

Opinion of ALITO, J.

SUPREME COURT OF THE UNITED STATES

No. 09–6822

JASON PEPPER, PETITIONER *v.* UNITED STATES

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

[March 2, 2011]

JUSTICE ALITO, concurring in part, concurring in the judgment in part, and dissenting in part.

I join Part III of the opinion of the Court. I agree with the Court that the decision below cannot be affirmed on the basis of 18 U. S. C. §3742(g), as *amicus* suggests. This provision was designed to function as part of the mandatory Guidelines scheme that the Court struck down in *United States v. Booker*, 543 U. S. 220, 258–265 (2005). Although *amicus*’ argument is ingenious, even the sort of surgery sanctioned in *Booker* cannot transform this provision into one that can survive in the post-*Booker* world.

I also concur in the judgment to the extent that it holds that the decision below regarding evidence of postsentencing rehabilitation must be reversed. That decision, which entirely precluded consideration of such evidence, was consistent with the policy statement in §5K2.19 of the United States Sentencing Guidelines, but “[t]he *Booker* remedial decision . . . does not permit a court of appeals to treat the Guidelines’ policy decisions as binding.” *Kimbrough v. United States*, 552 U. S. 85, 116 (2007) (ALITO, J., dissenting).

Under *Booker*, however, district judges are still required in almost all cases to give significant weight to the policy decisions embodied in the Federal Sentencing Guidelines. See 552 U. S., at 116; *Gall v. United States*, 552 U. S. 38, 61–67 (2007) (ALITO, J., dissenting). Congress delegated

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to the Sentencing Commission the authority to make policy decisions regarding federal sentencing, see 18 U. S. C. §§3553(a)(4), (5), and requiring judges to give significant weight to the Commission’s policy decisions does not run afoul of the Sixth Amendment right that the mandatory Guidelines system was found to violate, *i.e.*, the right to have a jury make certain factual findings that are relevant to sentencing.

While I continue to believe that sentencing judges should be required to give significant weight to all Guidelines provisions and policy statements, see *Kimbrough*, 552 U. S., at 116 (opinion of ALITO, J.), the Court in *Kimbrough* held that sentencing judges may not be required to give weight to some unusual policy decisions, see *id.*, at 109–110 (majority opinion). And JUSTICE BREYER now makes a reasonable case that the particular policy statement involved in this case is distinguishable from almost all of the other rules that the Commission has adopted. See *ante*, p. ____ (opinion concurring in part and concurring in judgment). His position seems to me more consistent with *Kimbrough* than the Court’s. It would at least prevent us from sliding all the way down the slippery slope that leads back to the regime of entirely discretionary federal sentencing that preceded the enactment of the Sentencing Reform Act of 1984, 98 Stat. 1987.

Anyone familiar with the history of criminal sentencing in this country cannot fail to see the irony in the Court’s praise for the sentencing scheme exemplified by *Williams v. New York*, 337 U. S. 241 (1949), and 18 U. S. C. §3661.*

*Insofar as 18 U. S. C. §3661 permitted a sentencing judge to consider evidence of postsentencing rehabilitation, that provision was effectively modified by the subsequent enactment of the Sentencing Reform Act, which instructed the Sentencing Commission to adopt guidelines and policy statements that avoid “unwarranted sentencing disparities,” 28 U. S. C. §991(b)(1)(B); see also §994(f), and which provided that sentencing courts “shall consider . . . any pertinent policy

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By the time of the enactment of the Sentencing Reform Act in 1984, this scheme had fallen into widespread disrepute. See, e.g., *Mistretta v. United States*, 488 U. S. 361, 366 (1989) (noting “[f]undamental and widespread dissatisfaction with the uncertainties and the disparities” of this scheme); *United States v. DiFrancesco*, 449 U. S. 117, 142 (1980) (“It has been observed . . . that sentencing is one of the areas of the criminal justice system most in need of reform”); S. Rep. No. 98–223, p. 62 (1983) (“The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system”). Under this system, each federal district judge was free to implement his or her individual sentencing philosophy, and therefore the sentence imposed in a particular case often depended heavily on the spin of the wheel that determined the judge to whom the case was assigned. See *Bullington v. Missouri*, 451 U. S. 430, 444, n. 16 (1981) (“There has been no attempt to separate policymaking from individual sentencing determinations” (internal quotation marks omitted)); M. Frankel, *Criminal Sentences: Law Without Order* 5 (1973) (“[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law”).

Some language in today’s opinion reads like a paean to that old regime, and I fear that it may be interpreted as sanctioning a move back toward the system that prevailed prior to 1984. If that occurs, I suspect that the day will come when the irrationality of that system is once again seen, and perhaps then the entire *Booker* line of cases will be reexamined.

statement,” 18 U. S. C. §3553(a)(5).