Volume 60 | Issue 2 Article 2

10-1-2015

The District Court Tried to Make Me Go to Rehab, The Eleventh Circuit Said "No, No, No": The Divide over Rehabilitation's Role in Criminal Sentencing and the Need for Reform Following United States v. Vandergrift

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Notes

THE DISTRICT COURT TRIED TO MAKE ME GO TO REHAB, THE ELEVENTH CIRCUIT SAID "NO, NO, NO": THE DIVIDE OVER REHABILITATION'S ROLE IN CRIMINAL SENTENCING AND THE NEED FOR REFORM FOLLOWING *UNITED STATES v. VANDERGRIFT*

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"The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind."[1]

I. UNDERSTANDING THE STALEMATE: AN INTRODUCTION TO CRIMINAL SENTENCING AND CURRENT CONCERNS

The United States holds five percent of the world's population, yet it incarcerates twenty-five percent of the world's prisoners.[2] Within the United States, one in every thirty-five adults lives in a correctional supervision facility, which, in the aggregate, costs the country seventy billion dollars each year.[3] Sixty-seven percent of people released from prison in the

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1. Hopt v. Utah, 110 U.S. 574, 579 (1884) (illustrating goal of punishment under rehabilitation model).

2. *See Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/pages/criminal-justice-fact-sheet (last visited Feb. 3, 2015) (describing current trends in criminal justice system, including "Incarceration Trends in America," "Racial Disparities in Incarceration," and "Drug Sentencing Disparities"); *see also*, Karina Kendrick, Note, *The Tipping Point: Prison Overcrowding Nationally, in West Virginia, and Recommendations for Reform*, 113 W. VA. L. REV. 585, 586 (2011) ("Due to the fact that the United States imprisons its citizens at a higher rate than any country in the world it should be of little surprise that there is a current state of disarray within America's prison system." (footnote omitted)).

3. *See Criminal Justice Fact Sheet*, *supra* note 2 (reporting yearly figures country spends to support high incarceration rates); *see also* LAUREN E. GLAZE & ERINN J. HERBERMAN, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 1 (Dec. 2013), *available at* http://www.bjs.gov/content/pub/pdf/cpus12.pdf ("[S]ummariz[ing] data from several Bureau of Justice Statistics (BJS) correctional data collections to provide statistics on the total population supervised by adult correctional systems in the United States.").

United States will return to prison within three years.[4] In the United States, prisons operating over capacity are the norm.[5]

Recently, the growing American prison population has become a controversial and significant issue.[6] The root of the problem is the criminal

4. *See Recidivism*, NAT'L INST. OF JUSTICE (June 17, 2014), http://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx [hereinafter *Recidivism*] ("Within three years of release, about two-thirds (67.8 percent) of released prisoners were rearrested. Within five years of release, about three-quarters (76.6 percent) of released prisoners were rearrested."). Currently, "revocations [of parole and supervised release] are the fastest growing category of prison admissions." *Project Hope Alabama: Ex-Offender Re-Entry Initiative*, U.S. ATTORNEY'S OFFICE: S. DIST. ALA., justice.gov/usao/als/rei.html (last visited Feb. 3, 2015).

The concept of returning to prison is known as recidivism. *See Recidivism*, *supra* (defining recidivism and commenting "[r]ecidivism is measured by criminal acts that resulted in rearrest, reconviction or return to prison with or without a new sentence during a three-year period following the prisoner's release"); *see also* Gregory L. Little et al., *Twenty-Year Recidivism Results for MRT-Treated Offenders*, COGNITIVE BEHAVIORAL TREATMENT REV., First Quarter 2010, at 1, *available at* http://www.moral-reconation-therapy.com/Resources/CBTR-%2019_1%202010GL.pdf ("Recidivism measures whether or not a given individual returns to performing an undesirable behavior after a treatment is applied. Within criminal justice, recidivism is typically measured by a follow-up of released offenders' criminal records at a given time period.").

5. *See Prisons, Jails & Probation—Overview*, DRUGWARFACTS.ORG, http://www.drugwarfacts.org/cms/Prisons_and_Jails#State (last visited Feb. 3, 2015) [hereinafter *Prisons*] (providing federal and state prison capacity statistics). Overcrowded prisons are a problem across the United States. *See id.* ("Nineteen state systems were operating above their highest capacity, with seven states at least 25% over their highest capacity at yearend 2010, led by Alabama at 196% and Illinois at 144%." (quoting PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, PRISONERS IN 2010, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2011)) (internal quotation marks omitted)); *see also* NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS (2014), *available at* http://fas.org/sgp/crs/misc/R42937.pdf ("[H]igh—and medium—security male facilities were operating at 52% and 45%, respectively, over rated capacity.").

6. *See* Kendrick, *supra* note 2, at 588 (explaining controversial nature of issue of prison reform). This is a controversial issue because the "majority of society does not seem sympathetic" to prisoners' situations and therefore sees no need for reform. *See id.* Despite the concerns falling on deaf ears, the overcrowding in American prisons has created deplorable and sometimes dangerous conditions for the inmates. *See id.* at 588–89 ("[S]evere overcrowding in some prisons is a threat to the physical and mental health of its inhabitants and the people who work there—with the likelihood of transmission of infectious disease increased and the propensity for violence greater in such overpopulated common areas."). Further, the Bureau of Prisons, an agency responsible for federal inmates and prison administration, found a positive correlation between overcrowding and misconduct. *See* JAMES, *supra* note 5 (noting correlation between overcrowded prisons and violence as reason for legislators to step in and reform current situation).

For a discussion of how the current overcrowded prison situation is significant to the legal profession, see ABA, COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 58 (2007) [hereinafter SECOND CHANCES], *available at* http://www.pardonlaw.com/materials/rev_2ndchance(3).pdf (criticizing legal profession for not "pay[ing] sufficient attention to corrections and prisons" and

sentencing guidelines, which are in grave need of reform.[7] One proposed solution is providing inmates with rehabilitative services while in prison, in the hopes of decreasing recidivism rates.[8]

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advocating for legal profession to help reform inadequate American prison system).

7. *See* Kendrick, *supra* note 2, at 586 (indicating "commentators and experts" pinpoint problem on sentencing guidelines); Nicole Flatow, *As Federal Prison Population Spiked 790 Percent, Average Drug Sentences Doubled*, THINKPROGRESS (Nov. 26, 2013, 7:35 PM), http://thinkprogress.org/justice/2013/11/06/2895301/federal-prison-population-spiked-average-drug-sentences-doubled-report-finds/ ("The prison population explosion was not driven primarily by a spike in crime, but by a change in punishment."); *see also* JAMES, *supra* note 5 ("Changes in federal sentencing [e.g., the sentencing guidelines] and correctional policy since the early 1980s have contributed to the rapid growth in the federal prison population."). The federal government has already begun to reevaluate the Sentencing Guidelines. *See* Gary Fields, *U.S. Commission to Assess Mandatory Sentences*, WALL ST. J. (Nov. 12, 2009, 12:01 AM), http://online.wsj.com/news/articles/SB125798793160144461 ("Congress has ordered . . . a review of mandatory-minimum sentences, a move that could lead to a dramatic rethinking of how the U.S. incarcerates its criminals."); *see also* Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html?pagewanted=all&_r=0 (indicating federal government's commitment to reforming current sentencing guidelines).

8. *See* James P. Bond, *Reduce Prison Overcrowding by Offering Alternatives to Jail*, MORNING CALL (Nov. 16, 2010), http://articles.mcall.com/2010-11-16/opinion/mc-prison-overcrowding-pennsylvania-b20101116_1_building-four-new-prisons-jeffrey-beard-minimum-sentences (highlighting Virginia and Michigan's efforts to reduce overcrowding by utilizing alternatives to prison); Press Release, Cal. Dep't of Corr. & Rehab., Substance Abuse Programs Reduce Recidivism—New Report Finds (Oct. 7, 2009), *available at* http://www.cdcr.ca.gov/News/Press_Release_Archive/2009_Presss_Releases/Oct_07.html (reporting California's recent success after incorporating rehabilitative programs); Mike Ward, *Texas Prison Population Shrinks as Rehabilitation Programs Take Root*, STATESMAN (Aug. 11, 2012, 10:40 PM), http://www.statesman.com/news/news/state-regional-govt-politics/texas-prison-population-shrinks-as-rehabilitatio-1/nRNRY/ (reporting lower imprisonment rates in Texas after state adopted certain rehabilitation measures).

For more local programs, see Press Release, Drug Policy Alliance, New Report Finds New Jersey a National Leader in Reducing Recidivism (Apr. 14, 2011) [hereinafter New Report], http://www.drugpolicy.org/news/2011/04/new-report-finds-new-jersey-national-leader-reducing-recidivism (commending New Jersey for being "One of Six States to Reduce Prison Recidivism Rate by More Than 10 Percent"); *see also Prison Overcrowding Solutions: Testimony Submitted to the Pennsylvania Senate Judiciary Committee*, COMMONWEALTH FOUND. FOR PUB. POL'Y ALTERNATIVES (Nov. 16, 2009), http://www.commonwealthfoundation.org/research/detail/prison-overcrowding-solutions (urging Pennsylvania to adopt "alternative-sentencing programs" as solution to overcrowded prisons). For a further discussion on the success of these programs, see *infra* notes 154–72 and accompanying text.

Rehabilitative in this context is not limited to substance abuse programs, but rather includes programs that aim to assist prisoners in many aspects of their lives. *See generally* Stephanie Stravinskas, Lower Crime Rates and Prisoner Recidivism (May 1, 2009) (unpublished Honors College Thesis, Pace University, Pforzheimer Honors College), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1079&context=honorscollege_theses (illustrating how rehabilitative programs assist people in getting jobs, pursuing higher education, and are not limited to substance abuse programs). For a complete list of rehabilitative programs offered by the Bureau of Prisons, see *A Directory of Bureau of Prisons' National*

The concept of sending offenders to prison to receive rehabilitative services is a heavily litigated issue that, unsurprisingly, made its way to the United States Supreme Court.[9] In *Tapia v. United States*,[10] the Supreme Court disapproved of the district court's decision to sentence the defendant to fifty-one months in prison for the purpose of completing "the Bureau of Prison's Residential Drug Abuse Program."[11] The Court held, "sentencing courts [are precluded] from imposing or lengthening a prison term to promote an offender's rehabilitation."[12] Courts subsequently referred to the inappropriate consideration of rehabilitative needs as *Tapia* error.[13] Because the opinion did not provide a framework for lower courts to follow or define the scope of *Tapia*'s application, circuit courts disagree in their interpretations of *Tapia*.[14]

In *United States v. Vandergrift*,[15] the Eleventh Circuit weighed in on the *Tapia* debate as a matter of first impression.[16] The court considered the issue of whether a defendant's rehabilitative needs could be taken into

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Programs, BUREAU OF PRISONS (May 21, 2014), http://www.bop.gov/inmates/custody_and_care/docs/BOPNationalProgramCatalog.pdf.

9. For a further discussion of a fraction of the litigation that has taken place over this issue, see *infra* notes 52–66 and accompanying text.

10. 131 S. Ct. 2382 (2011).

11. *See id.* at 2385 (recounting district court judge's rationale for Tapia's sentence); *id.* at 2393 ("[A] court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation."). Alejandra Tapia, the defendant, was "convicted of, *inter alia*, smuggling unauthorized aliens into the United States . . . ." *Id.* at 2385. The judge stated, "'[t]he sentence has to be sufficient to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program.'" *Id.* (quoting district court opinion) (explaining why Tapia's sentence was greater than sentence recommended in Sentencing Guidelines).

The Bureau of Prisons is the agency in charge of federal inmates and prisons. *See About Our Agency*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/agency/ (last visited Feb. 3, 2015) (providing basic information about Bureau). For a further discussion of the role of the Bureau in criminal sentencing, see *infra* notes 123–29 and accompanying text.

12. *Tapia*, 131 S. Ct. at 2391 (rejecting earlier distinction between considering rehabilitation when choosing *form* of punishment and *length* of imprisonment).

13. *See, e.g.*, United States v. Vandergrift, 754 F.3d 1303, 1309 (11th Cir. 2014) (referring to part of analysis as "Alleged *Tapia* Error").

14. *See* Kimberly L. Patch, Note, *The Sentencing Reform Act: Reconsidering Rehabilitation as a Critical Consideration in Sentencing*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 165, 166 (2013) ("However, the Supreme Court [in *Tapia*] did not explicitly delineate the scope of the rule, and the circuit courts of appeals have subsequently disagreed on [*Tapia*'s] appropriate application."); *see also Tapia*, 131 S. Ct. at 2391 (relying not on framework, but on "text, context, and history . . . [that] precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation"). For a further discussion of the circuit split, see *infra* notes 52–66 and accompanying text.

15. 754 F.3d 1303 (11th Cir. 2014).

16. *See id.* at 1309 (explaining novel issue Eleventh Circuit confronted because "[t]his court has not decided whether *Tapia* applies in the context of resentencing upon the revocation of supervised release").

consideration at a revocation of supervised release hearing.[17] The *Vandergrift* court rejected the muddled *Tapia* interpretations adopted by other circuits in favor of a bright-line rule.[18] After *Vandergrift*, the Eleventh Circuit prohibited sentencing judges from considering defendants' rehabilitative needs when determining imprisonment sentences.[19]

This Note asserts that the Eleventh Circuit's decision to preclude judges from considering rehabilitation marks a step in the right direction for criminal sentencing because it properly limits judicial power.[20] Yet, this Note also recognizes the advantages that rehabilitative services offer prisoners and thus urges the federal Sentencing Commission (Commission) to reexamine rehabilitation's role in the Sentencing Guidelines.[21] Evidence-based research indicates that rehabilitation lowers recidivism rates, and therefore, could serve as a solution to overcrowding in America's prisons.[22]

Part II of this Note sets forth a brief history of criminal sentencing and discusses the legal landscape surrounding *United States v. Vandergrift*.[23] Part III provides the facts, procedural history, and holding of the Eleventh Circuit's decision in *Vandergrift*.[24] Part IV recognizes the rationale for prohibiting judges from considering defendants' rehabilitative needs, but suggests an alternative solution to the pressing issue of overcrowding in

17. *See id.* (presenting issue Eleventh Circuit decided on appeal).

18. *See id.* at 1309–13 (comparing other circuits' interpretations of *Tapia* before rejecting them in favor of its holding). For a further discussion of other circuit interpretations, see *infra* notes 60–63 and accompanying text.

19. *See id.* at 1310 (deciding not to "limit *Tapia* to [certain] situations," but instead to find *Tapia* error whenever "the district court *considers* rehabilitation when crafting a sentence of imprisonment").

20. For a further defense of the Eleventh Circuit's framework, see *infra* notes 113–34 and accompanying text.

21. The Sentencing Commission is responsible for amending the Sentencing Guidelines in response to new research under the Sentencing Reform Act. *See* Mistretta v. United States, 488 U.S. 361, 369 (1989) (recognizing "obligation [of Commission] periodically to 'review and revise' the [sentencing] guidelines"). For a further discussion of the Sentencing Commission's role with regard to the Sentencing Guidelines and potential role in resolving the prison overcrowding problem, see *infra* notes 38–51 and accompanying text.

22. For a further discussion of the latest conclusions by social scientists on rehabilitation's role in reducing recidivism, see *infra* notes 139–53 and accompanying text.

23. For a further discussion of how the stalemate developed among the circuit courts, see *infra* notes 27–66 and accompanying text.

24. For a further discussion of the facts, holding, and rationale in *Vandergrift*, see *infra* notes 67–103 and accompanying text.

prisons.[25] Part V concludes by asserting the necessity of amending the Sentencing Guidelines to reconsider rehabilitation.[26]

II. THE DEVELOPMENT OF THE DEADLOCK: AN OVERVIEW OF CRIMINAL SENTENCING, *TAPIA*, AND THE CIRCUIT STANDOFF

The current deadlock over defendants' rehabilitative needs originates from federal legislation and subsequent interpretations of this legislation by courts.[27] Until Congress passed the Sentencing Reform Act ("the Act") in 1984, judges enjoyed untethered discretion and authority in determining a criminal's punishment.[28] Beginning in the 1950s, concern over the disparities in sentencing motivated Congress to pass the Act.[29] Although

25. For a further discussion of the limited powers of the judiciary to control defendants' receiving rehabilitative services, see *infra* notes 104–34 and accompanying text. For a further discussion of alternative solutions to the overcrowding problem, see *infra* notes 135–72 and accompanying text.

26. For a further discussion of the need to reconsider rehabilitation as a possible solution for the overcrowding problem, see *infra* notes 173–78 and accompanying text.

27. *See* Steven L. Chanenson, *Consistently Inconsistent: Circuit Rulings on the Guidelines in 1994*, 7 FED. SENT'G REP. 224, 224 (1995), *available at* http://www.jstor.org/stable/20639798 ("It is no longer surprising that the federal courts of appeals fail to interpret the guidelines in a uniform manner. Inconsistency is the order of the day as each circuit, to varying degrees, puts its own mark on the guidelines."). Each of the cases discussed in this Note interprets the Sentencing Reform Act and subsequent circuit interpretations. *See, e.g.*, Tapia v. United States, 131 S. Ct. 2382, 2387–92 (2011) (commenting on statutory analysis and legislative history of Sentencing Reform Act); United States v. Vandergrift, 754 F.3d 1303, 1309–13 (11th Cir. 2014) (discussing sister circuits' interpretations of Sentencing Reform Act post-*Tapia*).

28. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551–86); Mistretta v. United States, 488 U.S. 361, 363 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing."). In this context, indeterminate meant, "(1) judges had virtually unfettered discretion in sentencing an offender, causing unjustified sentencing disparity; and (2) both judges and parole boards had a role in determining the length of an offender's sentence, the ultimate control lying with the parole board." Jennifer Borges, *The Bureau of Prisons' New Policy: A Misguided Attempt to Further Restrict a Federal Judge's Sentencing Discretion and to Get Tough on White-Collar Crime*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 141, 143–44 (2005) (summarizing history of federal sentencing before Sentencing Reform Act); *see also* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993) (providing timeline of legislative history); *Simplification Draft Paper*, U.S. SENT'G COMM'N, http://www.ussc.gov/research-and-publications/working-group-reports/simplification/simplification-draft-paper-2 (last visited Feb. 4, 2015) (explaining procedural history of Sentencing Reform Act as part of Comprehensive Crime Control Act of 1984). For more information about the Comprehensive Crime Control Act of 1984, see Comprehensive Crime Control Act of 1984, S. 1762, 98th Cong. For a full discussion of sentencing policy before the Sentencing Reform Act, see *infra* notes 33–37 and accompanying text.

29. *See* Shanna L. Brown, Case Comment, *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*

the Act attempted to create more uniform sentences, the legislation was unclear in terms of the role of rehabilitative needs and whether such needs could influence a defendant's sentence.[30] In 2011, the Supreme Court made an effort to clarify the role of defendants' rehabilitative needs in *Tapia v. United States*.[31] Clarification has yet to be truly achieved however, as the circuit courts are split in their interpretations of *Tapia*.[32]

A. *At the Court's Discretion: The History of Criminal Sentencing*

Prior to Congressional intervention in 1984, judges had almost complete discretion in deciding a defendant's criminal sentence.[33] As a result of such discretion, sentences varied depending on the specific facts and circumstances of each case because judges relied on "any evidence that [they] felt was an important factor . . . ."[34] At this point in time, rehabilitation was one of the main goals of imprisonment, and judges often "tailor[ed] their sentences to rehabilitate the defendant."[35]

(2011), 87 N.D. L. REV. 375, 383–84 (2011) (explaining external influences that motivated Congress to pass Sentencing Reform Act).

30. For a further discussion of the prior circuit split over varying interpretations of the Act, see *infra* notes 52–56 and accompanying text.

31. *See Tapia*, 131 S. Ct. at 2388–91 (acknowledging varying circuit interpretations and concluding rehabilitative needs cannot influence defendant's sentence).

32. For a further discussion of the circuit split post-*Tapia*, see *infra* notes 57–66.

33. *See* Borges, *supra* note 28, at 143–45 (explaining "how federal sentences were imposed before and after the Guidelines"); *see also* William B. Mateja, *Sentencing Reform, The Federal Criminal Justice System, and Judicial Prosecutorial Discretion*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 319, 321 (2004) ("The system of sentencing in place before the sentencing reform of the 1980s [ ] was almost entirely discretionary. Choosing a sentence for those convicted of most felony offenses was left to the unfettered discretion of judges and essentially was ungoverned by law."); Scott A. Schumacher, *Sentencing in Tax Cases After* Booker*: Striking the Right Balance Between Uniformity and Discretion*, 59 VILL. L. REV. 563, 565–70 (2014) (detailing sentencing prior to federal Sentencing Guidelines). Judges did not have total discretion because Congress set maximum sentences for offenses. *See* Borges, *supra* note 28, at 144 (explaining how judges did not have absolute discretion). Another element of judicial discretion at this time was the lack of appellate review of the district court's sentencing. *See* Stith & Koh, *supra* note 28, at 226 (providing background of criminal sentencing prior to Sentencing Reform Act).

34. *See* Borges, *supra* note 28, at 144 ("A judge's 'vast discretion in determining the appropriate amount and type of punishment for each offender' bred unpredictable results." (quoting Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1078 (1992))). As a result of judges' "any evidence" practice, "federal sentences were based 'more on the characteristics of the individual offender than on the nature of the crime.'" *Id.* (quoting Barrett, *supra*, at 1078) (explaining how judges created criminal sentences before reform of 1980s).

35. *See id.* (providing rationale behind judge's sentences); *see also* NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS 5 (Susan E. Martin et al. eds., 1981) ("Rehabilitation was formally adopted as the goal of penology by the First Prison Congress in 1870 . . . . [T]he belief that rehabilitation rather than punishment should be the goal of correctional policy stood virtually unchallenged for the first half of the twentieth century."); Andrea Avila, Note, *Consideration of Rehabilita-*

By the mid-1970s, concern over widespread sentencing disparities and frustration with the rehabilitation model reached a breaking point, bringing the judges' free reign to a halt.[36] In response to the dissatisfaction, Congress passed the Sentencing Reform Act in October 1984, to serve as a framework for judges, with the ultimate goal of facilitating more uniform sentences.[37]

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tive Factors for Sentencing in Federal Courts: Tapia v. United States*, 131 S. Ct. 2382 (2011)*, 92 NEB. L. REV. 404, 408 (2013) ("[R]ehabilitation was generally favored for the majority of the twentieth century.").

At this point in time, "it was realistic to attempt to rehabilitate the inmate[s] and thereby to minimize the risk that [they] would resume criminal activity upon [their] return to society." Mistretta v. United States, 488 U.S. 361, 363 (1989) (explaining rationale for imprisonment under rehabilitative model).

There are four rationales for imprisonment: retribution, deterrence, incapacitation, and rehabilitation, with rehabilitation being the most prominent before the Sentencing Reform Act. *See* Avila, *supra*, at 406 (providing overview for different models of punishment). *Retribution* aims to have the punishment and the crime be proportionate to one another. *See* JENNIFER EDWARDS WALSH, THREE STRIKES LAWS 2–3 (2007). The *deterrence* theory suggests "people commit crime because it gives them some sort of benefit," and therefore, courts can lower this "attractiveness [by increasing] the associated costs and consequences . . . ." *Id.* at 2. Supporters of *incapacitation* believe "some people are incorrigible," and they need to be placed away from society to avoid any social harm. *Id.* at 3. Finally, *rehabilitation*, also referred to as the medical model, is premised on the idea that "people break the law because of external influences or internal impulses . . . ." *Id.* at 1–2. Emphasis on rehabilitation during sentencing is also known as the rehabilitative model. *See* Brown, *supra* note 29, at 383 (providing example of use of phrase "rehabilitation model"). This Note will use both terms for the model.

36. *See Mistretta*, 488 U.S. at 366 (referencing Senate Report for Sentencing Reform Act that commented on failure of the "'outmoded rehabilitation model'" and its "'unjustified[ed]' and 'shameful' consequences" (alteration in original) (quoting S. REP. NO. 98-225, at 38, 65 (1983))); *see also* Avila, *supra* note 35, at 408–09 (summarizing frustration with rehabilitative model because "no noted change in recidivism rates . . . left the 'rehabilitationist rationale . . . and [its sentencing] differences . . . seen as irrational and indefensible'" (second, third, and fourth alterations in original) (quoting WAYNE R. LAFAVE, CRIMINAL LAW § 1.5(b) (4th ed. 2003))).

Several prominent people spoke out against judges' absolute discretion. *See* Brown, *supra* note 29, at 383–84 (stating "several notable organizations and commissions made proposals for reform" and providing examples of academics' responses). One of "the most prominent and staunch critic[s]," Marvin E. Frankel (a federal district court judge himself) believed judges' absolute discretion was "'terrifying and intolerable for a society that professes devotion to the rule of law.'" *Id.* at 384 (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972)) (providing example of critic to rehabilitation model who helped pave way for reform). One judge, Justice Henry McCardie, summarized the problem well, stating, "'[a]nyone can try a criminal case . . . . The real problem arises when the judge has to decide what punishment to award.'" James R. Thompson & Gary L. Starkman, Book Review, Criminal Sentences: Law Without Order, 74 COLUM. L. REV. 152, 152 (1974) (reviewing FRANKEL, *supra*) (quoting Charles E. Wyznaski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291 (1952) (providing statement of Justice McCardie)) (illustrating distrust even among judges during this time period about lack of sentencing standards).

37. *See* Avila, *supra* note 35, at 409 (indicating motivation for Congress to pass Sentencing Reform Act); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1A

B. *An Attempt at Conformity: The Sentencing Reform Act*

Recognizing the disappointment with the rehabilitation model and the need for uniformity, Congress passed the Sentencing Reform Act in October 1984.[38] The Act aimed to hold judges more accountable for their sentences and ultimately changed the laws of criminal sentencing in three ways.[39]

First, the Act created the Sentencing Commission, a federal agency responsible for promulgating federal Sentencing Guidelines.[40] While the Supreme Court later concluded that these Guidelines were only advisory, the Court also instructed district courts to reference them when sentencing.[41] To properly sentence an offender, judges refer to a sentencing table for each offense and select a sentence within the provided range.[42] These Guidelines are considered "evolutionary," and therefore, the Commission has the "dut[y] to monitor federal sentencing law . . . and to revise the guidelines accordingly."[43]

(2013), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/Chapter_1.pdf [hereinafter MANUAL] (stating "Congress sought reasonable uniformity in sentencing" when creating Sentencing Reform Act).

38. *See* Tapia v. United States, 131 S. Ct. 2382, 2387 (2011) (asserting disapproval of rehabilitation model prompted Congress to pass Sentencing Reform Act); *Mistretta*, 488 U.S. at 365 (reporting that questioning of rehabilitative model lead to Sentencing Reform Act); *see also* Avila, *supra* note 35, at 408 (citing concerns of public regarding sentence disparities and rehabilitation model that "laid the groundwork for the sentencing reform movement").

39. *See* Borges, *supra* note 28, at 146–48 (discussing substantive changes Sentencing Reform Act had on laws of criminal sentencing). For a further discussion of these substantive changes, see *infra* notes 40–51 and accompanying text.

40. *See Mistretta*, 488 U.S. at 368–69 (explaining membership criteria of Commission). The Commission is a part of the judicial branch and consists of seven voting and two non-voting, *ex officio* members, with at least three being federal judges. *See id.* (detailing membership makeup of Commission). For more information about the composition and procedures of the Commission, see 28 U.S.C. § 994(a) (2012) (providing statutory authority of Commission). For a copy of the Guidelines, effective Nov. 1, 2013, see MANUAL, *supra* note 37 (providing current copy of Sentencing Guidelines Manual).

41. *See* United States v. Booker, 543 U.S. 220, 264 (2005) ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."); *see also* Schumacher, *supra* note 33, at 575–81 (discussing Supreme Court's decision in *Booker* that rendered the Guidelines merely advisory, rather than mandatory).

42. *See* Borges, *supra* note 28, at 149–50 (providing step-by-step process for sentencing judge using Guidelines). Once the judge knows the range, there are other factors that need to be considered. *See* 18 U.S.C. § 3553(a) (2012) (stating factors "to be considered in imposing a sentence"). Should the judge decide to go outside the range provided, "[t]he judge must also make a statement describing the reasons for the specifics of the sentence and any deviation from the Guidelines." Avila, *supra* note 35, at 410 (describing how judges create sentences).

43. *See* MANUAL, *supra* note 37, at 2, 14 (establishing Commission's role "to monitor sentencing practices"). For a further discussion regarding the responsibility of the Commission to amend the Sentencing Guidelines, see *infra* note 135 and accompanying text. *See generally* Rita v. United States, 551 U.S. 338, 350–51 (2007).

Second, the Act eliminated the Parole Commission, an agency that previously played a significant role in sentencing.[44] Before the Act, parole boards undermined judicial sentencing by granting defendants early release.[45] In stripping parole boards of this authority, the Act aimed to consolidate the power to determine sentences in the judiciary.[46]

Third, the Act curtailed the role of rehabilitation in criminal sentencing.[47] This change was in direct response to the overwhelming frustration with the rehabilitation model at this time.[48] Relying on studies by social scientists, Congress decided that "imprisonment is not an appropriate means of promoting correction and rehabilitation."[49] While judges could consider rehabilitation in other contexts, they could no longer allow reha-

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44. *See U.S. Parole Commission*, ALLGOV.COM, http://www.allgov.com/departments/department-of-justice/us-parole-commission?agencyid=7221 (last visited Feb. 4, 2015) (explaining Parole Commission is made up of parole boards); *see also* Borges, *supra* note 28, at 144–46 (summarizing problems with Parole Commission's involvement in sentencing, most notably its power to shorten sentences, which created confusion). Congress felt that the "Parole Commission served no useful purpose and only perpetuated the problems of 'unfairness and uncertainty,'" and therefore chose to elminate it under the Act. *See id.* at 146 (quoting S. REP. NO. 98-225, at 3236 (1983)) (providing Congressional rationale for eliminating Parole Commission's involvement).

45. *See* Borges, *supra* note 28, at 144–45 (detailing Parole Commission's power to release an offender after serving "one-third" of sentence).

46. *See id.* at 147 ("The Senate wanted to make sure that the 'sentence imposed by the judge [would] be the sentence actually served.'" (alteration in original) (quoting S. REP. NO. 98-225, at 3239)).

47. *See* 18 U.S.C. § 3582(a) ("[R]ecognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation."); 28 U.S.C. § 994(k) (2012) (instructing Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant"); *see also* Borges, *supra* note 28, at 147–48 (explaining new goal of sentencing following Sentencing Reform Act was determinate sentencing which advocated for retribution, not rehabilitation).

48. For a discussion of the frustration with the rehabilitation model, see *supra* notes 33–37 and accompanying text.

49. *See* 18 U.S.C. § 3582(a) (prohibiting courts from considering rehabilitation when sending offender to prison); *see also* Brown, *supra* note 29, at 383 (noting studies done by social scientists that contributed to rehabilitation model's decline). One of the bigger factors that contributed to the rehabilitation model's decline was a study conducted by Robert Martinson. *See id.* (explaining conclusions of social scientists that led to decline of rehabilitation model). Martinson's work, unofficially titled *Nothing Works*, concluded "'[w]ith few and isolated exceptions, the rehabilitative efforts that [had] been reported . . . had no appreciable effect on recidivism'" and "there was 'little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation.'" *See id.* (alterations in original) (quoting ROBERT MARTINSON, WHAT WORKS?—QUESTIONS AND ANSWERS ABOUT PRISON REFORM 6 (1974)); *see also* Jerome G. Miller, *The Debate on Rehabilitating Criminals: Is It True that Nothing Works?*, WASH. POST (Mar. 1989), *available at* http://www.prisonpolicy.org/scans/rehab.html (explaining media titled Martinson's work *Nothing Works*).

bilitative needs to affect their decisions regarding prison sentences.[50] Although the Act instructed courts not to consider rehabilitation when "*imposing* a term of imprisonment," a circuit split emerged over whether judges could consider rehabilitative needs when determining an appropriate sentence *length*.[51]

C. *A Standoff Between the Circuits:* Tapia *and Its Mixed Interpretations*

The Supreme Court resolved the initial circuit split over the consideration of defendants' rehabilitative needs in *Tapia v. United States*.[52] In *Tapia*, the Court scrutinized two provisions of the Act that seemed to be at odds with one another.[53] One provision stated, "imprisonment is not an appropriate means of promoting correction and rehabilitation."[54] Yet, another provision instructed judges to consider "provid[ing] the defendant with needed educational or vocational training [e.g., rehabilitative services]."[55] The Court concluded that the Sentencing Reform Act "precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation."[56]

Ironically, rather than uniting the circuits, the Supreme Court's decision in *Tapia* soon became the source of yet another disagreement among the circuits.[57] Today, the circuits are divided as to the method by which courts are to "measure *Tapia* error."[58] With each circuit advocating a dif-

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50. *See* Brown, *supra* note 29, at 386 (explaining rehabilitation can be taken into consideration when deciding the *form* of offenders' punishment (e.g., imprisonment, fine, probation), but not "a term of imprisonment").

51. *See* Avila, *supra* note 35, at 405 (indicating point of contention among circuits that led to initial circuit split).

52. *See* Tapia v. United States, 131 S. Ct. 2382, 2391 (2011) (holding rehabilitative needs cannot be taken into consideration when "imposing or lengthening a prison term").

53. *Compare* 18 U.S.C. § 3582(a) (listing "Factors to be considered in imposing a term of imprisonment . . . recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation."), *with id.* § 3553(a)(2) (instructing courts to consider "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"). "The Sixth, Eighth, and Ninth Circuits" allowed courts to extend a sentence based on rehabilitative needs whereas the "Third and D.C. Circuits . . . prohibit[ed] sentencing courts from using rehabilitation as a justification . . . ." *See* Brown, *supra* note 29, at 388–89 (discussing circuit split over above quoted provisions).

54. 18 U.S.C. § 3582(a).

55. *Id.* § 3553(a)(2)(D).

56. *See Tapia*, 131 S. Ct. at 2385, 2391 (concluding no distinction existed between decision to choose imprisonment as form of punishment and decision of length of imprisonment in terms of rehabilitation consideration).

57. For a comparison of the tests used by other circuits, see *infra* notes 60–63 and accompanying text.

58. *See id.*

ferent method, the question of how *Tapia* should be implemented remains unanswered.[59]

The various methods of measuring *Tapia* error can be condensed into two different tests.[60] The first test analyzes the role rehabilitative needs played when sentencing the defendant.[61] Provided it is not the "dominant factor," consideration is allowed.[62] The second test assess whether the judge *explicitly linked* the defendant's rehabilitative needs with the length of the sentence.[63]

While the Eleventh Circuit previously ruled on the issue of defendants' rehabilitative needs, *Vandergrift* was the Eleventh Circuit's first opportunity to rule on this issue post-*Tapia*.[64] Prior to *Tapia*, the Eleventh Circuit allowed judges to "consider a defendant's rehabilitative needs when imposing" a sentence.[65] In *Vandergrift*, the Eleventh Circuit weighed in on the *Tapia* debate.[66]

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59. *See id.*

60. *See* United States v. Vandergrift, 754 F.3d 1303, 1309–11 (11th Cir. 2014) (describing other circuits' interpretations of *Tapia*).

61. *See, e.g.*, United States v. Walker, 742 F.3d 614, 616 (5th Cir. 2014) (allowing consideration of rehabilitation when *secondary factor* to judge's analysis); United States v. Garza, 706 F.3d 655, 660 (5th Cir. 2013) (explaining Fifth Circuit precedent as creating "distinction between legitimate commentary and inappropriate consideration as whether rehabilitation is a 'secondary concern' or 'additional justification' (permissible) as opposed to a 'dominant factor' (impermissible) informing the district court's decision"). In *Garza*, the Fifth Circuit relied heavily on the record of the district court's decision and determined that "the record makes clear that Garza's rehabilitative needs were the dominant factor in the court's mind." *Id.* at 661–62; *see also* United States v. Replogle, 678 F.3d 940, 943 (8th Cir. 2012) (upholding district court's sentence because "[d]eterrence, respect for the law, and protection of the public were the *dominant factors* in the district court's analysis" (emphasis added)).

62. *See Garza*, 706 F.3d at 660 (citing cases that used dominant factor analysis in determining *Tapia* error).

63. *See, e.g.*, United States v. Lifshitz, 714 F.3d 146, 150 (2d Cir. 2013) (determining no *Tapia* error because "there is no indication in the record that the district court based the length of Lifshitz's sentence on his need for treatment"); United States v. Gilliard, 671 F.3d 255, 260 (2d Cir. 2012) (finding no explicit link between rehabilitative needs and defendant's sentence); *see also* United States v. Deen, 706 F.3d 760, 769 (6th Cir. 2013) (finding no *Tapia* error because "the record in [the] case permits no conclusion but that the length of his prison sentence was fixed to promote his rehabilitation").

64. *See* United States v. Brown, 224 F.3d 1237, 1240 (11th Cir. 2000) ("[A] court may consider a defendant's rehabilitative needs when imposing a specific incarcerative term following revocation of supervised release.").

65. *See Vandergrift*, 754 F.3d at 1309 (acknowledging "that *Tapia* abrogates [Ninth Circuit's] holding in *United States v. Brown*").

66. *See id.* (recognizing new test set forth by Supreme Court in *Tapia* that governs Vandergrift's appeal).

III. AT AN IMPASSE: THE ELEVENTH CIRCUIT REMAINS UNSWAYED BY OTHER CIRCUITS AND TAKES AN ORIGINAL STANCE IN *VANDERGRIFT*

The Eleventh Circuit faced a novel issue in *Vandergrift* because it had to decide whether the Supreme Court's holding in *Tapia* applied to sentencing hearings following revocation of supervised release.[67] *Vandergrift* therefore presented the Eleventh Circuit with an opportunity to interpret the much-debated *Tapia* decision.[68] By holding that *Tapia* error occurs whenever judges contemplate rehabilitative needs in sentencing determinations, *Vandergrift* launched the Eleventh Circuit into the growing circuit split.[69] The court's decision reflects yet another possible interpretation of *Tapia* and highlights the growing need for a determination of the role of rehabilitation in criminal sentencing.[70]

A. *Facts and Procedure*

Walter Henry Vandergrift was convicted for "the possession and distribution of child pornography."[71] After serving prison time, Vandergrift began a supervised release program.[72] However, before completing the program, his probation officer alleged Vandergrift "violated the condi-

67. *See id.* (stating Eleventh Circuit had not decided whether *Tapia* applied to revocation of supervised release hearings, but for present case would rely upon sister circuits' conclusion that *Tapia* applied).

68. *See id.* at 1309–11 (detailing different *Tapia* interpretations adopted by other circuits). For a further discussion of the debate regarding varying *Tapia* interpretations, see *supra* notes 52–66 and accompanying text.

69. *See id.* at 1310 (acknowledging that decision rejected approaches taken by other circuits); *see also* Hugh Kaplan, *Consideration of Rehabilitation at Sentencing Is Dealt with Differently in Different Circuits*, U.S. L. WEEK (June 24, 2014), *available at* https://www.bloomberglaw.com/document/XCVBC6D0000000?jcsearch=dk%253Abna%2520a0f2a0a0c9#jcite (reporting Eleventh Circuit decision widened circuit split on consideration of rehabilitation in criminal sentencing).

70. *See Vandergrift*, 754 F.3d at 1310 (asserting Eleventh Circuit holding properly interpreted *Tapia* after "declin[ing] to limit *Tapia* to [certain] situations").

71. *See id.* at 1305 (providing facts of Vandergrift's initial conviction).

72. *See id.* (explaining Vandergrift's sentence from initial conviction). Vandergrift spent ninety-seven months in prison before beginning his supervised release of three years. *See id.* For an explanation of supervised release programs, see Harold Baer, Jr., *The Alpha & Omega of Supervised Release*, 60 ALB. L. REV. 267, 269 (1996) ("Supervised release is a form of government supervision after a term of imprisonment."). Whereas parole "reduc[es] the stated term of imprisonment," supervised release is "in addition to, and following, a term of imprisonment imposed by a court." *Id.* (articulating difference between these two sentencing options). For more information on supervised release programs under the federal Sentencing Guidelines, see MANUAL, *supra* note 37, at 413–20.

tions of his supervised release . . . ."[73] These allegations triggered a preliminary and final revocation hearing.[74]

The United States District Court for the Middle District of Alabama determined Vandergrift had indeed violated the terms of release and "subsequently revoked his supervised release."[75] Once a defendant's supervised release status is revoked, the court has the authority to sentence a defendant to a term of imprisonment."[76]

When deciding the length of Vandergrift's imprisonment sentence, the judge "'consider[ed] all factors set out in 18 U.S.C. Section 3553 . . . the safety of the public . . . the example set to others . . . [and] what's best for the defendant . . . .'"[77] The judge relied heavily on Vandergrift's ex-

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73. *See Vandergrift*, 754 F.3d at 1305 (illustrating process by which supervised release may be revoked). The probation officer did so by filing a petition with the district court. *See id.* (describing process that follows alleged violation of supervised release). The judgment provided the standard conditions of supervision as well as special conditions of Vandergrift's supervision. *See* Judgment in a Criminal Case, United States v. Vandergrift, No. 2:04cr033-WHA, at *3–4 (M.D. Ala. May 30, 2012), *available at* http://ia600705.us.archive.org/23/items/gov.uscourts.almd.11361/gov.uscourts.almd.11361.76.0.pdf.

> The petition for revocation alleged Vandergrift:
> (1) fail[ed] to obtain lawful employment; (2) fail[ed] to obey instructions to search for and obtain employment; (3) knowingly [gave] false information to a probation officer when questioned about the whereabouts of another federal supervisee (his roommate); (4) possess[ed] or [had] access to a pornographic DVD and a Maxim magazine, both of which contained sexually stimulating material; and (5) violat[ed] 18 U.S.C. § 1001, which prohibits making materially false statements to a federal agent . . . .

Vandergrift, 754 F.3d at 1305–06.

74. *See* Baer, *supra* note 72, at 285 (discussing procedural steps that occur after defendant violates supervised release). "The purpose of the preliminary hearing is to determine whether there is probable cause to hold the defendant for a revocation hearing." *Id.* at 286 (providing rights of defendants for preliminary hearings). The revocation hearing is governed by Federal Rule of Criminal Procedure 32.1(b)(2) and requires the government to prove by a preponderance of the evidence that the offender violated conditions of supervised release. *See id.* at 287–89 (explaining procedural elements of revocation hearings).

75. *See Vandergrift*, 754 F.3d at 1306 (concluding government met burden and proved by preponderance of evidence that Vandergrift violated conditions of supervised release).

76. *See* 18 U.S.C. § 3583(e)(3) (2012) (explaining court's authority when supervised released is revoked). "If a court revokes a defendant's term of supervised release, the court may sentence the defendant to a term of imprisonment for all or part of the term of supervised release authorized by statute for the offense that resulted in the term of supervised release . . . ." Baer, *supra* note 72, at 292 (footnote omitted) (describing judicial authority to sentence offenders following revocation of supervised release provided sentence does not violate "maximum terms of imprisonment set forth in 18 U.S.C. § 3583(e)(3)"). The Sentencing Guidelines Manual provides a framework for judges to reference when deciding how long to sentence an offender following revocation of supervised release. *See* MANUAL, *supra* note 37, at 485–88 (providing revocation table to serve as reference when creating terms of imprisonment).

77. *Vandergrift*, 754 F.3d at 1306 (reciting rationale of district judge when creating Vandergrift's sentence). Under the Sentencing Reform Act, if the judge

pert witness, a psychologist, who testified to "'the difficulty in finding, outside the prison system, any vocational training and help that might assist the defendant.'"[78] Following the hearing, the judge sentenced Vandergrift to "24 months' imprisonment to be followed by one year of supervised release."[79]

Vandergrift subsequently appealed to the Eleventh Circuit Court of Appeals, arguing that the district court committed *Tapia* error when deciding his sentence.[80]

B. *Refusing to Budge: The Eleventh Circuit Rejects Sister Circuits' Approaches and Creates New* Tapia *Interpretation*

The Eleventh Circuit agreed with Vandergrift that the district court erred when creating the sentence because it considered his rehabilitative needs.[81] Nonetheless, the court affirmed the district court's holding because Vandergrift could not prove the *Tapia* error "substantially affected" his rights at the revocation hearing.[82] The court initially analyzed a matter of first impression for the Eleventh Circuit, deciding that *Tapia* did in

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sentences a defendant to a greater sentence than the Guidelines recommend, the judge must explain the judge's reasoning. *See* 18 U.S.C. § 3553(c) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . (2) is not of the kind, or is outside the range . . . the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons . . . .").

78. *Vandergrift*, 754 F.3d at 1306 (quoting testimony from revocation hearing). The psychologist, Dr. Kirkland, believed Vandergrift had bipolar disorder, which could "'be helped in some way in the prison system.'" *Id.* (quoting testimony of psychologist at revocation hearing that indicated Vandergrift would do better in prison environment). The judge stated his hopes that Vandergrift's imprisonment sentence would "'put him on a better course'" and "'could also help save the defendant's life.'" *Id.* (explaining reasoning behind judge's decision to sentence Vandergrift to twenty-four months' imprisonment).

79. *See id.* (following Sentencing Reform Act's procedures by explaining why defendant's sentence was longer than Sentencing Guidelines for this offense).

80. *See id.* at 1306–07 (summarizing issue on appeal in front of Eleventh Circuit). Vandergrift also alleged that the district court erred in revoking his supervised release and created an unreasonable sentence by using incorrect sentencing factors. *See id.* at 1307–10 (discussing Vandergrift's allegations of district court error). The Eleventh Circuit determined the district court properly revoked Vandergrift's supervised release status and dismissed the allegation of impermissible sentencing factors because Vandergrift was unable to show "plain error as to this issue." *See id.* at 1307, 1309 (dismissing briefly Vandergrift's other allegations in order to focus on alleged *Tapia* error).

81. *Id.* at 1311 (characterizing actions by district court as "improper" and "procedural error"). For a further discussion of the district court's analysis, see *supra* notes 71–73, 75, and 77–80 and accompanying text.

82. *See id.* at 1311–12 (upholding decision of district court "despite [the] finding of *Tapia* error"). For a further discussion of how Vandergrift failed to meet the burden to prove procedural error, see *infra* notes 101–03 and accompanying text.

fact apply to revocation of supervised release hearings.[83] Next, the court rejected other circuits' interpretations of *Tapia*, ultimately finding that any consideration of rehabilitation constitutes *Tapia* error.[84]

1. *A Point of Agreement: Like Its Sister Circuits, the Eleventh Circuit Applies* Tapia *to Revocation Hearings*

In *Vandergrift*, the court was presented with the novel issue of whether *Tapia* applied to revocation of supervised release hearings.[85] In making its determination, the Eleventh Circuit relied on its sister circuits' analyses of the Act and their previous determinations that *Tapia* applied to sentencing following revocation of supervised release.[86] While the Eleventh Circuit did not adopt the other circuits' methods of detecting *Tapia* error, the court was persuaded by their rationales in deciding that *Tapia* applied to Vandergrift's revocation hearing for two reasons.[87]

First, relying on section 3582(a), the Court in *Tapia* "made clear that prison is not to be viewed by sentencing judges as rehabilitative."[88] Section 3582(a) of the Act states Congress's position that rehabilitation should not be the goal of imprisonment.[89] This same provision instructs judges to "consider the factors set forth in section 3553(a)" when deciding a term of imprisonment.[90] Because section 3553(a) applies to sentencing

83. For a further discussion of the court's decision to apply *Tapia* to revocation hearings, see *infra* notes 85–94 and accompanying text.

84. *See Vandergrift*, 754 F.3d at 1310 (rejecting tests used by other circuits and concluding that *Tapia* error occurs when judge considers rehabilitation at sentencing phase). For a further discussion of the Eleventh Circuit's analysis, see *infra* notes 95–103 and accompanying text.

85. *See Vandergrift*, 754 F.3d at 1309 (recognizing different fact pattern in *Vandergrift* than in *Tapia*). It is important to distinguish that *Tapia* dealt with initial sentencing, whereas *Vandergrift* dealt with revocation of supervised release. *See* Tapia v. United States, 131 S. Ct. 2382, 2385 (2011) (addressing question of whether courts may consider rehabilitation when "imposing or lengthening a prison term").

86. *See Vandergrift*, 754 F.3d at 1308–09 (referring to sister circuits that previously determined *Tapia* applies to revocation of supervised release hearings). For a complete list of circuits the Eleventh Circuit cited to, see *infra* note 93.

87. *See Vandergrift*, 754 F.3d at 1309 ("This court has not decided whether *Tapia* applies in the context of resentencing upon the revocation of supervised release. But we agree with our sister circuits and today hold that it does.").

88. *Id.* (describing how *Tapia* abrogated precedential case, *United States v. Brown*, 224 F.3d 1237, 1240 (11th Cir. 2000)); *see also Tapia*, 131 S. Ct. at 2389 ("Under standard rules of grammar, § 3582(a) says: A sentencing judge shall recognize that imprisonment is not appropriate to promote rehabilitation . . . .").

89. *See* 18 U.S.C. § 3582(a) (2012) ("[R]ecognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.").

90. *See id.* ("The court . . . in determining the length of the term, shall consider the factors set forth in section 3553(a) . . . ."); *see also id.* § 3553(a) (listing "[f]actors to be considered in imposing a sentence"). The judge considers:

> [T]he need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and

following revocation of supervised release, courts reason that section 3582 extends to revocation hearings as well.[91] Second, when section 3582 states, "imprisonment is not an appropriate means of promoting correction and rehabilitation," courts have determined that this language does not restrict application only to sentences following an original conviction.[92]

In applying this same analysis, six circuits have held that *Tapia* applies to revocation of supervised release hearings.[93] In similar fashion, the Eleventh Circuit found *Tapia* governed over the circumstances presented in *Vandergrift*.[94]

2. *Forging Its Own Path: The Court Rejects Sister Circuits'* Tapia *Interpretations*

The Eleventh Circuit analyzed the approaches taken by other circuits to measure *Tapia* error before rejecting them and creating its own test.[95]

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Id. § 3553(a)(2).

91. *See, e.g.*, United States v. Garza, 706 F.3d 655, 658 (5th Cir. 2013) ("[T]he phrasing in § 3582(a) that prohibits consideration of rehabilitative needs applies to a prison term imposed upon revocation of supervised release.").

92. *See* 18 U.S.C. § 3582(a); *see also Garza*, 706 F.3d at 659 (asserting that *Tapia*'s holding applies "where actual incarceration is involved").

93. *See* United States v. Lifshitz, 714 F.3d 146, 150 (2d Cir. 2013) (arguing that if rehabilitation is not proper for "initial sentencing" then "logic requires extending such reasoning to sentencing on revocation of supervised release"); *Garza*, 706 F.3d at 657 (allowing *Tapia* to apply to revocation hearings after government's concession); United States v. Bennett, 698 F.3d 194, 197–98 (4th Cir. 2012) (relying on language in Sentencing Reform Act and logic behind *Tapia* decision to apply *Tapia* to "revocation context too"); United States v. Mendiola, 696 F.3d 1033, 1041–42 (10th Cir. 2012) (relying on Judge Holloway's logic in another Tenth Circuit case where he "argued '[t]he Supreme Court's reliance on Congress's declination to grant judicial authority to control a prisoner's rehabilitation extinguishes any . . . distinction between [initial sentencing under] § 3582 and [revocation sentencing under] § 3583'" and agreeing with his logic that *Tapia* applied to revocation hearings (alterations in original) (quoting United States v. Collins, 461 F. App'x 807, 812 (10th Cir. 2012) (Holloway, J., dissenting))); United States v. Taylor, 679 F.3d 1005, 1006–07 (8th Cir. 2012) (relying on Justice Souter's explanation "in *United States v. Molignaro*, there is no 'hint in the Court's exposition' that the prohibition on imposing or lengthening a sentence for rehabilitation purposes would not extend to 'resentencing after violation of release conditions'" (citation omitted) (quoting United States v. Molignaro, 649 F.3d 1, 5 (1st Cir. 2011))); *Molignaro*, 649 F.3d at 4–5 (rejecting parsing of Act's language and concluding *Tapia* applies to revocation hearings).

94. *See* United States v. Vandergrift, 754 F.3d 1303, 1309 (11th Cir. 2014) (establishing that *Tapia* will govern court's decision and apply to Vandergrift's revocation of supervised release hearing).

95. *See id.* at 1309–11 & n.5 ("We believe our sister Circuits have taken an unnecessarily narrow view of *Tapia* for the reasons discussed throughout."). For a full analysis of the other circuits' holdings, see *supra* notes 60–63 and accompanying text.

The court decided, "*Tapia* error occurs where the district court *considers* rehabilitation when crafting a sentence of imprisonment."[96]

To determine whether the district court considered rehabilitation, the Eleventh Circuit examined the sentencing transcript from the revocation hearing.[97] At the hearing, most notably, the district court judge stated:

> I've also got to consider *what's best for the defendant* as a factor in the equation. . . . [V]ocational training for a period of time in the prison system not only would benefit the public . . . but *could also help save the defendant's life*. . . . [T]he sentence is being imposed in excess of the guidelines at 24 months . . . *for the benefit of the defendant*.[98]

The Eleventh Circuit found that this language demonstrated that the judge considered rehabilitative needs in determining Vandergrift's sentence.[99] Therefore, the Eleventh Circuit concluded that the district court judge committed *Tapia* error.[100]

Finding *Tapia* error was just the first step in the Eleventh Circuit's review of the district court's sentence.[101] The next step in its analysis re-

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96. *Id.* at 1310 (providing Eleventh Circuit's bright-line test).

97. *See id.* at 1311 (discussing how Eleventh Circuit reviewed district court's sentence).

98. *Id.* at 1306, 1311 (last alteration in original) (emphases added) (quoting sentencing judge) (illustrating what district court judge said that lead Eleventh Circuit to conclude judge considered rehabilitation).

99. *See id.* at 1311 ("As detailed above, the sentencing transcript demonstrates that the district court considered how prison would benefit Vandergrift and how incarceration might save his life when it imposed the 24-month sentence.").

100. *Id.* (determining "district court did exactly what *Tapia* . . . instruct[s] district courts not to do"). The court went on to explain that this holding does not bar judges from "discussing" or "address[ing]" rehabilitative needs. *Id.* (detailing scope of test). Rather, it forbids judges from *only* considering rehabilitative needs when crafting a sentence. *Id.* at 1311–12 (recognizing that consideration of rehabilitation is not completely barred from revocation hearings). The Eleventh Circuit believed the district court did not just discuss or address rehabilitative needs, but that "prison's rehabilitative benefits were considered in the course of deciding whether or not Vandergrift should be sentenced to prison at all." *Id.* at 1311.

101. *See id.* at 1312 (announcing Eleventh Circuit's analysis did not end after finding *Tapia* error). Typically, an appellate court reviewing a district court's sentence post-revocation of supervised release looks to the reasonableness of the revocation to determine if the district court abused its discretion. *See id.* at 1307 (presenting overarching standard of review for Vandergrift's case). However, for this case, the court looked to see if the district court's decision constituted plain error because of Vandergrift's untimely objection to his sentence. *See id.* (citing Eleventh Circuit precedent which does not allow defendants to raise objection on appeal if they had opportunity to raise objection at trial).

The analysis for determining plain error is threefold: the plaintiff "must demonstrate (1) that the district court erred; (2) that the error was 'plain'; and (3) that the error 'affect[ed his] substantial rights.'" *Id.* (alteration in original) (quoting United States v. Olano, 507 U.S. 725, 732, 734 (1993)) (summarizing standard of review Eleventh Circuit used). Provided all three of these elements are present,

quired Vandergrift to prove that the error affected his substantial rights or, in other words, "'affected the outcome of the district court proceedings.'"[102] Vandergrift could not meet this burden, and therefore, despite the *Tapia* error, the Eleventh Circuit affirmed the district court's holding.[103]

IV. CRITICAL ANALYSIS: SENTENCING COMMISSION, NOT JUDGES, SHOULD SAY "YES" TO REHABILITATION

In *Vandergrift*, the Eleventh Circuit adhered to the objectives of the Sentencing Reform Act and provided a more definitive framework for the legal profession.[104] *Tapia* sparked a wide range of interpretations, which spoiled the goal of sentencing uniformity and fostered disparate treatment of offenders throughout the United States.[105] In *Vandergrift*, the Eleventh Circuit provided more equal treatment for offenders.[106]

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the appellate court then looks to see whether "'the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (alteration in original) (quoting United States v. Cotton, 535 U.S. 625, 631 (2002)) (elaborating on plain error analysis).

Here, the Eleventh Circuit determined that the district court erred and assumed the error was plain. *See id.* at 1312 (determining Vandergrift met first two prongs of plain error analysis). The only other requirement was for Vandergrift to show that it affected his substantial rights. *See id.* (stating Vandergrift had to prove last prong of plain error analysis).

102. *See id.* (quoting *Olano*, 507 U.S. at 734) (providing standard of review to measure if plain error affected substantial rights).

103. *See id.* ("Vandergrift has failed to show that his sentence would have been different but for the court's consideration of rehabilitation."). Looking to the role the rehabilitation consideration played, the Eleventh Circuit concluded it "'constituted only a minor fragment of the court's reasoning'" because "[t]he court's primary considerations were for the safety of the public and deterring others from similar conduct." *Id.* (quoting United States v. Bennett, 698 F.3d 194, 201 (4th Cir. 2012)) (considering role rehabilitation played in district court's decision and declining to find error affected substantial rights).

104. For a complete discussion of the objectives of the Sentencing Reform Act, see *supra* notes 38–51 and accompanying text. For a further discussion of the legal profession's need for a bright-line test, see *infra* notes 130–34 and accompanying text.

105. For a discussion of *Tapia*'s varying interpretations, see *supra* notes 52–66 and accompanying text. *Compare* Tapia v. United States, 131 S. Ct. 2382, 2385 (2011) (overruling district court's sentence of fifty-one months because court improperly considered rehabilitation), *with* United States v. Gilliard, 671 F.3d 255, 257–60 (2d Cir. 2012) (declining to find error with district court's sentence of ninety-six months because there was no explicit link in opinion, despite judge stating: "[I]t's important . . . that you be sentenced in such a way that you . . . have access to facilities and care that will enable you to deal with these problems. So that's something, obviously, I take very, very seriously, and will, in fashioning my sentence.").

106. *See Vandergrift*, 754 F.3d at 1310 ("From this language and rationale, it is clear that *Tapia* prohibits *any consideration* of rehabilitation when determining whether to impose or lengthen a sentence of imprisonment." (emphasis added)). The decision treats offenders equally in the sense that the Eleventh Circuit created

The Eleventh Circuit's decision is properly decided given the lack of authority delegated to judges to ensure defendants *actually participate* in rehabilitative services.[107] While acknowledging the importance of the limitations restricting federal judges from considering rehabilitation in sentencing, there is persuasive evidence showing that rehabilitative programs effectively reduce recidivism rates.[108] As such, rehabilitation should not be overlooked as a valid solution to overcrowding in America's prisons.[109]

A. *Judges' Hands Are Tied: Statutory Authority Says "No, No, No" to Judges' Consideration of Rehabilitation*

The Eleventh Circuit properly decided *Vandergrift* and provided a more appropriate framework that other circuits should adopt for two reasons.[110] First, the Sentencing Reform Act makes very clear that Congress did not intend for judges to consider rehabilitation when deciding terms of imprisonment.[111] Second, the Bureau of Prisons, not sentencing judges, has the sole power to actually *place* a defendant into a prison rehabilitation program.[112]

1. *Line in the Sand: Congress Purposely Chose Not to Grant Judges Authority to Consider Rehabilitation*

The Sentencing Reform Act, enacted to curtail judicial discretion, clearly allocates specific authority to sentencing judges.[113] As a result, courts properly concluded that, in the absence of such explicit statutory authority permitting judges to consider rehabilitation when imposing or lengthening a prison sentence, sentencing judges did not have that

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a bright-line test that provides a more straightforward, consistent framework for courts to use. *See id.*

107. For a full analysis of the statutory authority and legislative history, see *infra* notes 113–29 and accompanying text.

108. For a full discussion regarding the latest studies on rehabilitation's relationship to recidivism rates, see *infra* notes 139–53 and accompanying text.

109. For a full discussion advocating rehabilitation as a solution to the current overcrowded prison problem, see *infra* notes 154–72 and accompanying text.

110. For a complete discussion of the two reasons, see *infra* notes 113–29 and accompanying text.

111. For a full discussion of the statutory authority, see *infra* notes 113–22 and accompanying text.

112. For a full discussion regarding the statutory authority afforded to the Bureau of Prisons, see *infra* notes 123–29 and accompanying text.

113. *See* 18 U.S.C. § 3582 (2012) (stating, very clearly, powers judges have when creating sentence of imprisonment); *see also* Tapia v. United States, 131 S. Ct. 2382, 2390 (2011) (explaining that Congress was very clear when drafting Sentencing Reform Act); Stith & Koh, *supra* note 28, at 243 (theorizing Congress had to be strict when granting judges power in order to limit likelihood they would rely on their discretion when sentencing).

power.[114] Both the unambiguous statutory language and legislative history of the Act confirm this conclusion.[115]

First, Congress explicitly provided factors judges *should consider* when crafting sentences.[116] An accompanying provision adds a limitation, stating, "[i]mprisonment is not an appropriate means of . . . rehabilitation."[117] Congress had the option, but chose not to embed consideration of rehabilitation within the judges' list of enumerated powers.[118]

The relevant Senate report further clarifies the role Congress wanted rehabilitation to have in sentencing.[119] Instead of completely doing away with rehabilitation, Congress limited the use of rehabilitation to deciding the *type* of punishment courts could hand down; examples of such punishments include supervised release, parole, and fines.[120] The report states,

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114. *See Tapia*, 131 S. Ct. at 2390 (commenting on "statutory silence [and] the absence of any provision granting courts the power to ensure that offenders participate in prison rehabilitation programs"). The *Tapia* Court saw this silence as proof of Congress's outright decision not to give judges this power. *See id.* ("For when Congress wanted sentencing courts to take account of rehabilitative needs, it gave courts the authority to direct appropriate treatment for offenders.").

115. For a full discussion of the statutory authority and legislative history, see *infra* notes 116–22 and accompanying text.

116. *See* 18 U.S.C. § 3553(a) (providing "factors to be considered in imposing sentence"). The statute instructs judges to consider:

> (2) the need for sentence imposed—(A) to reflect the seriousness of the offense . . . (B) to afford adequate deterrence to criminal conduct, (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Id.

117. *See id.* § 3582(a) ("The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.*" (emphasis added)); *see also Tapia*, 131 S. Ct. at 2389–90 (summarizing key provisions of Sentencing Reform Act, while noting Congress's express disapproval of using imprisonment as means of rehabilitation).

118. *See Tapia*, 131 S. Ct. at 2390 ("If Congress had similarly meant to allow courts to base prison terms on offenders' rehabilitative needs, it would have given courts the capacity to ensure that offenders participate in prison correctional programs."). The *Tapia* Court saw this decision to not include rehabilitation as a deliberate, significant sign of congressional intent. *See id.* (noting Congress was very clear about when judges *could* take rehabilitative needs into account and therefore in absence of such authority, judges must not have that power).

119. *See generally* S. REP. NO. 98-225 (1983), *available at* http://www.fd.org/docs/select-topics—sentencing/SRA-Leg-History.pdf (explaining role of rehabilitation following Sentencing Reform Act).

120. *See Tapia*, 131 S. Ct. at 2390 ("[T]he [Sentencing Reform Act] instructs courts, in deciding whether to impose probation or supervised release, to consider whether an offender could benefit from training and treatment programs."). The *Tapia* Court called this "statutory silence" "[e]qually illuminating." *Id.* (commenting on congressional silence regarding allowing consideration of rehabilitation at sentencing and suggesting it indicated lack of congressional intent to give judges this power).

"the purpose of rehabilitation is still important in determining whether a sanction *other than a term of imprisonment* is appropriate in a particular case."[121]

Therefore, based on the statutory language and legislative history of the Act, the Eleventh Circuit correctly established a bright-line test determining that *Tapia* error occurs whenever judges consider rehabilitation while creating a sentence of imprisonment.[122]

2. *Blockade to Judicial Power: The Bureau of Prisons Has Authority Under the Act to Determine Place of Imprisonment*

A second statutory provision also supports the Eleventh Circuit's decision, by allocating the power to place prisoners in rehabilitative programs to the Bureau of Prisons (Bureau).[123] The provision states, "[a]ny order, recommendation, or request by a sentencing court . . . shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person."[124] This language means that while judges have the ability to sentence offenders, once sentenced, offenders are placed within the Bureau's custody.[125]

The Bureau then has the power to choose the "place of the prisoner's imprisonment."[126] Therefore, any judicial order for an offender to receive rehabilitative services does not actually mean the offender will re-

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121. S. REP. NO. 98-225, at 76–77 (emphasis added); *see also Tapia*, 131 S. Ct. at 2391 ("Instead [of completely eliminating rehabilitation], Congress barred courts from considering rehabilitation in imposing prison terms, but not in ordering other kinds of sentences." (citations omitted)).

122. *See* United States v. Vandergrift, 754 F.3d 1303, 1310 (11th Cir. 2014) (concluding decision was "faithful to *Tapia*'s reasoning" and therefore was appropriate framework).

123. *See* 18 U.S.C. § 3621 (2012) (granting Bureau of Prisons authority over placement of prisoners); *see also* Borges, *supra* note 28, at 173 ("The [Bureau of Prisons'] most basic responsibility is incarcerating sentenced federal offenders.").

124. *See* 18 U.S.C. § 3621(b) (authorizing Bureau to make final determination on prisoners' placements in rehabilitation services).

125. *See id.* § 3621(a) ("A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.").

126. *See id.* § 3621(b) ("The Bureau of Prisons shall designate the place of the prisoner's imprisonment."). When determining placement, the Bureau considers:

> (1) the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the court that imposed the sentence—(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or (B) recommending a type of penal or correctional facility as appropriate; and (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

Id.

ceive said services.[127] However, judges' recommendations have been "almost always honored by [the Bureau]."[128] Nonetheless, these blatant limitations support the decision not to have judges consider rehabilitation in sentencing because judges cannot guarantee offenders will actually be placed in the programs.[129]

3. *Although It Deepens the Circuit Split, the Eleventh Circuit's Test Is Necessary to Provide Courts with a Clear Framework*

Aside from honoring the above statutory analysis, the Eleventh Circuit's test provides a bright-line rule for lower courts.[130] Other circuit approaches are too imprecise, lenient, and suggest judges are taking rehabilitation into consideration.[131] Those judges avoid the *Tapia* holding by not explicitly writing rehabilitation language into their opinions.[132] Without a proper framework or mode of analysis, circuit courts are at a loss to determine what constitutes considering a defendant's rehabilitative

127. *See* Tapia v. United States, 131 S. Ct. 2382, 2390–91 (2011) ("A sentencing court can *recommend* that the [Bureau of Prisons] place an offender in a particular facility or program."). An example of an offender being sentenced to receive rehabilitative services, but not receiving them, is Tapia, the defendant in *Tapia v. United States*. *See id.* at 2391 ("[Tapia] was not admitted to RDAP [the Bureau of Prison's Rehabilitation Program], nor even placed in the prison recommended by the district court." (first alteration in original)). The Supreme Court in *Tapia* thought this "incapacity speaks volumes [ ] indicat[ing] that Congress did not intend that courts consider offenders' rehabilitative needs when imposing prison sentences." *Id.* (reasoning lack of congressional authority illustrated that judges lacked power to consider rehabilitation).

The defendant in *Tapia* is not the only offender to not be placed in a prison program. *See* Avila, *supra* note 35, at 429 (referring to *United States v. Story*, 635 F.3d 1241 (10th Cir. 2011), where defendants "were never enrolled in the programs for which their sentences were lengthened" and highlighting again "[i]t is up to prison administrators to make these programs available").

128. *See* Borges, *supra* note 28, at 142, 173 ("The [Bureau of Prisons] places great emphasis on the judicial recommendation, and it is reported that the [Bureau of Prisons] complies with judicial recommendations about eighty percent of the time it receives them . . . ."); *see also* U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 12 (2014), *available at* http://www.bop.gov/resources/publications.jsp ("While every effort is made to comply with the court's recommendation, conflict with [Bureau of Prisons] policy and sound correctional management may prevent honoring the court's recommendation.").

129. *See Tapia*, 131 S. Ct. at 2390–91 (highlighting importance of statutory authority in determining Supreme Court's prohibition of judges' consideration of rehabilitative services).

130. *See* United States v. Vandergrift, 754 F.3d 1303, 1310 (11th Cir. 2014) (creating bright-line test by declining to "limit *Tapia* to [certain] situations").

131. *See, e.g.*, United States v. Gilliard, 671 F.3d 255, 257 (2d Cir. 2012) (citing defendant's substance abuse problems and need for "facilities and care" when determining defendant's sentence).

132. *See id.* at 260 (concluding judge relied on "other permissible reasons" and finding no explicit link to rehabilitation). There are other examples of courts skirting the *Tapia* holding. *See, e.g.*, United States v. Lifshitz, 714 F.3d 146 (2d Cir. 2013); United States v. Garza, 706 F.3d 655 (5th Cir. 2013).

needs.[133] The Eleventh Circuit answered the call by providing a framework that would benefit other courts as well as prisoners.[134]

B. *Solution to the Gridlock?*

While this Note agrees with the Eleventh Circuit's ultimate decision, it urges the circuit courts, and more specifically the Sentencing Commission, to reconsider their views on rehabilitation.[135] An upward trend in prison population and frustration with the lack of results discredited the rehabilitation model in the 1980s.[136] Today, as prison populations and recidivism rates continue to rise, both state and federal officials are rethinking their focus on retribution and instead giving the rehabilitation model a second glance.[137] New studies showcasing the positive effects of rehabilitation and the successful implementation of rehabilitative services in some states make the rehabilitation model worth reconsidering.[138]

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133. This confusion as to what constitutes considering a defendant's rehabilitative needs can be seen in the interpretations of *Tapia*. *See supra* notes 62–66 and accompanying text; *see also* Chanenson, *supra* note 27, at 224 (commenting that inconsistency amongst circuits in interpreting guidelines indicates need for better framework).

134. *See generally Vandergrift*, 754 F.3d 1303 (providing framework that requires courts to examine whether district court judge considered rehabilitation in determining an imprisonment sentence).

135. This Note specifically highlights the Sentencing Commission because it has the statutory obligation to amend the Guidelines. *See* 28 U.S.C. § 994(o) (2012) (establishing role of Sentencing Commission to be diligent in administering changes to sentencing process); Rita v. United States, 551 U.S. 338, 350–51 (2007) (explaining Commission's duty to modify Sentencing Guidelines as needed); *see also* Patch, *supra* note 14, at 190 ("Improvements in prison-based rehabilitation programs and advances in the field of criminology demand a revision of the Sentencing Guidelines" because "[t]he Sentencing Reform Act requires the Sentencing Commission to 'periodically . . . review and revise [the Sentencing Guidelines] in consideration of comments and data coming to its attention.'" (second and third alterations in original) (quoting 28 U.S.C. § 994(o) (2006))).

136. *See* S. REP. NO. 98-225, at 40 (1983) ("We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated."). For an analysis of the discussion that brought about rehabilitation's decline, see *supra* notes 33–37 and accompanying text.

137. *See* Flatow, *supra* note 7 (reporting "federal prison population has ballooned 790 percent since 1980," indicating need of reform). For an example of the federal government's actions in rethinking the Guidelines, see *id.* ("[P]ublic officials—most prominently Attorney General Eric Holder—are now acknowledging that 'too many Americans go to too many prisons for far too long . . . .'").

In 2005, "the Justice Kennedy Commission reported that 'many prosecutors, judges, defense counsel and legislators who have differing attitudes toward crime and punishment share a feeling that more incarceration and longer sentences are not always in the public interest.'" *See* SECOND CHANCES, *supra* note 6, at 10. For a full discussion on the state's efforts, see *infra* notes 154–72 and accompanying text.

138. For a full discussion of the new look at the rehabilitation model, see *infra* notes 154–72 and accompanying text.

1. *Rehabilitating the Rehabilitation Model*

One of the main reasons why the rehabilitation model was discredited was because it was difficult to measure the effects rehabilitation had on prisoners.[139] Today, evidence-based research and meta-analysis of rehabilitation programs can provide more accurate conclusions about the effects of rehabilitation.[140] Some social scientists have since concluded that rehabilitative programs can reduce recidivism rates.[141] These findings, coupled with the prisoners' need to receive rehabilitative services, provide a strong argument for reconsidering the rehabilitation model.[142]

The benefit of a meta-analysis is that it allows social scientists to determine certain characteristics that make rehabilitation programs effective at reducing recidivism rates.[143] While studies identify numerous principles

139. For a discussion regarding the decline of the rehabilitation model, see *supra* notes 33–37 and accompanying text.

140. Evidence-based research is a type of research that "prov[es] the effectiveness of an approach" by comparing those treated versus those non-treated (or in control group). *See* Little et al., *supra* note 4, at 1 (explaining evidence-based research in context of measuring recidivism rates). Meta-analysis "is a statistical combination of the results from multiple studies to provide a more comprehensive assessment of the outcomes in that area of research." Avila, *supra* note 35, at 425 & n.226 (providing definition of meta-analysis while explaining that "[d]etermining the rehabilitation of prisoners with reasonable accuracy is not impossible" due to meta-analysis); *see also* Patch, *supra* note 14, at 190–91 ("Although the Sentencing Reform Act was drafted with skepticism toward rehabilitation, numerous studies indicate that prison-based rehabilitation programs have been successful when correctly implemented.").

141. *See* Patch, *supra* note 14, at 187 (citing studies that determined "rehabilitation programs do in fact have a significant impact on recidivism"); *Rehabilitation—Does Correctional Rehabilitation Work?*, JRANK.ORG, http://law.jrank.org/pages/1936/Rehabilitation-Does-correctional-rehabilitation-work.html (last visited Feb. 6, 2015) [hereinafter *Rehabilitation*] ("After considerable research, the evidence is clear: these deterrence-oriented programs do not work to reduce recidivism.").

It is particularly significant that one leading critic of the rehabilitation model retracted his earlier conclusion that the rehabilitation model did not work. *See* Patch, *supra* note 14, at 186 n.209 (citing critic's retraction that stated "'[n]ew evidence . . . leads me to reject my original conclusion . . . .'" (second and third alterations in original) (quoting Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979))). Further, previous studies have been declared "misleading and methodologically unsound." *Id.* at 186 (noting weaknesses in previous conclusion that rehabilitation was ineffective).

142. For a further discussion of prisoners' need for rehabilitative services, see *infra* notes 148–51 and accompanying text.

143. *See Rehabilitation*, *supra* note 141 (recognizing those who participated in "rehabilitation programs that conformed to the *principles of effective intervention*" had significantly lower recidivism rates than control group); *see also* DORIS LAYTON MACKENZIE, NAT'L CRIMINAL JUSTICE REFERENCE CTR., SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 29–32 (July 2001), *available at* https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf (summarizing characteristics of successful rehabilitation programs that reduce recidivism rates); Patch, *supra* note 14, at 188–89 (advocating three characteristics that contribute to rehabilitation program's successfulness).

or characteristics, three are common among successful programs.[144] First, the program needs to identify and focus its attention on "high-risk offenders."[145] Second, the program should aim to "reinforce prosocial attitudes and behavior[s]."[146] Third, the program should be adjusted to accommodate each offender's learning capabilities.[147]

In addition to the success of the rehabilitation model, it is equally important to look at prisoners' needs for rehabilitation.[148] One report explained that prisoners do not have the skills necessary to be successful after leaving prison, which ultimately leads to their return.[149] For instance, "forty percent of inmates are functionally illiterate," compared to twenty-one percent of the United States population.[150] By participating in the successful rehabilitative programs described above, prisoners, once released, should have better opportunities and hopefully will not return to prison.[151]

The Sentencing Commission should fulfill its statutory obligations under the Sentencing Reform Act and use this new research as a reason to amend the Guidelines to incorporate rehabilitative services.[152] Certain states have incorporated the rehabilitation model into sentencing practices and serve as examples of the success that could be achieved in other states.[153]

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144. For a complete list of effective principles, see MACKENZIE, *supra* note 143, at 25; Patch, *supra* note 14, at 188–89; *Rehabilitation*, *supra* note 141.

145. *See* Patch, *supra* note 14, at 188 ("[H]igher levels of treatment should be directed toward high-risk offenders . . . .").

146. *See Rehabilitation*, *supra* note 141 (noting second goal of rehabilitation).

147. *See* MACKENZIE, *supra* note 143, at 126 (including factors such as IQ levels, learning disabilities, etc.).

148. *See* SECOND CHANCES, *supra* note 6, at 61 (urging renewed commitment to defendants' rehabilitative needs). Former President George W. Bush commented, "[w]e know from long experience that if [the released prisoners] can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison. . . . America is the land of second chance—and when the gates of the prison open, the path ahead should lead to a better life." *Id.* (advocating need for defendants to receive services they need to avoid returning to prison).

149. *See* Stravinskas, *supra* note 8, at 3 (reasoning that offenders' lack of skills, particularly in employment arena, is directly related to why they return to prison).

150. *Id.* at 3–6 (explaining need for prisoners to receive some type of training while in prison and why these needs contribute so much to recidivism rates). "Without the tools to build a successful life and with the stress of trying to 'make ends meet,' many prisoners resort to crime." *Id.* at 3 (highlighting importance of providing support to prisoners when they are in prison, in hopes of reducing recidivism rates).

151. *See* SECOND CHANCES, *supra* note 6, at 27 (explaining importance of training and rehabilitative programs in prison because "those who are unable to get a job are three times more likely to return to prison").

152. *See* 28 U.S.C. § 994(o) (2012); *see also supra* note 135.

153. For a further discussion of the success of these programs, see *infra* notes 154–72 and accompanying text.

2. *A Second Chance for Rehabilitation: Will Pennsylvania and Delaware Follow in New Jersey's Footsteps?*

Giving the rehabilitation model a second chance paid off in New Jersey, a state seemingly more committed to reducing recidivism rates than its neighbors, Pennsylvania and Delaware.[154] New Jersey's success is due to the current administration's belief in the rehabilitation model and the availability of programs statewide.[155] Based on their staggering prison budgets, it would behoove Pennsylvania and Delaware to follow New Jersey's lead.[156]

In recent years, Pennsylvania has focused its time and budget on erecting and maintaining halfway houses, also known as "community correction centers," throughout the state.[157] In terms of recidivism rates,

154. For example, compare New Jersey's recidivism rate of 42.7%, with Pennsylvania's at 59.9% and Delaware's at 75%. *See* New Report, *supra* note 8 (reporting New Jersey's recidivism rate); Paula Reed Ward, *Pennsylvania Will Offer Incentives to Combat Recidivism*, PITTSBURGH POST-GAZETTE (Mar. 1, 2013, 12:00 AM), http://www.post-gazette.com/hp_mobile/2013/03/01/Pennsylvania-will-offer-incentives-to-combat-recidivism/stories/201303010145 (reporting Pennsylvania's recidivism rate); DEL. CRIMINAL JUSTICE COUNCIL STATISTICAL ANALYSIS CTR., RECIDIVISM IN DELAWARE: AN ANALYSIS OF PRISONERS RELEASED IN 2008 AND 2009 (July 2013), *available at* http://wilmhope.org/wp-content/uploads/2013/07/Recidivism-in-Delaware.pdf [hereinafter RECIDIVISM IN DELAWARE] (reporting Delaware's recidivism rate). *See generally* PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 10–11 (Apr. 2011), *available at* http://www.michigan.gov/documents/corrections/Pew_Report_State_of_Recidivism_350337_7.pdf (comparing states' recidivism rates); Press Release, Bureau of Justice Statistics, 3 in 4 Former Prisoners in 30 States Arrested Within 5 Years of Release (Apr. 22, 2014), *available at* http://www.bjs.gov/content/pub/press/rprts05p0510pr.cfm (comparing recidivism rates among different states, offenses, and races).

155. *See* New Report, *supra* note 8 (stating reducing recidivism is priority of Governor Chris Christie's administration); *see also Christie Commits to Inmate Education, Rehabilitation*, CORRECTIONAL NEWS (May 14, 2014), http://www.correctionalnews.com/articles/2014/05/14/christie-commits-inmate-education-rehabilitation (reiterating Governor Christie's focus on rehabilitation in New Jersey).

156. Each state has a staggering prison expenditure that would benefit from a lower prison population. *See The Price of Prisons: Pennsylvania*, VERA INST. OF JUSTICE, CTR. ON SENT'G & CORRS. (Jan. 2012), http://www.vera.org/files/price-of-prisons-pennsylvania-fact-sheet.pdf ("In Fiscal Year 2010, the Pennsylvania Department of Corrections (PADOC) had almost 1.6 billion in prison expenditures."); *see also The Price of Prisons: Delaware*, VERA INST. OF JUSTICE, CTR. ON SENT'G & CORRS. (Jan. 2012), http://www.vera.org/files/price-of-prisons-delaware-fact-sheet.pdf ("In Fiscal Year 2010, the Delaware Department of Corrections had 190.4 million in prison expenditures.").

157. *See* Sam Dolnick, *Pennsylvania Study Finds Halfway Houses Don't Reduce Recidivism*, N.Y. TIMES (Mar. 24, 2013), http://www.nytimes.com/2013/03/25/nyregion/pennsylvania-study-finds-halfway-houses-dont-reduce-recidivism.html?pagewanted=all&_r=0 (reporting Pennsylvania has thirty-eight halfway houses that "cost[ ] more than $110 million annually"). This effort was supposed to be a big push for Pennsylvania to lower recidivism rates, however, based on the current studies, it appears Pennsylvania has more work to do. *See id.* (indicating need for more reform in Pennsylvania after recidivism rates remain unchanged). One member of Community Education's board of directors even commented, "'We looked at quality indicators in our study. They were all poor. There were almost

sending offenders to halfway houses before release has proved mildly successful, with no real effect on recidivism rates.[158] A recent study by the Pennsylvania Department of Corrections "found that [sixty-seven] percent of inmates sent to halfway houses were rearrested or sent back to prison within three years."[159] This result is disappointing, especially considering how much money Pennsylvania has dedicated to this cause in the recent past.[160] As a result, Pennsylvania is now offering financial incentives in order to improve performance.[161]

Delaware is one of six states that has a "unified correctional system," which means the state (through the Delaware Department of Corrections) operates the entire prison system.[162] Officials in Delaware only recently realized the problematic effect that the growing prison population has on its state's budget.[163] In response, Delaware commissioned its first report

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no positive results.'" *Id.* (quoting Professor of Criminology, Edward Latessa) (illustrating Pennsylvania's need to reform its current rehabilitation programs).

158. *See* PA. DEP'T OF CORRS., RECIDIVISM REPORT 2013 (2013), *available at* https://www.portal.state.pa.us/portal/server.pt/document/1324154/2013_pa_doc_recidivism_report_pdf (providing results of recidivism research which showed "mixed picture" of success in reducing recidivism rates). The current administration acknowledges "we have a lot of work to do to improve outcomes in our [community corrections center] system." *Id.* (agreeing with other reports that halfway houses need reform to better reduce recidivism rates). For more information about community correction centers, see *What Is a Community Corrections Center?*, 69 PAPPC J., Spring 2012, at 5, *available at* http://www.pappc.org/docs/Feb%202012%20Journal%20FINAL2%20lo%20res.pdf (explaining halfway houses are referred to as community correction centers).

159. *See* Dolnick, *supra* note 157 (reporting "[sixty-seven] percent of inmates sent to halfway houses were rearrested or sent back to prison within three years, compared with [sixty] percent of inmates who were released to the streets"); *see also* Editorial, *Halfway Back to Society*, N.Y. TIMES (Mar. 29, 2014), http://www.nytimes.com/2014/03/30/opinion/sunday/halfway-back-to-society.html?_r=1 ("[I]nmates sent to halfway houses were actually *more likely* to reoffend than those released directly into society . . . ." (emphasis added)).

160. *See* Dolnick, *supra* note 157 (noting halfway house programs cost Pennsylvania approximately "$110 million annually").

161. *See* Ward, *supra* note 154 (providing details of Pennsylvania's new plan to incentivize rehabilitation programs to reduce levels of recidivism). According to the Pennsylvania Department of Corrections, "[u]sing the recidivism report as a baseline, the facilities that win contracts must meet at least the minimum recidivism rate—60 percent—to continue their relationship with the state." *Id.* (illustrating Pennsylvania's new strategy to incentivize rehabilitation programs in order to help reduce recidivism rates).

162. *See* RECIDIVISM IN DELAWARE, *supra* note 154, at iv (explaining how Delaware's prison system differs from those across United States). Each prison is run by the State, compared to other states that choose to have county agencies run prisons. *See id.*

163. *See* Cris Barrish, *Study: 8 in 10 Released Inmates Return to Del. Prisons*, WILMINGTON DEL. NEWS J. (July 31, 2013, 4:16 PM), *available at* http://www.usatoday.com/story/news/nation/2013/07/31/delaware-prison-recidivism/2603821/ (explaining that new research on Delaware's recidivism rates "was a necessary initial step to evaluating the effectiveness of the state's justice system").

analyzing prison populations and recidivism rates throughout the state.[164] This report found that slightly more than seventy-five percent of those released would be re-arrested.[165] Delaware public officials have taken a firm stance on the need to start implementing programs in order to control the unsettling recidivism rate.[166]

Unlike its neighbors, New Jersey has been commended for its work in reducing recidivism rates state-wide.[167] New Jersey's success is credited to the current administration's emphasis on rehabilitative programs.[168] State-wide, there are several programs aimed at assisting offenders, beginning in prison and extending to after their release.[169] The success of New

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164. *See* RECIDIVISM IN DELAWARE, *supra* note 154 (referring to 2012 initiative that required Delaware to submit report about prison populations and recidivism rates).

165. *See id.* (reporting statistics of inmates who will return to Delaware prisons within three years of their release).

166. A number of public officials, including the Delaware Attorney General and Public Defender, have commented about the seriousness of the recent report. *See* Barrish, *supra* note 163 ("Delaware Attorney General Beau Biden said in a written statement that the report 'highlights an alarming rate of recidivism that needs to be addressed by the criminal justice system.'").

167. *See* Press Release, N.J. Office of the Gov., Governor Chris Christie Takes Action to Help Offenders Successfully Re-Enter Society and Lead Productive Lives (Nov. 28, 2011), *available at* http://www.state.nj.us/governor/news/news/552011/approved/20111128c.html [hereinafter Governor Christie Press Release] ("Today, New Jersey is widely recognized as a national leader in reducing incidents of recidivism and reducing its prison population.").

168. *See id.* ("'New Jersey has a strong record of helping rehabilitate offenders and providing the services they need to be successful in society, significantly decreasing their likelihood of reoffending and improving public safety.'" (quoting Governor Chris Christie)); *see also* New Report, *supra* note 8 (indicating that recidivism is "priority" of Governor, and that "'New Jersey is head[ed] in the right direction'" (quoting James Plousis, Chairman of the New Jersey State Parole Board)).

169. *See Funding for Criminal Justice and Offender Reentry Programs and Services*, NICHOLSON FOUND., http://thenicholsonfoundation-newjersey.org/programs/cri/NicholsonFoundationReentryGrantSummary.pdf (last visited Feb. 6, 2015) (describing many different programs available to New Jersey offenders). Examples of some of the programs offered to New Jersey offenders include Computer-Based Learning from Prison to Community, a License Reinstatement Program, and the New Careers Project. *See id.* (providing list of diverse programs offered to New Jersey offenders).

In addition to New Jersey's successful programs, its governor recently expanded New Jersey's focus on recidivism rates in four ways: (1) expanding the Drug Court program, (2) appointing an "Office Coordinator for Prisoner Reentry" to continue the successful work and "implement the Governor's vision," (3) creating and appointing a "Task Force for Recidivism Reduction," and (4) providing for "Ongoing Program Assessment and Measurement" and "Real-Time Recidivism Rates," both of which aim to track which programs are most successful. *See* Governor Christie Press Release, *supra* note 167 (illustrating ways New Jersey is continuing to move forward while providing rehabilitation services to inmates, as example to other states).

Jersey's rehabilitative programs is impressive and illustrative.[170] In fact, New Jersey recently reported that sixty-seven percent of its inmates did *not return* to prison post-release, making its current recidivism rate "below the national average."[171] By following New Jersey's lead, Pennsylvania and Delaware can drastically reduce prison overcrowding and recidivism rates.[172]

V. CONCLUSION

As former Senator Jim Webb commented, "'either [Americans] are home to the most evil people on earth or we are doing something different—and vastly counterproductive. Obviously, the answer is the latter.'"[173] Here, the problem facing the American prison system is the Sentencing Guidelines that are in need of reform.[174] For the sake of inmates and taxpayers alike, the Sentencing Commission must step in to amend the Guidelines.

Adopting Sentencing Guidelines that emphasize rehabilitation will result in a more uniform application of the law and ultimately help the 6,937,600 individuals in correctional facilities avoid returning to prison.[175] Further, American taxpayers are forced to bear the burden of supporting the growing prison population.[176] Each year, prison expenses cost taxpayers $39 billion.[177] As one inmate who participated in a prison rehabilita-

170. *See* New Report, *supra* note 8 (recognizing New Jersey for being one of six states to reduce recidivism rates, which is credited to its rehabilitation programs).

171. *See Frequently Asked Questions*, STATE OF N.J., DEPT. OF CORRS., OFFICE OF TRANSITIONAL SERVS., http://www.state.nj.us/corrections/SubSites/OTS/OTS_faq.html (last visited Feb. 6, 2015) (providing recidivism rates for offenders leaving state prison in New Jersey); *see also* New Report, *supra* note 8 ("New Jersey's recidivism rate, 42.7 percent, was below the national average of 43.3 percent.").

172. For an overview of all state recidivism studies, not only those discussed in this Note, see *State Recidivism Studies*, SENT'G PROJECT, http://sentencingproject.org/doc/publications/inc_StateRecidivismFinalPaginated.pdf (last visited Feb. 6, 2015) (providing "references for [ninety-nine] recidivism studies conducted between 1995–2009 in all [fifty] states and the District of Columbia").

173. *See Mission Statement*, PRISON-JUSTICE FOR AM., http://prison-justice.org/component/content/article/23-prison-justice/110-mission-statement (last visited Jan. 15, 2015) (quoting former Senator Jim Webb).

174. For a further discussion of why the Guidelines are in need of reform and should be amended, see *supra* notes 4, 139–72 and accompanying text.

175. *See* GLAZE & HERBERMAN, *supra* note 3 (providing total number of offenders in "U.S. adult correctional systems").

176. *See* CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, CTR. ON SENT'G & CORRS., THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS (July 2012), *available at* http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf (explaining costs to taxpayers to support incarceration system).

177. *See id.* ; *see also* J. Hirby, *What Is the Average Cost to House Inmates in Prison*, L. DICTIONARY, http://thelawdictionary.org/article/what-is-the-average-cost-to-house-inmates-in-prison/ (last visited Feb. 6, 2015) ("According to the U.S. Bureau

tion program stated, "'[i]t makes me feel like a better man. This program, it works. It really works.'"[178]

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of Prisons, the average annual cost of incarceration in Federal prisons in 2010 was $28,284 per inmate.").

178. *See* Kathy Matheson & Pete Yost, *Holder Looks for Answers on Overcrowded Prisons*, ASSOCIATED PRESS (Nov. 5, 2013, 6:02 PM), http://bigstory.ap.org/article/looking-answers-overcrowded-prisons (quoting former prison inmate, Robert Warner).