ORIGINAL

No. 09-6822

IN THE SUPREME COURT OF THE UNITED STATES

JASON PEPPER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, at petitioner's resentencing following the government's appeal, the district court was required to apply the same percentage departure from the Guidelines range for substantial assistance that had been applied at petitioner's initial sentencing.

2. Whether post-sentencing rehabilitation is an impermissible basis for varying downward at resentencing from the advisory Guidelines range under 18 U.S.C. 3553(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 570 F.3d 958. Prior relevant opinions of the court of appeals (Pet. App. 19-22, 27-30, and 31-34) are reported at 518 F.3d 949, 486 F.3d 408, and 412 F.3d 995.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2009. The petition for a writ of certiorari was filed on September 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted of conspiring to distribute methamphetamine, in violation of 21 U.S.C. 846. The district court initially sentenced petitioner to 24 months of imprisonment, to be followed by five years of supervised release, but that sentence was set aside on appeal. Pet. App. 31-34 (Pepper I). On remand, the district court resentenced petitioner to 24 months of imprisonment, to be followed by five years of supervised release, and the court of appeals again reversed. Pet. App. 27-30 (Pepper II). This Court vacated the court of appeals' judgment and remanded the case for further consideration in light of Gall v. United States, 552 U.S. 38 (2007). Pet. App. 23. On remand from this Court, the court of appeals again reversed the 24-month sentence imposed by the district court and remanded for resentencing, Pet. App. 19-22 (Pepper III), and this Court denied review, Pepper v. United States, 129 S. Ct. 138 (2008). The district court thereafter resentenced petitioner to 77 months of imprisonment, to be followed by 12 months of supervised release, but the court subsequently reduced the term of imprisonment to 65 months pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure. Pet. App. 8, 14. The court of appeals affirmed that sentence. Id. at 1-6 (Pepper IV).

1. In 2003, law enforcement officers arrested petitioner for his participation in a methamphetamine trafficking operation. He pleaded guilty to conspiring to distribute methamphetamine, in violation of 21 U.S.C. 846. At his initial sentencing in 2004, the district court determined that his sentencing range under the United States Sentencing Guidelines was 97 to 121 months of imprisonment. The government moved for a 15% downward departure from that range pursuant to Sentencing Guidelines § 5K1.1 based on petitioner's substantial assistance in the investigation. The district court granted a significantly greater departure from the Guidelines range and imposed a sentence of 24 months of imprisonment. The government appealed, and the court of appeals reversed, finding that the district court had erred by considering factors unrelated to petitioner's assistance to the investigation in determining the extent of the substantial assistance departure. Pet. App. 31-34 (Pepper I); see 09-1191 Gov't C.A. Br. 3-7.

2. In 2006, the district court resentenced petitioner after this Court's decision in United States v. Booker, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory, and again imposed a sentence of 24 months of imprisonment. The court granted a 40% downward departure under the Guidelines for substantial assistance. The court also granted a further 59% downward variance under 18 U.S.C. 3553(a) based on petitioner's post-sentencing rehabilitation (including his completing a drug

treatment program, enrolling in community college, and maintaining employment after release from serving his initial sentence), petitioner's lack of a violent history, and, to a lesser degree, the need to avoid unwarranted sentencing disparity among the defendants in the case. See Pet. App. 28.

3. The government again appealed petitioner's sentence, and the court of appeals again reversed. Pet. App. 27-30 (Pepper II). The court stated that, although it was a "close call," the district court had not abused its discretion in granting a 40% downward departure for substantial assistance. Id. at 28. The court of appeals concluded, however, that the district court had abused its discretion in granting a further 59% downward variance under 18 U.S.C. 3553(a). Pet. App. 28-30. In reaching that conclusion, the court of appeals ruled that petitioner's alleged post-sentencing rehabilitation was an "impermissible factor to consider in granting a downward variance" under Section 3553(a). Id. at 30. The court reasoned that evidence of post-sentencing rehabilitation could not have been considered at the original sentencing and thus permitting its consideration upon resentencing "would create unwarranted disparities and inject blatant inequities into the sentencing process." Ibid. Because the district judge who had sentenced petitioner in 2004 and 2006 had expressed a reluctance to sentence petitioner a third time if the case was again remanded, the court of appeals directed that the case be assigned to a different judge for resentencing. Ibid.

4. This Court vacated the court of appeals' decision in Pepper II and remanded the case for further consideration in light of Gall v. United States, 552 U.S. 38 (2007). Pet. App. 23. On remand, the court of appeals concluded that Gall did not alter its holding that the district court had committed procedural error in failing to provide an adequate justification for a 59% downward variance under Section 3553(a), after the substantial assistance departure. Pet. App. 19-22 (Pepper III). As relevant here, the court of appeals concluded that Gall did not alter the rule that evidence of a defendant's post-sentencing rehabilitation "is an impermissible factor to consider in granting a downward variance," and the court found that the district court had "given significant weight, and possibly overwhelming weight," to that impermissible factor in imposing sentence. Id. at 21-22. Accordingly, the court of appeals reversed the 24-month sentence imposed by the district court and remanded the case for resentencing. Id. at 22. As in its vacated decision in Pepper II, the court of appeals directed that the resentencing be assigned to a different judge in the district court. Ibid. This Court denied a petition for a writ of certiorari. Pepper v. United States, 129 S. Ct. 138 (2008).

5. Following Pepper III, petitioner was resentenced before a different district judge. The parties agreed that petitioner's recommended sentencing range under the Guidelines remained 97 to 121 months of imprisonment. 12/22/2008 Sealed Sent. Mem. 4-5. The district court concluded that, in departing from that range under

Guidelines § 5K1.1 to account for petitioner's substantial assistance, the court was not bound to grant petitioner the same 40% departure that had been applied by the judge who initially sentenced him. Id. at 7; see Pet. App. 24-26. The district court determined that petitioner should instead receive only a 20% substantial assistance departure, which reduced his Guidelines sentencing range to 77 to 97 months. 12/22/2008 Sealed Sent. Mem. 8-10. After considering the sentencing factors set out in Section 3553(a) and petitioner's arguments, the district court further found that no variance from that advisory Guidelines range was warranted. Id. at 10-26. In reaching that conclusion, the court observed that the court of appeals had ruled in Pepper II and Pepper III that post-sentence rehabilitation is not a permissible ground for a variance at resentencing, and the district court accordingly declined to vary downward on that basis. Id. at 16.

On January 5, 2009, the district court sentenced petitioner to 77 months of imprisonment, to be followed by 12 months of supervised release. Pet. App. 8-9. The court then granted the government's motion under Rule 35(b) of the Federal Rules of Criminal Procedure and reduced petitioner's term of imprisonment to 65 months to account for investigative assistance petitioner had provided after his initial sentencing. Id. at 14-15; see id. at 3.

6. The court of appeals affirmed petitioner's sentence. Pet. App. 1-6. As relevant here, the court rejected petitioner's claim that the scope of the prior remand and the law-of-the-case doctrine

required the district court at his 2009 resentencing to grant him the same 40% departure for substantial assistance that the district court had granted him at his 2006 sentencing. The court of appeals noted that a sentencing court on remand is bound to proceed within the scope of any limitations imposed by the appellate court, but the court of appeals found that its decisions in Pepper II and Pepper III did not restrict the district court's discretion in determining the extent of any substantial assistance departure at resentencing. Id. at 3-4. The court of appeals concluded that it had ordered a "general remand for resentencing" that "did not place any limitations on the discretion of the newly assigned district court judge in resentencing petitioner." Id. at 4. In reaching that conclusion, the court noted that its prior decisions had not specified that the district court would be bound by the 40% downward departure for substantial assistance previously granted but had merely found that a 40% departure was "within the range of reasonableness." Ibid.

The court of appeals also rejected petitioner's argument that the district court had erred in refusing to consider his post-sentencing rehabilitative efforts as a basis for a downward variance under Section 3553(a). Pet. App. 4-5. The court of appeals acknowledged that petitioner had "made significant progress during and following his initial period of imprisonment," and it commended him on the "positive changes he has made in his life." Id. at 5. The court ruled, however, that petitioner's claim was

foreclosed by circuit precedent holding that "post-sentencing rehabilitation is not a permissible factor to consider in granting a downward variance." Ibid.

DISCUSSION

Petitioner raises two claims: first, he contends (Pet. 18-26) that the district court was required, under the law-of-the-case doctrine and the court of appeals' prior remand, to grant him a 40% downward departure for substantial assistance under Sentencing Guidelines § 5K.1.1; and, second, he contends (Pet. 27-29) that the court of appeals erred in holding that a district court, when conducting a general resentencing, may not vary downward from the Guidelines range under 18 U.S.C. 3553(a) based on a defendant's rehabilitation after his initial sentencing. Petitioner's first claim lacks merit and, in any event, does not warrant this Court's review. On petitioner's second claim, however, the government agrees with petitioner that the court of appeals erred in holding that post-sentencing rehabilitation is not a permissible ground for a downward variance under Section 3553(a) at resentencing. Accordingly, the Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand the case for further consideration in light of the position expressed in this brief.

1. Petitioner first renews (Pet. 18-26) his argument that the district court was required by the law-of-the-case doctrine and the court of appeals' prior remand to grant him at resentencing the

same 40% substantial assistance departure that he had been granted at his initial sentencing. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review of the claim is not warranted.

First, petitioner's reliance on the law-of-the-case doctrine is mistaken. "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 of the same case." Arizona v. California, 460 U.S. 605, 618 (1983). In its earlier opinions in this case, the court of appeals did not decide as a "rule of law" that petitioner was entitled to a 40% substantial assistance departure. Rather, in Pepper II, it concluded only that the district court's decision to grant a 40% departure did not constitute an abuse of discretion. Pet. App. 28; see id. at 4. As the courts below recognized, the court of appeals did not hold that a 40% departure "was the only reasonable outcome for [petitioner]." Ibid. Moreover, the court of appeals' decision in Pepper II was subsequently vacated by this Court, see id. at 23, and the court of appeals did not address the substantial-assistance issue in Pepper III, see id. at 19-22. The vacated-and-never-reinstated holding on the substantial-assistance departure could not have bound the district court on resentencing. In any event, as petitioner himself acknowledges (see Pet. 19, 20), the law-of-the-case doctrine is discretionary and does not limit a court's

power to address an issue. See Arizona v. California, 460 U.S. at 618. The exercise of that discretion by the courts below in the specific circumstances of this case, particularly in the absence of any claim by petitioner of a conflict with any decision of another court of appeals, does not warrant this Court's review.

Petitioner's related argument that the district court exceeded the scope of the remand by reducing the extent of the substantial assistance departure is similarly unfounded. Because Pepper II held only that the 40% departure was not an abuse of discretion and did not hold that a 40% departure was required, see Pet. App. 28, the court of appeals correctly concluded that its order in Pepper II remanding "for resentencing consistent with this opinion," id. at 30, did not require the district court to grant a 40% departure. See id. at 3-4. Indeed, Pepper II did not even govern the district court's actions on resentencing because that decision was vacated by this Court. Id. at 23. Instead, the resentencing was governed by the instructions in Pepper III that petitioner be resentenced "consistent with this opinion," id. at 22, and the Pepper III opinion did not address the validity of the 40% substantial-assistance departure, see id. at 19-22. In any event, the court of appeals' assessment of the scope of its own remand order is a fact-bound issue that does not warrant review by this Court.

2. Petitioner next contends (Pet. 27-29) that the court of appeals erred in holding that post-sentencing rehabilitation is an

impermissible factor to consider at resentencing in granting a downward variance under Section 3553(a). The government agrees.

a. Before this Court's decision in United States v. Booker, 543 U.S. 220 (2005), the United States Sentencing Guidelines were mandatory, and a district court was required to sentence within the Guidelines range unless the court found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by" the Guidelines. 18 U.S.C. 3553(b). In addition, various Guidelines policy statements provided that specified circumstances were not permissible grounds for departure from the Guidelines range. See Guidelines Ch. 5, Pt. K.2. Adherence to those policy statements, like adherence to the Guidelines themselves, was mandatory. Williams v. United States, 503 U.S. 193, 201 (1992).

Beginning November 1, 2000, the Guidelines contained a policy statement providing that "[p]ost-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 resentencing the defendant for that offense." Guidelines § 5K2.19; see Guidelines App. C, amend. 602 (effective Nov. 1, 2000) (adding § 5K2.19 to the Guidelines). Accordingly, when the Guidelines were mandatory, a defendant's post-sentencing rehabilitation was an impermissible ground for sentencing outside the Guidelines range.

In Booker, however, the Court held that the mandatory Guidelines system violated the Sixth Amendment, and the Court remedied that violation by severing certain provisions of the Sentencing Reform Act of 1984 (SRA) and thus rendering the Guidelines "effectively advisory." Booker, 543 U.S. at 245. The Court explained that, under the new sentencing regime, the SRA still requires "a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a)." Id. at 245-246.

After Booker, although "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," "the district judge should then consider all of the § 3553(a) factors" to determine the appropriate sentence. Gall v. United States, 552 U.S. 38, 49-50 (2007). As the Court clarified in Kimbrough v. United States, 552 U.S. 85 (2007), the Guidelines are now "just one factor among several" that "courts must consider in determining an appropriate sentence." Id. at 90. In particular, "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." Id. at 570 (citation omitted). The Court recently reaffirmed that holding in Spears v. United States, 129 S. Ct. 840 (2009) (per curiam), reiterating that district courts generally have authority to vary from the "Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular

case." Id. at 843. Accordingly, policy statements prohibiting courts from imposing non-Guidelines sentences based on specified factors are no longer binding, and courts generally may vary from the Guidelines range based on any consideration that is permissible under Section 3553(a).

No provision in Section 3553(a) prohibits a court from considering at resentencing a defendant's efforts at rehabilitation undertaken after his initial sentencing. On the contrary, Section 3553(a) specifically instructs sentencing courts to consider "the history and characteristics of the defendant." 18 U.S.C. 3553(a)(1). That phrase encompasses a defendant's rehabilitative efforts, whether they occur before or after his original sentencing. Consideration of a defendant's rehabilitation after his original sentencing may also be relevant to "the need for the sentence imposed" on resentencing "to protect the public from further crimes of the defendant," another Section 3553(a) factor. 18 U.S.C. 3553(a)(2). Accordingly, the court of appeals erred in concluding that, under the advisory Guidelines regime, post-sentencing rehabilitation is never a permissible factor to consider in varying downward under Section 3553(a) from the advisory Guidelines range.

b. Plenary consideration of the issue by this Court is not warranted at this time. The only other court of appeals that has held that consideration of post-sentencing rehabilitation is never permissible under the advisory Guidelines system is the Eleventh

Circuit. See United States v. Lorenzo, 471 F.3d 1219, 1221 (2006). That decision, like the decision below, was issued without the benefit of the government's current views on the issue. The Eleventh Circuit's decision in Lorenzo also predates this Court's decisions in Kimbrough and Spears. Accordingly, the Eleventh Circuit may well reconsider its position on the issue when confronted with the question in a future case.[1]

c. Because the district court sentenced petitioner under the misapprehension that post-sentencing rehabilitation is an impermissible factor to consider in granting a downward variance under Section 3553(a), see 12/22/2008 Sent. Mem. 16, the court of appeals should have vacated petitioner's sentence and remanded for resentencing. Its failure to do so was based on its view that the district court was prohibited from considering petitioner's post-sentencing rehabilitation. Pet. App. 5-6. As explained above,

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[1] In United States v. Bernardo Sanchez, 569 F.3d 995, 999 (9th Cir.), cert. denied, 130 S. Ct. 761 (2009), the court of appeals held that a district court did not err in declining to consider post-sentencing rehabilitation on a limited remand under United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (en banc). That holding is fully consistent with the government's position here. Under Ameline, the sole issue is whether the district court committed reversible plain error in a pre-Booker sentencing by failing to treat the Guidelines as advisory, and the sole question is whether the district court would have imposed a materially different sentence had it known that the Guidelines were advisory. Id. at 1084-1085. Post-sentencing developments do not bear on that inquiry. In contrast, in this case, as the court of appeals expressly concluded, it had ordered a "general remand for resentencing" that "did not place any limitations on the discretion of the newly assigned district court judge in resentencing petitioner." Pet. App. 4.

that view is incorrect.[2] In arriving at that ruling, however, the court of appeals did not have the benefit of the government's current views on the issue. See Gov't C.A. Br. 16-20 (arguing that post-sentencing rehabilitation could not be considered). The court of appeals also did not discuss the impact of Kimbrough and Spears on its prior holdings that post-sentencing rehabilitation is an impermissible consideration. See Pet. App. 5-6. Accordingly, this Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further consideration by the courts below.

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[2] A district court may still decline to reduce a sentence for extraordinary post-sentencing rehabilitation. It may find persuasive, for example, the Sentencing Guidelines policy statement that post-sentencing rehabilitation does not justify a below-Guidelines sentence, see Guidelines § 5K2.19; it may conclude (as had the Commission) that good behavior in prison is to be rewarded by the Bureau of Prisons' award of good-conduct time that reduces a sentence by up to 54 days a year for "exemplary compliance with institutional disciplinary regulations," 18 U.S.C. 3624(b), see Guidelines § 5K2.19, comment.; the court might find it inequitable to reduce a sentence on grounds not available to prisoners who do not "gain the opportunity to be sentenced de novo," ibid.; or the court might take a skeptical view of rehabilitation undertaken only after sentencing. For those reasons, it is likely that a district court would impose a downward variance based on a defendant's post-sentencing rehabilitative efforts only in "an unusual case." United States v. Lloyd, 469 F.3d 319, 324 (3d Cir. 2006), cert. denied, 552 U.S. 822 (2007). But the reasons why such a reduction is likely to be rare do not mean that it is legally unavailable in an advisory Guidelines regime.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES**, via e-mail and first class mail, postage prepaid, this **February 19, 2010**.

[See Attached Service List]

Elena Kagan
Solicitor General
Counsel of Record

February 19, 2010.

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.