SENTENCING AND PUNISHMENT—SENTENCING GUIDELINES: THE SENTENCING REFORM ACT PRECLUDES COURTS FROM LENGTHENING A PRISON SENTENCE SOLELY TO FOSTER OFFENDER REHABILITATION

Tapia v. United States, 131 S. CT. 2382 (2011)

ABSTRACT

In *Tapia v. United States*, the Supreme Court held 18 U.S.C. § 3582(a) prohibits sentencing courts from imposing or lengthening a prison sentence to promote an offender's rehabilitation. The Court concluded the plain text of § 3582(a) tells sentencing courts that imprisonment is an inappropriate means of promoting rehabilitation. This limitation applied not only to the decision to impose a prison term, but also to determining its length. Therefore, the Court held the district court erred by giving Tapia a longer sentence so she could complete a drug treatment program provided by the U.S. Bureau of Prisons. The Court noted, however, § 3582(a) allows sentencing courts to discuss the programs available in prison and their benefits. *Tapia* will significantly impact future sentencing decisions. In particular, this ruling overturns the law of the Eighth Circuit, which held sentencing courts could extend, but not impose, a prison term for rehabilitative purposes. In addition, recent First, Fifth, and Ninth Circuit decisions suggest there is an emerging split on *Tapia's* application to sentencing upon supervised release.

I. FACTS

On January 14, 2008, after a border agent discovered two illegal aliens hidden in the modified gas tank of Alejandra Tapia's vehicle, Tapia and her friend, Tinamarie Debenedetto, were arrested at the San Ysidro, California border crossing.[1] A grand jury indicted Tapia for smuggling illegal aliens

1. Brief for United States Supporting Vacatur at 4-5, Tapia v. United States, 131 S. Ct. 2382 (2011) (No. 10-5400). Earlier that day, Tapia agreed to drive the aliens from Mexico to the United States. *Id.* at 4. Tapia was later given a Jeep to accomplish this task. *Id.* To allow Tapia to secret individuals in the gas tank compartment, the Jeep had been converted to run on an alternative fuel source. *Id.* Before departing on the journey, Tapia helped fit the aliens into the modified gas tank compartment. *Id.*

for financial gain and without presentation.[2] Following the indictment, the district court released her on bond pending further proceedings.[3] After Tapia missed a court date, a bench warrant was issued for her arrest.[4] Six months later, officers found Tapia with methamphetamine, a sawed-off shotgun, and stolen mail she planned to use for identity theft.[5]

At sentencing, the district court calculated a Federal Sentencing Guideline[6] range of forty-one to fifty-one months of imprisonment for Tapia's offense.[7] In determining the length of Tapia's sentence, the district court considered several factors, including Tapia's history of physical and sexual abuse, her need for correctional treatment, the seriousness of her offense, and the need for deterrence.[8] The district court sentenced Tapia to fifty-one months of imprisonment, with three years of supervised release to follow.[9] In justifying this sentence, the district court stressed the need for the sentence to be long enough for Tapia to qualify for and finish the U.S. Bureau of Prison's (BOP) 500-hour Residential Drug Abuse Program (RDAP).[10]

When the district court imposed the sentence, Tapia made no objections.[11] The sentencing judge recommended Tapia be placed in Federal Correctional Institution (FCI) Dublin,[12] "where they ha[d] the facilities to really help her."[13] The BOP, however, placed Tapia in a different facility and she never enrolled in RDAP.[14] On appeal, Tapia argued the district court abused its discretion by lengthening her sentence so

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2. *Id*. at 5.

3. *Id*.

4. Brief for Petitioner at 3, *Tapia*, 131 S. Ct. 2382 (No. 10-5400).

5. Brief for United States, *supra* note 1, at 5.

6. The Federal Sentencing Guidelines provide federal judges with a set of advisory sentencing ranges for federal offenses. *See infra* Part II.C; *see also* U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 2, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf.

7. *Tapia*, 131 S. Ct. at 2385.

8. Brief for Petitioner, *supra* note 4, at 4-5; Brief for United States, *supra* note 1, at 6-7.

9. *Tapia*, 131 S. Ct. at 2385.

10. *Id*. RDAP is a nine- to twelve-month drug treatment program. JANET HINTON, BUREAU OF PRISONS RESIDENTIAL DRUG ABUSE PROGRAM REFERENCE CHART 1 (Jan. 2009), *available at* http://www.fd.org/pdf_lib/2009%0RDAP%20Chart.pdf. Ordinarily, the offender must have at least twenty-four months remaining on his or her sentence in order to be considered for the program. FED. BUREAU OF PRISONS, PSYCHOLOGICAL TREATMENT PROGRAMS 9, 11 (2009), *available at* http://www.bop.gov/policy/progstat/5330_011.pdf.

11. *Tapia*, 131 S. Ct. at 2385.

12. FCI Dublin is located in Dublin, California. *FCI Dublin*, BUREAU OF PRISONS, http://www.bop.gov/locations/institutions/dub/index.jsp (last visited Nov. 30, 2011).

13. *Tapia*, 131 S. Ct. at 2391.

14. *Id*.; *see also* Brief for Stephanos Bibas et. al. as Amicus Curae by Invitation of the Court, *Tapia*, 131 S. Ct. 2382 (No. 10-5400).

she could complete RDAP.[15] According to Tapia, 18 U.S.C. § 3582(a) precludes sentencing courts from imposing or lengthening a prison sentence to promote an offender's rehabilitation.[16] The Ninth Circuit affirmed Tapia's sentence.[17] Citing its previous holding in *United States v. Duran*,[18] the Ninth Circuit held § 3582(a) only prohibits a sentencing court from considering rehabilitation when making the initial decision to incarcerate.[19] Once that decision is made, however, a court can consider rehabilitative factors in calculating the length of the prison sentence.[20]

II. LEGAL BACKGROUND

Throughout American history, reformers have run the gamut of rehabilitation methods and strategies.[21] In the early nineteenth century, reformers believed they could rehabilitate offenders through isolation and hard labor.[22] By the 1950s, activists thought individualized treatment and correctional programs could purge the offender of his criminal tendencies.[23] Each reform effort, however, faced the relentless criticism that the treatment programs were not working.[24] By the 1970s, policymakers rejected the rehabilitative model, which set the stage for the enactment of the Sentencing Reform Act of 1984 (SRA).[25] Thus, an understanding of the statutory context of this Act requires a review of American history.

First, this section will briefly discuss the evolution of American prison programs, leading up to the sentencing reform movement of the mid-1970s.[26] Second, this section will track the legislative history of the Act, specifically focusing on the role of rehabilitation in incarceration.[27] Third, this section will provide a brief overview of the relevant law regarding the

15. *Tapia*, 131 S. Ct. at 2386.
16. *Id*.
17. *Id*.
18. 37 F.3d 557 (9th Cir. 1994).
19. *Tapia*, 131 S. Ct. at 2386 (citing *Duran*, 37 F.3d at 561).
20. *Id*.
21. Michael Braswell, *Correctional Treatment and the Human Spirit*, *in* CORRECTIONAL COUNSELING AND REHABILITATION 3, 4 (Patricia Van Voorhis et al. eds., 3d ed. 1997).
22. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 79 (1993).
23. *See* LARRY E. SULLIVAN, THE PRISON REFORM MOVEMENT: FORLORN HOPE 61-62 (1990).
24. *See* Francis T. Cullen & Brandon K. Applegate, *Introduction* to OFFENDER REHABILITATION, at xiii, xiv-xvi (Francis T. Cullen & Brandon K. Applegate eds., 1997).
25. *See* Mistretta v. United States, 488 U.S. 361, 364-66 (1989) (briefly discussing the genesis of the SRA of 1984).
26. *See infra* Part II.A.
27. *See infra* Part II.B.

Federal Sentencing Guidelines.[28] Finally, this section will layout the underlying circuit split[29] leading up to *Tapia v. United States*.[30]

A. THE HISTORY OF REHABILITATION IN AMERICAN PRISONS

The Quakers were the earliest Americans to embrace the idea that offenders were capable of self-reformation.[31] Inspired by this belief, in 1787, a group of Quakers formed the first prison reform organization, the Philadelphia Society for Alleviating the Miseries of Public Prisons (Philadelphia Prison Society), which sought to improve the miserable conditions in the public prisons and jails.[32] Urged by the Philadelphia Prison Society, the state legislature converted the Walnut Street Jail into its state prison, which was the first penitentiary in the United States.[33]

The Walnut Street Prison opened its doors in 1790.[34] Although most inmates were housed in large night rooms, violent offenders were placed in solitary confinement.[35] To pass the time, inmates could participate in various vocational programs, such as shoemaking, weaving, and polishing marble.[36] In addition to these vocational programs, the Walnut Street Prison provided inmates with medical care and religious services.[37] By 1798, inmates also had access to a school, which offered reading, writing, and arithmetic lessons.[38] Reformers hoped the combination of labor and reflection would make offenders both contrite and penitent.[39] Despite the Walnut Street Prison's initial success,[40] overcrowding and prison violence forced reformers to dispense with this system.[41]

Unfazed by this failure, reformers moved to build massive facilities capable of isolating and reforming inmates.[42] Both Pennsylvania[43] and

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28. *See infra* Part II.C.

29. *See infra* Part II.D.

30. 131 S. Ct. 2382 (2011).

31. *See* SULLIVAN, *supra* note 23, at 5.

32. *See* JOHN W. ROBERTS, REFORM AND RETRIBUTION: AN ILLUSTRATED HISTORY OF AMERICAN PRISONS 24 (1997).

33. *Id*. at 26-27.

34. SULLIVAN, *supra* note 23, at 6.

35. *Id*.

36. ROBERTS, *supra* note 32, at 27.

37. *See* SULLIVAN, *supra* note 23, at 6.

38. Ruth-Ellen M. Grimes, *Walnut Street Jail*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS 796, 800 (Marilyn D. McShane & Frank P. Williams III eds., 1996).

39. ROBERTS, *supra* note 32, at 26-27.

40. SULLIVAN, *supra* note 23, at 6.

41. *See* Grimes, *supra* note 38, at 801; Matthew W. Meskell, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 847-50 (1999).

42. *See* THOMAS G. BLOMBERG & KAROL LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL 53 (2000).

New York[44] developed rival prison systems that would theoretically isolate and reform offenders.[45] While both systems sought to separate prisoners from one another, the Pennsylvania system took isolation to its extreme.[46] For the entire length of their sentence, prisoners stayed in their individual cells where they were expected to eat, work, and sleep.[47] New York's Auburn system, on the other hand, took a more moderate approach to isolation.[48] Under the Auburn system, prisoners were only isolated at night.[49] During the day, prisoners could eat and work together in congregate workshops, but prison policies required prisoners to complete their activities in total silence.[50]

As these facilities filled to their capacity, however, it became impossible to maintain the isolation and discipline these two systems required.[51] To keep the inmate population at a manageable level, prisons pardoned large groups of inmates every year.[52] Nevertheless, the recidivism rate of these released prisoners continued to rise.[53] Penitentiaries were clearly in need of an overhaul.[54]

With the Auburn system falling into ruin, the New York Prison Association commissioned Enoch Cobb Wines and Theodore Dwight to survey and evaluate penitentiaries in the United States and Canada.[55] In 1867, Wines and Dwight compiled their discoveries and recommendations

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43. *See* J.M. MOYNAHAN & EARLE K. STEWART, THE AMERICAN JAIL: ITS DEVELOPMENT AND GROWTH 37 (1980). Pennsylvania's first penitentiary, based on the separate system model, was the Western Penitentiary in Pittsburgh. Pennsylvania's second penitentiary, Eastern Penitentiary, was later built at Cherry Hill in Pittsburgh. *Id*.

44. *Id*. (stating Auburn Prison was built in 1823).

45. *See* ROBERTS, *supra* note 32, at 31.

46. *See* David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 111, 118 (Norval Morris & David J. Rothman eds., 1995); *see also* BLOMBERG & LUCKEN, *supra* note 42, at 53. For example, officials hooded inmates when they entered jail, when they left their cells, and when they were eventually released. BLOMBERG & LUCKEN, *supra* note 42, at 53.

47. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 82 (1971).

48. *See id*.

49. *Id*.

50. *Id*.

51. Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, *in* THE OXFORD HISTORY OF PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY, *supra* note 46, at 170. By 1865, three to four inmates were living in a cell designed for one. BLOMBERG & LUCKEN, *supra* note 42, at 58. For example, in 1867, New York's legislature reported that one-third of its inmates were housed two to a cell. *Id*.

52. BLOMBERG & LUCKEN, *supra* note 42, at 58.

53. *See* NICOLE HAHN RAFTER & DEBRA L. STANLEY, PRISONS IN AMERICA: A REFERENCE HANDBOOK 7 (1999).

54. *See id*.

55. *Id*.

and published the *Report on the Prisons and Reformatories of the United States and Canada*.[56] While they could not find an American penitentiary system deserving praise, Wines and Dwight enthusiastically endorsed the Irish prison system, developed by Sir Walter Crofton.[57] Under the Irish system, inmates advanced through a series of grades, which, depending on their good conduct, led to their release.[58]

Wines and Dwight shared their recommendations and insights at the 1870 Cincinnati Conference, along with other penal reform advocates, such as Franklin Sanborn and Zebulon Brockway.[59] To the conference attendees, the Irish prison system was an appealing alternative to the Auburn and Pennsylvania prison systems.[60] At the conclusion of the conference, the National Congress of Penitentiary and Reformatory Discipline adopted the "Declaration of Principles," which included "the establishment of adult reformatories, in conjunction with (1) the indeterminate sentence, (2) a mark/classification system, (3) intensive academic and vocational instruction, (4) constructive labor, (5) humane disciplinary methods, and (6) parole."[61]

When Zebulon Brockway became the superintendent of the Elmira Reformatory in New York in 1876, he put these principles to the test.[62] In the Elmira Reformatory, inmates had access to a variety of educational programs taught by college professors, lawyers, and public school principals.[63] For the less astute, Elmira offered vocational programs such as "tailor cutting, plumbing, telegraphy, and printing."[64] To incentivize prisoners to reform themselves, Brockway adopted a graded system, which rewarded inmates' good behavior and participation in vocational and educational programs with new privileges and the possibility of early release on parole.[65] Due to flawed architecture and scant resources, Elmira Reformatory was unable to achieve its sweeping aspirations of prisoner reformation.[66]

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56. SULLIVAN, *supra* note 23, at 17.
57. *Id*.
58. *Id*. at 17-18.
59. BLOMBERG & LUCKEN, *supra* note 42, at 70.
60. Rotman, *supra* note 51, at 173.
61. BLOMBERG & LUCKEN, *supra* note 42, at 70-71.
62. *See* EDGARDO ROTMAN, BEYOND PUNISHMENT: A NEW VIEW ON THE REHABILITATION OF CRIMINAL OFFENDERS 40 (1990).
63. *Id*. at 41.
64. *Id*.
65. *Id*. at 40.
66. ROBERTS, *supra* note 32, at 65.

During the same period, New York passed legislation providing for indeterminate sentences.[67] The statute gave "managers of . . . reformator[ies]" the discretion to set the length of the offender's sentence, but the sentence had to be within the maximum statutory term for the offense.[68] Courts, on the other hand, were precluded from limiting the duration of the sentence.[69] In other words, an offender had two options: "be cured, or be kept."[70]

In 1910, Congress established a federal parole system, which authorized the use of indeterminate sentencing.[71] Under the new system, Congress, the judge, and the parole board each played a role in determining the length of an offender's sentence.[72] Congress set the maximum sentence an offender could serve, the judge imposed a sentenced within the statutory range for the offense, and the parole board determined when the offender would actually be released.[73] Unlike Congress and the parole board, the judge had the power to sentence offenders to no time at all.[74] With the passage of the National Probation Act of 1925, aside from crimes punishable by death or life imprisonment, a sentencing judge could opt to suspend a sentence.[75]

In the 1950s, the "medical model" became the method of choice among policymakers.[76] Under this model, penologists viewed criminality as a disease, which could be treated or cured through individualized treatment programs.[77] As part of this system, many states had "diagnostic centers," where offenders would be quarantined and classified before being placed into an institution.[78] Based on these classifications, officials placed inmates in individualized treatment programs, which could include educational programs, work release, group counseling, and even specialized living units designed to treat disruptive inmates, drug addicts, and sex offenders.[79] Like

67. *See* Jeanine M. Schupbach, *New York's System of Indeterminate Sentencing and Parole: Should It Be Abolished?*, 13 FORDHAM URB. L.J. 395, 403 (1985).

68. KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 18 (1998).

69. *Id*.

70. BLOMBERG & LUCKEN, *supra* note 42, at 73 (citing Martin B. Miller, *At Hard Labor: Rediscovering the 19th Century Prison*, *in* PUNISHMENT AND PENAL DISCIPLINE 79 (T. Platt & P. Takgai eds., 1980)).

71. STITH & CABRANES, *supra* note 68, at 19.

72. Mistretta v. United States, 488 U.S. 361, 365 (1989).

73. *Id*.

74. STITH & CABRANES, *supra* note 68, at 19.

75. *Id*.

76. Braswell, *supra* note 21, at 4.

77. *Id*.

78. SULLIVAN, *supra* note 23, at 63; *see also* ROBERTS, *supra* note 32, at 171.

79. ROBERTS, *supra* note 32, at 172.

the states, the BOP provided several specialized programs: "Asklepieion," which sought to promote self-help attitudes through transactional analysis;[80] "CASE," which encouraged young offenders to succeed academically; the Special Treatment and Rehabilitative Training unit (START), which incentivized the most disruptive inmates to maintain good behavior; and several drug abuse treatment units, which were established by the Narcotic Addicts Rehabilitation Act of 1966 (NARA).[81]

While the rehabilitative ideal enjoyed immense support, by the mid-1970s, many experts started to question the efficacy of the model.[82] One study by Robert Martinson and his colleagues reviewed 231 studies of correctional programs that had been conducted from 1945 to 1967, focusing on these programs' effects on recidivism.[83] The programs scrutinized included vocational training, educational remediation, and medical programs.[84] After reviewing these studies, Martinson and his research team concluded, "[w]ith few and isolated exceptions, the rehabilitative efforts that [had] been reported . . . had no appreciable effect on recidivism."[85] In sum, Martinson believed there was "little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation."[86]

This report was the tipping point for liberals and conservatives who already harbored negative sentiments towards the rehabilitation model.[87] Liberals argued racial discrimination in sentencing was an epidemic.[88] Further, liberals contended the uncertainty of these sentences was breeding

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80. Transactional analysis (TA) involved a TA leader guiding a group of inmates through script analysis, in which inmates identify the effects of their negative thoughts. CLEMENS BARTOLLAS, INTRODUCTION TO CORRECTIONS 323 (1981). If willing, an inmate could participate in a goal-centered treatment regimen that was aimed at helping inmates effectively manage self-defeating thoughts. *Id*. The TA program used in the Federal Penitentiary at Marion, Illinois was named Asklepieion in reference to the "temple erected in honor of Asklepios, the Greek god of healing." *Id*.

81. ROBERTS, *supra* note 32, at 173. Under the NARA, if an offender was "likely to be rehabilitated through treatment," the sentencing court could place the offender into the custody of the Attorney General for treatment. *See* Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, § 4252, 80 Stat. 1438, 1443 (1966), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 218(a)(6), 98 Stat. 1837, 2027 (1984). If the offender was placed in the Attorney General's custody, the offender's treatment would last for an indeterminate period of no more than ten years. *See id*. § 4253.

82. *See* Katie Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227-28 (1993).

83. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, *reprinted in* OFFENDER REHABILITATION, *supra* note 24, at 3, 5.

84. *Id*.

85. *Id*. at 6.

86. *Id*. at 30.

87. Cullen & Applegate, *supra* note 24, at xv.

88. CASSIA SPOHN, HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 220 (2002).

anxiety and unrest in the inmate population.[89] Conservatives, on the other hand, focused on the disparate treatment of offenders who had committed similar offenses.[90] Because of judges' unfettered discretion, sentences did not correlate to the seriousness of the offense, which often led to unjust results.[91] Both liberals and conservatives agreed, however, that rehabilitation, as a sentencing rationale, had failed.[92]

Although several notable organizations and commissions made proposals for reform,[93] the most prominent and staunch critic of indeterminate sentencing during this movement was Marvin E. Frankel, a federal district judge in New York City.[94] Frankel bewailed that indeterminate sentencing should be "terrifying and intolerable for a society that professes devotion to the rule of law."[95] Frankel called for the legislature to create an independent sentencing authority that would establish guideline sentences and promulgate rules for judges to follow.[96] Frankel's criticism, coupled with ongoing federal criminal code reform efforts, paved the way for the SRA.[97]

B. THE SENTENCING REFORM ACT OF 1984

The SRA can be traced to a 1974 Yale seminar on sentencing.[98] Each month, members of this seminar would meet and discuss the problems with the current sentencing scheme and make recommendations for reform.[99] The monthly sessions culminated in a book, which included a detailed proposal for the creation of sentencing guidelines and the creation of an

89. *Id*.

90. *Id*.

91. *Id*.

92. TODD R. CLEAR, GEORGE F. COLE, & MICHAEL D. REISIG, AMERICAN CORRECTIONS 2 (2003).

93. STITH & CABRANES, *supra* note 68, at 32. The Model Penal Code, drafted by the American Legal Institute (ALI), provided for moderate changes in judicial sentencing. *Id*. Although the Code retained rehabilitation as a sentencing factor, the ALI conceded the prison setting was not conducive to rehabilitating. *Id*. Likewise, the National Council on Crime and Delinquency promulgated the Model Sentencing Act, which sought to bring order to the sentencing process. *Id*. For example, the Act mandated that judges articulate reasons and factual bases for a sentence. *Id*. Similarly, the Brown Commission, enacted by President Lyndon B. Johnson, argued for appellate review of sentences. *Id*.

94. Stith & Koh, *supra* note 82, at 228.

95. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972).

96. *Id*. at 122.

97. *See* STITH & CABRANES, *supra* note 68, at 37.

98. *See* Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forwards, Steps Backwards*, 78 JUDICATURE 169, 172 (1995); *see also* Stith & Koh, *supra* note 82, at 230.

99. EDWARD M. KENNEDY, *Preface to* TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM, at ix (1977).

independent sentencing commission.[100] Although the proposal preserved rehabilitation as a sentencing goal, the authors stressed their "wariness of most past institutional efforts to rehabilitate offenders."[101] This manuscript became the foundation for Senate Bill 2966, a sentencing reform bill introduced by Senator Edward M. Kennedy in 1975.[102] Despite the inclusion of their proposals in the bill, the Yale authors criticized Senate Bill 2966 for its many shortcomings, including the bill's "fail[ure] to define its sentencing goals clearly" and its lack of specific guidance for sentencing judges.[103]

After joining forces with Senator John McClellan of Arkansas, Senator Kennedy re-introduced the bill as Senate Bill 1437, which primarily focused on criminal code reform, but also included sentencing provisions.[104] Like its predecessor, the bill did not distinguish between the four sentencing philosophies—retribution, deterrence, incapacitation, and rehabilitation.[105] The only clear guidance on the goals of sentencing was the prohibition against prison sentences based on rehabilitative considerations.[106] However, even this prohibition would be ineffective "in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact."[107] The accompanying Senate Report further clarified that "this approach to rehabilitation efforts is to be avoided as much as possible."[108]

After the bill failed to pass the House, in 1980, both houses of Congress developed and reported a bill that included sentencing provisions.[109] Senate Bill 1722, introduced by Senator Kennedy and Senator Strom Thurmond, removed the previous bill's exception permitting judges to impose an indeterminate prison sentence for rehabilitative

100. *Id*.

101. PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 47 (1977). The authors noted the circumstances in which an imprisonment term could be used for rehabilitative purposes was limited. *Id*. Such a sentence would "be justified only if it [was] more likely than not that the incarceration and its accompanying rehabilitative programs [would] actually succeed in 'rehabilitating' the offender." *Id*. Moreover, the authors enumerated several factors the court would have to consider before imposing an imprisonment term for this purpose. *Id*.

102. KENNEDY, *supra* note 99, at ix.

103. Stith & Koh, *supra* note 82, at 230.

104. *Id*. at 233.

105. *Id*. at 239.

106. *Id*. at 241 (citing S. 1437, 95th Cong. § 124 (2d Sess. 1978) (proposed tit. 18, § 994(j))).

107. *Id*. (quoting S. 1437, 95th Cong. § 124 (1st Sess. 1977) (proposed tit. 18, 994(j))).

108. S. REP. NO. 95-605, at 1166 (1978).

109. *See* Stith & Koh, *supra* note 82, at 225.

purposes.[110] As Senator Kennedy commented, Congress hotly debated the eradication of indeterminate sentencing.[111] Ultimately, "complete elimination" won.[112] In contrast, House Bill 6915 did not remove rehabilitation as a goal of sentencing.[113] Instead, the House contended rehabilitation was a permissible sentencing goal.[114] Nevertheless, the House warned courts to "not give primary consideration to the defendant's prospects for rehabilitation when deciding whether to incarcerate the offender."[115] Both of these bills failed to pass both houses.[116]

On October 4, 1984, the SRA finally passed as an omnibus funding resolution.[117] In the oft-quoted Senate Report 98-225, Congress remarked that the indeterminate sentencing model, which tied an offender's release to his successful completion of treatment programs in prison, had failed.[118] Several studies demonstrated the indeterminate scheme was unsuccessful.[119] Congress opined parole boards knew too little about human behavior to determine whether an offender was rehabilitated.[120] In addition, Congress feared parole boards' and judges' unlimited discretion would result in widespread sentencing disparity.[121]

To avoid sentencing disparity and to prevent "the employment of a term of imprisonment on the sole ground that a prison has a program that would be of benefit to the prisoner," Congress rejected the rehabilitation model.[122] This did not mean, however, that Congress believed prison programs should be eliminated altogether.[123] Instead, the availability of prison programs could factor into the judge's recommendation for a certain facility.[124] Judges could also consider rehabilitation when considering an offender's overall sentence, such as choosing between imposing a term of

110. *Id*. at 241-42 (citing S. 1722, 96th Cong. § 125 (1st Sess. 1980) (proposed tit. § 994(k)). *But see* S. REP. NO. 96-553, at 1245 (1980) (caveating it is permissible for rehabilitation to be a "secondary purpose of the sentencing").

111. Edward M. Kennedy, *Commentary—The Federal Criminal Code Reform Act and New Sentencing Alternatives,* 82 W. VA. L. REV. 423, 431 n.34 (1980).

112. *Id*.

113. *See* H.R. REP. NO. 96-1396, at 435 (1980).

114. *Id*.

115. *Id*. at 436.

116. *See* Stith & Koh, *supra* note 82, at 225.

117. *See* 130 CONG. REC. 29,730 (1984).

118. S. REP. NO. 98-225, at 40 (1983).

119. *Id*.

120. *Id*.

121. *See id*. at 38.

122. *Id*. at 119.

123. *Id*.

124. *Id*.

imprisonment, probation, or fine.[125] Overall, Congress stressed that rehabilitation should not be the sole purpose for imposing a term of imprisonment, but it could be an appropriate consideration when imposing a term such as probation or supervised release.[126]

C. SENTENCING UNDER THE FEDERAL GUIDELINES

As part of the SRA, Congress created the United States Sentencing Commission, an independent agency within the judicial branch of the federal government.[127] One of the Commission's duties is to promulgate appropriate guideline sentences for criminal offenses.[128] After *United States v. Booker*,[129] sentencing courts must consult these Guidelines when determining the appropriate sentence for an offense.[130] In other words, the recommended Guidelines range is just another factor to consider when tailoring a sentence.[131]

When calculating the Guidelines range for an offense, the sentencing court follows approximately seven steps.[132] First, the court selects the base offense level that matches the offense.[133] Second, the court decides whether to increase or decrease base level based on "specific offense characteristics."[134] Third, the court will apply additional adjustments to the base level, such as the status of the victim, the offender's role in the crime, and obstruction of justice.[135] Fourth, the court will identify which of the six "criminal history categories" applies to the offender.[136] Fifth, after selecting a criminal history category, the court will locate where the offense level and criminal history category intersect on the sentencing grid, which dictates the sentencing range for the offense.[137] Sixth, the court will consider an upward or downward departure from the sentencing range.[138]

125. *Id.* at 77.
126. *Id.* at 76.
127. 28 U.S.C. § 991 (2006).
128. *Id.* § 994(a)(1).
129. 543 U.S. 220 (2005).
130. *See Booker*, 543 U.S. at 264. ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.")
131. *Id.*
132. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2009).
133. *Id.* § 1B1.1(b).
134. *Id.*
135. *Id.* § 1B1.1(c).
136. *Id.* § 1B1.1(f).
137. *Id.* § 1B1.1(g).
138. *Id.* § 1B1.1(i).

Finally, the court will consider any relevant policy statements, commentary, or language within the Guidelines that may affect the sentence.[139]

On appellate review, there is a rebuttable presumption that a sentence properly calculated within the Guidelines range is reasonable.[140] A departure from the Guidelines range, however, is not presumptively unreasonable.[141] When reviewing a sentence, an appellate court engages in a two-step review of the sentence, reviewing for abuse of discretion.[142]

First, the appellate court will determine if the sentencing judge committed any procedural errors, "such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range."[143] Second, the appellate court will determine if the sentence was substantively unreasonable "tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range."[144] For example, a sentence may be substantively unreasonable if the district court significantly relied on impermissible factors.[145] A sentencing court abuses its discretion when it commits a procedural error or imposes a substantively unreasonable sentence.[146]

D. THE CIRCUIT SPLIT

After the enactment of the SRA and the promulgation of the Sentencing Guidelines, a split emerged among circuit courts regarding the apparent tension between 18 U.S.C. § 3582(a) and § 3553(a)(2)(D).[147] On one hand, § 3582(a) admonishes sentencing courts to recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation."[148] On the other hand, § 3553(a)(2)(D) directs sentencing

139. *Id.*

140. United States v. Rita, 551 U.S. 338, 347-48 (2007); *see also* United States v. Robinson, 516 F.3d 716, 718 (8th Cir. 2008) (noting the presumption is appropriate "if the court finds that the case before it is typical [circuit case]").

141. *See* Gall v. United States, 552 U.S. 38, 47 n.3 (2007); *see also* United States v. Solis-Bermudez, 501 F.3d 882, 884-85 (8th Cir. 2007).

142. *See Gall*, 552 U.S. at 51.

143. *Id.*

144. *Id.*

145. United States v. Floyd, 458 F.3d 844, 851 (8th Cir. 2006).

146. *Gall*, 552 U.S. at 51.

147. United States v. Jimenez, 605 F.3d 415, 424 (6th Cir. 2010).

148. 18 U.S.C. § 3582(a) (2006).

courts to consider a defendant's need for "educational or vocational training, medical care, or other correctional treatment."[149]

To reconcile these two sections, circuit courts developed two approaches.[150] The Sixth, Eighth, and Ninth Circuits held § 3582(a) bars courts from imposing a term of imprisonment to promote an offender's rehabilitation, but allows courts to lengthen a sentence in pursuit of this goal.[151] In reaching this conclusion, these circuit courts construed § 3582(a) to distinguish between two decisions made by a sentencing court: whether to incarcerate and determining the length of an imprisonment term.[152] While § 3582(a)'s limiting language applied to the imposition of an imprisonment term, it did not apply to the decision to lengthen the sentence, whether it be within the Guidelines range or an upward departure.[153] If Congress intended otherwise, these circuit courts believed Congress would have explicitly admonished judges to recognize "that imprisonment *or the length of imprisonment* is not an appropriate means of promoting correction or rehabilitation."[154]

Conversely, the Third and the D.C. Circuits held § 3582(a) prohibits sentencing courts from using rehabilitation as a justification to impose a sentence of imprisonment and to determine its length.[155] These circuits courts believed the perceived conflict between § 3582(a) and § 3553(a)(2)(D) was illusory.[156] In fact, the Third and D.C. Circuits contended these two sections work in harmony.[157] In allowing sentencing courts to consider rehabilitation in the overall sentencing process, these two sections combined ensure sentencing courts will not use incarceration as a means to facilitate rehabilitation.[158] Moreover, these circuits found it nonsensical to say the statute prohibits a court from imposing a sentence on the basis of rehabilitation, but allows them to lengthen a sentence for that impermissible purpose.[159] As the D.C. Circuit questioned, "If . . . imprisonment is not an appropriate means of promoting rehabilitation, how

149. *Id*. § 3553(a)(2)(D).

150. *See Jimenez*, 605 F.3d at 424.

151. *Id*.; United States v. Hawk Wing, 433 F.3d 622, 629-30 (8th Cir. 2006); United States v. Duran, 37 F.3d 557, 561 (9th Cir. 1994).

152. *See generally In re* Sealed Case, 573 F.3d 844, 848-49 (D.C. Cir. 2009) (describing the Sixth, Eighth, and Ninth Circuits interpretation of § 3582(a)).

153. *See Duran*, 37 F.3d at 561.

154. *Id*.

155. *In re Sealed Case*, 573 F.3d at 859; United States v. Manzella, 475 F.3d 152, 158 (3d Cir. 2007).

156. *See Manzella*, 475 F.3d at 157.

157. *Id*. at 158.

158. *Id*.

159. *See In re Sealed Case*, 573 F.3d at 849.

can *more* imprisonment serve as an appropriate means of promoting rehabilitation?"[160]

III. ANALYSIS

In *Tapia v. United States*, Justice Kagan authored the opinion for the Supreme Court, concluding § 3582(a) precludes courts from imposing or lengthening a sentence for rehabilitative purposes.[161] Justice Sotomayor filed a concurring opinion, to which Justice Alito joined.[162] Reversing the Ninth Circuit, the Court held the district court's act of lengthening Tapia's sentence so she could participate in RDAP was barred by § 3582(a).[163] In her concurrence, Justice Sotomayor questioned whether the district court had actually violated the proscription set forth in § 3582(a).[164]

A. MAJORITY OPINION

First, the Supreme Court provided a brief background of the relevant sentencing provisions.[165] In light of this statutory background, the Court next examined the text of the statute itself.[166] Despite finding the statute clear and unambiguous, the Court also considered how the legislative history and lack of judicial authority to order treatment affected its textual reading of the statute.[167] Finally, the Court provided guidance to sentencing courts on how to avoid running afoul of § 3582(a).[168]

1. *Statutory Background*

As an initial matter, the Supreme Court briefly outlined the background of the relevant sentencing provisions.[169] Prior to the enactment of the SRA, the indeterminate system dominated federal sentencing.[170] This system gave sentencing courts boundless discretion to choose sentences for federal offenses.[171] Once the court determined the minimum sentence for the offense, the parole board determined how much time the offender would

160. *Id.*
161. Tapia v. United States, 131 S. Ct. 2382, 2385 (2011).
162. *Id.* (Sotomayor, J., concurring).
163. *Id.* at 2392 (majority opinion).
164. *Id.* at 2393 (Sotomayor, J., concurring).
165. *Id.* at 2386 (majority opinion).
166. *Id.* at 2388.
167. *Id.* at 2391-92.
168. *Id.* at 2392-93.
169. *Id.* at 2386.
170. *Id.*
171. *Id.*

actually serve.[172] A good example of how this system operated, the Court remarked, was the statutes dealing with the punishment of drug offenders.[173] Under these statutes, if a judge found a drug offender was "likely to be rehabilitated through treatment," it could confine the offender for treatment for an indeterminate period of no more than ten years.[174] After six months of treatment, the Attorney General could recommend the offender for early release.[175]

Due to sentencing disparities and an overwhelming belief that rehabilitation had failed, indeterminate sentencing fell out of favor.[176] Accordingly, Congress enacted the SRA, where it explicitly abandoned indeterminate sentencing in favor of guideline sentences.[177] The Court concluded the enactment of the SRA was in direct response to the overwhelming perception that rehabilitation could not be reliably induced in the prison setting.[178]

After discussing this statutory background, the Court noted sentencing courts are still required to consider the sentencing factors laid out in § 3553(a), which includes "the need for the sentence . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[179] The Court clarified, however, that these factors may "apply differently, or even not at all, depending on the kind of sentence under consideration."[180] For example, the SRA prohibits courts from imposing a term of supervised release for retributive purposes.[181]

2. *Plain Text Analysis*

Turning its attention to the statute at issue, the Court proceeded to conduct a plain text analysis of § 3582(a).[182] First, the Court examined the common definitions of the words "recognize" and "appropriate" in § 3582(a)'s limiting clause.[183] The Court concluded the most natural

172. *Id*.
173. *Id*. at 2387 n.3.
174. *Id*. at 2387.
175. *Id*.
176. *Id*.
177. *Id*.
178. *Id*. at 2391 (citing S. REP. NO. 98-225, at 38 (1983)).
179. *Id*. at 2387.
180. *Id*. at 2388.
181. *Id*.
182. *Id*.
183. *Id*.

definition of "recognize" was to "acknowledge or treat as valid."[184] The Court also stated something is not "appropriate" if it is not "suitable or fitting for a particular purpose."[185]

Using these definitions to interpret § 3582(a), the Court concluded the most natural reading of this section "tells courts that they should acknowledge that imprisonment is not suitable for the purpose of promoting rehabilitation."[186] Invited by the Court as amicus curiae to represent the government's position, Professor Stephanos Bibas[187] argued "recognizing" also means "recall to mind" or "perceive clearly."[188] Under his interpretation of the "recognizing" clause, § 3582(a)'s caveat is nothing more than a reminder or a guide for sentencing judges' cognitive processes.[189] The Court rejected amicus' statutory construction, reasoning a judge would not sentence a person to a term of imprisonment to promote rehabilitation if he or she "perceived clearly" that incarceration is an inappropriate means for doing so.[190]

Citing *United States v. Duran*, amicus also contended § 3582(a) only bars a court's initial decision to impose a term of imprisonment and does not apply when a court is determining the length of the sentence because § 3582(a) caveat applies only to "imprisonment," and imprisonment means "the act of confining a person."[191] Rejecting this argument, the Court pointed out the definition of imprisonment is defined as "[t]he state of being confined" or "a period of confinement."[192] Because the definition did not distinguish between the decision to incarcerate and the length of incarceration, the Court found § 3582(a)'s limiting language logically applies to both.[193]

184. *Id*.
185. *Id*.
186. *Id*.
187. *Id*. Professor Bibas is a law professor and director of the Supreme Court Clinic at the University of Pennsylvania School of Law. *Stephanos Bibas*, PENN LAW, http://www.law.upenn.edu/cf/faculty/sbibas/ (last visited Jan. 29, 2012). In addition to teaching Criminal Sentencing, Bibas has written several articles on the subject. STEPHANOS BIBAS, CURRICULUM VITAE, *available at* http://www.law.upenn.edu/cf/faculty/sbibas/cv.pdf. Bibas has served as Amicus Curiae on three prior occasions. *Id*.
188. Brief of Amicus Curiae, *supra* note 14, at 24.
189. *Id*.
190. *Tapia*, 131 S. Ct. at 2388-89.
191. Brief of Amicus Curiae, *supra* note 14, at 52.
192. *Tapia*, 131 S. Ct. at 2389.
193. *Id*.

3. *Statutory Context and Legislative History*

Although the Court felt the analysis could start and end with the text of § 3582(a), the Court bolstered its analysis by examining the statute's context and legislative history.[194] Citing § 994(k) and § 3582(a), which directs the Commission and the Court to reject imprisonment as a means of promoting rehabilitation, the Court emphatically stated "[e]ach actor at each stage in the sentencing process receives the same message: Do not think about prison as a way to rehabilitate an offender."[195]

Moreover, the Court noted Congress did not provide sentencing courts plenary power to ensure the offender ends up in a facility where rehabilitation services are available, or require the offender to participate in them.[196] The SRA left these decisions within the discretion of the BOP.[197] In this context, if a judge can increase the length of the sentence to promote rehabilitation, an offender can end up with a longer prison term in a facility that does not provide the offender with needed treatment.[198] Even if an offender has access to rehabilitative programs, the sentencing judge cannot force an offender to participate in them.[199]

The Court determined if Congress wanted to consider rehabilitation when imposing a term of imprisonment, it would have given sentencing judges the power to ensure the offender participated in rehabilitative programs.[200] For example, unlike the imposition of a term of imprisonment, when a judge is sentencing an offender to either probation or supervised release, the SRA grants the judge the power to require the offender to participate in rehabilitative programs.[201] In those instances, Congress explicitly tells sentencing courts to consider rehabilitation as a factor in imposing these types of sentences.[202] This lack of judicial authority, the Court continued, supported the textual conclusion that sentencing courts cannot impose or lengthen a term of imprisonment in order for the offender to participate in correctional programs.[203]

Finally, the Court, citing the key Senate Report accompanying the SRA, concluded the legislative history of the SRA suggests Congress was

194. *Id*. at 2390.
195. *Id*.
196. *Id*. (citing 18 U.S.C. §§ 3621(b), (e), (f), 3624(f) (2006); 28 CFR pt. 544, 550 (2010) as BOP authority over administering inmate educational, recreational, and vocational programs).
197. *Id*. at 2391.
198. *Id*. at 2390.
199. *Id*.
200. *Id*.
201. *Id*.
202. *Id*.
203. *Id*.

trying to prevent judges from sentencing offenders to prison because it had some program that might benefit them.[204] In the report, Congress recognized indeterminate sentencing had resulted in a prisoner's release being conflated with the completion of prison treatment programs.[205] While Congress debated at length as to whether rehabilitation should be eliminated completely, Congress refused to take that categorical position.[206] Instead, Congress stated, although rehabilitation is an impermissible reason to sentence an offender to prison, a court may consider rehabilitative concerns when recommending a facility, or "determining whether a sanction other than a term of imprisonment is appropriate in a particular case."[207]

As a final argument, amicus contended the rehabilitative model rejected by the SRA did not include targeted-treatment programs.[208] Instead, the rehabilitative ideal was based on the belief that isolation and hard labor alone could reform an offender.[209] The Court also rejected this argument, stating that prior to the SRA, prison rehabilitation efforts were focused on educational, vocational, and counseling programs.[210] Considering the unambiguous language of the statute, its legislative history, and its context, the Court held § 3582(a) "prevents a sentencing court from imposing or lengthening a prison term because the court thinks an offender will benefit from a prison treatment program."[211]

4. *Guidance for Sentencing Courts*

In applying the district court's findings to Tapia's case, the Supreme Court proclaimed it did not disapprove of what the sentencing judge was trying to accomplish.[212] The Court noted § 3582(a) does not preclude a judge from merely discussing what prison rehabilitation programs are available and their benefits.[213] Likewise, a judge can recommend a facility that has a needed treatment program and encourage an offender to participate in them.[214] But when a sentencing court imposes a lengthier prison sentence in order for the defendant to be eligible for a correctional

204. *Id*. at 2391.
205. *Id*.
206. *Id*. (citing S. REP. NO. 98-225, at 40 (1983)).
207. *Id*.
208. *Id*.
209. *Id*.
210. *Id*. at 2392.
211. *Id*.
212. *Id*.
213. *Id*.
214. *Id*.

program, the court commits error.[215] Here, the Court found the judge's comments suggested he had calculated Tapia's sentence length to fifty-one months so she could qualify for and complete RDAP, which was in violation of § 3582(a).[216] The Court remanded the case for further reconsideration consistent with its opinion.[217]

B. JUSTICE SOTOMAYOR'S CONCURRENCE

Justice Sotomayor concurred with the judgment, but expressed her skepticism that the judge had actually violated § 3582(a)'s prohibition in this case.[218] Justice Sotomayor commented that rehabilitation was only one of many factors, including deterrence, the district court used to justify lengthening Tapia's sentence.[219] Moreover, Justice Sotomayor noted that, at minimum, a thirty-six month sentence would have been sufficient to qualify Tapia for RDAP.[220] Increasing Tapia's sentence to fifty-one months would have little effect on Tapia's eligibility.[221] Therefore, Justice Sotomayor questioned whether the judge based Tapia's sentence on her eligibility for RDAP.[222] Given the Ninth Circuit's stance on the issue and some of the sentencing judge's comments, Justice Sotomayor conceded it was unclear whether rehabilitation took precedence in the district court's decision.[223]

IV. IMPACT

Overturning the Eighth and Ninth Circuits, the Supreme Court resolved a longstanding circuit split regarding the interpretation of § 3582(a).[224] After *Tapia*, even if a sentencing court believes the defendant will benefit from a correctional program, the court cannot impose a term of imprisonment or lengthen it so that the defendant can participate in the program.[225] While the application of *Tapia* seems straightforward, courts have found the line between proper and improper sentencing statements is

215. *Id*.
216. *Id*. at 2392-93.
217. *Id*. at 2393; *see also* United States v. Tapia, No. 09-50248, 2011 WL 6091308, at *3 (9th Cir. Dec. 8, 2011) (finding on remand the district court committed plain error by selecting a longer sentence so Tapia could qualify and complete RDAP).
218. *Id*. at 2393 (Sotomayor, J., concurring).
219. *Id*. at 2393-94.
220. *Id*. at 2394.
221. *Id*.
222. *Id*.
223. *Id*.
224. *See* United States v. Hawk Wing, 433 F.3d 622, 630 (8th Cir. 2006); United States v. Duran, 37 F.3d 557, 561 (9th Cir. 1994).
225. *Tapia*, 131 S. Ct. at 2392.

not so clear.[226] In addition, it is unclear whether *Tapia*'s scope extends beyond initial sentencing.[227]

A. SENTENCING STATEMENTS: WHEN DO THEY GO TOO FAR AND VIOLATE § 3582(A)?

As a general matter, a talismanic statement such as, "I've got to give [the defendant] that length of time to do the programming and the treatment and the counselling [sic] . . . that is the reason for [the] sentence," is a *Tapia* error.[228] However, a sentencing court's mere mention of rehabilitation during a sentencing hearing is not sufficient to constitute an error.[229] Whether a sentencing court commits a *Tapia* error is not always clear.[230] As Justice Sotomayor observed during oral argument, sometimes rehabilitation, deterrence, and incapacitation may be intertwined.[231] Extrapolating on this issue, in *United States v. Kubeczko*,[232] the Seventh Circuit concluded there was no impropriety in a court lengthening a sentence based on the concern—whether due to mental illness or addiction—that the defendant is likely to commit further crimes upon release such that a longer sentence is necessary to protect the public from the defendant's future offenses.[233] To illustrate its reasoning, the Seventh Circuit posited two hypothetical sentencing statements:

> In one the judge says, "I'm not worried that you'll commit more crimes if I gave you a shorter sentence; I am giving you a long sentence to enable you to obtain psychiatric assistance that will bring about your complete rehabilitation." In the other sentencing statement the judge says, "I am going to sentence you to a sentence long enough to enable you to obtain psychiatric assistance, because . . . you can't control your violent impulses."[234]

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226. *See infra* Part IV.A.

227. *See infra* Part IV.B.

228. United States v. Henderson, 646 F.3d 223, 224 (5th Cir. 2011).

229. *See, e.g.*, United States v. Blackmon, 662 F.3d 981, 987 (8th Cir. 2011) (finding "the district court merely pointed out a mathematical flaw in [defendant's] request" for a lesser sentence based on rehabilitative needs, and therefore the sentencing statement did not constitute plain error).

230. *See, e.g.*, United States v. Kubeczko, 660 F.3d 260, 262 (7th Cir. 2011).

231. *See* Oral Argument at 5:04, Tapia v. United States, 131 S. Ct. 2382 (No.10-5400), *available at* http://www.oyez.org/cases/2010-2019/2010/2010_10_5400.

232. 660 F.3d 260 (7th Cir. 2011).

233. *Kubeczko*, 660 F.3d at 262-63.

234. *Id.* at 262.

The Seventh Circuit contended the first statement, but not the second, would violate the statute.[235] The Seventh Circuit reasoned the second statement is permissible because it is based on the defendant's need for incapacitation; without treatment, the defendant would continue to be a danger to the public.[236] While the hope the defendant will be rehabilitated through prison programs is an impermissible consideration, the fact that the defendant's problem would make him or her more dangerous would be a proper consideration.[237] This distinction is made even clearer if the judge indicates he does not think the defendant is interested in rehabilitation, but believes a longer sentence is necessary "to protect the community, promote respect for the law, and to provide a just punishment for the offense, all of which are permissible sentencing considerations under § 3553(a)."[238] Nevertheless, if the court unambiguously states that the defendant needs a longer sentence so he or she can be rehabilitated, the court runs afoul of § 3582(a).[239]

B. *TAPIA*'S APPLICATION TO RESENTENCING UPON REVOCATION OF SUPERVISED RELEASE

While sentencing judges cannot impose or extend a prison sentence so an offender can benefit from rehabilitative programs,[240] it is unclear whether *Tapia*'s scope extends beyond the context of initial sentencing.[241] Before *Tapia*, most circuits held that sentencing judges could consider rehabilitative concerns when imposing a prison term at resentencing upon revocation of supervised release under § 3583(e), which governs discretionary revocation.[242] After *Tapia*, some circuits took the opposite view.

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235. *Id*.
236. *Id*.
237. *Id*. at 262-63.
238. *Id*.
239. *See id*.
240. Tapia v. United States, 131 S. Ct. 2382, 2392 (2011).
241. *See* United States v. Molignaro, 649 F.3d 1, 4-5 (1st Cir. 2011); United States v. Breland, 647 F.3d 284, 291 (5th Cir. 2011); United States v. Grant, 664 F.3d 276, 282 (9th Cir. 2011).
242. *See Molignaro*, 649 F.3d at 3 (citing United States v. Doe, 617 F.3d 766, 773 (3d Cir. 2010); United States v. Abeita, 409 F. App'x 2, 4 (7th Cir. 2010); United States v. Crudup, 461 F.3d 433, 440 (4th Cir. 2006); United States v. Tsosie, 376 F.3d 1210, 1217 (10th Cir. 2004); United States v. Brown, 224 F.3d 1237, 1239-40 (11th Cir. 2000); United States v. Thornell, 128 F.3d 687, 688 (8th Cir. 1997); United States v. Jackson, 70 F.3d 874, 880-81 (6th Cir. 1995); United States v. Anderson, 15 F.3d 278, 282-83 (2d Cir. 1994); United States v. Giddings, 37 F.3d 1091, 1097 (5th Cir. 1994)).

In *United States v. Molignaro*,[243] the First Circuit held § 3582(a)'s admonition also applied to post-revocation prison terms.[244] In its reasoning, the First Circuit conceded there were two arguments that made the majority view persuasive. "First, the dog didn't bark."[245] In face of constant litigation on this issue, neither Congress nor the Sentencing Commission amended the statute or took action through their regulatory power.[246] Second, it is sensible for Congress to allow courts to give a defendant, who failed to complete his or her treatment on release, another chance at treatment, albeit an unpromising one.[247] However, the First Circuit found the congressional intent underlying § 3582(a) overshadowed these arguments.[248] Echoing the reasoning in *Tapia*, the First Circuit noted sentencing courts' "incapacity speaks volumes."[249] Based on its reading of *Tapia*, the First Circuit concluded this incapacity trumps the omission of the limiting language in § 3583(e).[250]

A few months later, the Fifth Circuit, without addressing *Molignaro*, held the plain language of § 3583(e) permits courts to consider rehabilitation when resentencing the defendant to a term of imprisonment in *United States v. Breland*.[251] In affirming the defendant's sentence, the Fifth Circuit relied on its prior reasoning in *United States v. Giddings*.[252] In *Giddings*, the court recognized § 3583(g), which governs mandatory revocation of supervised release, did not contain § 3582(a)'s limiting clause.[253] In fact, while § 3583(g) did not require the court to consider a defendant's need for rehabilitation, it did not prohibit it either.[254] The *Giddings* court also noted both § 3583(c), which governs the general imposition of supervised release, and § 3583(e) specifically require the court to consider rehabilitation.[255]

Equally compelling, the *Giddings* court pointed out that a sentencing judge is not imposing a new term of imprisonment at resentencing.[256] Upon revocation, the sentencing judge is merely requiring the defendant to serve

243. 649 F.3d 1 (1st Cir. 2011).
244. *Molignaro*, 649 F.3d at 5.
245. *Id.* at 3.
246. *Id.*
247. *Id.* at 3-4.
248. *Id.* at 4.
249. *Id.* (citing Tapia v. United States, 131 S. Ct. 2382, 2390-91 (2011)).
250. *Id.* at 5.
251. 647 F.3d 284 (5th Cir. 2011).
252. 37 F.3d 1091 (5th Cir. 1994).
253. *Giddings*, 37 F.3d at 1094-95.
254. *See id.* at 1095.
255. *Id.* at 1096.
256. *Id.*

the rest of his or her supervised release in prison.[257] Because a court must consider rehabilitative factors when imposing a term of supervised release, it follows that, upon revocation, courts can consider these factors so the term of imprisonment corresponds with the purposes of the original sentence.[258]

After reviewing the reasoning in *Giddings*, the Fifth Circuit in *Breland* also noted nothing in the *Tapia* opinion suggested its holding would apply to revocation of supervised release.[259] Rather, the Fifth Circuit pointed out the Supreme Court cited § 3583 as a provision that does allow courts to consider rehabilitative factors.[260] Given the uniform interpretation of § 3583(e) among the circuits and the plain language of the statute, the Fifth Circuit saw no reason to read § 3583(e) any differently from § 3583(g).[261] Therefore, the Fifth Circuit held § 3582(a) does not preclude a court from considering rehabilitation when resentencing upon revocation of supervised release.[262]

Recently joining the First Circuit, the Ninth Circuit in *United States v. Grant*[263] found sentencing courts' incapacity to place a defendant in a particular prison or force the defendant to join a BOP program outweighed the Fifth Circuit's "cross-referencing" argument. Looking at the language of § 3582(a), the Ninth Circuit concluded the section "appears to embrace all sentences of imprisonment."[264] Based on this reasoning, the Ninth Circuit held a prison term, whether imposed at initial sentencing or upon revocation of supervised release, can only be imposed or lengthened based on retributive, deterrence, or incapacitation rationales.[265] Although the Ninth Circuit acknowledged that a sentencing judge may rightfully believe a prison sentence has rehabilitative benefits, "those benefits cannot be the reason for imposing it."[266]

V. CONCLUSION

In *Tapia*, the Supreme Court held § 3582(a)'s prohibition against considering rehabilitation applies both to the decision to incarcerate and to

257. *Id.* at 1095 n.15.
258. *Id.*
259. United States v. Breland, 647 F.3d 284, 290 (5th Cir. 2011).
260. *Id.* (citing Tapia v. United States, 131 S. Ct. 2382, 2390 (2011)).
261. *Id.*
262. *Id.*
263. 664 F.3d 276 (9th Cir. 2011).
264. *Grant*, 664 F.3d at 281.
265. *Id.* at 281-82.
266. *Id.* at 282.

the determination of the length of the prison term.[267] While the Court did not disapprove of Tapia's sentence, the Court held the sentencing judge went too far in selecting the term of imprisonment to ensure participation in the 500-Hour Drug program.[268] With its holding, the Supreme Court ended the long-running practice of lengthening a defendant's sentence so he or she could participate in correctional programs.[269] After this decision, if a defendant shows the district court committed a *Tapia* error, the defendant may be entitled to resentencing.[270] Although *Tapia* clearly applies to initial sentencing, the First, Fifth, and Ninth Circuits have differing views on *Tapia*'s application to resentencing upon revocation of supervised release.[271] If the Supreme Court grants certiorari and finds its *Tapia* holding applies to revocation of supervised release, arguments that a defendant needs a second chance at rehabilitation in prison would no longer be a valid reason for incarceration.[272]

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267. *See generally* United States v. Censke, No. 09-2385, 2011 WL 6005199, at *14 (6th Cir. Dec. 2, 2011) (discussing the practice of courts lengthening defendant's sentences so they can qualify for BOP specialized programs).

268. Tapia v. United States, 131 S. Ct. 2382, 2392 (2011).

269. *Id.* at 2393.

270. *See, e.g.*, United States v. Tapia, No. 09-50248, 2011 WL 6091308, at *3 (9th Cir. Dec. 8, 2011) (holding Tapia was entitled to resentencing after she establishing the district court's *Tapia* error was plain); *Censke*, 2011 WL 6005199 at *14-15 (vacating and remanding for resentencing because defendant established district court abused its discretion by lengthening the defendant's sentence based on his need for medical and psychological treatment).

271. *See supra* Part IV.B.

272. *See* United States v. Molignaro, 649 F.3d 1, 5 (1st Cir. 2011); United States v. Grant, 664 F.3d 276, 282 (9th Cir. 2011).

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