The Road to Recovery: The Third Circuit Recognizes the Importance of Rehabilitative Needs During Sentencing in United Staes v. Schoenwolf

Marissa A. Booth

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Law Commons

Recommended Citation

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
The Road to Recovery: The Third Circuit Recognizes the Importance of Rehabilitative Needs During Sentencing in United States v. Schoneewolf

Marissa A. Booth*

“Circumstances of crimes vary. So do motives. And so do prospects for rehabilitation. The number of imponderables makes it impossible to sentence by formula and still sentence justly.”

I. KEEP IT SIMPLE: AN INTRODUCTION TO REHABILITATION IN PRISON

One in two incarcerated persons struggle with substance abuse disorders and dependency. Of these inmates, many were under the influence of narcotics while they committed the crime that led to their incarceration. One study found that about 15% of male and 30% of female inmates suffer from diagnosed mental illnesses. These figures are likely conservative, as other studies have revealed that over half of inmates satisfy the criteria for a mental illness.

* J.D., 2019, Villanova University Charles Widger School of Law; B.A., 2016, University of Pittsburgh. This Casebrief is dedicated to my parents, Jim and Marian Booth, and my brother, James Booth. I owe much of my success to your unconditional love, continuous support, and steady encouragement. I would also like the Villanova Law Review staff for all of their hard work, dedication, and thoughtful feedback throughout the publication process.


3. See id. (noting study in five cities showed 63% to 83% of defendants had drugs in their system at time of arrest).


In addition to high percentages of mental illness and substance use disorders, other concerns include the lack of formal education and vocational training available to citizens who later become incarcerated. Approximately 41% of federal and state inmates did not complete high school or obtain their General Education Development, or GED. Moreover, many inmates struggled to maintain well-paying employment prior to their incarceration, and upon release from prison, it is even harder to find a job that pays well. This is especially disheartening because studies demonstrate that job-training and employment reduce an inmate’s likelihood of reoffending.

The connection between incarceration and the above-mentioned areas—mental health, education, and substance abuse—influences rehabilitation efforts. Rehabilitation is the theory that an individual’s criminal behavior has an underlying cause, and if that cause is corrected, the individual’s criminal behavior will cease. For example, if an individual commits crimes to fund their drug addiction, the theory of rehabilitation would assert that treating the underlying addiction would prevent the individual from future criminal activity.

---


7. See Harlow, supra note 6 (reporting numerous statistics regarding educational backgrounds of inmates). Only 9.1% of state and 9.4% of federal inmates earned their high school diploma outside of prison. See id. (explaining statistics on high school graduation rates).

8. See Looney, supra note 6 (discussing employment trends of inmates before and after serving prison terms).


10. For a discussion of areas in which courts and other members of the criminal justice system may try to focus their rehabilitation efforts, see supra notes 2–9 and accompanying text.

11. See generally Beth M. Huebner, Rehabilitation, OXFORD BIBLIOGRAPHIES, http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0046.xml [https://perma.cc/7ZTU-SF4X] (last reviewed Aug. 1, 2014) (“Rehabilitation is a central goal of the correctional system. This goal rests on the assumption that individuals can be treated and can return to a crime free lifestyle.”).
vidual from committing future crimes. Another example is that of individuals who commit crimes to support their family; in this case, rehabilitation might mean providing specialized job training or helping the individuals obtain their GEDs to increase the likelihood that they will find a higher paying job.

Because most inmates and offenders struggle with substance abuse disorders, mental illness, or a lack of educational or vocational training, judges, lawyers, and other actors in the legal system often focus on rehabilitation as the method to effectively lower the likelihood of recidivism. While rehabilitation occupies a central role in discussions of criminal justice reform it is not a new concept within the criminal justice system. Instead, rehabilitation has been a goal of punishment—along with deterrence, retribution, and incapacitation—since the creation of the system. Nevertheless, the popularity of rehabilitation has waxed and waned. Currently, the theory’s popularity is in a waxing phase, with prisons offering a variety of programs designed to rehabilitate inmates. Specifically, prisons provide substance use programs, which often vary in inten-
Drug abuse education classes are less intense; they are designed to teach inmates about substance abuse and identify the inmates who may need additional programming. Prisons may also offer two types of drug abuse treatment programs: residential and non-residential. In residential drug abuse programs (RDAP), inmates live separately from general population for approximately nine months. RDAPs are the most intensive program because participants live separately from other inmates and half of each day consists of programming. Non-residential drug abuse treatment is less intense than the RDAP and typically lasts approximately twelve weeks and involves cognitive-behavioral therapy conducted in a group setting. Many prisons also have programs for inmates who have mental health concerns, including group counseling, crisis intervention, and mental health units.

In addition to the typical drug, alcohol, and mental health programs prisons offer, most prisons also offer educational and vocational programs. Specifically, prisons may offer basic literacy classes, GED classes, and vocational training. These programs are designed to help inmates acquire skills that can be useful upon their release from custody.

Importantly, the residential drug abuse program has been tested as follows: The Bureau and National Institute on Drug Abuse combined funding and expertise to conduct a rigorous analysis of the Bureau’s RDAP. Research findings demonstrated that RDAP participants are significantly less likely to recidivate and less likely to relapse to drug use than non-participants. The studies also suggest that the Bureau’s RDAPs make a significant difference in the lives of offenders following their release from custody and return to the community.

Educational program opportunities within prisons and jails vary greatly from place to place. Educational program opportunities within prisons and jails vary greatly from place to place.
and college-level programs. Additionally, many prisons offer work release, which allows inmates to work in the community during the day and return to the prison at night.

Because many offenders and inmates require treatment and programming, it seems prudent for courts to consider a defendant’s rehabilitation when imposing a sentence. Nevertheless, the laws in some jurisdictions preclude judges from even mentioning a defendant’s rehabilitative needs or the possibility of rehabilitation at sentencing. This harsh shift away from considering rehabilitation developed slowly over several decades.

In the 1980s, Congress enacted the Sentencing Reform Act (the Act). Under the Act, a judge must consider multiple factors to deter

27. See FAQ: Prison Educational Programs: Which Educational Programs are Available to Prisoners?, supra note 26 (recognizing many prisons offer GED courses and some prisons offer college-level programs).

28. See Reich, supra note 9 (discussing logistics of how work release programs function and impact of such programs on inmates).

29. See id.

30. For a discussion of circuits that preclude courts from mentioning and considering rehabilitation at sentencing, see infra notes 67–90 and accompanying text.

31. See Phelps, supra note 15 (outlining history and trends of rehabilitation as purpose of punishment within criminal justice system).

mine an appropriate sentence, including retribution, deterrence, incapacitation, and the defendant’s need for “educational or vocational training, medical care, or other correctional treatment . . . .” Despite the Act’s requirement to consider “correctional treatment,” another federal statute precludes courts from ordering imprisonment as a “means of promoting correction and rehabilitation.” Because these two statutes are seemingly inconsistent, they sparked a debate regarding the role of rehabilitation at sentencing.

In 2011, in *Tapia v. United States*, the United States Supreme Court spoke on the issue, holding that the Act prevents federal judges from imposing a sentence to further a defendant’s general rehabilitation. Nevertheless, the *Tapia* Court’s holding did not wholly resolve whether a sentencing judge may consider a defendant’s rehabilitative needs when fashioning an appropriate sentence. Instead, the *Tapia* decision led to a federal circuit split because it changed the focus of the discussion.

Following *Tapia*, circuit courts began considering the extent to which a sentencing court may consider a defendant’s rehabilitative needs without violating the *Tapia* holding. The Seventh, Ninth, Tenth, and Eleventh Circuits held that any consideration of rehabilitation at sentencing violates *Tapia*. In contrast, the First, Second, Fourth, Fifth, Sixth, and Eighth Circuits held that courts can consider rehabilitation as long as it is not the determinative factor for the length of the sentence. Recently, in

33. See § 3553(a)(2) (discussing factors courts should consider in imposing sentences).


37. See id. at 335 (“As we have held, a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.”).

38. For a discussion of the circuit split that developed following the *Tapia* decision which demonstrates the need for further resolve on the issue, see infra notes 67–85 and accompanying text.


40. See id. (noting dilemmas among circuit courts).

41. See also United States v. Thornton, 846 F.3d 1110, 1119 (10th Cir. 2017) (precluding courts from considering rehabilitation); United States v. Spann, 757 F.3d 674, 675 (7th Cir. 2014) (applying strict test that precludes any consideration of rehabilitation at sentencing); United States v. Vandergrift, 754 F.3d 1303, 1310 (11th Cir. 2014) (holding courts cannot consider rehabilitation during sentencing). See generally United States v. Joseph, 716 F.3d 1273, 1280–81 (9th Cir. 2013) (applying strict standard for *Tapia* challenges).

42. See United States v. Del Valle-Rodriquez, 761 F.3d 171, 175 (1st Cir. 2014) (holding district court did not err in considering rehabilitation when imposing sentence); see also United States v. Lifshitz, 714 F.3d 146, 150 (2d Cir. 2013) (stat-
United States v. Schonewolf, the Third Circuit weighed in on the issue, joining the latter circuits and holding courts may consider rehabilitation at sentencing.

This Note analyzes the Third Circuit’s holding in Schonewolf and ultimately concludes that although the Third Circuit’s holding is consistent with Tapia, this area of law requires further reform to prevent future confusion and disagreement amongst courts. Part II summarizes relevant statutes and cases, outlining the justifications courts have utilized in determining the reach of Tapia. Part III describes the facts and procedure giving rise to the decision in United States v. Schonewolf. Part IV outlines the Third Circuit’s approach in determining that courts can consider a defendant’s rehabilitative needs when imposing a particular sentence. Part V examines the Third Circuit’s legal analysis of Tapia, and also discusses issues surrounding Tapia challenges. Finally, Part VI analyzes the likely impact of the Third Circuit’s decision on the extent to which a court can consider a defendant’s rehabilitative needs at sentencing.

The district court did not err in considering treatment when primary considerations in sentencing are promoting respect for law and protecting public interest); United States v. Garza, 706 F.3d 655, 657 (5th Cir. 2013) (holding courts may consider rehabilitation when considering location or treatment options but not when considering lengthening inmate’s sentence); United States v. Deen, 706 F.3d 760, 768–69 (6th Cir. 2013) (noting courts may consider rehabilitation when recommending treatment or location options but not when considering lengthening defendant’s sentence); United States v. Bennett, 698 F.3d 194, 200–02 (4th Cir. 2012) (holding court did not err by basing sentence on “egregious breach of trust”); United States v. Replogle, 678 F.3d 940, 943 (8th Cir. 2012) (commenting district courts may consider “educational or vocational training, medical care, or other correctional treatment” during sentencing).

43. 905 F.3d 683 (3d Cir. 2018).

44. See id. (adopting approach that allows courts to discuss rehabilitation when imposing sentences).

45. Compare United States v. Tapia, 564 U.S. 319 (2011) (holding courts may not impose or lengthen a sentence based on defendant’s rehabilitative needs), with Schonewolf, 905 F.3d 683 (concluding sentencing court’s decision was not unconstitutionally based on rehabilitation). For a further discussion of the current disagreement among circuits, see infra notes 67–85 and accompanying text. For a discussion on suggested ways for the court to simplify the issue and lower the defendant’s burden, see infra notes 157–87 and accompanying text.

46. For a further discussion of the development of sentencing jurisprudence as it relates to the consideration of rehabilitation, see infra notes 52–90 and accompanying text.

47. For a further discussion of the facts, procedural history, and holding in Schonewolf, see infra notes 91–121 and accompanying text.

48. For a narrative analysis of the Schonewolf decision, see infra notes 122–50 and accompanying text.

49. For a critical analysis of the Schonewolf decision, see infra notes 151–87 and accompanying text.

50. For a discussion of the impact of the Schonewolf decision, see infra notes 188–207 and accompanying text.
II. A LEGAL BACKGROUND: ONE SOURCE AT A TIME

Although sentencing judges have discretion to impose sentences they feel are appropriate, such sentences can be arbitrary and disproportionate given the number of factors judges are allowed to consider.\textsuperscript{51} To reduce the likelihood of arbitrary or disproportionate sentences, Congress and the Sentencing Commission provide guidance to judges.\textsuperscript{52} Additionally, the Supreme Court and circuit courts provide guidance by interpreting the laws and applying them to specific cases.\textsuperscript{53}

A. Support from the Legislative and Judicial Branches

Judges often look for legislative guidance on the proper considerations when imposing sentences.\textsuperscript{54} In response, the United States Sentenc-
ing Commission promulgated the United States Sentencing Guidelines (USSG), which aim to advise judges and reduce sentencing disparities. When imposing a sentence, 18 U.S.C. § 3553(a) directs 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 . . . .” Additionally, 18 U.S.C. § 3582(a) clarifies that “if a term of imprisonment is to be imposed, in determining the length of the term, [the court] shall consider the factors set forth in section 3553(a) . . . recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”

In addition to these statutes, federal judges must also consider the USSG before imposing a sentence. The United States Sentencing Commission designed the USSG to encompass the purposes of sentencing, provide certainty and fairness in sentencing, and reflect “advancement in the knowledge of human behavior as it relates to the criminal justice process.” Although the USSG are advisory—meaning judges are not re-
quired to follow them—if judges decide to impose either a more lenient or harsher sentence than the one the guidelines recommend, they must explain the departure.60

B. The Sponsor: The Supreme Court

Apparent inconsistencies in the aforementioned statutes regarding whether courts are permitted to consider the treatment needs of defendants prompted the Supreme Court to resolve the tension.61 In Tapia, the Court interpreted the section of the Act that states courts should “consider the factors set forth in . . . § 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”62 The Tapia Court interpreted this section to mean that courts “should acknowledge that imprisonment is not suitable for the purpose of promoting rehabilitation.”63 Consequently, the

60. See id. at 2 (explaining that judges must explain their logic for imposing sentencing that deviates from Guidelines). Importantly, if a judge imposes a guideline sentence, and the sentence is appealed, courts on appeal will assume the sentence is reasonable. See id. (citing Rita v. United States, 551 U.S. 338 (2007)). Although the United States Sentencing Guidelines are advisory rather than mandatory, this was not always the case; the Guidelines came into question in 2004. See Kelly Lyn Mitchell, What is Blakely and Why is it so Important?, UNIV. OF MINN.: ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE (Mar. 16, 2015), https://sentencing.umn.edu/content/what-blakely-and-why-it-so-important [https://perma.cc/GQ3Y-JVJF] (providing history of guidelines). In Blakely v. Washington, the Supreme Court considered the validity of Washington’s sentencing guidelines, but the Court’s decision also cast doubt upon the federal guidelines. See id. (citing Blakely v. Washington, 542 U.S. 296 (2004)). Washington’s sentencing guidelines allowed a court to impose a more severe sentence if it found “substantial and compelling reasons justifying an exceptional sentence.” See id. (emphasis in original) (citing Blakely, 542 U.S. at 299) (explaining justifications for imposing more severe sentences). The Blakely Court determined that the guidelines’ process “violated the defendant’s Sixth Amendment right to a jury trial because the judge rather than a jury made the findings that justified the higher sentence.” See id. (explaining Blakely Court’s holding). In United States v. Booker, the Supreme Court considered the application of Blakely to the federal guidelines. See id. (citing United States v. Booker, 543 U.S. 220 (2005)). After Booker, “sentencing courts in the federal system must consider the guidelines[,] but are permitted to tailor the sentences as deemed appropriate, subject to appellate review for unreasonableness.” See id. (citing Booker, 543 U.S. at 260–65) (explaining impact of Booker decision).

61. See Tapia v. United States, 564 U.S. 319, 326 (2011) (considering whether courts can consider defendant’s rehabilitative needs when imposing sentence).

62. See id. (recognizing that section 3582(a) was at issue and outlining factors courts should consider when sentencing to term of imprisonment).

63. See id. at 327 (determining that section 3582(a) instructs courts to acknowledge imprisonment is not appropriate means to promote rehabilitation). The Court reached this conclusion by examining definitions for both “recognize” and “appropriate.” See id. (discussing Court’s reliance on dictionary definitions of recognize and appropriate). More specifically, the Court noted that recognize
Court held the Act forbids a sentencing judge from imposing or extending a sentence in order to promote a defendant’s rehabilitation. Nevertheless, in reaching its holding, the Tapia Court recognized an exception that allows sentencing courts to urge defendants to receive treatment or even suggest specific rehabilitative programs to the defendant.

C. The Sponsee: Circuit Courts

Although the Tapia holding appeared relatively clear, it still sparked disagreement amongst the circuits because the Tapia Court noted that some discussion of rehabilitation may be permissible. In its wake, the question became not whether a court can consider a defendant’s rehabilitation at sentencing, but to what extent can a court consider rehabilitation at sentencing. The second question has proven far more difficult to answer. Some circuits utilize a strict standard where any discussion of rehabilitation at sentencing violates Tapia. For example, in United States v. Van

64. See id. at 332 (“And so this is a case in which text, context, and history point to the same bottom line: Section 3582(a) precludes sentencing courts from imposing or lengthening a prison term to promote an offender’s rehabilitation.”).

65. See id. at 334 (“A court commits no error by discussing the opportunities for rehabilitation within prison or the benefits of specific training or rehabilitation programs. To the contrary, a court properly may address a person who is about to begin a prison term about these important matters.”).

66. See Gornick, supra note 35 at 860–61 (2016) (recognizing confusion created amongst circuits because Tapia distinguished between acceptable and unacceptable discussion of rehabilitation).


68. See id. at 1301–06 (outlining several different holdings that disagree as to extent sentencing court can consider rehabilitation at sentencing).

69. See United States v. Joseph, 716 F.3d 1273, 1281 n.10 (9th Cir. 2013) (finding Tapia violation where rehabilitation “may have been a factor in the court’s sentencing decision”); see also United States v. Thornton, 846 F.3d 1110, 1119 (10th Cir. 2017) (noting Tapia error where district court imposed sentence based in part on rehabilitation); United States v. Spann, 757 F.3d 674, 675 (7th Cir. 2014) (finding Tapia violation where judge considered fact that defendant needed enough time in prison to learn lawful work skills); United States v. Vandergrift, 754 F.3d 1303, 1311 (11th Cir. 2014) (finding Tapia error where district court considered rehabilitation to any extent in imposing sentence of incarceration). The Thornton court elaborated on several questions surrounding Tapia violations. See Thornton, 846 F.3d at 1113 (clarifying principles surrounding Tapia cases). Impor-
Vandergrift,70 the Eleventh Circuit held that a court violates Tapia where it so much as considers rehabilitation in imposing a sentence.71 In Vandergrift, before the sentencing court imposed a sentence designed to benefit the defendant, it merely mentioned the defendant’s likely mental health diagnosis and the possibility that he could receive vocational training in prison.72 In outlining its reasoning, the sentencing court also cited other sentencing factors it considered, including the seriousness of the offense and deterring future misconduct.73 On appeal, the Eleventh Circuit interpreted Tapia as precluding any consideration of rehabilitation whatsoever in imposing a sentence.74

Likewise, in United States v. Thornton,75 the Tenth Circuit determined that a court violates Tapia even where rehabilitation is one of many factors.
a court considers in imposing a sentence of imprisonment. Specifically, the sentencing court considered the defendant’s upbringing, lack of education, and need for remedial services. In another case, the Tenth Circuit determined the sentencing court violated *Tapia* when it considered rehabilitation in tailoring the length of a sentence. Taking these cases together, the Tenth Circuit applies a strict interpretation of *Tapia* by which it considers rehabilitation in imposing a sentence of imprisonment or determining the length of a sentence of imprisonment improper.

In contrast, other circuits have determined that to constitute a *Tapia* violation, the defendant’s rehabilitation must have been the primary or dominant reason the court imposed a certain sentence. For example,

76. See id. at 1116 (determining that “[a] rule requiring reversal only when rehabilitation is the sole motivation would not make sense” because “there will almost always be some valid reasons advanced by the district court for imposing the sentence issued”); see also United States v. Vandergrift, 754 F.3d 1303, 1311 (11th Cir. 2014) (explaining *Tapia* violation occurs where rehabilitation is sole reason for imposing sentence); see also United States v. Spann, 757 F.3d 674 (7th Cir. 2014) (determining that sentencing court violated *Tapia* when it justified defendant’s sentence in part on potential for him to learn job skills).

77. See id. at 1113 (outlining multiple factors sentencing court considered in imposing Thornton’s sentence). First, the sentencing court recognized that Thornton needed services that would be available to him in prison. See id. (outlining major factor for Thornton’s sentence). Next, the sentencing court noted that defendant was previously involved with gangs, and he had both juvenile adjudications and adult convictions. See id. (discussing defendant’s criminal history). Regarding the defendant’s family, his mother abandoned him, and he had a challenging relationship with his father. See id. (addressing familial relationships). Additionally, the court recognized that Thornton did not graduate high school but went back to get his GED. See id. (elaborating on Thornton’s education). In summarizing the reasons for Thornton’s sentence, the sentencing court stated three primary reasons: (1) community safety issues, (2) his history of rejecting efforts to help him, and (3) “because I am firmly convinced that he needs enough time in prison to get treatment and vocational benefits.” See id. (emphasis in original) (summarizing reasons for sentence).

78. See United States v. Cordery, 656 F.3d 1103, 1106 (10th Cir. 2011) (finding error where district court imposed term of defendant’s imprisonment to ensure defendant’s eligibility for rehabilitative treatment program); see also United States v. Deen, 706 F.3d 760, 769 (6th Cir. 2013) (vacating and remanding where sentencing court wanted to give “Bureau of Prisons another chance to do some in-depth rehabilitation with [defendant]” and imposed above-range sentence). In Deen, although the USSG recommended sentence was four to ten months’ imprisonment, the sentencing court imposed a twenty-four-month sentence to give the prison time to rehabilitate the defendant. See id. at 762 (stating recommended sentence and sentence court imposed).

79. See Thornton, 846 F.3d at 1116 (determining that any consideration of rehabilitation in imposing imprisonment is improper); see also Cordery, 656 F.3d at 1106 (finding error where district court considered rehabilitation in determining the length of imprisonment).

80. See United States v. Lifshitz, 714 F.3d 146, 149–50 (2d Cir. 2013) (finding court may discuss rehabilitative opportunities available within prison in imposing sentence of incarceration); United States v. Bennett, 698 F.3d 194, 195 (4th Cir. 2012) (declining to find *Tapia* violation where defendant’s repeated failure to abide by conditions of supervised release rather than rehabilitation was reason for sentence); United States v. Replogle, 678 F.3d 940, 943 (8th Cir. 2012) (declining
the Fourth Circuit declined to reverse an alleged Tapia error where the defendant’s potential rehabilitation was a minor part of the sentencing court’s reasoning.\(^8\) The Fourth Circuit reasoned that if the sentencing court’s mention of rehabilitative needs is only a fragment of the court’s explanation for the sentence, the outcome of the proceeding has not been altered based on a defendant’s rehabilitative needs.\(^9\) Similarly, the Second Circuit, in United States v. Lifshitz,\(^8\) declined to find a Tapia violation where rehabilitation was not the lower court’s primary consideration in crafting the sentence.\(^8\)

\(^8\) See United States v. Bennett, 698 F.3d 194, 201 (4th Cir. 2012) (finding no reversible Tapia error where sentencing judge mentioned defendant’s need for drug rehabilitation, but justified sentence based on defendant’s multiple crimes during short period of freedom).

\(^9\) See id. at 196–97 (discussing sentencing court’s reasoning for Bennett’s sentence). In many cases where a defendant challenges his or her sentence based on a Tapia error, the claim has not been preserved properly. See id. at 200 (noting Bennett failed to preserve his claim alleging Tapia error). As a result, the defendant has the burden to establish “plain error.” See id. (stating defendant’s burden of proof where claim is not preserved). More specifically, to succeed, a defendant must establish: “(1) that the district court erred; (2) that the error was ‘plain’; and (3) that the error ‘affect[ed] his or her’ substantial rights,” meaning that it ‘affected the outcome of the district court proceedings.’ See id. (quoting United States v. Olano, 507 U.S. 725, 732 (1993) (detailing elements of burden of proof)). Notably, however, even if a defendant establishes the aforementioned elements, the court still has the discretion to deny relief; importantly, denial is warranted if it would not “result in a miscarriage of justice.” See id. (internal quotation marks omitted) (quoting United States v. Robinson, 627 F.3d 941, 954 (4th Cir. 2010)) (identifying discretionary exception). As to the first prong regarding district court error, in revocation proceedings, the court considers whether the sentence was “plainly unreasonable.” See id. (citing United States v. Crudup, 461 F.3d 433, 437 (4th Cir. 2006) (detailing proper court reasoning). Reasonableness, however, is also a multi-step inquiry. See id. (citing Gall v. United States, 552 U.S. 38, 51 (2007) (noting Gall is instructive for examining reasonableness of sentence). Under Gall, the court first considers whether the sentencing court committed a significant procedural error. See id. (noting first question Gall instructs reviewing court to ask). If there is no significant procedural error, the reviewing court should consider whether the sentence is substantively reasonable. See id. (noting second question Gall instructs reviewing court to ask). However, if the reviewing court finds either error, the defendant is not automatically entitled to relief and the inquiry continues. See id. (noting extra step reviewing court may have to take). Instead, the reviewing court must “decide whether [the error] is plainly unreasonable.” See id. (citing United States v. Finley, 531 F.3d 288, 294 (4th Cir. 2008)) (identifying final step)).
Recently, the Third Circuit adopted the less rigorous approach and determined that “the better reading of Tapia would only find error where the record suggests ‘that the court may have calculated the length of [a defendant’s] sentence to ensure that [the defendant] receive[s] certain rehabilitative services.’” In doing so, the Third Circuit overruled its prior decision in United States v. Doe, in which it held that section 3583, the statute governing post-revocation sentencing, permits courts to consider medical and rehabilitative needs. Additionally, in United States v. Zabielski, the Third Circuit declined to find a Tapia violation where the sentencing court discussed rehabilitation as just one reason for imposing a particular sentence.

III. TROUGHT TIMES MAKE TOUGHER PEOPLE: THE FACTS AND PROCEDURE OF UNITED STATES v. SCHONEWOLF

The facts underlying the Schonewolf decision are both tragic and reflective of the harsh reality of many criminal defendants. Janet Sonja Schonewolf began smoking marijuana at age fourteen. By fifteen, she dropped out of high school and left home. Additionally, Schonewolf struggled with alcoholism and attempted suicide multiple times. Eventually, doctors diagnosed Schonewolf with bipolar disorder. Schonewolf also struggled with crack cocaine and methamphetamine abuse.

...
Schonewolf began using opioids after doctors prescribed Percocet and a fentanyl patch to help ease the pain of a back injury.\(^96\)

Schonewolf's first arrest occurred in 2010 after her father gave her $88,000 and asked her to transport drugs from Nevada to Pennsylvania.\(^97\) When officers arrested her, she had about twelve pounds of methamphetamine in the trunk of her car.\(^98\) She pleaded guilty and received a sentence of time served with an added sixty months of supervised release, which represented a downward departure from the recommended sentence under the USSG.\(^99\)

Despite successfully completing years of supervised release, Schonewolf relapsed and began using heroin.\(^100\) Officers caught her trying to purchase heroin, leading to new criminal charges.\(^101\) Because of the new charges, Schonewolf violated the terms of her supervised release.\(^102\) Schonewolf's probation officer filed the violation with the district court, but withdrew it because Schonewolf entered a detox program.\(^103\)

---

\(^96\). See id. (suggesting Schonewolf began using opioids only after being prescribed painkillers post-surgery).

\(^97\). See id. (outlining circumstances of Schonewolf's first arrest).

\(^98\). See id. (stating weight of drugs Schonewolf transported).

\(^99\). See id. (noting procedure and resolution of Schonewolf's first case). The recommended sentence under the USSG was seventy-to-eighty-seven months' imprisonment. See United States v. Schonewolf, Brief for Appellee, 2018 WL 1014780 (mentioning recommended sentence). When a court imposes a time served sentence, "the sentence is the same as the time the defendant has spent in jail, and the defendant is set free." See Time Served, CORNELL LAW SCH. LEGAL INFORMATION INST., https://www.law.cornell.edu/wex/time_served [https://perma.cc/2KFL-GVV4] (last visited Jan. 31, 2019) (citing Time Served, NOLO'S PLAIN-ENGLISH LAW DICTIONARY (1st ed. 2009) (defining time served)). For example, if a defendant spends eighteen months in prison while awaiting sentencing and is subsequently sentenced to time served, the sentence is essentially an eighteen-month sentence. See id.

\(^100\). See Schonewolf, 905 F.3d at 685 (recognizing circumstances that led to Schonewolf's rearrest).

\(^101\). See id. (outlining facts of Schonewolf's second prior arrest).

\(^102\). See id. (noting interplay between Schonewolf's first and second arrest). Where an offender is on federal probation, the offender may violate their probation in multiple ways. See UNITED STATES SENTENCING GUIDELINES MANUAL § 7B (2012) (outlining procedure and justifications for probation and parole violations). New criminal charges are a basis for revocation because of the notion that offenders failed to abide by the court-imposed conditions of their supervision. See id. (explaining why new arrests place individuals on probation in violation). In other words, conditions of parole or probation generally include abstaining from committing new crimes; consequently, if an offender engages in further criminal activity, the offender violates the terms of probation or parole. See id. (elaborating on which condition of probation committing new offense violates).

\(^103\). See Schonewolf, 905 F.3d at 685 (recognizing circumstances that led to delayed violation hearing).
Schonewolf eventually overdosed and left the detox program.\textsuperscript{104} As a result, her probation officer re-filed the violation.\textsuperscript{105} During the revocation hearing, the government noted Schonewolf’s re-enrollment in a treatment program and progress within the program.\textsuperscript{106} The district court sentenced Schonewolf to one day in prison and her pre-existing term of supervised release.\textsuperscript{107}

While Schonewolf was on supervised release, officers caught her selling heroin.\textsuperscript{108} She admitted that she had been doing so for six to seven months, and she pleaded guilty to multiple drug charges.\textsuperscript{109} The court sentenced Schonewolf to two to four years’ imprisonment.\textsuperscript{110} As a result of her new case, Schonewolf’s probation officer again filed a violation with the court.\textsuperscript{111}

On August 15, 2017, Schonewolf appeared for the district court to determine whether to revoke the period of supervised release on her first case and impose a new sentence.\textsuperscript{112} At the time, the USSG recommended a sentence of twenty-four to thirty months’ imprisonment.\textsuperscript{113} The government argued that Schonewolf should be sentenced to forty-eight months’ imprisonment because she received a lesser sentence during her last revocation hearing based on her promise to stop using drugs.\textsuperscript{114} In contrast, Schonewolf argued for a twenty-four month sentence based on her history of bipolar disorder, substance abuse, and the fact that her criminal activity was nonviolent and solely to support her drug habits.\textsuperscript{115} Additionally, she

\begin{itemize}
\item \textsuperscript{104} See id. (acknowledging that Schonewolf failed to complete her detox program due to overdose).
\item \textsuperscript{105} See id. (explaining how Schonewolf’s probation officer refiled violation of supervised release).
\item \textsuperscript{106} See id. (outlining evidence before sentencing court).
\item \textsuperscript{107} See id. (noting specific sentence Schonewolf received). When someone under supervision violates the conditions of his or her probation or parole, a probation officer reports the violation and offers a recommendation. See U.S. Dep’t of Justice, Frequently Asked Questions, https://www.justice.gov/uspc/frequently-asked-questions#q38 [https://perma.cc/NXF8-H8F2] (last visited Nov. 14, 2019) (answering common questions regarding parole and probation). For example, the probation officer might report the violation and then recommend that no sanction be imposed. See id. (noting one option available to probation officers). Nevertheless, the officer may recommend a sanction, such as a period of incarceration or revoking and restarting the term of supervision. See id. (noting option wherein probation officers can recommend period of incarceration).
\item \textsuperscript{108} See Schonewolf, 905 F.3d at 685 (outlining circumstances of most recent arrest).
\item \textsuperscript{109} See id. (elaborating on facts and procedure of Schonewolf’s most current arrest).
\item \textsuperscript{110} See id. (stating Schonewolf’s sentence).
\item \textsuperscript{111} See id. (noting that probation officer filed second petition stating Schonewolf violated her supervised release).
\item \textsuperscript{112} See id. (listing date of revocation hearing).
\item \textsuperscript{113} See id. at 686 (acknowledging sentence range recommended by guidelines).
\item \textsuperscript{114} See id. (outlining government’s argument at revocation hearing).
\item \textsuperscript{115} See id. (discussing Schonewolf’s arguments at revocation hearing).
\end{itemize}
emphasized that she already received a two-to-four-year sentence for her new crime, which would give her time to complete treatment.\footnote{See id. (recognizing sentence for new charges).}

The district court sentenced Schonewolf to forty months’ imprisonment to run consecutive to her state sentence.\footnote{See id. at 684 (noting sentence court imposed following revocation hearing). Consecutive sentences are those that are served one after the other. See \textit{Consecutive Sentence}, CORNELL LAW SCH. LEGAL INFORMATION INST., https://www.law.cornell.edu/wex/consecutive_sentence [https://perma.cc/N82T-TYKG] (last visited Jan. 17, 2019) (citing \textit{Consecutive Sentence}, NOLO’S PLAIN-ENGLISH LAW DICTIONARY (1st ed. 2009)) (defining consecutive sentence). For example, if an offender “was sentenced to two consecutive ten-year terms, the total sentence would be 20 years.” See id. (providing example of consecutive sentencing). In contrast, a concurrent sentence allows the sentences to be served simultaneously. See \textit{Concurrent Sentence}, CORNELL LAW SCH. LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/concurrent_sentence [https://perma.cc/R3UH-XDRM] (last visited Jan. 17, 2019) (citing \textit{Concurrent Sentence}, NOLO’S PLAIN-ENGLISH LAW DICTIONARY (1st ed. 2009)) (defining concurrent sentence). Taking the above simplified example, if the two-year sentences for simple assault and theft were concurrent, the offender would only serve two years. See id.)} In imposing the sentence, the court stated “the last step we have in order to give you a fighting chance to recover from whatever addictions you have . . . is to limit your contact with the outside world for a significant period of time.”\footnote{See Schonewolf, 905 F.3d at 686 (quoting Transcript of Violation of Supervised Release Hearing at 21, United States v. Schonewolf, No. 2:13-cr-00037-JP-1 (E.D. Pa. 2017) (ECF No. 27) (identifying district court language that Schonewolf argued violated \textit{Tapia}).} The sentencing court also mentioned the fact that Schonewolf previously received a downward departure and that Schonewolf was a danger to herself and society.\footnote{See id. (recognizing other factors sentencing court considered).} Schonewolf appealed her sentence, arguing that the district court violated the Sentencing Reform Act by sentencing her to imprisonment to further her rehabilitation.\footnote{See id. (reciting Schonewolf’s primary argument on appeal).}

IV. EASY DOES IT: A NARRATIVE ANALYSIS

The Third Circuit began by reviewing Schonewolf’s claim—that her sentence violated the Act—for plain error because she failed to preserve it at sentencing.\footnote{See id. at 686–87 (“[Schonewolf] did not raise this argument as an objection at her sentencing, and thus it is not preserved for appeal. “We review unpreserved claims for plain error.” (footnote omitted) (citing United States v. Berry, 553 F.3d 273, 279 (3d Cir. 2009))).} As the court explained, “to be entitled to relief under a plain error standard, ‘a defendant must show: (1) error, (2) that is plain or obvious, and (3) that affects a defendant’s substantial rights.’”\footnote{See id. at 687 (quoting \textit{Berry}, 553 F.3d at 279).} Nevertheless, even if these elements are met, the court “may exercise its dis-
cretion to grant relief, but only if ‘the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.’”

Next, the Third Circuit determined that Tapia effectively overruled the court’s prior decision in Doe, which held that partly basing the length of post-revocation incarceration on a defendant’s need for drug rehabilitation is not a violation of the Act. Additionally, Schonewolf challenged whether Tapia applies to sentences imposed at post-violation hearings, such as Schonewolf’s revocation hearing. As the Supreme Court noted in Tapia, the plain text of section 3582(a), which governs the court’s imposition of imprisonment, does not refer to the procedural posture of a case. Instead, section 3582(a) merely states that imprisonment is not an appropriate way to promote rehabilitation. Thus, because the Act is not limited in application by its own terms, the Third Circuit held the restrictions in Tapia apply to post-violation hearings.

The Third Circuit also noted that the Tapia Court determined that “Congress did not intend that courts consider offenders’ rehabilitative needs when imposing prison sentences.” In reaching its conclusion, the Tapia Court noted the lack of statutory provisions granting courts the unfettered authority to ensure that defendants participate in rehabilitative programs persuaded the Tapia Court. To illustrate, courts have the statutory authority to order defendants to participate in certain rehabilitative programs as conditions of their supervised release; yet, courts do not have a similar statutory authority when it comes to sentences of incarceration.

Additionally, the Third Circuit examined the existing circuit split surrounding Tapia. The court noted that one group of circuits utilizes a stringent standard of review for Tapia claims where essentially every men-

123. See id. at 687 (quoting Johnson v. United States, 520 U.S. 461, 467 (1997)).
124. See id. at 689–90 (recognizing Tapia overruled Doe). In sum, the Third Circuit recognized that the Act, specifically section 3582(a), applies to revocation sentences under section 3583(e) and section 3583(g). See id. (outlining reasoning why Tapia overruled Doe). The Third Circuit determined that the reasoning the Tapia Court used to reach its ultimate conclusion applies equally to post-revocation sentences. See id. (elaborating and simplifying court’s reasoning).
125. See id. at 690–91 (recognizing that sentences imposed following violation hearings are similar to other sentences).
126. See id. at 690 (noting what statute does not include).
127. See id. (stating what statutory language precludes).
128. See id. at 689–91 (discussing court’s rationale).
129. See id. (recognizing limitations to conditions of sentence courts can impose) (citing United States v. Tapia, 564, U.S. 319, 331 (2011)).
130. See id. at 689 (noting Tapia relied on lack of statutory authority).
131. See id. (noting courts do have authority to order rehabilitative programming as condition of probation or supervised release, but no such statute exists granting courts authority to order rehabilitative programming in conjunction with imprisonment).
132. See id. at 690–91 (noting circuit split regarding standard to apply when considering possible Tapia violation). For a discussion of the circuit split that de-
tion or consideration of rehabilitation is prohibited. The court also recognized that another group of circuits holds that *Tapia* is violated only if rehabilitation is the determinative factor for the defendant’s sentence.

The Third Circuit ultimately concluded that the second grouping of circuits decided the issue correctly. In doing so, it noted that the *Tapia* Court rejected the sentence because the sentencing court tailored it with the goal of providing the defendant access to the prison’s drug abuse program. Following *Tapia*, the Third Circuit determined that a court violates the Act if it imposes or lengthens a sentence to further a defendant’s rehabilitation. Importantly, however, courts may still mention or discuss a prison’s rehabilitative programs during sentencing. Consequently, the Third Circuit declined to hold that a sentencing judge merely mentioning rehabilitation violates *Tapia*. The court stated that such a holding is inconsistent with *Tapia* and “risk[s] a chilling effect on district courts ‘discussing the opportunities for rehabilitation within prison,’ a subject that ‘a court properly may address.’”

Finally, the court addressed Schonewolf’s arguments. Schonewolf argued that the sentencing court’s “comments were addiction-centric and developed following the *Tapia* decision, see supra notes 67–85 and accompanying text.

133. See id. at 691 (outlining circuits using strict standard wherein essentially any mention of rehabilitation would constitute *Tapia* violation). In particular, the Seventh, Ninth, Tenth, and Eleventh Circuits apply a strict standard to *Tapia* claims. See id. (listing strict circuits).

134. See id. (outlining circuits that apply more lenient standard wherein courts can consider rehabilitation to certain extent without violating *Tapia*). The First, Second, Fourth, Fifth, Sixth, and Eighth Circuits apply a more lenient standard to *Tapia* challenges. See id. (listing lenient circuits).

135. See id. at 692 (stating court’s belief that circuits that applied more lenient standard correctly decided the issue). In siding with the circuits that adopted the more lenient approach, the Third Circuit stated that it believed that approach “tracks *Tapia* more closely.” See id. (stating reasoning for declining to follow more stringent approach).

136. See id. at 692 (citing United States v. Tapia, 564 U.S. 319 (2011)) (noting *Tapia* Court’s reasoning for its holding).

137. See id. (“[*Tapia* is the paradigmatic example of how a District Court’s sentence may violate the Act—when it is imposed or lengthened to provide the opportunity to further a rehabilitative aim. Importantly, [*Tapia*] specifically left open the door for a District Court to ‘discuss[ ] the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs.’” (citing *Tapia*, 564 U.S. at 334)).

138. See id. (discussing *Tapia*).

139. See id. (restating prior determination that *Tapia* does not preclude any mention of rehabilitation at sentencing).

140. See id. (citing Tapia, 564 U.S. at 334) (recognizing risk of “chilling effect” on district courts if judges are prevented from considering or discussing rehabilitation).

141. See id. at 692–93 (applying *Tapia* to facts of Schonewolf’s case).
In particular, Schonewolf pointed to the court’s statement that it needed to limit her access to the outside world to give her the opportunity to recover from her addictions. The Third Circuit rejected Schonewolf’s arguments and determined that the record as a whole showed that the sentencing court did not rely on Schonewolf’s addiction or potential for sobriety when it determined the appropriate sentence. Instead, Schonewolf’s increased sentence was based on past leniency. Specifically, the Third Circuit noted that the sentencing judge stated “I have decided to grant an upward variance. And we take special note of the Application Note number . . . [four] which points out . . . [past leniency] as a basis for an upward variance from the range here.”

In reaching its conclusion, the Third Circuit cited Zabielski, declining to find a Tapia violation where statements did not “show that the District Court imposed a longer sentence to ensure that [the defendant] received the treatment that he needed.” Moreover, the Schonewolf court determined that the record did not show that the sentencing court imposed a sentence of imprisonment or tailored the length of the sentence to allow Schonewolf to participate in a particular rehabilitative program. As a result, the Third Circuit held that Schonewolf’s sentence was not erroneous, and she failed to satisfy her burden of establishing plain error.

142. See id. at 692 (outlining Schonewolf’s arguments on appeal).
144. See id. (evaluating Schonewolf’s arguments in light of the record as a whole).
145. See id. (acknowledging main reason for Schonewolf’s sentence was past leniency rather than rehabilitation).
147. See id. at 693–94 (noting district court in Zabielski stated “one reason why I think that incarceration at this point in time is necessary is the fact that you don’t seem to be able to live up to the conditions that you need to maintain in order to keep yourself sober on your medications” (quoting United States v. Zabielski, 711 F.3d 381, 391 (3d Cir. 2013))).
148. See id. at 694 (noting sentencing court did not impose longer sentence to ensure Schonewolf received benefit of specific rehabilitative program).
149. See id. at 694 (stating court’s ultimate conclusion). For a discussion of the circuits that utilize the more lenient approach, see infra notes 81–85 and accompanying text. For a discussion of different rehabilitation programs, see infra notes 19–28 and accompanying text.
V. PROGRESS, NOT PERFECTION: A CRITICAL ANALYSIS

In Schonewolf, the Third Circuit applied the less stringent Tapia interpretation in a manner that would satisfy the views of many, including several federal circuits and those who believe that rehabilitation can successfully lower recidivism rates. Schonewolf committed a new crime and previously received a downward departure, making the analysis less complicated. Nevertheless, Tapia challenges in cases with different procedural and factual histories still present multiple obstacles, including a seemingly impossible burden for defendants to meet. For example, a court may hold a revocation hearing and resentence the defendant if the defendant fails to successfully finish drug treatment. In these cases, the purpose of incarceration may be less clear because the court is imposing a sentence based solely on the defendant’s losing battle with addiction.

A. Don’t Lose Focus: Consider the Role, Not the Extent

Courts are seemingly losing sight of the question they should be considering—what was the role of rehabilitation? In the wake of Tapia, the question on appeal centers around the extent to which the sentencing court considered rehabilitation. This complicates the analysis because it is difficult to measure how much emphasis sentencing courts place on rehabilitation, and it hints at the primary purpose and dominant factor tests utilized by the more lenient circuits, both of which are not defined. Instead, courts should ask a simpler question: What role did rehabilitation have at sentencing?

More specifically, courts should ask whether rehabilitation was a motivating factor for the sentence or whether the court was merely suggesting...
that the defendant enroll in a rehabilitative program while in prison.\footnote{160. See Tapia v. United States, 564 U.S. 319, 334 (2011) (recognizing that courts may recommend different rehabilitative programming to defendants but courts may not lengthen period of imprisonment to further rehabilitative goals). The distinction between what is said and what is considered in Tapia may complicate an appellate court’s review. See Gornick, supra 35, at 861–62 (discussing possible trouble with distinguishing between what is considered or said). Notably, this “distinction between thought and speech has ex ante value for a sentencing court because it provides parameters for a judge’s ‘cognitive processes,’ i.e., her internal decisionmaking.” See id. at 862 (footnote omitted) (explaining sentencing court distinguishing between thoughts and spoken words may be valuable for sentencing court at time of sentencing). On appeal, however, this distinction “has virtually no ex post value” because the appellate court can only review “the sentencing hearing transcript, which includes only what the judge said—not what she thought.” See id. (recognizing distinction between thoughts and spoken words can be problematic on appeal because appellate courts are limited to spoken words contained in record).}

\footnote{161. See id. (discussing potential problems with distinguishing between what judge says and what judge actually means). Unlike trying to distinguish between what is said and what is meant to evaluate whether rehabilitation is considered, focusing on the role of rehabilitation may simplify the issue. See id. at 860–62 (outlining disagreements and discrepancies among circuits). Rather than reading a transcript to determine judge’s precise intent, considering the role itself may make it easier to use context clues within the transcript. Contra id. (recognizing reviewing court is limited to the words in transcript and cannot discern judge’s precise thoughts). For example, if the judge while imposing a sentence mentions a program the judge knows of that many similarly situated defendants have success with, the role of the discussion of rehabilitation is merely a suggested program, which Tapia allows. See Tapia, 564 U.S. at 334 (recognizing courts can suggest that defendants take advantage of certain programs). If, however, the judge says “I considered imposing a period of probation, but if I send you to prison you can participate in XYZ Program, and I want you to do that,” or, “I was going to sentence you to one year in prison, but if I sentence you to a year and a half you can participate in XYZ Program, so you are sentenced to a year and a half,” it is more clear that the defendant’s rehabilitative needs are part of the reason for the specific sentence. See id. at 321 (recognizing extending length of sentence to allow defendant to participate in certain rehabilitative program is improper).}

\footnote{162. See Tapia, 564 U.S. at 334 (“A court commits no error by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs. To the contrary, a court properly may address a person who is about to begin a prison term about these important matters.”).}

\footnote{163. See id. at 335 (“[A] court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.”).}

\footnote{164. Cf. id. (holding courts cannot impose sentence to enable defendant to participate and complete rehabilitation program, but carving out exception for rehabilitation).
proach, sentencing judges can have a conversation about rehabilitation and even recommend programming; however, they will be unable to use a defendant’s rehabilitative needs to impose a sentence of imprisonment or in determining the length of that sentence.165

B. Be Realistic: Level the Playing Field

Moreover, the plain error standard of review for unpreserved claims places an onerous burden on the defendant.166 Unfortunately, this means that some instances where a sentencing court violates Tapia go uncorrected because defendants were unable to meet that burden.167 Shockingly, even if a defendant satisfies his or her burden, the court may still use its discretion to decline to grant relief.168 This is because under the plain error standard of review, meeting the elements does not end the inquiry; instead, the court can only grant relief if it makes a second finding that “the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.”169 Similarly, this burden may make it easier for judges to circumvent the application of Tapia merely by omitting from the record specific reasons for a sentence.170

A common suggestion to avoid the harsh standard that is applied to unpreserved claims is to tell defendants to preserve their claims.171 In merely recommending different rehabilitative opportunities that defendant should consider). Tapia’s holding precluded courts from imposing or lengthening a period of incarceration to allow defendants to enroll in and complete certain rehabilitate programs. See id. (explaining purpose of Tapia holding). Yet, the Court recognized an exception, which allows courts to recommend and suggest rehabilitative programs with which they are familiar. See id. at 334–35 (recognizing exception). The ultimate holding in conjunction with the exception lead to the inference the Tapia Court focused on the role rehabilitation played and intended for sentencing courts to do the same moving forward. See generally id.

165. See Tapia, 564 U.S. at 334–35 (noting courts cannot impose or lengthen sentence of imprisonment based on rehabilitative needs, but courts can recommend and suggest certain programs).

166. For a discussion of why the plain error standard of review is especially problematic in the realm of Tapia challenges, see infra notes 167–80 and accompanying text.

167. See, e.g., United States v. Thornton, 846 F.3d 1110, 1118–20 (recognizing that district court erred when it sentenced Thornton but declining to find that error was “plain”).

168. See United States v. Todd, 756 F. App’x 170, 177 (3d Cir. 2018) (finding Tapia violation but declining to grant relief).


170. See id. at 688 (reviewing record to determine existence of Tapia violation).

practice as applied to *Tapia* challenges, this may look absurd. Defense counsel stands up and says: “Objection! You relied heavily or completely on rehabilitation in sentencing my client.” Many judges would simply elaborate by providing other justifications for the sentence, effectively destroying the defendant’s appellate claim. As a result, defense counsel face a lose-lose situation. First, the defense counsel can choose not to object and limit the record to what the judge said without further prompting, but on appeal the plain error burden becomes nearly impossible to meet. Second, defense counsel can object and have a lower burden on appeal, but give the judge the opportunity to expound, which would lead to a record that even a lower burden would likely not be able to overcome. As is, defendants face two equally unappealing options: (1) leave their claim unpreserved and face the plain error standard of review, or (2) create a record that would be weak on appeal; thus, the reviewing courts should consider applying a fairer standard of review.

C. *Change is a Process, Not an Event*

In order to level the playing field, a better way to view *Tapia* challenges may be through a legality of sentencing lens. Courts should utilize the Pennsylvania approach, where arguments alleging an illegal appeal/ [https://perma.cc/W3US-TS6E] (using simple terms to instruct attorneys how to preserve issues for appeal).

172. See id. (instructing attorneys to object during hearings to preserve specific issues for appeal).

173. See United States v. Thornton, 846 F.3d 1110, 1113 (10th Cir. 2017) (stating that defendant “needs all kinds of services that he can get and will get in prison” in sentencing him (emphasis in original)).

174. See United States v. Tapia, 564 U.S. 319, 321 (2011) (holding that the Act “precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant’s rehabilitation”).

175. See United States v. Schonewolf, 905 F.3d 683, 686 (3d Cir. 2018) (discussing other reasons for sentence including previous downward departure, behavior growing in severity, and danger to society).

176. See id. at 692–94 (finding sentencing court did not violate *Tapia* because it imposed sentence based on more than just rehabilitation).

177. See Thornton, 846 F.3d at 1113 (noting plain error is standard of review for unpreserved claims).

178. See United States v. Adams, 873 F.3d 512, 516–17 (6th Cir. 2017) (recognizing if claim is preserved standard of review for sentences imposed due to violations of probation or parole is abuse of discretion standard for reasonableness).

179. See Thornton, 846 F.3d at 1115 (noting unpreserved claims subject to plain error review); see also United States v. Adams, 873 F.3d 512, 516–17 (6th Cir. 2017) (recognizing preserved claims subject to abuse of discretion standard for reasonableness).

sentence cannot be waived or unpreserved because the issue is a jurisdictional matter. Under 18 U.S.C. § 3582(a), a court must acknowledge that imprisonment is not an appropriate means to promote rehabilitation and correction. If a court imposes a sentence that violates a statute, the court is imposing a sentence that it does not have the statutory authority to impose; thus, the court is sentencing outside of its jurisdiction.

The burden for Tapia claims needs to be lower because if a court goes beyond the bounds of its jurisdiction in imposing a sentence, the defendant should realistically be able to obtain relief. In sum, reviewing Tapia claims through the legality of the sentence lens lowers the burden of

---

181. See generally, 26A CHRISTINE M. G. DAVIS ET AL., STANDARD PENNSYLVANIA PRACTICE § 132:642 (2d ed. 2019) (outlining legality of sentencing approach that Pennsylvania takes). In particular, Pennsylvania courts recognize that an illegal sentence is void; consequently, the appellate issue surrounding its illegality cannot be waived. See id. (explaining that claims that sentence is illegal are always preserved). In other words, “if a trial court does not have jurisdiction, it’s sentencing decision is automatically subject to appellate review because the court imposing sentence has exceeded the limits of its authority.” See id. (citing Commonwealth v. Smith, 544 A.2d 991 (Pa. Super. Ct. 1988)) (explaining that illegal sentences involve jurisdictional issues). Additionally, Pennsylvania recognizes that one instance where a sentence is illegal occurs “when the sentence imposed is patently inconsistent with the sentencing parameter set forth by the legislature.” See id. (citing Commonwealth v. Succi, 173 A.3d 269 (Pa. Super. Ct. 2017) (providing example of illegal sentence). In the federal system, 28 U.S.C. § 2255 outlines remedies that apply when the court imposes a sentence it is not authorized to impose. See 28 U.S.C. § 2255 (2018) (stating remedies in federal system). The federal system recognizes that there are some cases in which a court may impose an illegal sentence, such as where the court imposes a sentence that is greater than the number of years allowed under the statute. See RHOADS, supra at § 35:19 (providing example of where sentence would be illegal). Under Rule 35 of the Federal Rules of Criminal Procedure, “[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.” See FED. R. CRIM. P. 35 (outlining procedure for correcting or reducing a sentence).


183. Cf. Davis, supra note 181, at § 132:624 (noting sentence imposed without statutory authority is sentence imposed without jurisdiction); see also id. (identifying source of violation); see also 28 U.S.C. § 2255(a) (2018) (noting certain prisoners may move for relief if sentence imposed violates Constitution). Specifically, section 2255(a) states:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. See id. (explaining instance where prisoner can ask for relief based on claim that sentence violates United States Constitution or federal law).

184. See id. (discussing remedies for court exceeding its jurisdictional or statutory authority); see also United States v. Adams, 873 F.3d 512, 516–17 (6th Cir. 2017) (noting standard of review for sentences imposed for violations of probation or parole is abuse of discretion standard for reasonableness).
This approach would make the defendant’s burden fairer and allow appellate courts to focus on what is truly important: whether a defendant was unfairly sentenced in violation of a statute. This approach would make the defendant’s burden fairer and allow appellate courts to focus on what is truly important: whether a defendant was unfairly sentenced in violation of a statute.186

VI. Don’t Quit Before the Miracle Happens

Although Schonewolf was not the first instance where the Third Circuit considered a Tapia violation, it was the first time it expressly took a position in the circuit split.187 Following Schonewolf, district court judges will be able to discuss rehabilitative options within prisons as well as a particular defendants’ struggles, including drug addiction and mental health. Doing so will allow judges to have a meaningful conversation with defendants, which will be beneficial even if the defendants are not ultimately pleased with the sentence they receive.189 Importantly, however, courts cannot rely on rehabilitation to impose a sentence of imprisonment.190

The Schonewolf decision may also cause states within the Third Circuit to re-evaluate their own sentencing procedures.191 For example, the

185. See Adams, 873 F.3d at 516–17 (discussing abuse of discretion standard of review).
187. See United States v. Schonewolf, 905 F.3d 683, 692 (3d Cir. 2018) (“[W]e think the better reading of Tapia would only find error where the record suggests ‘that the court may have calculated the length of [a defendant’s] sentence to ensure that she receive[s] certain rehabilitative services.’” (quoting Tapia v. United States, 564 U.S. 319, 334–35 (2011))).
188. See id. (noting Tapia “left open the door for a District Court to ‘discuss[ ] the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs’” (alteration in original) (quoting Tapia, 564 U.S. at 334)).
189. See Tapia, 564 U.S. at 334 (noting courts can urge the Bureau of Prisons to place a defendant in prison treatment program). Notably, section 3582(a) states that a court can “make a recommendation concerning the type of prison facility appropriate for the defendant.” See 18 U.S.C. § 3582(a) (2018) (explaining courts can recommend certain prison facilities). This is because “the presence of a rehabilitation program may make one facility more appropriate than another.” See Tapia, 564 U.S. at 334 (recognizing certain facilities may be better equipped to deal with defendant’s needs). As a result, courts that try to get offenders into effective drug treatment programs do “something very right” as opposed to something wrong. See id. (discussing exception for when courts can discuss rehabilitation in imposing sentence of incarceration).
190. See id. (noting that if court does more than recommend programs within facility it improperly considered rehabilitation in imposing sentence of imprisonment).
Pennsylvania statute governing imprisonment allows for the imposition of total confinement based on “the nature and circumstances of the crime and the history, character, and condition of the defendant” if the court believes that imprisonment is necessary because the defendant needs “correctional treatment that can be provided most effectively by [the defendant’s] commitment to an institution . . . .”192 In light of Schonewolf, Pennsylvania may amend the statutory language or add a clause with an exception that notes rehabilitation cannot be the sole reason for a sentence of imprisonment.193

Similarly, a New Jersey statute recognizes one purpose of sentencing is “[t]o promote the correction and rehabilitation of offenders . . . .”194 Importantly, however, New Jersey has a separate statute that lists aggravating and mitigating factors courts must consider before imposing a sentence of imprisonment.195 This statute omits rehabilitation as an aggravating or mitigating factor, and it does not state whether courts can consider factors that are not listed.196 To clarify whether a court can or should consider rehabilitation as a general purpose of sentencing when imposing sentences of imprisonment, New Jersey should amend its statutory language.197

Currently, most inmates struggle with substance use disorders and mental illness.198 Moreover, many inmates have never received a formal education or job-training.199 These underlying struggles are what cause to further rehabilitation), with 42 PA. STAT. & CONS. STAT. ANN. § 9725(2) (allowing incarceration to further rehabilitation).

192. See 42 PA. STAT. & CONS. STAT. ANN. § 9725 (providing sentencing courts in Pennsylvania with factors to consider at sentencing).

193. See United States v. Schonewolf, 905 F.3d 683, 692 (3d Cir. 2018) (recognizing that Tapia allows courts to discuss rehabilitative opportunities). Compare 42 PA. STAT. & CONS. STAT. ANN. § 9725(2) (allowing incarceration for purposes of rehabilitation), with Tapia, 564 U.S. at 333 (holding courts cannot impose or lengthen prison terms for rehabilitative purposes), and 18 U.S.C. § 3582(a) (forbidding courts from imposing incarceration to allow for rehabilitation).

194. See N.J. STAT. ANN. § 2C:1-2(b) (West 2014) (listing “general purposes of the provisions governing the sentencing of offenders”).

195. See id. § 2C:44-1 (providing factors courts must consider before imposing sentence of imprisonment).

196. See id. (failing to list rehabilitation as factor but excluding subsection to clarify whether court may consider it as general purpose).

197. Compare id. § 2C:1-2(b) (noting rehabilitation is a purpose underlying the sentencing provisions), and id. § 2C:44-1 (listing factors courts must consider before imposing imprisonment but failing to clarify whether courts can consider rehabilitation generally at sentencing), with Tapia, 564 U.S. at 333 (holding courts cannot impose or lengthen prison terms for rehabilitative purposes), and 18 U.S.C. § 3582(a) (precluding courts from imposing incarceration to allow for rehabilitation).

198. For a discussion of the prevalence of substance use disorders and mental illness among inmates, see supra notes 2–5 and accompanying text.

199. For a discussion of the educational and vocational needs of inmates, see supra notes 6–9 and accompanying text.

https://digitalcommons.law.villanova.edu/vlr/vol64/iss4/3
many offenders to resort to criminal activity. Although the criminal justice system and courts need to address the rehabilitative needs of offenders, locking up offenders solely for the purpose of facilitating treatment is not a valid reason for a sentence of incarceration. As a result, Tapia and Schonewolf are important cases that draw a necessary line between the permissible and impermissible discussion of rehabilitation at sentencing.

Moving forward, many courts and legislatures will need to adjust their sentencing methodology and statutes in order to ensure compliance with Tapia. In doing so, they should focus more on the role rehabilitation played at sentencing and less on the extent to which a court considers rehabilitation. Alternatively, because a court that imposes a sentence of incarceration for rehabilitative purposes exceeds its statutory authority, appellate courts should evaluate Tapia claims as though they are challenges to the legality of the sentence, subjecting the appellant to a lower, more realistic burden of proof. Although these distinctions may seem minor, they are crucial for someone who is facing a period of incarceration solely because of their losing battle with addiction or mental illness.

200. See Incarceration, Substance Abuse, and Addiction, supra note 2 (explaining that 63–83% of defendants are under influence of drugs when arrested); see also Harlow supra note 6 (citing Grant Duwe, An Outcome Evaluation of a Prison Work Release Program: Estimating Its Effects on Recidivism, Employment, and Cost Avoidance, 26 CRIM. JUST. POL’Y REV. 531 (2015) (noting that job-training programs, specifically work release decreased rearrests by 16%, reconvictions by 14%, and new offense reincarceration by 17%)).


202. See Tapia, 564 U.S. at 335 (noting courts may discuss opportunities for rehabilitation or benefits of certain programs but holding that courts cannot impose or lengthen prison terms merely because they think offenders will benefit from prison treatment programs); United States v. Schonewolf, 905 F.3d 683, 692 (3d Cir. 2018) (recognizing that Tapia allows courts to discuss rehabilitative opportunities).

203. For a discussion of how Pennsylvania may have to amend its sentencing scheme, see supra notes 192–94 and accompanying text.

204. For a discussion on why courts should consider the role of rehabilitation in sentencing, see supra notes 157–66 and accompanying text.

205. For a discussion of the appellant’s burden under the plain error standard of review and how utilizing a legality of the sentence approach may fix the issue, see supra notes 167–80 and accompanying text.

206. See United States v. Thornton, 846 F.3d 1110, 1118–19 (10th Cir. 2017) (determining sentencing court violated Tapia because it sentenced Thornton to prison to give him enough time to get treatment and vocational benefits but declining to grant relief under plain error standard of review).