

Judge Bennett was only reversed and remanded in *Pepper II* because the Court did not agree with the judge's 34 month downward variance, *Id.* 486 F.3d at 411, not because of the 5K1.1 issue again. The *Pepper II* Court stated:

> The 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. 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.
>
> For the reasons stated, we reverse and remand this case for resentencing consistent with this opinion. The district court expressed a reluctance to resentence Pepper again should this case be remanded. Thus, we remand Pepper's case for re-sentencing by a different judge, pursuant to our authority under 28 U.S.C. § 2106...

Id. at 413; App. 30.

The *Pepper II* Court affirmed Judge Bennett's ruling regarding his 5K1.1 downward departure. The Court recognized:

> The government argues the district court abused its discretion by granting a 40% downward departure given the pedestrian nature of Pepper's assistance. We review for abuse of discretion the extent of a reduction for substantial assistance.
>
> At the resentencing hearing, the government described Pepper's assistance, which included debriefing with law enforcement immediately after his arrest, a proffer interview, and testifying before the grand jury against two defendants. The government acknowledged Pepper was the main witness against one of the two defendants.

Id. at 411 (internal citation omitted); App. 28. The Court concluded:

> We believe reasonable proportionality exists here between Pepper's assistance and the downward departure. The district court properly identified only assistance-related factors and noted, although Pepper's assistance was "pedestrian or average," it was timely, truthful, honest, helpful, and important. The district court considered the § 5K1.1 factors, including the government's recommendation, but felt Pepper's assistance was worth more than the recommended 15% downward departure. The district court found, under Eighth Circuit precedent, Pepper's assistance merited "something less than a

> 50 percent reduction" and determined a 40% reduction was warranted. Although we believe it is a close call, we cannot say the district court abused its discretion by the extent of the § 5K1.1 departure.

Id.

As can be seen by the progression from *Pepper I* to *Pepper II*, the government raised the 5K1.1 and won (Judge Bennett had to only rely on substantial assistance factors), and then lost (Judge Bennett did not abuse his discretion by the extent of the § 5K1.1 departure). To allow it to litigate the exact same issue again at the second resentencing in front of a different judge gives them a third bite at the litigation apple. *See Santonelli*, 128 F.3d at 1239. It is highly unlikely that if Judge Bennett was the second resentencing judge he would have entertained any argument regarding the 5K1.1 departure being any less or more than what he had already determined and the Eighth Circuit affirmed.

There was only one issue identified as error in *Pepper III*. That was the appropriate variances under 18 U.S.C. § 3553(a) and *Gall*. The 5K1.1 issue was off the table, it had been litigated an unambiguously decided. The law of the case doctrine presumes a hearing on the merits. *United States v. Hatter*, 532 U.S. 557, 566 (2001).

In this case the government did not introduce substantially different evidence (Second Resentencing Tr. pp. 8-10) or shown that the *Pepper II* decision regarding substantial assistance was clearly erroneous and worked a manifest injustice. If the government was not happy with the *Pepper II* decision regarding the 40% departure, it could have challenged the reduction and filed a petition for rehearing or hearing en banc, or a petition for writ of certiorari with the United States Supreme Court. It did not.

There is no hint in either *Pepper II* or *Pepper III*, or exceptions taken by the government, to indicate Pepper is entitled to anything less than a 40% reduction for substantial assistance.

The prejudice to Pepper by Judge Reade failing to grant him the 40% reduction is apparent when looking at how it lengthened his term of imprisonment.

The undisputed Guideline range was 97 to 121 months. Judge Reade granted a 20% 5K1.1 reduction, so this moved Pepper's range to 77-97 months. She then awarded a post-sentencing Rule 35(b) departure of 15%. This moved his final sentence down to 65 months.

If Pepper was given the 40% 5K1.1 departure, as advocated by this argument, his time in the BOP, following credit for the time he already has served in the BOP along with good time credit and adjustments under 18 U.S.C. §§ 3621(e)(2)(B) & 3624(c)(1) and (2), could be one month.

His starting sentence would be 49 months, not 65 months. A 40% 5K1.1 reduction from the Guideline range of 97 to 121 months moves the range to 58 to 73 months. Then award the post-sentencing Rule 35(b) departure of 15%. This moves his final sentence down to 49 months.

In conclusion, there were no explicit or implicit instructions in *Pepper II* or *Pepper III* to hold further proceedings on remand regarding the 5K1.1 downward departure. The resentencing court erred by revisiting the issue to the prejudice of Pepper. The Supreme Court should grant this petition for writ of certiorari and remand the case back to the district court with directions to follow the law of the case.

II. FOLLOWING A SENTENCING REMAND, A DISTRICT COURT CAN CONSIDER A DEFENDANT'S EXEMPLARY POST-SENTENCING CONDUCT AS A PERMISSIBLE FACTOR SUPPORTING A SENTENCING VARIANCE UNDER 18 U.S.C. § 3553(a) AFTER *GALL v. UNITED STATES*.

Pepper exhibited exemplary and extraordinary conduct following his sentencing on March 10, 2004. He was released from the BOP, went to college, got a job, and was married.

Since the Eighth Circuit has ruled its district courts can't consider post-sentencing conduct under 18 U.S.C. § 3553(a), Pepper must go back to prison to serve the remaining balance of a 65 month sentence of imprisonment.

In light of the way federal sentencing has evolved through *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005) and *Gall v. United States*, -- U.S.--, 128 S.Ct. 586, 169 L.Ed. 2d 445 (2007), Pepper's conduct following his sentencing warrants consideration for a variance under 18 U.S.C. § 3553(a). In relevant part this statute provides:

> (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...

18 U.S.C. § 3553(a)(1), (2).

In *Pepper IV* the Court ruled that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance and the district court followed this precedent. The Court ruled:

> We commend Pepper on the positive changes he has made in his life. However, the law of our circuit is clear. "[E]vidence of [a defendant]'s post-sentence 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." ..."'This panel is bound by Eighth Circuit precedent, and cannot overrule an earlier decision by another panel.'" *United States v. Lovelace, 565 F.3d 1080, 1085 (8th Cir. 2009)* (quoting *Passmore v. Astrue, 533 F.3d 658, 660 (8th Cir. 2008))*.

Pepper IV, 570 F.3d at 965 (internal citations omitted); App. 5.

This finding does not seem quite fair since the Eighth Circuit allows the sentencing court to punish a defendant for his conduct while in jail waiting for sentencing. In *United States v. Jones*, 509 F.3d 911(8th Cir. 2007) the Court found that post-offense/pre-sentencing misconduct warrants a four-level upward variance because such misconduct demonstrates lack of acceptance of responsibility and is clearly relevant to § 3553(a) factors, such as protecting the public from future crimes, deterring criminal conduct and promoting respect for the law. *See id.*, at 913-14 (While in jail awaiting sentencing, Jones engaged in numerous incidents of disruptive behavior, including damaging a window, swinging a piece of broken glass and a telephone cord in a threatening manner, flooding his cell on numerous occasions, threatening to harm himself, throwing a cup of urine at a correction officer and speaking and acting disrespectfully toward the jail staff. The U.S.

Probation Office recommended that the district court consider imposing an upward variance based upon his misconduct in jail.). Pepper's conduct once released from the BOP, while waiting for his case to go through the appellate process, is clearly relevant to § 3553(a) factors, such as protecting the public from future crimes, deterring criminal conduct and promoting respect for the law.

There appear to be hints in *Gall* that considering post-offense and post-sentencing rehabilitation in extraordinary circumstances is permissible at sentencing.

First, the Court in *Gall* reviewed what the Eighth Circuit regarded as the district judge's sentencing errors. One of the errors that the Eighth Circuit found was that the district judge placed "too much emphasis on Gall's post-offense rehabilitation." *Id.*, 128 S.Ct. at 594. The Supreme Court found "we are not persuaded that these factors, whether viewed separately or in the aggregate, are sufficient to support the conclusion that the District Judge abused his discretion." *Id.*

Second, it appears *Gall* requires the district courts to focus on the circumstances of the post-offense rehabilitation and whether it was genuine, as opposed to precluding its consideration all together:

> The District Court quite reasonably attached great weight to the fact that Gall voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life. This lends strong support to the District Court's conclusion that Gall is not going to return to criminal behavior and is not a danger to society. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C). Compared to a case where the offender's rehabilitation occurred after he was charged with a crime, the District Court here had greater justification for believing Gall's turnaround was genuine, as distinct from a transparent attempt to build a mitigation case.

Gall, 128 S.Ct. at 600-01.

> The District Court quite reasonably attached great weight to Gall's self-motivated rehabilitation, which was undertaken not at the direction of, or under supervision by, any court, but on his own initiative. This also lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C).

Id., at 602.

Third, the Eighth Circuit's finding that it would be unfair to the vast majority of defendants who receive no sentencing court review of any positive post-sentencing rehabilitative efforts, *see Pepper IV*, 570 F.3d at 965; App. 5, does not seem consistent with *Gall's* findings that every sentencing is individually unique:

> "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."

Gall, 128 S.Ct. at 598 (quoting *Koon v. United States,* 518 U.S. 81, 113, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)).

In this case Pepper's life changes occurred before he realized his 24 month sentence of imprisonment and five years of supervised release would turn into a 65 month term of imprisonment and one year of supervised release. The Court should also take into consideration that the situation that Pepper faced (additional time in prison following all the appeals) was not created by him. He made the best of his situation and took advantage of the benefits provided by the BOP and supervised release. He went above and beyond minimal compliance.

Pepper, his father, and the probation officer have all provided information regarding Pepper's life on supervised release. Pepper had been employed, sober, was excelling in

college, and married. This information is extremely relevant in assessing at least three of the Section 3553(a) factors, deterrence, protection of the public and rehabilitation, 18 U.S.C. § 3553(a)(2)(B), (C) & (D). *See also Gall*, 128 S.Ct. at 600-01 (The District Court quite reasonably attached great weight to the fact that Gall voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life. This lends strong support to the District Court's conclusion that Gall is not going to return to criminal behavior and is not a danger to society.).

Pepper had not made a transparent attempt to build a mitigation case. He had been out of prison for nearly three and a half years under supervised release[2], had no problems, was attending school full-time, was motivated to enter a manager-in-training program, was currently employed, was named associate of the year last year at the Sam's Club, was married in May 2007, and had taken on the responsibilities of a child.

There is nothing more telling of Pepper's ability to be a productive, law-abiding member of society than his exemplary behavior after his release from prison. With this information, there is no need to speculate as to whether the sentence already imposed on Pepper was sufficient to promote his respect for the law or to provide adequate deterrence to future criminal conduct. *See* § 3553(a)(2)(A) & (B). This evidence proved the sentence

---

[2] Custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. *Gall,* 128 S.Ct. at 595. Offenders on probation are subject to several standard conditions that substantially restrict their liberty. *Id.* Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. *Id.* at 595-96. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. *Id.*, at 596. Most probationers are also subject to individual "special conditions" imposed by the court. *Id.*

already imposed, and still imposed due to supervised release, had protected the public from further crimes. *See* § 3553(a)(2)(C). Pepper successfully received substance abuse treatment. *See* § 3553(a)(2)(D). Additionally, it proved that Pepper is not going to return to criminal behavior and is not a danger to society. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C).

Pepper was not asking for a variance because he went to Yankton for 17 months and did a good job. He was requesting a variance because he was sentenced to prison and completed his substance abuse program, he then was released from prison to a halfway house, and then released to supervised release all under the terms of valid criminal justice sentence at the time. During this time when his future was in doubt and in the hands of our appellate system, he matured, was rehabilitated, excelled in school and employment, was married taking on the responsibility of a family, and had exhibited nothing but extraordinary behavior.

During resentencing on May 5, 2006, the government argued against the judge considering post-offense rehabilitation, but commended Pepper for being in school and employed, but stated that is what defendants are supposed to do. (Resentencing Tr. pp. 45-46, 66). Judge Bennett responded, "[b]ut very few do," to which the government responded, "[w]ell, that's true." *Id.* Judge Bennett's view is not alone. *See United States v. Hairston*, 502 F.3d 378, 384 (6th Cir. 2007) ("The whole point of the sentencing judge's opinion is that individuals who are able to extricate themselves from such a life of drugs and guns are a rarity. Sad as it may be, Hairston appears to have been unique among repeat drug offenders to have come before this district judge, in that he not only complied

with the terms of his post-arrest rehabilitation, but exceeded them. If the judge were not faced with "countless instances," in which defendants were back in his court having failed to comply with the terms of post-release rehabilitation, then Hairston's behavior would not have been extraordinary.").

As Judge Bennett recognized during the first resentencing, while Pepper should not get the benefit of the prior illegal sentence, he should not be penalized for doing extraordinarily well on supervised release. (Resentencing Tr. p. 90).

The Supreme Court should issue a ruling that Pepper's post-offense and post-sentencing rehabilitative efforts warrant consideration for a downward variance under 18 U.S.C. § 3553(a).

III. THERE IS A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS REGARDING POST-SENTENCING REHABILITATION AND WHETHER IT CAN SUPPORT A DOWNWARD SENTENCING VARIANCE UNDER 18 U.S.C. § 3553(a).

In the present case the Eighth Circuit ruled that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance. *Pepper IV,* 570 F.3d at 965, citing *Pepper III,* 518 F.3d at 953, which quoted *Pepper II, 486 F.3d at 413*; App. 5.

Two of its own circuit judges have questioned the Eighth Circuit precedent. These judges also recognized a conflict among the courts of appeals. Regarding post-sentencing rehabilitation, Circuit Judge Melloy wrote:

> My concern with this case, and the reason for my concurrence, is the binding precedent upon which the *McMannus* decision rests, that is, the inability to consider post-sentencing rehabilitation. I would join the Third Circuit and hold that post-sentencing rehabilitation is not normally relevant, however, there are exceptional cases in which it may be considered. *United States v. Lloyd,* 469 F.3d 319, 325 (3rd Cir. 2006); *see also, United States v. Butler,* 221 Fed.Appx. 616, 617 (9th Cir. 2007) (unpublished). I would also find that this

> is such an exceptional case and that if we could consider post-sentencing rehabilitation, the sentence in this case would be reasonable. The majority has outlined the post-sentencing rehabilitation testimony and characterizes the evidence the district court heard as ".. extensive and compelling ..." *ante* at 851. While I do not disagree with the concept that post-sentencing rehabilitation should not normally be considered because of the potential windfall to those defendants who are the beneficiaries of resentencings, I also do not believe that we should have a rule that never allows an experienced district judge to consider that evidence. Certainly, such evidence is valuable in a case such as this where the post-sentencing rehabilitation not only involves conduct while incarcerated, but exceptional performance while in a half-way house and then following release to the community. Both the state probation officer who supervised Mr. McMannus in the half-way house and the federal probation officer who is currently supervising him on supervised release testified to his exceptional conduct.
>
> In assessing at least three of the Section 3553(a) factors, deterrence, protection of the public and rehabilitation, 18 U.S.C. § 3553(a)(2)(B)(C) & (D), there would seem to be no better evidence than a defendant's post-incarceration conduct. In an exceptional case, such as this, I would permit the district court to consider that evidence in fashioning a reasonable sentence.

United States v. McMannus, 496 F.3d 846, 853 (8th Cir. 2007) (Melloy, C.J. and Smith, C.J., concurring).

The First, Third, and Fourth Circuits permit district courts to consider post-sentencing information in certain circumstances. *United States v. Sanchez*, 569 F.3d 995, 999 (9th Cir. 2009). *See United States v. Aitoro*, 446 F.3d 246, 255 n.10 (1st Cir. 2006) (We have noted that "if a remand for resentencing is otherwise justified, it is quite arguable that the sentence on remand can and should take account of intervening facts that normally bear on sentencing,"... but that in evaluating the need for Booker remand "our focus is primarily upon what was known at the time of sentencing." We are skeptical of the propriety of considering post-sentencing developments in the ordinary Booker-remand case, but here we are persuaded that Aitoro's case requires remand solely on the basis of

facts known at the time of sentencing and so need not decide whether and when it might be permissible to do so.); *United States v. Hughes*, 401 F.3d 540, 560 n.19 (4th Cir. 2005) (if new circumstances have arisen or events occurred since Hughes was sentenced that impact the range prescribed by the guidelines, the district court should adjust its calculation accordingly).

The Third Circuit in *United States v. Lloyd*, 469 F.3d 319 (3rd Cir. 2006) found that in an unusual case a district court could consider a defendant's post-sentencing rehabilitation efforts when resentencing. *Id.* at 325. The Court did ultimately find there were no post-sentencing circumstances that warranted a variance or departure for Mr. Lloyd. *Id.*

While it is an unpublished opinion, the Ninth Circuit in *United States v. Butler*, 221 Fed.Appx. 616, 2007 WL 582698 (9th Cir. 2007) (unpublished), found:

> Under the 1995 version of the Sentencing Guidelines applicable to Butler, the district court erred in concluding not to consider Butler's post-sentence rehabilitation as a basis for downward departure. Although in many instances such an error would be immaterial in a post-*Booker* world, we cannot conclude the error was harmless in this case. While indicating a general awareness it could sentence outside Guidelines after *Booker*, the district court did not take into consideration Butler's successful participation in various Bureau of Prisons programs, and that if consideration of those post-sentencing factors was appropriate, "this Court would find defendant should be given credit for that under the guideline structure and would be a basis for departure."

Id. 221 Fed.Appx. at 617-618, 2007 WL 582698.

Along with the Eighth Circuit Court of Appeals, the Sixth, Seventh, and Eleventh Circuits have all ruled post-sentencing rehabilitation is not an appropriate factor for judicial consideration under 18 U.S.C. § 3553(a). *See United States v. Worley*, 453 F.3d 706, 707, 709-10 (6th Cir. 2006) (defendant's post-sentencing conduct, which the district judge

declined to consider, is not a factor listed in § 3553(a), although arguably it could be considered a part of a defendant's "history and characteristics") and *United States v. Presley*, 547 F.3d 625, 631 n.1 (6th Cir. 2008) (In *Worley*, we upheld a district court's determination that post-sentencing rehabilitation was not a relevant factor in a Booker resentencing. We need not consider the effect of *Worley* on this case, however, because, although it mentioned Presley's post-sentencing rehabilitation, the district court made clear that the primary factor upon which Presley's sentence was based was the disparity between Presley's and Davis's sentences.); *United States v. Re*, 419 F.3d 582, 584 (7th Cir. 2005) (the conduct or circumstances that bear on the § 3553(a) factors must have been in existence at the time the original sentence was imposed and post sentencing events or conduct simply are not relevant to that inquiry); and, *United States v. Lorenzo*, 471 F.3d 1219, 1221 (11th Cir. 2006) (Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when re-sentencing the defendant for that offense.).

The Supreme Court should grant this petition for writ of certiorari to resolve the conflict among the United States Courts of Appeal as to whether post-sentencing rehabilitative efforts can be considered under § 3553(a).

IV. SINCE THE FEDERAL COURTS ARE GRANTING VARIANCES FOR POST-OFFENSE REHABILITATION UNDER 18 U.S.C. § 3553(a), THEY SHOULD BE PERMITTED TO GRANT VARIANCES FOR POST-SENTENCING REHABILITION.

A variance for post-offense conduct is permitted by *Gall* and the federal courts.

Gall requires the district courts to focus on the circumstances of the post-offense

rehabilitation and whether it was genuine, as opposed to precluding its consideration all together:

> The District Court quite reasonably attached great weight to the fact that Gall voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life. This lends strong support to the District Court's conclusion that Gall is not going to return to criminal behavior and is not a danger to society. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C). Compared to a case where the offender's rehabilitation occurred after he was charged with a crime, the District Court here had greater justification for believing Gall's turnaround was genuine, as distinct from a transparent attempt to build a mitigation case.

Gall, 128 S.Ct. at 600-01.

> The District Court quite reasonably attached great weight to Gall's self-motivated rehabilitation, which was undertaken not at the direction of, or under supervision by, any court, but on his own initiative. This also lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C).

Id., at 602.

The Eighth Circuit in *United States v. Shy*, 538 F.3d 933 (8th Cir. 2008) found the district court's variance to probation based on the defendant's conduct and rehabilitation after her arrest was reasonable and was not an abuse of discretion. *Id.*, at 936-38. The Court found that the district court properly considered the defendant's rehabilitation after her initial arrest and before her indictment. *Id.*, at 938. Even though the defendant's rehabilitation only came after an encounter with law enforcement, her rehabilitation appeared genuine and she was a positive contributor to society through her extraordinary work with persons with disabilities. *Id.*

The Sixth Circuit in *Hairston*, found that the district court did not abuse its discretion when it made a downward variance to 60 months from 121 months for post-offense

rehabilitation. *Id.*, 502 F.3d at 385. The district court considered the history and characteristics of the defendant, his employment and work effort, he had supported his children, and that he complied wholeheartedly with all of his post-offense arrest conditions. *Id.*, at 383.

The Eleventh Circuit in *United States v. Clay*, 483 F.3d 739 (11th Cir. 2007) found that the district court did not abuse its discretion when it made a downward variance to 60 months from 188 months for post-offense rehabilitation. *Id.*, at 742-43, 745-46.

The Court found:

> It is true that some of Clay's postoffense behavior was not extraordinary. Among the conditions of Clay's pretrial release were maintaining or actively seeking employment, refraining from use or possession of controlled substances, and participating in substance abuse treatment. If Clay had not attended a drug program, stayed clean, and found a job, his bail could have been revoked.
>
> But Clay went beyond minimal compliance with his bail conditions. Clay's former employer testified that Clay worked a second job for him on the weekends, and stated that he would hire him again "tomorrow" if he could. The Lenos testified that, beyond merely attending drug counseling meetings, Clay invited fellow addicts into his home and inspired them to overcome their addictions through his example. On his own initiative, Clay also visited a juvenile detention center regularly for over a year and encouraged young people to change their lives. The confidence of people who did not know Clay before his arrest-people who had nothing to gain by lying about his transformation and plenty to lose if his transformation was phony-helps to demonstrate the extraordinariness of Clay's rehabilitation.
>
> Clay's family, his lawyer, and witnesses who worked in corrections emphasized that Clay's experience was not a "jailhouse conversion." Six months elapsed between Clay's arrest for misdemeanor possession and his indictment on federal charges. That the changes in Clay's life occurred before Clay had any inkling that he would face a prison sentence further evidences that the measure of his rehabilitation was extraordinary.

Id., at 746.

The very same efforts that make post-offense rehabilitation a permissible variance (law-bidding life, work, treatment, family, contributor to society) are present in a post-sentencing defendant's case such as Pepper's. In this case, Pepper's post-sentencing rehabilitative efforts are the very same efforts that the courts are using to grant variances for post-offense rehabilitative efforts.

The Eighth Circuit states to allow a defendant's post-sentencing rehabilitation successes to influence his sentence would be grossly unfair to the vast majority of defendants who receive no sentencing-court review of any positive post-sentencing rehabilitative efforts. *Pepper IV*, 570 F.3d at 965; App. 5. But, the same can be said of the vast majority of defendants who receive no sentencing-court review of any positive post-offense rehabilitative efforts because they are detained pre-trial under 18 U.S.C. § 3142(e). Defendant's detained pending trial are not as fortunate as the defendant's in *Gall, Shy*, *Hairston*, and *Clay*, who were released pending trial and were able to make positive changes in their lives.

The Supreme Court should grant this petition for writ of certiorari in order to permit the federal courts to consider post-sentencing rehabilitative efforts under § 3553(a).

CONCLUSION

Pepper respectfully requests that the Supreme Court grant his petition for a writ of certiorari for all the reasons stated herein.

PARRISH, KRUIDENIER, DUNN, BOLES, GRIBBLE
PARRISH, GENTRY & FISHER, L.L.P.

BY: Alfredo Parrish (BWA)
Alfredo Parrish
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
TELEPHONE: (515) 284-5737
FACSIMILE: (515) 284-1704
EMAIL: Aparrish@parrishlaw.com

MELLON AND SPIES – ATTORNEYS AT LAW
BY: Leon Spies (BWA)
Leon F. Spies
Counsel of Record
312 E. College Street, Suite 216
Iowa City, Iowa 52240
TELEPHONE: (319) 337-4193
FACSIMILE: (319) 337-2396
EMAIL: spieslegal@aol.com
ATTORNEYS FOR APPELLANT

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost to print this brief was the sum of $ 405.00.

Alfredo Parrish (BWA)
Alfredo Parrish