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IN THE SUPREME COURT OF THE UNITED STATES

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JASON PEPPER, :

Petitioner : No. 09-6822

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Monday, December 6, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

ALFREDO PARRISH, ESQ., Des Moines, Iowa; Tallahassee, Florida; appointed by this Court; on behalf of Petitioner.

ROY W. McLEESE, III, ESQ., Acting Deputy Solicitor General, Department of Justice, Washington, D.C.; for Respondent, in support of Petitioner.

ADAM G. CIONGOLI, ESQ., New York, N.Y.; appointed by this Court; for amicus curiae, in support of the judgment below.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 09-6822, Pepper v. United States.

Mr. Parrish.

ORAL ARGUMENT OF ALFREDO PARRISH
ON BEHALF OF THE PETITIONER

MR. PARRISH: Mr. Chief Justice, and may it please the Court:

Having successfully completed drug treatment in prison and having come home to succeed as a college student, valued employee, and family man, Jason Pepper presents to this Court two questions: Whether post-sentencing rehabilitation is a permissible basis for a downward variance from the sentencing guidelines at resentencing, and whether the district court judge in Pepper's resentencing was bound by the law of the case doctrine in its 5K departure ruling absent new facts, changes in the controlling law, or to avoid a manifest injustice.

Post-sentencing rehabilitation has traditionally been a relevant factor for judges to consider and is now a permissible ground for a

1 non-guideline sentence. 3553(a) and 3661 are the
2 authorities permitting post-sentencing rehabilitation as
3 a consideration for variance.

4 CHIEF JUSTICE ROBERTS: Counsel, I think
5 you -- I think you've got a difficult job navigating
6 between your two issues. It seems on the first one, the
7 40 percent to 20 percent, you're saying: Look, you've
8 got to stick with what you did before. And when it gets
9 to the post-sentencing consideration, you're saying:
10 Well, we can -- all bets are off; we can start -- start
11 anew; we can look at things that have happened since.

12 Is there a way you reconcile that --
13 those -- that tension?

14 MR. PARRISH: They're like apples and
15 oranges. The law of the case doctrine is what you refer
16 to as a matter that's left in the district court. The
17 other issue of the -- whether or not the individual
18 qualifies for downward variance is a completely separate
19 issue. The law of the case remains with the district
20 court judge.

21 In the other issue that we have, it's
22 whether or not he's entitled to a downward variance
23 based upon the book of remedies. So they are not, in
24 fact, the same issues.

25 JUSTICE GINSBURG: If the law of the case --

1 MR. PARRISH: And there is no tension --

2 JUSTICE GINSBURG: If the law in the case is
3 left to the district court, then the district court can
4 say, well, the law of the case -- that's what that other
5 judge said, but it was a question of what's a reasonable
6 time, and I'm -- I appraise it differently.

7 The -- the judgment has been vacated, the
8 sentence has been vacated, so how does the law of the
9 case survive? I mean, is -- the judgment is no
10 longer --

11 MR. PARRISH: The law of the case survives
12 on a couple of basic principles. One, there has to be
13 new facts that the district court judge heard; there has
14 to be a change of controlling law; and there has to be a
15 reason to avoid a manifest injustice.

16 If you go back to the 5K, one departure that
17 the first judge made the decision on, that law -- that
18 was the law of the case. That percentage followed
19 Mr. Pepper straight through the process. That's a
20 totally separate ruling from any of the other factors in
21 this case that relate to his downward variance.

22 JUSTICE GINSBURG: Can a district judge say
23 later on in the process: I made a ruling earlier in the
24 case; I've since done a lot of research, and I now think
25 that that ruling was wrong?

1 MR. PARRISH: Absolutely, they can do that.
2 The circumstances would be, did they see new facts? Was
3 there a change of controlling law? The reason we do
4 this is because we want to have confidence in that
5 decision to make sure litigants don't go judge shopping.

6 So that's part of the reason this law of the
7 case doctrine is in there. Even in Judge Posner's
8 Seventh Circuit decision we cite in our brief, you defer
9 to the first judge. But any time a judge can
10 reconsider; there's no problem with that.

11 But the law of the case in the 5K departure,
12 when the first district judge heard substantial evidence
13 with regard to the issue of cooperation, and that's what
14 he did. When the next judge heard it, she heard no new
15 facts, no change in controlling law, and absolutely
16 heard no evidence with regard to --

17 JUSTICE SOTOMAYOR: Counsel --

18 CHIEF JUSTICE ROBERTS: Well, that's kind of
19 a fortuitous situation, then. You're sort of saying if
20 you end up with the same judge, she can reconsider her
21 own prior determination. But if you, for whatever
22 reason, the death of the first judge, you're in a
23 different judge, she's bound by what went before. That
24 doesn't seem right.

25 MR. PARRISH: Well, that's an excellent

1 example -- bound by -- but you have to look at the law
2 of the case and make a decision whether or not new facts
3 came in, there was a change of controlling law.

4 Otherwise, you are still stuck, as law of the case, with
5 that particular information. If new facts came in --

6 JUSTICE SCALIA: Even with the original
7 judge?

8 MR. PARRISH: Even with the original judge.
9 Absolutely, Justice Scalia.

10 JUSTICE SCALIA: Unless there are new facts
11 or some -- some new --

12 MR. PARRISH: New facts, a change in
13 controlling law, or other factor. It's a basic concept,
14 and that's why a lot of cases are not floating around
15 about that. Plus the government --

16 JUSTICE SOTOMAYOR: Counsel, I'm -- I'm a
17 little confused.

18 MR. PARRISH: Sure.

19 JUSTICE SOTOMAYOR: I thought that the
20 entire premise of Booker was that judges should have
21 full discretion under 3553 to balance the factors that
22 are required by the statute to be balanced and to come
23 to what they believe is the appropriate sentence.

24 If we impose, in a resentencing, in a remand
25 order that has vacated a prior sentence, a limitation on

1 that power, don't we in turn do exactly what you're
2 arguing in your first half of your appeal, which is
3 unconstitutionally tie the hands of the judge? I think
4 that was what Justice -- the Chief Justice was getting
5 to in his first question.

6 MR. PARRISH: That's absolutely -- that's
7 why they are apples and oranges. If you go to the
8 Booker decision with regard to Mr. Pepper -- and Mr.
9 Pepper's decision is under the remedial remedy that we
10 are asking that you impose in this case -- Mr. Pepper's
11 case is still on direct appeal.

12 As a matter of fact, if the restrictions
13 placed upon 3742(g)(2), if they remained, Mr. Booker
14 would not have gotten the advantage of the remedial
15 ruling in the case. Actually, he was entitled to it as
16 part of the Sixth Amendment.

17 JUSTICE SOTOMAYOR: So why isn't a new
18 sentence just that: A new sentence? And the judge,
19 whoever the judge is, can do what they're supposed to
20 do, which is to look at all of the factors and weigh
21 them as that judge believes is appropriate, assuming the
22 remand order is not a limited order.

23 MR. PARRISH: They can look at all of the
24 facts, if there are new facts presented. The difference
25 is, in the law of the case, there were no new facts. In

1 this case, there were new facts to consider, which would
2 be part of the post-sentencing rehabilitation.

3 JUSTICE SCALIA: Well --

4 MR. PARRISH: In that issue, the Eighth
5 Circuit rule that prohibited this was not even part of
6 the 3742(g)(2) statute.

7 JUSTICE SCALIA: Yes, but one -- one of the
8 new facts that -- that is before a judge on remand is
9 that part of the basis for his decision has been
10 eliminated. He -- he gave additional time because of a
11 certain factor, and the court of appeals says: Oh, no,
12 you can't look at that factor. And then he looks at the
13 whole thing. He says: Gee, without that factor this
14 guy is getting off scot-free.

15 You mean he cannot -- he cannot readjust his
16 other discretionary judgments in light of the fact that
17 this additional factor doesn't exist? That seems
18 rather -- I don't -- counterintuitive, I guess.

19 MR. PARRISH: Well -- well, Justice Scalia,
20 under the issue that's presented to the Court, if you
21 mix law of the case doctrine with the 3742 problem, it
22 creates a problem in analysis. That's why they have to
23 be analyzed separately.

24 A judge can look at new facts, even under
25 the remand statute, now that they are restricted to the

1 facts that were part of the first case. That's what
2 3742(g)(2) does. It makes the guideline sentences
3 mandatory on remand. That's the problem with it.

4 If they become mandatory on remand, the
5 problem is nobody gets the advantage of the Booker
6 remedial ruling of it directly, and all sentences on
7 remand are mandatory. Even in the Booker decision, you
8 make it -- which Mr. Pepper was a recipient of, because
9 his case was going on during that time -- he did not
10 ever get the benefit of the Booker decision. When it
11 was sent back, he never did. Mr. Booker, under
12 3742(g)(2), never would have gotten that advantage.

13 And there were several other factors that
14 were coming into play where people would never get
15 advantage of the Booker ruling.

16 JUSTICE GINSBURG: Well, what do you do with
17 3742(g)(2)?

18 MR. PARRISH: You excise it. You discussed
19 it in the Booker decision. And in the Booker decision,
20 you indicated, Justice Ginsburg, that you excised two of
21 the other -- 3553(b); you also exercise -- excised
22 3742(e), which made the sentences on remand mandatory.

23 In this case, 3742(g)(2)(A) and (B) were
24 left open. And what happens then, the district court
25 judge has to come back. Once they look at the decision,

1 they are bound within those original facts. They can't
2 go outside of those facts to decide something different
3 or to permit a variance.

4 The Eighth Circuit didn't use that rule.
5 What we are suggesting is that you excise that rule.
6 You excise 3742(g)(2) and you excise (A) and (B) of that
7 section.

8 JUSTICE ALITO: Would it be consistent with
9 Booker for Congress to pass a statute that says the
10 following? When a judge initially imposes a sentence,
11 the judge must specify all of the factors that the judge
12 thinks are relevant to that sentence, whether it's going
13 to be a sentence within the guidelines or a sentence
14 that's outside of the guidelines, and if there is then a
15 remand, the judge may impose a sentence based on the
16 factors that were listed at the initial sentencing but
17 not based on any other factors.

18 MR. PARRISH: Justice Alito, Congress could
19 do that. Unfortunately, that's not what they did in
20 this case. The 3742, which came down as part of the
21 PROTECT Act -- in that case, Booker came after that.
22 So, consequently, 3742(g)(2) is problematic. It --

23 JUSTICE ALITO: Isn't that exactly what
24 3742(g)(2) does?

25 MR. PARRISH: It does not.

1 JUSTICE ALITO: It says -- well, under
2 3553(c), the sentencing judge is supposed to explain the
3 factors that justify the sentence that's imposed. And
4 that would -- that means explain a sentence outside of
5 the guidelines; also explain why the judge chooses a
6 particular sentence within the guidelines range.

7 MR. PARRISH: Well, what --

8 JUSTICE ALITO: And 3742(g)(2) says that
9 when there's a remand, the judge may take into account
10 all the factors that were mentioned the first time, but
11 not other factors.

12 MR. PARRISH: Well, Justice Alito, let me
13 give you an example. What if they didn't state the
14 reasons and you go up on the variance from the district
15 court decision saying you didn't get the stated reasons?
16 The appellate court then sends that decision back, and
17 the judge is then bound by those facts. And if they
18 didn't find all of the facts, suppose again they went up
19 on a presumption that the guidelines were, in fact,
20 reasonable. In that instance, you wouldn't get anything
21 for the judge to work from.

22 And, absolutely, they work from facts now
23 within the guidelines. You take the Stapleton case
24 that's in the Eighth Circuit that's cited in our brief.
25 They will increase the guidelines within the guidelines

1 on new facts. Yet, you can't take those same new facts
2 and then use them to assist your clients under 3553 --

3 JUSTICE GINSBURG: Has the Sentencing --

4 MR. PARRISH: -- which goes against all of
5 the things --

6 JUSTICE GINSBURG: Is the Sentencing
7 Commission -- it still has that guideline that you
8 can -- you can depart -- you can lower within the
9 guideline, but not beyond it?

10 MR. PARRISH: Correct. You mean under the
11 post-sentencing rehabilitation?

12 JUSTICE GINSBURG: Yes. Is it --

13 MR. PARRISH: They have it as a bar, a
14 policy bar, but the Kimbrough decision really indicates
15 that the courts are not supposed to use that as only one
16 factor. You're supposed to look at all of the rest of
17 the factors. And, as a matter of fact, the --

18 JUSTICE GINSBURG: But as far as the
19 Sentencing Commission itself is concerned, its position
20 is still that postconviction behavior does not warrant a
21 below-the-guideline sentence?

22 MR. PARRISH: Correct.

23 JUSTICE GINSBURG: That --

24 MR. PARRISH: And it comes right out of the
25 Eighth Circuit, which was not based upon empirical data,

1 like a lot of these other issues are based on that they
2 create as policy matters. But, under Kimbrough, you
3 said policy matters are only one consideration; you
4 must, in fact, look at all the other factors.

5 You also said it in Rita, too. You're not
6 bound by just one of the factors. The court has to look
7 at everything in order to be able to make a decision to
8 be consistent with all of the other decisions that
9 you've written in this area.

10 JUSTICE ALITO: Suppose that Mr. Pepper had
11 an identical twin, and suppose that Mr. Pepper and his
12 twin engaged in the same criminal conduct. They're
13 charged with the same offenses; they're tried together;
14 they're convicted of exactly the same offenses; they're
15 sentenced on the same day.

16 Between sentencing and the time of the
17 appeal, they -- they rehabilitate themselves in exactly
18 the same way. The twin's sentence is affirmed on
19 appeal, and Pepper's sentence is overturned and he is --
20 he gets a remand for a new sentence.

21 Why is it justified for Mr. Pepper to get
22 credit for post-sentencing rehabilitation, but his twin
23 does not?

24 MR. PARRISH: Well, in that instance, the
25 question is the guidelines accept the fact of some

1 disparity, and there's what's called "warranted
2 disparity." Mr. Pepper did exactly everything that we
3 want a person convicted of a crime to do. He exceeded
4 it. And in that instance, if his case comes back down,
5 it doesn't fall on any concept of unwarranted disparity.
6 There is a difference. There's a difference with every
7 individual who faces --

8 JUSTICE ALITO: His twin -- his twin did
9 everything that was expected of him, too, but he doesn't
10 get any credit for the rehabilitation. He just gets
11 good time credit for good conduct while he's
12 incarcerated.

13 MR. PARRISH: But our guidelines and our
14 laws make situations where people who are unique and
15 who, in fact, exceed don't fall into a separate category
16 of being unwarranted disparity.

17 The -- the emphasis is on "unwarranted."
18 There is some disparity, and if a person is unique and
19 that person does, in fact, under 3353 factors, meet all
20 of the things that require us to look at a person as an
21 individual, that's what we want in our society. And
22 that's what your cases -- 3553, 3661 -- that's what they
23 indicate. You look at the person as an individual.

24 And, true enough, some disparity will be
25 there, but it's a warranted disparity. And it's

1 something that the court can look at, along with all of
2 the other factors.

3 CHIEF JUSTICE ROBERTS: Well, it's -- it's
4 warranted that the one get the benefit, and it's
5 unwarranted that the other does not. I mean, the
6 departure in the case of the one who gets
7 reconsideration is warranted, but that doesn't mean that
8 the disparity is warranted.

9 MR. PARRISH: Well, it would be on a
10 variance and, as you know, under the Gall decision,
11 Chief Justice Roberts, you can look at all of the other
12 factors. Under the departure theory, it's a little bit
13 different. They're little bit narrower, given it's more
14 restrictive, and there's other factors that come into
15 play.

16 Under the variance theory, you have to look
17 at the entire individual. So if that individual can
18 demonstrate that they have made improvements -- not just
19 gone to drug classes but completed them successfully;
20 not just worked as an employee but also excelled and got
21 on a management track after conviction; not just went to
22 college but got on the dean's list and made straight A's
23 -- those are the factors that we want these individuals
24 to have.

25 And that's why 3553(a) allows us that

1 latitude, and 3661, which has a long history based upon
2 no limitation being placed upon the district court
3 judge -- these are the things we want these people to
4 have.

5 JUSTICE BREYER: Is there a guideline that
6 says that there cannot be a departure for rehabilitation
7 after an initial sentencing that's set aside?

8 MR. PARRISH: It's not a guideline. There's
9 a policy out of the Eighth Circuit --

10 JUSTICE BREYER: No. So there's no
11 guideline. So as far as the answer to Justice
12 Ginsburg -- what I thought was her question, that is --
13 the guidelines initially said that the Commission has
14 the power to limit departures --

15 MR. PARRISH: That's right.

16 JUSTICE BREYER: -- but it doesn't do it,
17 except for race and gender --

18 MR. PARRISH: And age and factors like --
19 that's absolutely right, Justice Breyer.

20 JUSTICE BREYER: -- and age. That's right.
21 So under the guidelines, a judge can depart for any
22 reason except those few forbidden things, which I think
23 are properly forbidden.

24 MR. PARRISH: And that's the gram thing --

25 JUSTICE BREYER: Yes. Yes. And --

1 MR. PARRISH: -- the statutory -- the
2 departure from --

3 JUSTICE BREYER: And -- and that's still the
4 law. That's still the law.

5 MR. PARRISH: Correct. That's correct.

6 JUSTICE BREYER: And so it's -- it's the
7 circuits that have made this thing up.

8 MR. PARRISH: The Eighth Circuit created it
9 out of whole cloth following the Sims case. It was a
10 policy that was actually adopted by the guidelines in
11 the year 2000. Prior to that, there were about eight
12 circuits that allowed post-sentencing rehabilitation.
13 Now, even under the new analysis, there are about six
14 circuits that allow it.

15 JUSTICE BREYER: Well, what would the source
16 of law be to make up such a thing? I mean, what is the
17 source --

18 MR. PARRISH: No source of law -- it's a
19 policy --

20 JUSTICE BREYER: What law gives the right to
21 the -- to -- a -- a circuit, to make that up, would have
22 to say it was an unreasonable thing to do.

23 Now, I guess you could have an argument
24 either way on that, but it doesn't strike me off the bat
25 as unreasonable, where a person has rehabilitated

1 himself, to take that into account.

2 MR. PARRISH: I would agree with you.

3 JUSTICE BREYER: And we would have the power
4 to say that.

5 MR. PARRISH: Absolutely.

6 JUSTICE SCALIA: What about 3742(g)(2)?

7 JUSTICE BREYER: I wasn't going to bring
8 that up.

9 JUSTICE SCALIA: That's what we're arguing
10 about.

11 JUSTICE BREYER: No --

12 MR. PARRISH: It is what we're arguing
13 about, not about the policy, because they didn't even
14 use that, Justice Scalia, in making their decision.

15 CHIEF JUSTICE ROBERTS: You may want to --

16 MR. PARRISH: I would like to reserve my
17 time.

18 CHIEF JUSTICE ROBERTS: -- reserve time.
19 Thank you, counsel.

20 MR. PARRISH: Thank you so much.

21 CHIEF JUSTICE ROBERTS: Mr. McLeese.

22 ORAL ARGUMENT OF ROY W. McLEESE, III,

23 ON BEHALF OF THE RESPONDENT,

24 IN SUPPORT OF THE PETITIONER

25 MR. McLEESE: Mr. Chief Justice, and may it

1 please the Court:

2 There is no valid basis to categorically bar
3 variances under the -- variances from the guidelines
4 based on post-sentencing rehabilitation. That's true
5 for four primary reasons.

6 First, it's undisputed that post-sentencing
7 rehabilitation is logically irrelevant to statutory
8 sentencing factors in 3553(a), including the need for
9 deterrents and the need to protect the safety of the
10 community.

11 Second, the guidelines themselves authorize
12 consideration of presentencing rehabilitation to a
13 limited extent, because it's permissible under the
14 guidelines to consider presentencing rehabilitation in
15 selecting a sentence with inside the guideline range.

16 What the guidelines do prohibit, and there
17 is a provision in the guidelines that does prohibit,
18 the -- a departure from the guidelines based on
19 post-sentencing rehabilitation. The guidelines prohibit
20 that, but the judgment of the Commission about how much
21 weight that factor can be given after Booker in an
22 advisory guideline regime is advisory rather than
23 mandatory.

24 Third --

25 JUSTICE BREYER: Wait. Which guideline?

1 What guideline prohibits that?

2 MR. McLEESE: 5K2.19.

3 And, third, contrary to the suggestion of
4 amicus, there is no general principle in our law that at
5 a resentencing, new information may not be considered.
6 To the contrary, the consistent assumption of the law is
7 that at a resentencing, you take the defendant as you
8 find him as of the time of resentencing. That's clear
9 from this Court's decisions in Pearce and in Wasman.
10 It's clear from the large body of cases from the lower
11 courts cited in Petitioner's brief at pages 42 through
12 44. That's the way the guidelines operate. So there is
13 no general principle that you cannot consider new
14 information.

15 Now, it's true, as Justice Alito's question
16 suggested earlier, that that can result in differences
17 of opportunity, where one defendant will have an
18 opportunity for a resentence and new information will be
19 considered as to that defendant; a similarly situated
20 defendant will not get a resentencing.

21 But that opportunity is sometimes referred
22 to as "luck." First, it can be good luck or bad luck.
23 And to take the example Justice Alito gave of two twins,
24 if you have an example of two defendants who are twins
25 who are each convicted of an offense -- let's say

1 burglary -- and they are given very lenient sentences,
2 and because the judge looks at their record at the time
3 and determines that they are sympathetic. They are
4 don't have a prior criminal record.

5 One of them's conviction, you know, has no
6 claims of legal error relative to his conviction; he
7 gets no resentencing. The other gets a resentencing.
8 By the time of resentencing, it has become clear that
9 that defendant had previously committed several murders,
10 and he has, you know, murdered -- has also committed a
11 subsequent murder.

12 There is no question that, at that
13 resentencing, that information would be considered.
14 There is no question there would be a disparity, and it
15 would be true even if, let's say, those earlier murders
16 had been committed by both of the twins together.

17 JUSTICE ALITO: Well, isn't there a
18 difference between evidence that -- evidence of conduct
19 that occurred prior to the initial sentencing but wasn't
20 known at the time of the initial sentencing, and
21 evidence of conduct that occurs between the initial
22 sentencing and the resentencing?

23 MR. McLEESE: There could be, but, again --
24 maybe going too far with the example of the two twins,
25 if the two twins, while they were serving -- let's say

1 they got lenient sentences but not probation. While
2 they were serving in jail together, they murdered a
3 correctional officer. If one of the defendants does not
4 get a resentencing, if one of those twins does not,
5 there will be no opportunity for that to be taken into
6 account.

7 JUSTICE SCALIA: And what's your --

8 MR. MCLEESE: With respect to the other who
9 gets a resentencing --

10 JUSTICE ALITO: Maybe it's all or nothing.

11 JUSTICE SCALIA: It is.

12 JUSTICE ALITO: Maybe it works both ways,
13 that the defendant doesn't get the credit for good
14 conduct between sentencing and resentencing but also
15 doesn't get punished at resentencing for unproven
16 conduct that occurs between the first sentence and the
17 next -- and the second sentence.

18 MR. MCLEESE: That's a possible rule of law,
19 but my point was that's not the rule of law we've ever
20 had. That's not the -- and I should say, nor is it the
21 rule of law that's created by 3742(g)(2), because
22 3742(g)(2) is not a rule about consideration of new
23 evidence. It's an anti-departure provision. It permits
24 consideration of new evidence, and it permits these
25 kinds of -- if you -- disparities, whether warranted or

1 not, because it permits consideration of new evidence in
2 determining the guidelines range, new evidence about
3 loss amounts or -- or whatever. It permits
4 consideration of new evidence as it might relate to
5 upward adjustments or downward adjustments, as it might
6 relate to criminal history. What it forbids is new
7 variances or departures.

8 So 3742(g)(2) does not implement some
9 general policy with respect to new evidence, nor, should
10 I say, to the guidelines, because as I said, the
11 guidelines permit consideration of post-sentence
12 rehabilitation in setting a guideline range. They
13 reflect a judgment not about the disparities always
14 trumping other considerations, including accuracy in
15 sentencing, but only how much weight that those
16 disparities --

17 JUSTICE SCALIA: Was that your fourth point?
18 I'm all on pins and needles waiting for your fourth
19 point.

20 MR. McLEESE: No. Apologies. The fourth
21 point is simply that 3742(g)(2), if valid, would
22 foreclose consideration of post-sentencing
23 rehabilitation, but after Booker it is not valid, and --

24 JUSTICE KENNEDY: If Congress reenacted
25 3742(g)(2) tomorrow, would it be valid?

1 MR. McLEESE: It would be invalid. It would
2 be invalid because it would be -- as applied in certain
3 circumstances, it would unconstitutionally constrain the
4 authority of judges at resentencings --

5 JUSTICE BREYER: Why?

6 MR. McLEESE: -- and also be inconsistent
7 with Booker.

8 JUSTICE BREYER: Why? Because the -- look,
9 the -- that is not this case. This case, they never had
10 a chance to consider whether Booker applies or not, so
11 this is, I think, a special case.

12 But think of 3742(g) in general. It's
13 pretty easy to read that section as applied to instances
14 where a judge, the initial sentencing judge, has decided
15 on his own volition to apply the guidelines rather than
16 not to apply them.

17 Now, in such a case, he sentences the
18 individual. There's then an appeal, and the appeal he's
19 reversed on. What in the Constitution says there has to
20 be a second chance to decide whether the guidelines or
21 something else should apply? What in Apprendi says
22 that? What in any of these cases says that?

23 This is an Apprendi problem. As you know,
24 I've dissented throughout; I think this is bad policy,
25 but -- I've disagreed with everything, but forget that

1 fact, important though it is.

2 (Laughter.)

3 JUSTICE BREYER: But the -- the thing that's
4 worrying me about -- and I don't think -- I agree with
5 you on policy, but what I'm -- what I'm having trouble
6 with is: Is it better under the law to say yes, we can
7 interpret 3742(g) so it can be constitutional, and then
8 if in some cases it violates Apprendi, let the court say
9 that in this case it violates Apprendi.

10 But it just isn't clear to me, which is why
11 I left it alone the first time. It's not clear. So --
12 so -- as to when it is, when it isn't constitutional.

13 You got my whole question there?

14 MR. McLEESE: I do, and to take it --

15 JUSTICE BREYER: And I'd appreciate as much
16 answer as you can give me.

17 MR. McLEESE: To take an example that's in
18 the briefs, if at an original sentencing a judge
19 determines the guideline range and ends up calculating
20 it to be relatively low -- 57 to 73 months, which
21 probably aren't even exact numbers -- and determines
22 that that's an appropriate sentence, and although the
23 defendant is urging various factors as a basis for
24 downward -- for variance from the guidelines, the judge
25 determines that there is no reason to vary because this

1 is a sentence that seems reasonable.

2 So that, although those reasons might well
3 be persuasive in some contexts, they aren't given the
4 range down. The government takes an appeal and argues
5 to the court of appeals: In fact, the judge was wrong;
6 the guideline range is much higher. And so on remand at
7 the resentencing, the judge makes some factual
8 determinations, not found by the jury or admitted by the
9 defendant, which increase the guideline range under the
10 new advice from the court of appeals to a guideline
11 range of 121 to 151 months. And --

12 JUSTICE BREYER: You think that violates
13 Apprendi?

14 MR. MCLEESE: Well, if the judge then says:
15 I would like to vary from the guidelines; I am locked in
16 under the guidelines to a 121-month sentence, and I
17 have -- I didn't -- it's true I didn't vary before on
18 these grounds, but that's because the sentence didn't --
19 didn't warrant -- because of its relative lack of
20 severity, did not warrant a variance, I think that
21 the -- the logic of Apprendi and Booker would foreclose
22 constraining resentencings in that way.

23 JUSTICE ALITO: I'm --

24 MR. MCLEESE: And I think that's an
25 answer -- if I just --

1 JUSTICE ALITO: Yes.

2 MR. MCLEESE: I think that's an answer to
3 the question that you had asked earlier, which is, I
4 think, if Congress enacted a statute which categorically
5 said that whatever happens at the original sentencing,
6 the judge has to list any reason that the judge is
7 relying on for a downward variance or departure, and
8 then cabins the judge on remand, that in certain
9 contexts that would be inconsistent with this Court's
10 line of cases from Apprendi through Booker.

11 JUSTICE ALITO: Well, under 3553(c), the
12 court is supposed to explain the reasons for the
13 sentence, even if it's within the guidelines; isn't that
14 right?

15 MR. McLEESE: Yes.

16 JUSTICE ALITO: And so if the court is
17 deciding whether the sentence should be 57 months or
18 63 months, whatever the figures were that you gave, and
19 the court thinks that some factor -- let's say age -- is
20 significant, the court should say: I'm sentencing the
21 defendant to 57 as opposed to 63 because of the
22 defendant's advanced age or young age or whatever it is.

23 Now, on appeal, the -- the court of appeals
24 says the guidelines sentence was improperly calculated;
25 it should be -- the real range is 120 to 125 months.

1 Remand. Now if the court wants to grant a departure or
2 a variance based on age, the court has mentioned age
3 previously as a relevant factor, and it can do that.
4 But if age wasn't -- if age was not relevant to the
5 determination of where within the guidelines this
6 sentence should be set, why is it -- why does the
7 Constitution require that age be a relevant factor, a
8 factor that's open to the judge on resentencing?

9 MR. McLEESE: Well --

10 JUSTICE ALITO: It's just a notice
11 provision. It's not -- it's not something that
12 substantively limits what the court can do.

13 MR. McLEESE: To clarify, a judge is
14 required to state in open court orally the reasons for a
15 sentence inside the guideline range, only if the range
16 is sufficiently large, and the written statement of
17 reasons is not -- the reasons for selecting a sentence
18 within the guideline range are not required to be in the
19 written statements of reasons. The written statement of
20 reasons relates only to grounds outside the -- the
21 guidelines. And to -- from a practical perspective, it
22 would be extremely difficult to expect sentencing judges
23 to list every conditionally or contingently relevant
24 fact, depending on whatever sentence ultimately comes
25 back on remand, that might be relevant to a reason to

1 depart from a range that the judge is not contemplating
2 at the time of the sentencing.

3 But I should say also that it -- the answer
4 to this question, of whether Congress could reenact
5 3742(g)(2) after Booker, and it would be constitutional
6 or not constitutional as applied in certain settings, is
7 not essential to our point, because the appeal
8 provisions that were excised in Booker were not
9 determined by the Court -- they were not excised because
10 the Court determined they would be independently
11 unconstitutional.

12 The -- the remedial component of the Booker
13 opinion was focused on the question of, having found a
14 constitutional violation, what then do we do to remedy
15 it? And what the Court said was the way we will remedy
16 this is that we will make the guidelines advisory rather
17 than mandatory.

18 JUSTICE BREYER: The answer to this case is,
19 I don't think, too hard. You say it's at least
20 questionable enough, 42(g) you could say, at least
21 questionable enough that it's the same box as the ones
22 that were excised.

23 MR .McLEESE: And --

24 JUSTICE BREYER: And then there has not been
25 focus in the district court on what the district court

1 would want to do, assuming he is free to apply the
2 guidelines or not, on the remand decision that that
3 judge has never made.

4 MR. McLEESE: Yes, and to elaborate on
5 that --

6 JUSTICE BREYER: Is that right?

7 MR. McLEESE: Just -- just by its terms,
8 section 3742(g)(2) is inconsistent with the remedial
9 rule announced in Booker, which was that the guidelines
10 would be advisory rather than mandatory --

11 JUSTICE BREYER: They didn't say -- forget
12 that argument. What I was about --

13 MR. McLEESE: But more specifically --

14 JUSTICE BREYER: I do have another point I'd
15 like to get out, as long as I have this opportunity. It
16 seems to me there's a considerable confusion, perhaps,
17 only from my point of view, but this word "variance" --
18 I mean, why is it felt necessary to use the word
19 "variance"? If it's true -- and it's not totally true,
20 but if it's true the judge -- you can apply the
21 guideline, apply it. Now, the guidelines themselves
22 gives you the right to depart in every single case but,
23 for example, a handful of factors such as race, where
24 you really shouldn't change the thing just because of
25 race. So what is the need for the variance?

1 Now, maybe this 5K9-point whatever that
2 is -- maybe there are a handful where there is a need,
3 and maybe this is an example of it. But are there a
4 lot, many, what -- can you just talk a little bit about
5 it?

6 MR. McLEESE: It's -- two points with
7 respect to that, one of which is this is a provision
8 where the -- the Commission has specifically said it is
9 not lawful to depart on this basis, though it is
10 permissible, again, to sentence within the range --

11 JUSTICE BREYER: It's just a policy
12 statement. Does it enjoy the same status of law?

13 MR. McLEESE: Correct. Yes, they are
14 treated -- in the era when the guidelines were treated
15 as mandatory, they were treated as binding in their
16 turn. There are other guidelines provisions about
17 departures which either foreclose other bases or which
18 will say they are not usually or ordinarily a basis for
19 departure.

20 JUSTICE BREYER: Oh, I get it.

21 MR. McLEESE: And so, there still is
22 litigation in a post-mandatory guideline system about
23 whether it's a correct application of the guidelines to
24 depart on this basis.

25 CHIEF JUSTICE ROBERTS: Counsel, perhaps

1 before your time is up, you'd like to address the first
2 question.

3 MR. McLEESE: Yes. With respect to the law
4 of the case issue, as it has been framed by the --
5 the -- the briefs by Petitioner on the merits in this
6 Court, it is an extremely narrow issue; and that is,
7 taking as a given that the Eighth Circuit had authority
8 to order de novo resentencing and that, in fact, it did
9 order de novo resentencing, was, at that resentencing,
10 the district court -- the resentencing district court
11 judge bound by the earlier judge's discretionary
12 determination that the substantial assistance provided
13 by defendant Pepper justified a 40 percent reduction?
14 And to ask that question is almost to answer it in the
15 sense that the phrase "de novo" means anew or afresh.
16 And the point --

17 CHIEF JUSTICE ROBERTS: But it has
18 nothing -- but what if the appeal had nothing to do with
19 the issue at all? I'm thinking in -- the analogy in the
20 civil context, so you have two totally unrelated issues.
21 If you appeal issue B and that's what the fight is
22 about, and you reverse and send it back, it would at
23 least be unusual for judge to say, oh, and by the way,
24 I'm coming out the other way on issue A.

25 MR. McLEESE: And that's true in the civil

1 setting. Courts have taken the view that sentencing is
2 different because sentencing is a relatively discrete
3 proceeding where there are a number of interconnected
4 determinations, a lot of them discretionary based on the
5 judge's assessment, a lot of them conditionally relevant
6 to each other.

7 CHIEF JUSTICE ROBERTS: But these are not
8 interconnected, are they?

9 MR. McLEESE: Well, the amount of
10 substantial assistance that is given in a particular
11 case can easily be interconnected to antecedent
12 determinations, including what the guidelines level is,
13 because judges are often --

14 CHIEF JUSTICE ROBERTS: No, my point is that
15 the level of assistance is not in any way connected to
16 the post-sentencing conduct.

17 MR. McLEESE: No, these two issues are not
18 interrelated, but I'm explaining the reason for the
19 doctrine in the -- in the sentencing setting. The
20 greater willingness of courts of appeals to order de
21 novo resentencing and say even though the particular
22 issue on appeal doesn't directly open up the other
23 issues that may have been determined at sentencing,
24 judges in the -- courts of appeals in the sentencing
25 context all agree they have authority to order de novo

1 resentencing where they think it's appropriate. And
2 they tend to think it's more appropriate in the
3 sentencing context than generally, because, as I said --

4 CHIEF JUSTICE ROBERTS: No, but why -- why
5 does that matter when you're talking about two totally
6 unrelated issues?

7 MR. McLEESE: Because also --

8 CHIEF JUSTICE ROBERTS: There's no reason to
9 suppose that the court of appeals thinks there ought to
10 be -- or any issue with respect to the question A when
11 they focus solely on question B.

12 MR. McLEESE: I agree. But, again, when the
13 court of appeals orders de novo resentencing, that
14 doesn't open up only substantial assistance. The point
15 is the judge is going to go through and make, as of the
16 time of the resentencing, determinations on the
17 situation as it exists at that time. So, it is possible
18 and not at all unusual that issues that were not up in
19 the court of appeals will come up on resentencing.

20 CHIEF JUSTICE ROBERTS: So, you're worried
21 about the general rule, but you agree that none of those
22 arguments make any sense in this case.

23 MR. McLEESE: I -- I agree that it would
24 have been permissible for the court of appeals here to
25 choose not direct a de novo resentencing. That would

1 have been a permissible way to resolve the issue as
2 well --

3 CHIEF JUSTICE ROBERTS: That would not
4 interfere with the new judge's or the judge's discretion
5 across the board?

6 MR. McLEESE: I -- I --

7 CHIEF JUSTICE ROBERTS: I have never had to
8 sentence someone, but it seems to me, particularly when
9 you have a change in the judges, there's a very personal
10 investment in what you do with the -- the defendant, and
11 to say that, well, another judge looked at this factor
12 so your hands are tied in that respect is -- is a
13 questionable result.

14 MR. McLEESE: I agree. And I should say
15 that the issues that we're discussing are interesting
16 ones, but they are not in the law of the case issue
17 that's being presented here, because, in fact, the
18 Eighth Circuit did order de novo resentencing. The
19 defendant has never challenged the validity of their
20 ordering de novo resentencing. So the only issue is,
21 what does it mean for the law of the case doctrine when
22 de novo resentencing is ordered?

23 And on that question, it's very clear. In
24 fact, not just the Eighth Circuit but every court of
25 appeals that we're aware of to resolve that question has

1 said that, as the name suggests, when the circuit
2 chooses, for whatever reasons, to order de novo
3 resentencing, the -- the judge at the resentencing is
4 not bound by earlier determinations of the district
5 court judge. And --

6 CHIEF JUSTICE ROBERTS: Is there reason to
7 suppose when they say de novo resentencing, they're
8 talking about the mistake that was made with respect to
9 issue B and not issue A?

10 MR. McLEESE: No, there's no reason to
11 suppose that. But what there is reason to suppose --

12 CHIEF JUSTICE ROBERTS: Do they -- is it
13 their practice in some cases to say we're sending this
14 back for de novo sentencing but only with respect to the
15 issue that we addressed? Or do they just normally throw
16 it out and say start over, without any supposition that
17 the district court would take a look again at something
18 that wasn't before the court of appeals at all?

19 MR. McLEESE: Different circuits approach
20 that somewhat differently, but all circuits have --
21 understand that they have authority to make
22 individualized case determinations and they do. There
23 are cases where --

24 CHIEF JUSTICE ROBERTS: Could they -- are
25 you aware of any case where the Eighth Circuit has said

1 we're sending this back for resentencing but only on the
2 issue that we addressed on appeal?

3 MR. McLEESE: Yes. And the Eighth Circuit's
4 opinions make clear that -- although they apply sort of
5 a default presumption that there will be de novo
6 resentencing, they make clear that they have authority
7 to order limited resentencings. And they do that where
8 in a particular case they think that's more efficient or
9 more appropriate.

10 They explained in this case, by the way,
11 with respect to the suggestion you made earlier,
12 Mr. Chief Justice, that part of the reason they thought
13 de novo resentencing was appropriate here is because
14 they were reassigning the matter to a different judge,
15 and, therefore, I think for some of the reasons that you
16 were suggesting, they felt de novo review was
17 appropriate.

18 But, again, on the narrow law of the case
19 issue that is presented, there is no disagreement among
20 the courts of appeals, and as the name suggests, if
21 there is a de novo resentencing, the matter is de novo.

22 If I could, for just a moment, turn back to
23 the post-sentence rehabilitation issue to make one last
24 point, which is, going one level deeper into the Booker
25 remedy analysis, again, even if there were some --

1 excuse me.

2 CHIEF JUSTICE ROBERTS: Finish your
3 sentence.

4 MR. McLEESE: All I was going to say is that
5 in excising the appeal provisions that were excised in
6 Booker, the Court identified four reasons why those
7 should be excised, and each one of them applies equally
8 or more so with respect to the provision at issue here.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Ciongoli.

11 ORAL ARGUMENT OF ADAM G. CIONGOLI

12 AS AMICUS CURIAE, IN SUPPORT OF THE JUDGMENT BELOW

13 MR. CIONGOLI: Mr. Chief Justice, and may it
14 please the Court:

15 Congress enacted 3742(g) for the purpose of
16 stopping district courts from evading the mandate of the
17 court of appeals on remanded sentencing cases by relying
18 on grounds that they did not consider at the original
19 sentencing.

20 JUSTICE SOTOMAYOR: And as far as you're
21 concerned, Justice Alito's question about post- --
22 post-sentencing criminal conduct couldn't be considered
23 by a court, either?

24 MR. CIONGOLI: I --

25 JUSTICE SOTOMAYOR: Because it wasn't a

1 factor mentioned in the original sentence, so you would
2 apply the rule equally to --

3 MR. CIONGOLI: I -- I would, Justice
4 Sotomayor.

5 JUSTICE SOTOMAYOR: Is there any logic to
6 that? I mean, I know that when I was a district court
7 judge, routinely post-sentencing criminal conduct would
8 make me wonder whether this person really was worthy of
9 a lower sentence or not, or of whatever largesse I may
10 have given him or her in original sentence. What makes
11 sense about that?

12 MR. CIONGOLI: Well, I think one thing that
13 would make sense of it is there's a different mechanism.
14 There's an opportunity for that to be reflected in a --
15 in a separate criminal prosecution and a -- and a
16 sentencing for that conduct. When -- when the
17 sentencing guidelines were created and when 3742(g) was
18 passed, all of this was done against the backdrop of a
19 sense that the sentencing guidelines were to focus on
20 avoiding unwarranted disparities, but as the Court
21 observed in Booker, sentencing -- similar -- similar
22 sentences for similar crimes conducted in similar ways.

23 JUSTICE SOTOMAYOR: I -- when this provision
24 was passed, Congress was worried, I thought, about the
25 situations where district court judges' hands -- were on

1 appeal told you can't use this ground for departure, and
2 often the court, because they thought the original
3 sentence they gave was fair, would then articulate
4 another ground for departure that they hadn't earlier.
5 But didn't all of that go out of the window with Booker?
6 I mean, the presumption in -- that drove Congress was
7 that the guidelines were mandatory. Once Booker said
8 they weren't, why should we be limiting Congress -- a
9 judge's discretion ab initio or post hoc to giving what
10 they believe is a reasonable sentence?

11 MR. CIONGOLI: Justice Sotomayor, I think
12 that the purpose of 3742(g) is to limit the ability of a
13 district court to evade the mandate on remand in
14 sentencing. And I think that purpose was valid before
15 Booker; I think it's actually even more important after
16 Booker if you're going, for example, to have meaningful
17 opportunities for the government to appeal. If a
18 district court can impose a sentence that the court of
19 appeals then finds substantively unreasonable, and --
20 and on remand the district court can then consider
21 grounds that didn't exist at the time of the original
22 sentencing and, in fact, couldn't have been considered
23 by the court of appeals because the evidence didn't
24 exist at the time the court of appeals reviewed it and
25 is, in this case, uniquely in the hands of the defendant

1 to create, then you're going to create essentially a
2 procedural merry-go-round where a district court will
3 impose a 24-month sentence, the government will appeal,
4 the court of appeals will think that's substantively
5 unreasonable. It will be remanded to the district court
6 who will say: Well, in the interim this person has
7 rehabilitated them self, they've gotten a job and
8 they've gone to school. The government -- imposing
9 another 24-month sentence. These are not related to the
10 facts of the case, but this is a different hypothetical.

11 The government will then appeal again and
12 say: This is ridiculous. The underlying conduct is
13 extremely severe; 24 months is substantively
14 unreasonable. And they'll appeal to the court of
15 appeals.

16 The court of appeals will say: We agree
17 it's substantively unreasonable; we're going to remand
18 for resentencing.

19 And the district court will say: Well, not
20 only has he gone to school and not only does he have a
21 job, but he's gotten married, and he has been promoted,
22 and he has been named employee of the year. So I'm
23 imposing a 24-month sentence again.

24 And at some point, the district -- the
25 government is going to say: I give up, because I could

1 keep appealing, but what's the point? It appears --

2 JUSTICE KENNEDY: Well, but there are two
3 explanations for your hypothetical. One is there has
4 been a real change that affects the judge.

5 The other is where you -- where you began, I
6 thought you were going, where the judge is evading the
7 court of appeals. Those are two different things. I
8 mean, one may happen, and one may not.

9 MR. CIONGOLI: That -- that's right,
10 Justice Kennedy, and I think that both purposes are
11 served by 3742(g). 3742(g), as both Petitioner and the
12 Government -- serves a constitutional purpose. What
13 both the Petitioner and the Government object to is the
14 way that it's drafted. It's not that Congress, they
15 say, couldn't pass this, but that they couldn't pass it
16 the way that it's passed because it makes essentially
17 illegal references to the mandatory sentencing
18 guidelines. That is a product of the fact that this
19 statute was drafted before Booker and didn't have the
20 benefit of knowing how Booker was going to come out.

21 What the Court, I think, needs to decide is,
22 post-Booker, how it's going to deal with statutes like
23 3742(g) -- and there are others -- which stand for an
24 entirely constitutional and important purpose but which
25 necessarily, because of the time they were drafted, have

1 references to or language that assumes the existence of
2 a mandatory guidelines scheme.

3 JUSTICE SOTOMAYOR: How many of those
4 statutes are left that we -- that the Court hasn't
5 looked at?

6 MR. CIONGOLI: Well, I can think of at least
7 three problems that would -- that would result from the
8 Court saying that any reference to a mandatory
9 guidelines scheme creates -- creates essentially a
10 facial invalidity if it's incapable of constitutional
11 review and --

12 JUSTICE SOTOMAYOR: Which are the three?

13 MR. CIONGOLI: Well, first of all, 3553(a)
14 makes two references to -- to 3742(g). And so there's a
15 question as how you would apply those if you strike
16 3742(g). I think that 3553(c), to the extent that it
17 requires a written statement in the context of a
18 departure, starts to -- starts to raise questions. And
19 as Justice Scalia pointed out in his dissent in Booker
20 itself, there's a real question as to whether 3742(f)
21 has any reason to exist after Booker.

22 JUSTICE BREYER: But all those -- what you'd
23 tend to do is take the parts that refer to the other
24 statute and say they don't do anything. And does that
25 ruin the provision it's in? The answer, I think,

1 normally was no, it doesn't ruin it at all. It makes
2 sense.

3 But this one is a tough one. I grant you
4 that this one is a tough one. And my problem of course
5 is I can think of a constitutional way of applying this,
6 but it's a little far-fetched. And the far-fetched one
7 makes me think that it's unconstitutional in the
8 far-fetched nature of it, and I don't think it has a
9 spillover.

10 MR. CIONGOLI: But, Justice Breyer, I --

11 JUSTICE BREYER: You see, the far-fetched
12 one was the one that was brought out. I mean, not
13 far-fetched. To -- to say in those circumstances that
14 it is constitutional, where they're going to apply a new
15 guideline and they don't have the evidence -- as much as
16 I dissented in Apprendi, I think that one probably does
17 violate Apprendi.

18 MR. CIONGOLI: Justice --

19 JUSTICE BREYER: And I think I have to stick
20 up for that, don't I?

21 MR. CIONGOLI: Well, Justice Breyer, if
22 you're referring to the Solicitor General's hypothetical
23 of a case in which they miscalculate the guidelines and
24 they don't announce their reasons otherwise, I actually
25 think that there's a way to avoid the problem in that,

1 depending on whether the case arises before or after
2 this case. If it arises after this case, I think it
3 will be very clear to district courts that they need to
4 be very careful and thorough in articulating their
5 reasons for reaching the sentence, which, particularly
6 in a post-Booker world, I think is a good thing. If
7 there's --

8 JUSTICE SOTOMAYOR: Would that -- I mean --
9 we right now are receiving hundreds of petitions saying
10 the court didn't sufficiently articulate its reasons.
11 We're going to change the practice of the district
12 court. I mean, dramatically.

13 MR. CIONGOLI: Well --

14 JUSTICE SOTOMAYOR: You think that's a good
15 thing to do?

16 MR. CIONGOLI: I -- I think having a
17 district court articulate its reasons is a good thing.
18 They are supposed to do that under -- under
19 congressional statute now, 3553(c). They're supposed to
20 do it in open court very clearly, and in certain
21 circumstances, they're supposed to do it -- they're
22 supposed to do it in writing.

23 JUSTICE BREYER: They can check a box. They
24 can check a box and the -- unless they're going to
25 depart. Now, the part that's not necessary -- you could

1 deal with later, but the part that's confusing me is
2 where this word "variance" comes into, because I think
3 the word "departure" would normally -- normally -- cover
4 the matter. And then when it gets to the court of
5 appeals, the court of appeals, whether they're inside
6 the guideline or outside the guideline and have
7 departed, reviews the matter for -- you know, inside and
8 have departed or outside, those situations. It says in
9 Booker the standard is to review for reasonableness.
10 But where does this variance business come in?

11 MR. CIONGOLI: Well, I think in the context
12 of 3742(g), that's one of the -- the linguistic vestiges
13 of the guidelines, which is that, up until Irizarry, the
14 Court itself used the terms "variance" and "departure"
15 interchangeably because a variance didn't exist prior to
16 Booker.

17 I don't -- the Court obviously spoke to the
18 question of whether or not it was going to equate a
19 variance and a departure in the context of rule 32(h) in
20 Irizarry. I don't think actually that that distinction
21 was essential to the holding in Irizarry, and I think
22 could be limited there. I think, particularly where the
23 court is trying to avoid invalidating a duly enacted
24 statute, some flexibility in terms of interpreting
25 departure in 3742(g)(2)(B) would be warranted, and you

1 would essentially say that to the extent that a court is
2 varying or departing, that they would need to articulate
3 the reasons.

4 JUSTICE GINSBURG: It's true that -- that in
5 all of the briefing in Booker, 3742(g) was not mentioned
6 by any party.

7 MR. CIONGOLI: That's correct, Justice
8 Ginsburg.

9 JUSTICE GINSBURG: So it wasn't a question
10 of the Court overlooking it. The Court didn't say
11 anything one way or the other about it because it wasn't
12 presented as one of the statutes that would have to be
13 overruled.

14 MR. CIONGOLI: Justice Ginsburg, I think
15 that obviously the Court is dealing very clearly with
16 the constitutionality of it now. And I think that
17 Congress had very good reasons for enacting it that
18 continue to be valid. It's capable of constitutional
19 application, I think, in the mine run of cases and, in
20 particular, in this case. There's no Sixth Amendment
21 allegation in this case.

22 JUSTICE BREYER: But the problem, to be very
23 specific, is I think the following: The first
24 sentencing, the judge applies the guideline. He says:
25 There was \$300,000 stolen from the bank. I look it up

1 over here and I get sentence X. On appeal, the
2 appellate court says: You should have counted the
3 securities as money taken. So it's 1,300,000. So go
4 and apply guideline Y. He goes back, looks at Y -- it's
5 a very high number -- and thinks: Given certain
6 circumstances which make this case unusual, I want to
7 depart downward.

8 Now, I would have thought that the judge's
9 behavior in that second instance would have violated
10 Apprendi, because that judge was either going to
11 sentence even without the departure on the basis of his
12 having taken some securities worth a million dollars
13 which was not a fact that went to the jury. So there it
14 is. Or he'd have to throw aside the guideline.

15 But this statute says you can't throw aside
16 the guidelines, and you can't depart for a reason that
17 wasn't previously given. So this statute is -- is
18 forcing him to sentence on the basis of a fact that was
19 not found by a jury. I think that's the argument for
20 saying it violates Apprendi. And I -- I don't see why
21 it doesn't.

22 MR. CIONGOLI: Justice Breyer, I -- I think
23 that in -- in certain applications of this statute,
24 there will be problems. I -- I think that's
25 unavoidable, and I think it's an unavoidable consequence

1 of having been drafted before Booker. The question is
2 how the Court is going to address that. Is the Court
3 going to read the statute flexibly? Is -- is it going
4 to interpret it in a way that tries to avoid those
5 circumstances, those constitutional problems? Or does
6 it ultimately determine that it's -- it's essentially
7 not capable of a saving construction.

8 I think it is capable of a saving
9 construction; I think it's capable of a saving
10 construction in a couple of ways that avoid most of the
11 problems that have been articulated by -- by both
12 Petitioner and the Government.

13 The first, which actually Petitioner points
14 out in his reply brief, is in 3742(g) itself. There's
15 this language about "except that," that appears to limit
16 the -- the ability of the district court to actually
17 follow the mandate of the court of appeals.

18 I don't think that that can be read to limit
19 the mandate of the court of appeals, nor do I think that
20 anyone is suggesting that 3742(g) changes the rule in
21 Harper v. Virginia Department of -- of Taxation, the
22 idea that -- that district courts obviously would have
23 to give the benefit of intervening changes in -- in law
24 in judicial decisions. And so Booker, which has been
25 used as an example -- Booker on remand would likely have

1 been entitled to a -- a resentencing, a resentencing
2 based on factors that the district court judge could
3 have considered at the time of the original sentencing,
4 but now in light of Booker, basically a do-over. And
5 for a -- for a small section of cases, I think that
6 would work.

7 JUSTICE SCALIA: How? Would -- would you
8 explain, as concisely as you can, why you think that
9 (g)(2) would be unconstitutional in -- in some limited
10 category of cases, and how that can be avoided by what
11 you call a flexible interpretation?

12 MR. CIONGOLI: Justice Scalia, I think I
13 said it would be problematic; I don't think I conceded
14 that it would be unconstitutional.

15 JUSTICE SCALIA: All right.

16 MR. CIONGOLI: I -- I think that -- I think
17 that there are some -- there are some circumstances
18 where, by a strict read of -- of (g)(2), the court would
19 be required to apply the guidelines, a guidelines range.
20 And the example that -- that the Solicitor General's
21 Office gave might be the best, which is where you have a
22 circumstance where the district court has imposed a
23 sentence within the guidelines range, has not given any
24 other reason for a variance, the sentence is at the
25 bottom of the range, which may or may not indicate that

1 they thought that the -- that the sentence should be at
2 the low end; and then on a -- on a calculation, there's
3 a determination that the -- on appeal, there's a
4 determination that the calculation was incorrect; and on
5 remand, the district court says: I'm -- I'm bound by
6 this new calculation, and I'm giving you a mandatory
7 sentence. I'm giving you -- I'm bound by the guidelines
8 range because I didn't give any other reasons. I didn't
9 give any other reasons under -- under (2)(A), and,
10 therefore, I can only give you a guideline sentence.

11 And in those cases, the guidelines would be
12 mandatory. And, under Booker, I think there's --
13 there's a question as to whether a court can -- can
14 impose a mandatory sentence in any case after Booker.

15 JUSTICE SCALIA: Well, but -- I mean, why
16 wouldn't you read that simply to have been overcome by
17 the holding of Booker, that you apply -- that every
18 judge has to apply 3553 factors and decide the ultimate
19 sentence on the basis of those factors? I mean, isn't
20 that what Booker said? And why wouldn't you apply that
21 to -- to (2)(A) and (B) as well?

22 MR. CIONGOLI: I -- I certainly think the
23 Court could take that approach, and -- and, in fact, I
24 think -- I think to the -- I think it should. I think
25 that the Court should find a way to read or construe

1 3742(a) to be constitutional, because it serves an
2 important and independent policy choice that has been
3 identified by Congress.

4 JUSTICE GINSBURG: But doesn't it conflict
5 with 3553(a)(2), that is, the overriding provision that
6 a sentence should be sufficient but not greater than
7 necessary to deter criminal conduct? And the judge is
8 looking at this defendant and says -- a criminal -- to
9 deter criminal conduct and protect public against future
10 crimes: Well, this person has turned out to be a model
11 citizen, and we don't have to keep him in for a longer
12 time to protect the public against future crimes. So if
13 I were to apply 3742(g)(2), I would give him a sentence
14 that is unnecessary to protect the public against future
15 crimes.

16 MR. CIONGOLI: Justice Ginsburg, I think
17 you're pointing out that there is some tension which I
18 have admitted. I think that, again, this statute was
19 drafted at a time when there was a different set of
20 assumptions, and so there -- there may be applications
21 which create some difficulty. They create more
22 difficulty in terms of how it's applied, but they are
23 not the kinds of difficulties that I think are
24 insurmountable. And they're certainly not the kinds of
25 difficulties that support what I think is -- is a

1 proposed broad solution by both Petitioner and the
2 Government, that post-Booker, sentencing statutes which
3 -- which impose a mandatory guideline sentence really in
4 any applications are facially unconstitutional.

5 I don't -- I don't read Booker that way. I
6 don't think the Court intended it that way. Certainly,
7 the remedial holding in Booker doesn't indicate that.
8 If it did -- if that is, in fact, what the remedial
9 holding in Booker stands for, I think the -- the
10 implications are more far reaching than the Court -- the
11 Court intended.

12 If there are no further questions --

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Parrish, you have 2 minutes remaining.

15 REBUTTAL ARGUMENT OF ALFREDO PARRISH

16 ON BEHALF OF THE PETITIONER

17 MR. PARRISH: Thank you. I would like to
18 first address the law of the case issue, and that --
19 initially, I said it was apples and oranges, and it is.
20 On two separate occasions after the 5K ruling had been
21 made by District Court Judge Bennett, it was appealed
22 twice to the Eighth Circuit. After it was appealed
23 twice to the Eighth Circuit, they had an abuse of
24 discretion standard they could have used to resolve it.
25 They did not comment on it. They upheld it.

1 Then it was sent back down. After it had
2 come up on an original writ to this Court, this Court
3 vacated the Eighth Circuit opinion, sent that opinion
4 back down. But the law of the case, as you said, Mr.
5 Chief Justice Roberts, still remained with the district
6 court on the initial ruling. The initial ruling that
7 Judge Bennett made with regard to the 5K departure was a
8 separate ruling.

9 Now, the Eighth Circuit, in its own analysis
10 of how you interpret its remand -- we disagree with the
11 Government. They said they -- you look at the analysis
12 of the case to determine the remand. And in that
13 instance, we believe that the remand was the analysis of
14 the case that the 5K departure remains. No new facts
15 came in, no new controlling law came into place, and
16 there was no manifest injustice. She heard no new facts
17 on this case.

18 We believe the Court should reverse --
19 vacate the Eighth Circuit court of opinion case
20 regarding post-sentencing rehabilitation, remand with
21 directions from this Court consistent with an opinion
22 that requires the court to impose a sentence that does
23 not exceed 24 months.

24 And, Justice Ginsburg, we did mention, on
25 page 33 of our brief, the 3742(g)(2) as a footnote, when

1 the case first came up. But the Eighth Circuit, as you
2 all know, did not use that rule. They used an old rule
3 that was in effect from the Sims case to impose the
4 sentence. It was not part of 3742(g)(2) or any other
5 statute.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Ciongoli, you have briefed and argued
9 this case as an amicus curiae in support of the judgment
10 below at the invitation of the Court and have ably
11 discharged your responsibility.

12 The case is submitted.

13 (Whereupon, at 12:04 p.m., the case in the
14 above-entitled matter was submitted.)

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