No. 21-6466

IN THE
Supreme Court of the United States

ERNEST ROMOND GIBBS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY ARGUMENT

The question presented here boils down to this: What did this Court mean when it held in *Pepper v. United States*, 562 U.S. 476 (2011), that a district court "may consider" evidence of post-sentencing rehabilitation? Although the Court's holding in *Pepper* seemed plain enough, and several circuits have applied it correctly, the Eleventh Circuit has undone the rule entirely.

A. The phrase "may consider" does not mean "may refuse to consider."

In *Pepper*, this Court declared that a "district court at resentencing *may consider* evidence of the defendant's post-sentencing rehabilitation and . . . such evidence may, in appropriate cases, support a downward variance from" the guidelines range. What is the effect of the phrase "may consider"? This case presents a perfect opportunity for this Court to say, once and for all, what it meant in *Pepper*.

We must read in context the *Pepper* phrase "may consider evidence of the defendant's post-sentencing rehabilitation." Indeed, as we interpret texts, "[c]ontext is a primary determinant of meaning." *Whole-Text Canon*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 167 (Thomson/West 2012). "Th[is] Court . . . has said that statutory construction is a 'holistic endeavor,' and the same is true of construing any document." *Id.* at 168 (citation omitted). Remember that in *Pepper*, this Court was responding to the Eighth Circuit, which had held that at resentencing a district court was forbidden to account for a defendant's post-sentencing rehabilitation. The appeals

court believed "No, you may not," but this Court stepped in with a firm "Yes, you may."

A district court must face the evidence of post-sentencing rehabilitation, weigh it, and only then decide whether (or not) to credit it through a lower sentence. As we explained in our petition, we say (and several circuits agree) that the phrase "may consider" means that a judge must accept and read evidence of post-sentencing rehabilitation, but it may (or may not) reward that evidence in imposing a given sentence. *Mr. Gibbs' Petition for Writ of Certiorari* at 12-14.

In contrast, the government insists that the *Pepper* rule is more a suggestion than a rule. The government, like the Eleventh Circuit here, misunderstands which part of the *Pepper* inquiry is mandatory and which is optional. Evidence of rehabilitation, it says, may be "irrelevant" in a given case where it does not "materially affect [the] proceeding." *Brief for the United States in Opposition* at 10-11. But the government puts the cart before the horse. When a district court vacates a sentence on all counts, then refuses to admit or review evidence of post-sentencing rehabilitation, as it did here in Mr. Gibbs' case, none of us can fairly say that the evidence would not have affected the outcome of the sentence. A district court cannot, as the Eleventh Circuit wrote here, "thoroughly . . . review[] the record" or "adequately explain[]" its sentence when the record itself includes a gaping hole, that is, when the district court intentionally turns a blind eye to the proffered *Pepper* evidence.

The logical conclusion of the government's (and the Eleventh Circuit's) reading of "may consider" is this: A

district judge is empowered to refuse to accept, admit, or read evidence of rehabilitation, as if it did not exist at all. Put another way, the district court may behave as if such evidence is inadmissible. That is directly contrary to this Court's holding in *Pepper*.

B. The question here is the subject of a circuit split, and the government fails to show otherwise.

In our petition, we established that the question presented divides the circuits. *Mr. Gibbs' Petition for Writ of Certiorari* at 15-17. The government does not directly quibble with this proposition, but instead suggests that the split is of a lesser, junior-varsity variety. First, it notes that the Eleventh Circuit's opinion here was unpublished and, thus, not binding precedent. *Brief for the United States in Opposition* at 12. Yes and no. The opinion is given persuasive (if not binding) authority in that circuit, 11TH CIR. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."), which means the opinion will impose a gravitational pull on panels (not to mention the district courts) in the future. The government offers similar rebuttals to the Third and Sixth Circuit cases we cited. *Brief for the United States in Opposition* at 13-14. In the end, the government cites no authority for its apparent view that a circuit split is not a circuit split if it involves merely unpublished opinions.

Second, the government paints other circuits' *Pepper* holdings as dicta. *Brief for the United States in Opposition* at 12. But that misses the mark. In *United States v. Leahy*, a *published* First Circuit opinion, that court affirmed the sentence only because the district court followed *Pepper's*

mandate to admit evidence of the defendant's rehabilitation. 668 F.3d 18, 25 (1st Cir. 2012). The declaration that a "district court must consider evidence of a defendant's rehabilitation as part of its analysis" was integral to the outcome and, thus, not dictum at all. None of the later First Circuit cases cited by the government held otherwise. That is the rule in the First Circuit.

The government also tries to parry *United States v. White*, where the Second Circuit held that "[a] district court is . . . obliged at resentencing to take into account such material changes in circumstance as have arisen since the original proceeding. Acknowledging this principle, the parties agree that in fashioning a new sentence, the District Court was not at liberty to ignore evidence of White's post-sentencing rehabilitation." 655 Fed. Appx. 42, 44 (2d Cir. 2016) (unpublished). The government does not deny the plain meaning of this holding, but instead tries to contrast it with Mr. Gibbs' own district court, which "permissibly determined that petitioner's post-sentencing conduct was not material." *Brief for the United States in Opposition* at 13. Not so, the district court said nothing at all of Mr. Gibbs' evidence of rehabilitation, not even to say it was immaterial. If it had done so, we may not be here. But it did not, and so, the Eleventh Circuit has rendered *Pepper* obsolete in one corner of the country.

C. This case is an excellent vehicle to resolve the question presented.

The government says that Mr. Gibbs' case is not a "suitable vehicle" to address this question. *Brief for the United States in Opposition* at 15. But that assertion is based on a flawed reading of the record. The government

mistakenly claims that Mr. Gibbs "never described the evidence of rehabilitation that he wished to present." *Id.* On the contrary, he did just that. In a pleading Mr. Gibbs filed before the district court determined the new sentence, [Doc. 520], he said this:

> And what about *Pepper v. United States*? In every resentencing hearing, a court must choose a sentence that reflects all the tools of 18 U.S.C. § 3553(a), including a defendant's post-sentencing rehabilitation. The *Pepper* rule has arrived on the scene since [the original district judge] sentenced Mr. Gibbs. Indeed 14 years have passed since Mr. Gibbs stood before [that judge]. He has earned the right to present to this Court evidence of his own post-sentencing rehabilitation. By advocating against any sentencing inquiry at all, the government ignores *Pepper* and the passage of time. Yet this Court is empowered, in a way [the original judge] was not before, to account for these new principles with a reduced sentence. . . .
>
> The Court ought to conduct a fresh re-sentencing hearing or, at the very least, ought to permit the parties to file sentencing memoranda and evidence in order to advocate for their proposals.

By citing *Pepper* and demanding an opportunity to present evidence of post-sentencing rehabilitation, Mr. Gibbs did all he could to put the court on notice of his intensions. The district court simply barred the courthouse door to this evidence. Indeed, it is odd to see the government blame Mr. Gibbs for failing to describe the evidence in detail when the district court itself prevented him from doing exactly that.

The government ends with this gambit: "Petitioner identifies nothing in the record here indicating that the district court believed that it was limited in its ability to consider evidence of post-sentencing rehabilitation." *Brief for the United States in Opposition* at 14. True, because the court said nothing at all on the topic. If the government is right that a district court may utterly ignore a plea to admit rehabilitation even and write an order entirely silent on that topic, then the *Pepper* rule is a hollow shell indeed.

We ask the Court to make plain to the Eleventh Circuit what other circuits already recognize: A district court violates *Pepper* when it refuses to allow a defendant to proffer evidence of post-sentencing rehabilitation.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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March 30, 2022