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

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Notes

THE ROAD TO RECOVERY: THE THIRD CIRCUIT RECOGNIZES THE IMPORTANCE OF REHABILITATIVE NEEDS DURING SENTENCING IN *UNITED STATES v. SCHONEWOLF*

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"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."[1]

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

One in two incarcerated persons struggle with substance abuse disorders and dependency.[2] Of these inmates, many were under the influence of narcotics while they committed the crime that led to their incarceration.[3] One study found that about 15% of male and 30% of female inmates suffer from diagnosed mental illnesses.[4] These figures are likely conservative, as other studies have revealed that over half of inmates satisfy the criteria for a mental illness.[5]

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* 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.

1. *See* Robert F. Kennedy, Attorney General, Address at Joint Sentencing Institute of the Sixth, Seventh and Eighth Judicial Circuits (Oct. 12, 1961), https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/10-12-1961.pdf [https://perma.cc/Y5SD-J8PC].

2. *See Incarceration, Substance Abuse, and Addiction*, THE CTR. FOR PRISONER HEALTH & HUMAN RIGHTS, https://www.prisonerhealth.org/educational-resources/factsheets-2/incarceration-substance-abuse-and-addiction/ [https://perma.cc/GK8U-CUBJ] (last visited Jan. 17, 2019) (providing statistics on prevalence of substance use disorders amongst inmates).

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

4. *See Jailing People with Mental Illness*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/learn-more/public-policy/jailing-people-with-mental-illness [https://perma.cc/AH5E-NVDD] (last visited Jan. 17, 2019) (providing statistics on presence of mental illnesses among inmates).

5. *See Incarceration and Mental Health*, THE CTR. FOR PRISONER HEALTH & HUMAN RIGHTS, https://www.prisonerhealth.org/educational-resources/factsheets-2/incarceration-and-mental-health/ [https://perma.cc/GK8U-CUBJ] (last visited Jan. 17, 2019) (noting statistics regarding mental illness among inmates).

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.[6] Approximately 41% of federal and state inmates did not complete high school or obtain their General Education Development, or GED.[7] 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.[8] This is especially disheartening because studies demonstrate that job-training and employment reduce an inmate's likelihood of reoffending.[9]

The connection between incarceration and the above-mentioned areas—mental health, education, and substance abuse—influences rehabilitation efforts.[10] 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.[11] 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 indi-

6. *See* Caroline Wolf Harlow, *Education and Correctional Populations*, BUREAU OF JUSTICE STATISTICS: SPECIAL REP., https://www.bjs.gov/content/pub/pdf/ecp.pdf [https://perma.cc/R5JS-R3XY] (last revised Apr. 15, 2003) (reporting numerous statistics regarding educational backgrounds of inmates); *see also* Adam Looney, *5 Facts About Prisoners and Work, Before and After Incarceration*, BROOKINGS (Mar. 14, 2018) https://www.brookings.edu/blog/up-front/2018/03/14/5-facts-about-prisoners-and-work-before-and-after-incarceration/ [https://perma.cc/L4J2-ANPJ (discussing employment trends of inmates before and after serving prison terms).

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).

9. *See* Jacob Reich, *The Economic Impact of Prison Rehabilitation Programs*, WHARTON U. OF PA. PUB. POL'Y INITIATIVE (Aug. 17, 2017), https://publicpolicy.wharton.upenn.edu/live/news/2059-the-economic-impact-of-prison-rehabilitation/for-students/blog/news.php#_edn7 [https://perma.cc/6L7X-4RHA] (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, 544 (Mar. 11, 2014), https://doi.org/10.1177/0887403414524590 [https://perma.cc/5RGB-C23E]) (noting that job-training programs, specifically work release, decreased rearrests by 16%, reconvictions by 14%, and new offense reincarceration by 17%). Work release increased the risk of technical violations by approximately 78%. *See id.* (noting increased technical violations).

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.[12] 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.[13]

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.[14] While rehabilitation occupies a central role in discussions of criminal justice reform it is not a new concept within the criminal justice system.[15] Instead, rehabilitation has been a goal of punishment—along with deterrence, retribution, and incapacitation—since the creation of the system.[16] Nevertheless, the popularity of rehabilitation has waxed and waned.[17]

Currently, the theory's popularity is in a waxing phase, with prisons offering a variety of programs designed to rehabilitate inmates.[18] Specifically, prisons provide substance use programs, which often vary in inten-

12. *See generally id.* (discussing theory of rehabilitation).

13. *See id.* (discussing educational programming opportunities that may rehabilitate offenders).

14. For a discussion of the prevalence of offender mental illness and substance use disorder, see *supra* notes 2–5 and accompanying text. For a discussion of inmate educational and vocational concerns, see *supra* notes 6–9 and accompanying text.

15. *See* Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 L. & SOC'Y REV. 1, 1 (2011) (noting rehabilitation's varying degrees of popularity over time).

16. *See id.*; *see also* Jennifer Marson, *The History of Punishment: What Works for State Crime?*, 7 THE HILLTOP REV. 19 (2015) (outlining history of purposes of punishment). The theory of incapacitation is simple: if offenders are physically moved (i.e., incarcerated) away from society, they cannot reoffend. *See* Rebecca Bernstein, *Addressing Transgressions: Types of Criminal Punishment*, POINT PARK U. (Nov. 26, 2016), https://online.pointpark.edu/criminal-justice/types-of-criminal-punishment/ [https://perma.cc/5DLN-X7YE] (discussing theory of incapacitation). Deterrence is often split up into two subcategories: specific and general. *See id.* (recognizing different types of deterrence). General deterrence intends to dissuade other criminals from committing similar crimes. *See id.* (providing example of general deterrence). For example, sentencing one bank robber harshly may deter other bank robbers. *See id.* (illustrating concept of general deterrence). Specific deterrence intends to deter one particular offender from committing future crimes. *See id.* (providing example of specific deterrence). Retribution is essentially the notion that the offender will get his or her just desserts. *See id.* (clarifying that retribution is rooted in societal satisfaction). In other words, it allows society to feel as though offenders receive the punishments they deserve. *See id.* (explaining concept of retribution).

17. *See* Phelps, *supra* note 15, at 3–4 (providing timeline of increasing and decreasing popularity of rehabilitative model); *see also* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003) (detailing changes in purposes of punishment over time).

18. For a discussion of some of the different types of rehabilitative programs prisons offer, see *infra* notes 19–29 and accompanying text.

sity.[19] 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.[20] Prisons may also offer two types of drug abuse treatment programs: residential and non-residential.[21] In residential drug abuse programs (RDAP), inmates live separately from general population for approximately nine months.[22] RDAPs are the most intensive program because participants live separately from other inmates and half of each day consists of programming.[23] 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.[24] Many prisons also have programs for inmates who have mental health concerns, including group counseling, crisis intervention, and mental health units.[25]

In addition to the typical drug, alcohol, and mental health programs prisons offer, most prisons also offer educational and vocational programs.[26] Specifically, prisons may offer basic literacy classes, GED classes,

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19. *See Substance Abuse Treatment*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp [https://perma.cc/N7BZ-LRUV] (last visited Jan. 31, 2019) (noting different intensity of substance abuse treatment programs depending on current state of offender's addiction).

20. *See id.* (discussing drug abuse education classes within prisons).

21. *See id.* (outlining types of drug abuse treatment programs).

22. *See id.* (outlining residential drug abuse program). Inmates in this program have two halves to their day: half for intensive programming in the community and the other half for educational or vocational activities. *See id.* (specifying what standard day for inmate in residential drug abuse program would look like). 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.

See id. (outlining both process for and findings of study).

23. *See id.* (elaborating on what residential drug abuse programs involve).

24. *See id.* (discussing specifics of nonresidential drug abuse treatment). Nonresidential drug abuse treatment is designed for offenders who have short sentences, who either may not qualify for or are waiting to begin the residential drug abuse treatment program, are transitioning to the community, or have had a positive urinalysis test. *See id.* (describing type of inmates who would benefit most from nonresidential drug abuse treatment program). The curriculum is meant to address criminal lifestyles and build rational thinking and communication skills while helping inmates adjust to prison life. *See id.* (stating goals of curriculum).

25. *See Basic Mental Health Services*, NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/spotlight-on-the-standards-24-3 [https://perma.cc/8ENC-9RHP] (last visited Jan. 31, 2019) (providing guidelines for ensuring mental health services within prisons adequately address concerns of inmates).

26. *See* Reich, *supra* note 9 (analyzing economic impact of education and job-training programs within prisons). Educational program opportunities within prisons and jails vary greatly from place to place. *See FAQ: Prison Educational Programs:*

and college-level programs.[27] Additionally, many prisons offer work release, which allows inmates to work in the community during the day and return to the prison at night.[28]

Because many offenders and inmates require treatment and programming, it seems prudent for courts to consider a defendant's rehabilitation when imposing a sentence.[29] Nevertheless, the laws in some jurisdictions preclude judges from even mentioning a defendant's rehabilitative needs or the possibility of rehabilitation at sentencing.[30] This harsh shift away from considering rehabilitation developed slowly over several decades.[31]

In the 1980s, Congress enacted the Sentencing Reform Act (the Act).[32] Under the Act, a judge must consider multiple factors to deter-

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Which Educational Programs Are Available to Prisoners?, PRISON FELLOWSHIP, https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-prison-educational-programs/ [https://perma.cc/PHT2-KAMX] (last visited Jan. 18, 2019) (discussing educational opportunities within prisons). Many prisons offer GED classes for inmates. *See id.* (noting availability of GED classes). If an inmate has already obtained their high school diploma or GED, some correctional facilities have contracts with colleges and universities that enable inmates to take college-level courses. *See id.* (mentioning availability of college-level courses). Other educational opportunities include life skills courses. *See id.* (explaining availability of other education courses). Among other things, these courses are designed to help prisoners control their anger, set and achieve goals, and develop healthy relationships. *See id.* (discussing purposes of life skills classes). Moreover, inmates can and are often encouraged to participate in various twelve-step programs. *See id.* (noting availability of rehabilitative process programs). These twelve-step programs include Celebrate Recovery and Narcotics Anonymous. *See id.* (specifying some twelve-step programs). Additionally, many prisons offer parenting classes. *See Education Programs*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/education.jsp [https://perma.cc/PLQ9-P4FU] (last visited Jan. 18, 2019) (outlining educational programs within federal prisons). These classes allow inmates to develop their parenting skills while serving their prison sentence. *See id.* (noting benefits of parenting classes). Importantly, however, not every inmate may participate in these programs. *See FAQ: Prison Educational Programs: Which Educational Programs are Available to Prisoners?*, *supra* (listing qualifications to become enrolled in certain prison programs). In some cases, before inmates can participate, they must obtain approval from the prison administration, take and pass entrance exams, and pay full or partial tuition. *See id.* (providing examples of requirements inmates must satisfy before enrolling in certain programs).

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).

32. *See generally* 18 U.S.C. § 3553 (2018) (listing factors for court to consider when imposing sentence). The Act created the United States Sentencing Commission and outlined a new sentencing structure. *See* H.R. 5773, 98th Congress (1983-1984) (summarizing contents of the Act).

mine an appropriate sentence, including retribution, deterrence, incapacitation, and the defendant's need for "educational or vocational training, medical care, or other correctional treatment . . . ."[33] 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."[34] Because these two statutes are seemingly inconsistent, they sparked a debate regarding the role of rehabilitation at sentencing.[35]

In 2011, in *Tapia v. United States*,[36] 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.[37] 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.[38] Instead, the *Tapia* decision led to a federal circuit split because it changed the focus of the discussion.[39]

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.[40] The Seventh, Ninth, Tenth, and Eleventh Circuits held that any consideration of rehabilitation at sentencing violates *Tapia*.[41] 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.[42] Recently, in

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

34. *See* 18 U.S.C. § 3582(a) (2018) (stating courts should not sentence offenders to prison to promote rehabilitation).

35. *See generally* Matt J. Gornick, *Finding "*Tapia *Error": How Circuit Courts Have Misread* Tapia v. United States *and Shortchanged the Penological Goals of the Sentencing Reform Act*, 69 VAND. L. REV. 845, 860 (2016) (recognizing confusion created amongst circuits following *Tapia v. United States*, 564 U.S. 319 (2011)).

36. 564 U.S. 319 (2011).

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.

39. *See* Gornick, *supra* note 35, at 856–57 (outlining different approaches for analyzing *Tapia* challenges).

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,[43] the Third Circuit weighed in on the issue, joining the latter circuits and holding courts may consider rehabilitation at sentencing.[44]

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.[45] Part II summarizes relevant statutes and cases, outlining the justifications courts have utilized in determining the reach of *Tapia*.[46] Part III describes the facts and procedure giving rise to the decision in *United States v. Schonewolf*.[47] Part IV outlines the Third Circuit's approach in determining that courts can consider a defendant's rehabilitative needs when imposing a particular sentence.[48] Part V examines the Third Circuit's legal analysis of *Tapia*, and also discusses issues surrounding *Tapia* challenges.[49] 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.[50]

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ing 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.[51] To reduce the likelihood of arbitrary or disproportionate sentences, Congress and the Sentencing Commission provide guidance to judges.[52] Additionally, the Supreme Court and circuit courts provide guidance by interpreting the laws and applying them to specific cases.[53]

A. *Support from the Legislative and Judicial Branches*

Judges often look for legislative guidance on the proper considerations when imposing sentences.[54] In response, the United States Sentenc-

51. *See* Thomas A. Zonay, *Judicial Discretion: Ten Guidelines for Its Use*, THE NAT'L JUDICIAL COLL. (May 21, 2015), https://www.judges.org/judicial-discretion-ten-guidelines-for-its-use/ [https://perma.cc/8N3D-YEPR] (suggesting ten guidelines for judges to consider when exercising their sentencing discretion). Proportionality in the realm of criminal sentencing is the idea that "the punishment should equal the crime." *See* Mirko Bagaric, *Proportionality in Sentencing: Its Justification, Meaning and Role*, 12 CURRENT ISSUES CRIM. JUST. 141, 142–46 (2000) (detailing notion of proportionality in sentencing). Proportionality is an especially important concept in sentencing because of the amount of discretion courts have in imposing sentences. *See id.* at 159 ("Due to the large degree of discretion reposed in sentencers, sentencing law has been widely criticised as being unprincipled and lacking consistency, thereby compromising the fairness of the sentencing process." (citing MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); Mirko Bagaric, *Sentencing: The Road to Nowhere*, 21 SYDNEY L. REV. 597 (1999)). Another key aspect of proportionality is that "[s]imilarly situated defendants are supposed to receive similar sentences." *See* Eric Lotke, *Sentencing Disparity Among Co-Defendants: The Equalization Debate*, 6 FED. SENT'G REP. 116, 116 (1993) (discussing proportionate sentences amongst co-defendants and similarly situated defendants).

52. *See* 18 U.S.C. § 3553(a) (2018) (providing factors for judges to consider in sentencing); *see also* 18 U.S.C. § 3582(a) (2018) (informing judges that rehabilitation cannot be sole basis for sentencing offender to imprisonment); *An Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM'N, https://isb.ussc.gov/files/USSC_Overview.pdf [https://perma.cc/A49T-XB8E] (last visited Jan. 31, 2019) (noting objectives of United States Sentencing Guidelines). These resources provide guidance from Congress and the United States Sentencing Commission. *See id.* (elaborating on guidance from Congress and Sentencing Commission). For a discussion of guidance from Congress and the Sentencing Commission, see *infra* notes 55–61 and accompanying text.

53. For a discussion of Supreme Court and circuit court cases that provide further guidance, see *infra* notes 62–90 and accompanying text.

54. *See* § 3553(a) (enumerating factors for judges to consider, including deterrence, nature and circumstances of offense, protection of public, and need for restitution); *see also* § 3582(a) (providing that rehabilitation cannot be sole basis for sentencing offender to imprisonment). Some judges also consider whether the defendant is eligible for specialty courts. *See Federal Alternative-to-Incarceration Court Programs*, U.S. SENTENCING COMM'N, (Sept. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf [https://perma.cc/2AYP-EY3E] (discussing drug courts, specialty courts, and diversionary programs that are available as options at sentencing).

ing Commission promulgated the United States Sentencing Guidelines (USSG), which aim to advise judges and reduce sentencing disparities.[55] 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 . . . ."[56] 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."[57]

In addition to these statutes, federal judges must also consider the USSG before imposing a sentence.[58] 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."[59] Although the USSG are advisory—meaning judges are not re-

55. *See Mission*, U.S. SENTENCING COMM'N, https://www.ussc.gov/about-page [https://perma.cc/EQ3M-WPDC] (last visited Jan. 17, 2019) (noting Congress enacted Act that created Sentencing Commission). The Sentencing Reform Act of 1984 created the United States Sentencing Commission, which is an agency within the judicial branch. *See id.* (providing brief history of Sentencing Commission within United States government). The Commission's primary purpose is "to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes . . . ." *See id.* (noting Sentencing Commission's primary purpose). Additionally, the Commission serves two other purposes. *See id.* (explaining Sentencing Commission has multiple purposes). First, the Commission is "to advise and assist Congress and the executive branch in the development of effective and efficient crime policy." *See id.* Second, the Commission is "to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public." *See id.*

56. *See* § 3553(a)(2)(D) (directing courts to consider multiple factors in imposing sentences). In pertinent part, section 3553(a) directs courts to consider the nature and circumstances of the offense as well as the defendant's history and characteristics. *See id.* § 3553(a)(1)–(7) (naming factors related to defendant and defendant's history). Additionally, section 3553(a) requires that courts consider the seriousness of the crime, how to deter additional crimes, the protection of the public, and the educational, vocational, or medical needs of the defendant. *See id.* (outlining factors related to purposes of punishment). Finally, section 3553(a) outlines additional considerations, including policy statements and the sentence recommended by the USSG. *See id.* (naming miscellaneous factors).

57. *See* § 3582(a) (elaborating on factors courts should consider in imposing term of imprisonment).

58. *See Federal Sentencing Guidelines*, CORNELL LAW SCH., LEGAL INFORMATION INST., https://www.law.cornell.edu/wex/federal_sentencing_guidelines [https://perma.cc/TV3P-SM6F] (last visited Jan. 17, 2019) (noting that although USSG are not mandatory, judges must consider them before sentencing and explain factors leading to departure from USSG).

59. *See An Overview of the United States Sentencing Commission*, *supra* note 52 (discussing purpose of United States Sentencing Commission and objectives of United

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

States Sentencing Guidelines). The purposes of sentencing include "just punishment, deterrence, incapacitation, rehabilitation." *See id.* (specifying purposes of sentencing).

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['] ranges, 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.[64] 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.[65]

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.[66] 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.[67] The second question has proven far more difficult to answer.[68]

Some circuits utilize a strict standard where any discussion of rehabilitation at sentencing violates *Tapia*.[69] For example, in *United States v. Van-*

means "to acknowledge or treat as valid." *See id.* (internal quotation marks omitted) (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1611 (2d ed. 1987)). Additionally, the Court determined that something is not appropriate when it is not "suitable or fitting for a particular purpose." *See id.* (internal quotation marks omitted) (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 103 (2d ed. 1987)). Thus, the Court concluded that "a court making these decisions should consider the specified rationales of punishment *except for* rehabilitation, which it should acknowledge as an unsuitable justification for a prison term." *See id.* (emphasis in original) (stating Court's ultimate holding).

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 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.").

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).

67. *See* Madeline W. Goralski, Note, *Let the Jude Speak: Reconsidering the Role of Rehabilitation in Federal Sentencing*, 89 ST. JOHN'S L. REV. 1283, 1296–306 (2015) (noting circuit courts may deliberate extent to which sentencing judges can consider rehabilitation before violating *Tapia*).

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-

dergrift,[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

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tantly, even if rehabilitation is only one of several reasons the court uses to support an imposition of imprisonment, a *Tapia* violation may still occur. *See id.* (noting rehabilitation does not have to be sole rationale for sentence of imprisonment to violate *Tapia*). Similarly, a court may violate *Tapia* even if it does not expressly tie the term of imprisonment to a treatment program or opportunity. *See id.* at 1118–19 (explaining that a court may violate *Tapia* even if it does not explicitly justify sentence of imprisonment with rehabilitation). Nevertheless, the *Thornton* court clarified that a district court may discuss rehabilitation to rebut a defendant's argument that specific treatment opportunities would justify a lesser sentence. *See id.* at 1117–18 (noting circumstance in which it would be appropriate for court to mention defendant's rehabilitation).

70. 754 F.3d 1303.

71. *See id.* (noting this holding is consistent with *Tapia*). The Eleventh Circuit determined that its holding was consistent with *Tapia* because the *Tapia* Court emphasized "that imprisonment is not an appropriate means of promoting correction and rehabilitation." *See id.* (internal quotation marks omitted) (quoting Tapia v. United States, 564 U.S. 319, 322 (2011)) (explaining *Tapia's* justification for its holding). More specifically, the Eleventh Circuit noted that the *Tapia* Court directed sentencing courts to "*consider* the specified rationales of punishment *except for* rehabilitation, which it should acknowledge as an unsuitable justification for a prison term." *See id.* (emphasis in original) (quoting *Tapia*, 564 U.S. at 322) (providing Eleventh Circuit's recitation of *Tapia* holding). Thus, the Eleventh Circuit interpreted *Tapia* to preclude any consideration of rehabilitation when a court is "determining whether to impose or lengthen a sentence of imprisonment." *See id.* (explaining Eleventh Circuit's justification for its holding).

72. *See id.* at 1306 (noting mental health diagnosis and programs within prison). In particular, the sentencing court acknowledged that the defendant struggled with bipolar disorder, and stated that the prison system may be able to help the defendant in that respect. *See id.* Moreover, the court recognized that the defendant could benefit from vocational training programs within the prison. *See id.*

73. *See id.* (discussing sentencing court's reasoning for imposing sentence). In outlining the reasons for its sentence, the court expressed a desire to promote respect for the conditions of supervised release, reflect the seriousness of the defendant's conduct, provide just punishment, afford adequate deterrence, protect the public, and to benefit the defendant. *See id.* (quoting sentencing court's reasoning for Vandergrift's sentence).

74. *See id.* at 1309–12 (noting *Tapia* Court's reasoning for its holding).

75. 846 F.3d 1110 (10th Cir. 2017).

a court considers in imposing a sentence of imprisonment.[76] Specifically, the sentencing court considered the defendant's upbringing, lack of education, and need for remedial services.[77] In another case, the Tenth Circuit determined the sentencing court violated *Tapia* when it considered rehabilitation in tailoring the length of a sentence.[78] 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.[79]

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.[80] 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.[81] 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.[82] Similarly, the Second Circuit, in *United States v. Lifshitz*,[83] declined to find a *Tapia* violation where rehabilitation was not the lower court's primary consideration in crafting the sentence.[84]

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to find *Tapia* violation where court considered whether defendant would be "treated better somewhere else" in imposing sentence of imprisonment). *See* Gornick, *supra* 35, at 856 (outlining methods circuits use in analyzing *Tapia* claims).

81. *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).

82. *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)).

83. 714 F.3d 146 (2d Cir. 2013).

84. *See id.* at 150 (holding sentencing judge did not commit *Tapia* error where judge mentioned defendant's need for medical treatment but based sentence on defendant's continued violation of supervised release). The Second Circuit recognized that based on the sentencing colloquy, the "district court's primary considerations in sentencing Lifshitz were 'promoting respect for the law and protecting the public from further crimes of this defendant.'" *See id.* at 150 (describing sen-

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.'"[85] In doing so, the Third Circuit overruled its prior decision in *United States v. Doe*,[86] in which it held that section 3583, the statute governing post-revocation sentencing, permits courts to consider medical and rehabilitative needs.[87] Additionally, in *United States v. Zabielski*,[88] the Third Circuit declined to find a *Tapia* violation where the sentencing court discussed rehabilitation as just one reason for imposing a particular sentence.[89]

III. TOUGH TIMES MAKE TOUGH 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.[90] Janet Sonja Schonewolf began smoking marijuana at age fourteen.[91] By fifteen, she dropped out of high school and left home.[92] Additionally, Schonewolf struggled with alcoholism and attempted suicide multiple times.[93] Eventually, doctors diagnosed Schonewolf with bipolar disorder.[94] Schonewolf also struggled with crack cocaine and methamphetamine abuse.[95]

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tencing court's considerations). Further, although "the district court also considered Lifshitz's need for medical care, there is no indication in the record that the district court based the length of Lifshitz's sentence on his need for treatment." *See id.* (recognizing sentencing court mentioned Lifshitz's need for treatment, but did not base length of sentence upon needed treatment). Instead, the sentencing court based Lifshitz's sentence on "'continued disregard of the reasonable terms and conditions of supervised release,' which necessitated 'a lengthy period of incarceration' 'to promote respect for the law and to protect the public from other crimes of this defendant." *See id.* (outlining sentencing court's basis for imposing Lifshitz's particular sentence).

85. *See* United States v. Schonewolf, 905 F.3d 683, 692 (3d Cir. 2018) (quoting United States v. Tapia, 564 U.S. 319, 334–35 (2011)).

86. 617 F.3d 766 (3d Cir. 2010).

87. *See Schonewolf*, 905 F.3d at 687–90 (citing United States v. Doe, 617 F.3d 766 (3d Cir. 2010) (elaborating on *Doe* holding and reasoning); 18 U.S.C. 3583(e)-(g) (2018) (outlining procedures for post-revocation sentencing)).

88. 711 F.3d 381 (3d Cir. 2013).

89. *See Schonewolf*, 905 F.3d at 693–94 (discussing *Zabielski* holding).

90. *See id.* at 684–85 (discussing Schonewolf's circumstances, which parallel those of many defendants within criminal justice system).

91. *See id.* at 684 (outlining facts).

92. *See id.* (discussing Schonewolf's childhood).

93. *See id.* at 685 (noting beginning of Schonewolf's drinking problem).

94. *See id.* (acknowledging Schonewolf's mental health diagnosis).

95. *See id.* (elaborating on extent of Schonewolf's addiction).

Schonewolf began using opiates 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]

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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.[104] As a result, her probation officer re-filed the violation.[105] During the revocation hearing, the government noted Schonewolf's re-enrollment in a treatment program and progress within the program.[106] The district court sentenced Schonewolf to one day in prison and her pre-existing term of supervised release.[107]

While Schonewolf was on supervised release, officers caught her selling heroin.[108] She admitted that she had been doing so for six to seven months, and she pleaded guilty to multiple drug charges.[109] The court sentenced Schonewolf to two to four years' imprisonment.[110] As a result of her new case, Schonewolf's probation officer again filed a violation with the court.[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.[112] At the time, the USSG recommended a sentence of twenty-four to thirty months' imprisonment.[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.[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.[115] Additionally, she

104. *See id.* (acknowledging that Schonewolf failed to complete her detox program due to overdose).

105. *See id.* (explaining how Schonewolf's probation officer refiled violation of supervised release).

106. *See id.* (outlining evidence before sentencing court).

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).

108. *See Schonewolf*, 905 F.3d at 685 (outlining circumstances of most recent arrest).

109. *See id.* (elaborating on facts and procedure of Schonewolf's most current arrest).

110. *See id.* (stating Schonewolf's sentence).

111. *See id.* (noting that probation officer filed second petition stating Schonewolf violated her supervised release).

112. *See id.* (listing date of revocation hearing).

113. *See id.* at 686 (acknowledging sentence range recommended by guidelines).

114. *See id.* (outlining government's argument at revocation hearing).

115. *See id.* (discussing Schonewolf's arguments at revocation hearing).

emphasized that she already received a two-to-four-year sentence for her new crime, which would give her time to complete treatment.[116]

The district court sentenced Schonewolf to forty months' imprisonment to run consecutive to her state sentence.[117] 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."[118] The sentencing court also mentioned the fact that Schonewolf previously received a downward departure and that Schonewolf was a danger to herself and society.[119] Schonewolf appealed her sentence, arguing that the district court violated the Sentencing Reform Act by sentencing her to imprisonment to further her rehabilitation.[120]

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.[121] 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.'"[122] Nevertheless, even if these elements are met, the court "may exercise its dis-

116. *See id.* (recognizing sentence for new charges).

117. *See id.* at 684 (noting sentence court imposed following revocation hearing). Consecutive sentences are those that are served one after the other. *See 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 *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 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 *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.*

118. *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 *Tapia*).

119. *See id.* (recognizing other factors sentencing court considered).

120. *See id.* (reciting Schonewolf's primary argument on appeal).

121. *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))).

122. *See id.* at 687 (quoting *Berry*, 553 F.3d at 279).

cretion to grant relief, but only if 'the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.'"[123]

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.[124] Additionally, Schonewolf challenged whether *Tapia* applies to sentences imposed at post-violation hearings, such as Schonewolf's revocation hearing.[125] 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.[126] Instead, section 3582(a) merely states that imprisonment is not an appropriate way to promote rehabilitation.[127] 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.[128]

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."[129] 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.[130] 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.[131]

Additionally, the Third Circuit examined the existing circuit split surrounding *Tapia*.[132] 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.[133] 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.[134]

The Third Circuit ultimately concluded that the second grouping of circuits decided the issue correctly.[135] 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.[136] 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.[137] Importantly, however, courts may still mention or discuss a prison's rehabilitative programs during sentencing.[138] Consequently, the Third Circuit declined to hold that a sentencing judge merely mentioning rehabilitation violates *Tapia*.[139] 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.'"[140]

Finally, the court addressed Schonewolf's arguments.[141] Schonewolf argued that the sentencing court's "comments were addiction-centric and

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veloped 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).

'framed the choice [of sentence] in terms of treating her addiction.'"[142] 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.[143]

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.[144] Instead, Schonewolf's increased sentence was based on past leniency.[145] 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."[146]

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."[147] 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.[148] 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.[149]

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142. *See id.* at 692 (outlining Schonewolf's arguments on appeal).

143. *See id.* at 693 (quoting Brief for Appellant at 22–23, United States v. Schonewolf 905 F.3d 683 (2018) (No. 17-2846), 2018 WL 486021 (3d Cir. 2018)) (identifying portion of district court's reasoning for sentence that Schonewolf alleged violated *Tapia*). For the sentencing court's quoted language, see *supra* note 118 and accompanying text.

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).

146. *See id.* (quoting Brief for Appellant at 10, United States v. Schonewolf 905 F.3d 683 (2018) No. 17-2846, 2018 WL 486021 (3d Cir. 2018)) (identifying portion of record where district court elaborated on its reasoning for the sentence).

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 rehabilitation 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.[150] Schonewolf committed a new crime and previously received a downward departure, making the analysis less complicated.[151] Nevertheless, *Tapia* challenges in cases with different procedural and factual histories still present multiple obstacles, including a seemingly impossible burden for defendants to meet.[152] For example, a court may hold a revocation hearing and resentence the defendant if the defendant fails to successfully finish drug treatment.[153] 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.[154]

A. *Don't Lose Focus: Consider the Role, Not the Extent*[155]

Courts are seemingly losing sight of the question they should be considering—what was the role of rehabilitation?[156] In the wake of *Tapia*, the question on appeal centers around the extent to which the sentencing court considered rehabilitation.[157] 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.[158] Instead, courts should ask a simpler question: What role did rehabilitation have at sentencing?[159]

More specifically, courts should ask whether rehabilitation was a motivating factor for the sentence or whether the court was merely suggesting

150. *See id.* at 692 (applying less stringent approach and allowing court to consider rehabilitation in part).

151. *See id.* at 685–86 (recounting previous downward departure and new criminal activity).

152. For a discussion of the seemingly impossible burden that defendants who do not preserve their claims are subject to, see *infra* notes 167–80 and accompanying text.

153. *See* United States v. Todd, 756 F. App'x 170, 177 (3d Cir. 2018) (considering *Tapia* violation where defendant's only violation at issue during revocation hearing was her failure to complete drug treatment).

154. *See id.* (imposing period of incarceration without new crime or other violation).

155. I extend my sincere gratitude to Jacob Schuman, Esq., for his time and help in simplifying this issue.

156. *See* Gornick, *supra* note 35, at 860 (discussing discrepancies in different modes of analysis).

157. *See id.* (discussing application of primary purpose and dominant factor tests).

158. *See* Goralski, *supra* note 68, at 1303–05 (discussing dominant factor test without providing definition).

159. *Contra id.* at 1306–10 (advocating for courts to find *Tapia* error where rehabilitation is mentioned at sentencing).

that the defendant enroll in a rehabilitative program while in prison.[160] This phrasing of the question simplifies the issue.[161] Notably, the *Tapia* Court carved out an exception that allows a court to urge someone to get treatment or even suggest a specific rehabilitative program.[162] Nevertheless, a court cannot consider rehabilitation as a justification for a sentence of imprisonment.[163] Consequently, instead of trying to evaluate the degree to which a sentencing judge considered rehabilitation by reading a record, courts should focus on the role—mere advice versus reason for the crafted sentence—that rehabilitation played.[164] By applying this ap-

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).

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).

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.").

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.").

164. *Cf. id.* (holding courts cannot impose sentence to enable defendant to participate and complete rehabilitation program, but carving out exception for

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

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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).

169. *See* United States v. Schonewolf, 905 F.3d 683, 686–87 (3d Cir. 2018) (quoting Johnson v. United States, 520 U.S. 461, 467 (1997)) (elaborating on set of facts whereby court may deny relief even if defendant meets burden and establishes plain error).

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

171. *See* Namosha Boykin, *Making Your Record and Preserving Issues for Appeal*, AM. BAR ASS'N (Aug. 9, 2017), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/litigation/making-your-record-and-preserving-issues-

practice as applied to *Tapia* challenges, this may look absurd.[172] Imagine that a judge discusses the defendant's needs for rehabilitation when imposing a sentence.[173] Defense counsel stands up and says: "Objection! You relied heavily or completely on rehabilitation in sentencing my client."[174] Many judges would simply elaborate by providing other justifications for the sentence, effectively destroying the defendant's appellate claim.[175] As a result, defense counsel face a lose-lose situation.[176] 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.[177] 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.[178] 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.[179]

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.[180] Courts should utilize the Pennsylvania approach, where arguments alleging an illegal

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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 1113 (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).

180. *See generally* MARK S. RHOADS, 5 ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 35:19 (2d ed. Supp. June 2018) (discussing correctible illegalities in sentencing).

sentence cannot be waived or unpreserved because the issue is a jurisdictional matter.[181] Under 18 U.S.C. § 3582(a), a court must acknowledge that imprisonment is not an appropriate means to promote rehabilitation and correction.[182] 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.[183]

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.[184] 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* 180, 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).

182. *See* 18 U.S.C. § 3582(a) (2018) (stating imprisonment is not effective or permissible method of furthering rehabilitation).

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).

proof for defendants and remedies the defense objection dilemma.[185] 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.[188] 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).

186. *Contra* United States v. Thornton, 846 F.3d 1110, 1114 (10th Cir. 2017) (reviewing Thornton's claim under plain error standard).

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).

191. *See* 42 PA. STAT. & CONS. STAT. ANN. § 9725(2) (West 1974) (allowing courts to impose sentence of incarceration to allow defendant to receive treatment within prison). Because *Tapia* does not allow courts to impose sentences of imprisonment to further rehabilitation, Pennsylvania's statute appears to be in direct violation; consequently, Pennsylvania may reconsider its own statute. *Compare Tapia*, 564 U.S. at 333 (holding courts cannot impose or lengthen prison terms for rehabilitative purposes), *and* 18 U.S.C. § 3582(a) (2018) (precluding incarceration

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

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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.

many offenders to resort to criminal activity.[200] 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.[201] As a result, *Tapia* and *Schonewolf* are important cases that draw a necessary line between the permissible and impermissible discussion of rehabilitation at sentencing.[202]

Moving forward, many courts and legislatures will need to adjust their sentencing methodology and statutes in order to ensure compliance with *Tapia*.[203] 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.[204] 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.[205] Although these distinctions may seem minor, they are crucial for someone who is facing a period incarceration solely because of their losing battle with addiction or mental illness.[206]

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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%)).

201. *See* 18 U.S.C. § 3582(a) (2018) (noting imprisonment is not permissible means of promoting rehabilitation).

202. *See Tapia*, 564 U.S. at 333 (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).