Finding "*Tapia* Error": How Circuit Courts Have Misread *Tapia v. United States* and Shortchanged the Penological Goals of the Sentencing Reform Act

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INTRODUCTION

The American criminal justice system is called many things; "compassionate" is usually not one of them. Yet in the course of federal criminal proceedings, a sentencing hearing allows a judge to convey compassion[1] toward a defendant, if only to say, "I'm sorry about your situation, but this is how I must apply the law."[2] Likewise, a defendant might throw herself on the mercy of the court in hopes that the judge exercises discretion compassionately. Mitigating factors and downward departures[3] suggest that judges are capable of doing so. But how does a sentencing judge *show* compassion, as opposed to simply feeling it? In practice, a judge might make a sympathetic comment about a defendant's circumstances or recommend rehabilitation.[4] Arguably, a judge is more likely to show compassion when imposing a prison sentence, because a defendant's liberty is at stake. But as it turns out, this could be reversible error under the 2011 case *Tapia v. United States*,[5] in which the Supreme Court interpreted the Sentencing Reform Act of 1984 ("SRA") as providing that "when sentencing an offender to prison, the court shall consider all the purposes of punishment *except* rehabilitation—because imprisonment is not an appropriate means of pursuing that goal."[6]

Consider the hypothetical story of Paul Pennybags, whose Ponzi scheme was foiled by the Securities and Exchange Commission. Pennybags was indicted and swiftly convicted. The only remaining question is how long he will be imprisoned for. Pennybags is an anomalous convict—although he suffers from drug addiction, he used the proceeds from his exploits to fund a domestic violence center in

1. The first definition of *compassion* in Webster's Third New International Dictionary of the English Language, Unabridged (2002), is "deep feeling for and understanding of misery or suffering and the concomitant desire to promote its alleviation."

2. *See, e.g.*, Koon v. United States, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.").

3. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (Nov. 2014) ("In determining the sentence to impose within the guideline range, or whether a *departure* from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." (emphasis added)).

4. For the purposes of this Note, references to "rehabilitation" are generally consistent with the services listed at 18 U.S.C. § 3553(a)(2)(D), including "medical care, or other correctional treatment" such as substance abuse treatment, unless otherwise noted.

5. 131 S. Ct. 2382 (2011).

6. *Id.* at 2389 (emphasis added).

Atlantic City. In every way, he is a sympathetic white-collar criminal if there ever were one.

U.S. District Court Judge Battleship has no qualms about imprisoning Pennybags given the nature of his offense. However, it is clear from Pennybags's physical appearance and a psychologist's testimony that he would benefit from rehabilitation—specifically, substance abuse treatment. While Judge Battleship cannot mandate that Pennybags receive drug treatment in prison,[7] he is nonetheless authorized to recommend that Pennybags be placed in a "particular facility or program."[8]

At the sentencing hearing, Judge Battleship prescribes the high end of Pennybags's guideline sentencing range: fifty-one months in prison. In explaining his rationale for the sentence, the judge states: "And furthermore, Mr. Pennybags—I expect that you will avail yourself of the Residential Drug Abuse Program[9] while in prison. You will qualify for that program with this fifty-one-month sentence." These comments may seem innocuous. But depending on which circuit Judge Battleship's court sits, he might have committed procedural error by this statement alone.

Some circuit courts would contend that Judge Battleship's comments about drug treatment (his "compassionate remarks") potentially violated *Tapia*'s ban on considering rehabilitation when imposing or lengthening a prison sentence.[10] But a circuit split has arisen due to dicta in the *Tapia* decision.[11] Specifically, the *Tapia* Court stated, "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

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7. *See* Tapia v. United States, 131 S. Ct. 2382, 2390–91 (2011) (describing the distribution of authority between the judiciary and the Bureau of Prisons); *see also infra* Section I.C (providing an overview of the *Tapia* opinion).

8. *Tapia*, 131 S. Ct. at 2390–91 (citing 18 U.S.C. § 3582(a) (2012)).

9. *See Substance Abuse Treatment*, FED. BUREAU OF PRISONS, http://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited March 27, 2016) [http://perma.cc/NQ42-F6R7] (providing an overview of the Residential Drug Abuse Program, or "RDAP"). The RDAP, also known as the "500 Hour Drug Program," was referenced several times by the sentencing judge whose comments are the focus of *Tapia*. 131 S. Ct. at 2385.

10. *See Tapia*, 131 S. Ct. at 2389; *see also* 18 U.S.C. § 3582(a) ("The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall . . . recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.").

11. This is not to be confused with the now-resolved circuit split over whether *Tapia* applies not only at the time of initial sentencing but also upon revocation of supervised release. *See* United States v. Garza, 706 F.3d 655, 657 n.5 (2013) ("The only outlier was our own decision in *United States v. Breland*, . . . which the Supreme Court vacated, . . . and in which case we ultimately remanded for resentencing . . . ." (citations omitted)).

address a person who is about to begin a prison term about these important matters."[12] Thus, the concern over Judge Battleship's comments, or any sentencing judge's compassionate remarks, amounts to the following: do they indicate "consideration" of rehabilitation, which is verboten when imposing or lengthening a prison sentence, or do they indicate "discussion" of rehabilitation, which is allowed (if not encouraged)?[13] In other words, when do a sentencing judge's comments "amount[ ] to a *Tapia* error"?[14]

An expansive view of what amounts to "consideration" could be perilous.[15] By discussing rehabilitative options, judges provide valuable information to both the defendant and the Federal Bureau of Prisons ("BOP," or "Bureau"), which can review the sentencing transcript prior to placing a defendant in a particular facility.[16] But if sentencing judges become too sensitive to the *Tapia*-error tripwire, they might renounce compassionate remarks altogether and be unwilling to tell a defendant more than "go directly to jail."[17] Conversely, a narrow view of what amounts to "consideration" could contravene Congress's command to separate rehabilitation from decisions to impose or lengthen a term of imprisonment, as codified in the Sentencing Reform Act.[18]

This Note proceeds in three parts. Part I provides a brief overview of the prison population; the impetus for federal sentencing reform, which led to the enactment of the SRA; the Supreme Court's 2011 decision *Tapia v. United States*; and the resulting circuit split over what amounts to a *Tapia* error. The *Tapia* Court interpreted 18 U.S.C. § 3582(a) in the SRA as prohibiting "consideration" of a defendant's rehabilitative needs when deciding to impose or lengthen a prison term.[19] The Court noted in dicta that "discussion" of these rehabilitative needs is permissible, although the Court did not define this distinction between impermissible consideration and permissible

12. *Tapia*, 131 S. Ct. at 2392 (emphasis added).

13. *See id.* ("So the sentencing court here did nothing wrong—and probably something very right—in trying to get Tapia into an effective drug treatment program."); *infra* Section II.B (analyzing the distinction between the terms "consideration" and "discussion").

14. United States v. Del Valle-Rodríguez, 761 F.3d 171, 175 n.2 (1st Cir. 2014).

15. Under an expansive view, Judge Battleship's compassionate remarks would be interpreted as impermissible consideration of rehabilitation.

16. *See* 18 U.S.C. § 3553(c) (2012) ("The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, . . . if the sentence includes a term of imprisonment, to the Bureau of Prisons.").

17. To quote a *Monopoly* playing card.

18. *See infra* Section I.A (discussing the impetus for the SRA).

19. Tapia v. United States, 131 S. Ct. 2382, 2391–92 (2011).

discussion.[20] Part II analyzes the distinction between these two concepts and reviews the rationales behind both sides of the *Tapia*-error circuit split. This Part also discusses the four-prong plain-error standard of review and explains how the third prong (the "substantial rights" prong, which requires that any error be prejudicial to the defendant and affect the outcome) complements the circuit-split minority's interpretation of *Tapia*. Part III details how the circuit-split minority's approach safeguards against sentencing reversals, despite finding more *Tapia* errors than the circuit-split majority's approach.

I. FROM THE SENTENCING REFORM ACT TO "*TAPIA* ERROR"

The circuit split resulting from *Tapia*'s treatment of "consideration" affects a substantial subset of Americans. The Bureau of Justice Statistics reported that as of December 31, 2014, the United States held an estimated 1,561,500 people in state and federal correctional facilities; 210,567 were in federal prisons.[21] Prisoners suffer from physical and mental illness with greater frequency than the general U.S. population.[22] For instance, a 2007 study of recently incarcerated prisoners showed that seventy-two percent had a high probability of substance dependence.[23] Thus, in many instances, a person sentenced to incarceration[24] could likely benefit from rehabilitation such as substance abuse treatment.

But Congress did not give courts the authority to mandate that offenders participate in prison rehabilitation programs.[25] Instead, the Federal Bureau of Prisons "has plenary control, subject to statutory constraints, over 'the place of the prisoner's imprisonment,' . . . and the treatment programs (if any) in which he may participate."[26] The Sentencing Reform Act of 1984 codifies this division of control by

20. *See id.* at 2392–93.

21. E. Ann Carson, *Prisoners in 2014*, BUREAU OF JUST. STATS. 2 (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf [http://perma.cc/KK99-SMEZ].

22. Andrea Avila, Note, *Consideration of Rehabilitative Factors for Sentencing in Federal Courts:* Tapia v. United States*, 131 S. Ct. 2382 (2011)*, 92 NEB. L. REV. 404, 428 (2013).

23. Jennifer L. Rounds-Bryant & Lattie Baker Jr., *Substance Dependence and Level of Treatment Need Among Recently-Incarcerated Prisoners*, 33 AM. J. OF DRUG & ALCOHOL ABUSE 557, 560–61 (2007). This study further observed that "[g]iven the relationship between crime and substance dependence, applying prison-based treatment to address the high rates of substance dependence among incarcerated populations is critical." *Id.* at 661.

24. *See infra* Section II.D (analyzing the phrase "a person who is about to begin a prison term," which is used in the *Tapia* opinion).

25. Tapia v. United States, 131 S. Ct. 2382, 2390 (2011).

26. *Id.* (quoting 18 U.S.C. § 3621(b) (2012)). While a sentencing court can "*recommend* that the BOP place an offender in a particular facility or program," Congress vested decisionmaking authority in the BOP. *Id.*

prohibiting judges from considering rehabilitation when imposing or lengthening a prison term.[27]

A. Impetus for the Sentencing Reform Act

Congress established the federal parole system in 1910, which authorized the use of indeterminate sentencing.[28] Under the indeterminate-sentencing system, sentencing judges could generally exercise wide discretion in both the kind and degree of punishment imposed on a defendant.[29] This sentencing system was "premised on a faith in rehabilitation," whereby vocational, educational, and counseling programs within prisons helped prepare convicts to reenter society.[30] Successful completion of these programs often coincided with convicts' release.[31]

But by the mid-1970s, experts questioned the efficacy of this system in light of new empirical evidence.[32] A review of 231 studies of correctional programs conducted from 1945 to 1967 concluded that rehabilitation had no effect on recidivism, "[w]ith few and isolated exceptions."[33]

The prevailing system of indeterminate sentencing also led to serious disparities in sentences imposed on similarly situated defendants.[34] This occurred in part because judges were left to apply their own perceptions of the purposes of sentencing.[35] The Senate Report on the Comprehensive Crime Control Act of 1984 (which adopted a version of the SRA) declared the failure of this outmoded

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27. *Id.*

28. Shanna L. Brown, Case Comment, *Sentencing and Punishment—Sentencing Guidelines: The Sentencing Reform Act Precludes Courts from Lengthening a Prison Sentence Solely to Foster Offender Rehabilitation:* Tapia v. United States*, 131 S. Ct. 2382 (2011)*, 87 N.D. L. REV. 375, 382 (2011).

29. Mistretta v. United States, 488 U.S. 361, 363 (1989).

30. *Tapia*, 131 S. Ct. at 2386. For a wide-ranging discussion of rehabilitation's role in sentencing, see Chad Flanders, *The Supreme Court and the Rehabilitative Ideal* (St. Louis U. Legal Studies Research Paper No. 2014-3, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400508 [http://perma.cc/AY32-PPCQ].

31. *Tapia*, 131 S. Ct. at 2386.

32. Brown, *supra* note 28, at 383.

33. *Id.* (citations and internal quotation marks omitted). The review scrutinized correctional programs including vocational training, educational remediation, and medical programs. *Id.*

34. *Tapia*, 131 S. Ct. at 2387 (citing *Mistretta*, 488 U.S. at 365).

35. S. REP. NO. 98-225, at 38 (1983) ("[E]very day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances."); *see also Mistretta*, 488 U.S. at 364 ("Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected.").

system, noting "it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated."[36]

To revisit the hypothetical in the Introduction, consider if Paul Pennybags had an equally culpable co-defendant, Tom Terrier. The only discernible difference between Pennybags and Terrier is that the latter does not suffer from drug addiction. Given this distinction, under the old sentencing model Judge Battleship might decide that Terrier would not benefit from as long of a prison term as would Pennybags, who could use the extra prison time to complete substance abuse treatment. Judge Battleship could then prescribe a punishment without regard for Pennybags's criminality, instead focusing on his need for rehabilitation. But if prison rehabilitation programs are inefficacious, then Pennybags's extra prison time is unjustifiable—his lengthened prison term effectively becomes a punitive treatment of his addiction.

Parole officials exercised equally wide discretion under the indeterminate-sentencing model.[37] Under this model, once parole officials believed that a prisoner was rehabilitated, they could order her release as long as she had served one-third of her judicially imposed sentence.[38] Thus, release often coincided with the successful completion of rehabilitative programs within the prisons—the same programs that were later shown to have no effect on recidivism.[39] Yet given the discretion afforded to parole officials, a prisoner could be denied parole indefinitely, despite her participation in rehabilitative programs.[40] Congress ultimately retired the indeterminate-sentencing model due to its incongruous effects and uncertainty.[41]

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36. S. REP. NO. 98-225, at 38 ("[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting . . . .").

37. *See Tapia*, 131 S. Ct. at 2386 (discussing the discretion afforded to judges and parole officers).

38. *Id.* (citing KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 18–20 (1998)). Under the old sentencing model, sentencing disparities for "drug-addicted offenders (like Tapia)" could be magnified. *Id.* at 2387 n.3. If a court believed that such an offender could be rehabilitated through treatment, it could order confinement for treatment for an indeterminate period of time (generally, up to ten years). *Id.* (citing 18 U.S.C. § 4253(a) (1982) (repealed 1984)). After six months of treatment, "the Attorney General could recommend that the Board of Parole release him from custody, and the Board could then order release 'in its discretion.' " *Id.* (quoting 18 U.S.C. § 4254 (1982) (repealed 1984)).

39. *Tapia*, 131 S. Ct. at 2386–87 (quoting S. REP. NO. 98-225, at 40); Brown, *supra* note 28, at 383. The Senate Report on the Comprehensive Crime Control Act of 1984 cites a litany of studies suggesting that the indeterminate-sentencing model has failed. S. REP. NO. 98-225, at 40 n.138.

40. S. REP. NO. 98-225, at 38.

41. *Tapia*, 131 S. Ct. at 2387 ("Lawmakers and others increasingly doubted that prison programs could 'rehabilitate individuals on a routine basis'—or that parole officers could

B. The Sentencing Reform Act

Congress sought to eradicate the old system's shortcomings by enacting the Sentencing Reform Act of 1984, which marked the end of indeterminate sentencing and parole.[42] In their stead, the SRA established a system in which a new Sentencing Commission would promulgate Sentencing Guidelines.[43] These guidelines would curb judges' discretion by providing a range of determinate sentences, varying by categories of offenses and defendants.[44]

Under this new model, a judge sentencing a federal offender first must choose the proper sanction: "imprisonment (often followed by supervised release), probation, or a fine."[45] The SRA controls how a judge makes this decision by requiring her to "consider" enumerated factors, which embody the four purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation.[46] Depending on the kind of sanction under consideration, "a particular purpose may apply differently, or even not at all."[47] For instance, 18 U.S.C. § 3582(a) (hereinafter the "imprisonment-factors clause") specifies the factors a court shall consider in imposing or lengthening a term of imprisonment, with the caveat that imprisonment should not be used to promote rehabilitation.[48]

'determine accurately whether or when a particular prisoner ha[d] been rehabilitated.' " (quoting S. REP. NO. 98-225, at 40)).

42. *Id.*

43. *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 368 (1989)); *see also* 28 U.S.C. § 991 (2012) (establishing the Sentencing Commission as an independent commission in the U.S. Judicial Branch).

44. *Tapia*, 131 S. Ct. at 2387 (stating that the SRA "channeled judges' discretion by establishing a framework to govern their consideration and imposition of sentences"). While the Supreme Court held in the 2005 case *United States v. Booker* that the Sentencing Guidelines were no longer mandatory, the Court stated that district courts nonetheless "must consult those Guidelines and take them into account when sentencing." United States v. Booker, 543 U.S. 220, 264 (2005).

45. *Tapia*, 131 S. Ct. at 2387 (citing 18 U.S.C. § 3551(b) (2012)).

46. Specifically, the Act requires a judge to consider the need for the sentence imposed:

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

18 U.S.C. § 3553(a)(2). Subsection (D) describes different methods of rehabilitation. *See Tapia*, 131 S. Ct. at 2387.

47. *Tapia*, 131 S. Ct. at 2388; *see also* 18 U.S.C. §§ 3562(a), 3572(a), 3582(a), 3583 (providing examples of how the considerations listed in § 3553(a)(2) pertain to different sentencing options).

48. 18 U.S.C. § 3582(a).

This caveat is reinforced by another provision of the SRA, 28 U.S.C. § 994(k) (hereinafter the "Commission clause").[49] This clause restates the message of the imprisonment-factors clause, but is directed to the U.S. Sentencing Commission.[50] Specifically, the Commission clause instructs the Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment."[51]

In *Tapia v. United States*, the Supreme Court concluded that between the imprisonment-factors clause and the Commission clause, "[e]ach actor at each stage in the sentencing process receives the same message: Do not think about prison as a way to rehabilitate an offender."[52] Although this instruction may seem straightforward, in practice it has proven difficult to enforce, as evidenced by the circuit split over what amounts to a "*Tapia* error."

C. Tapia v. United States

In *Tapia*, Petitioner Alejandra Tapia was convicted of, among other offenses, smuggling unauthorized aliens into the United States.[53] For her offenses, the U.S. Sentencing Guidelines recommended a prison term of between forty-one and fifty-one months.[54] The district court decided on a fifty-one-month prison term followed by three years of supervised release.[55] At Tapia's sentencing hearing, the court made several references to her need for drug treatment, indicating that she should serve a prison term long enough to qualify for and complete the Bureau of Prison's Residential Drug Abuse Program (also known as "RDAP" or the "500 Hour Drug Program").[56] Tapia argued that by lengthening her prison term to ensure her eligibility for RDAP, the court violated the imprisonment-factors clause, 18 U.S.C. § 3582(a), which reads as follows:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, *recognizing*

49. *Tapia*, 131 S. Ct. at 2388, 2390.
50. *Id.*
51. 28 U.S.C. § 994(k) (2012).
52. 131 S. Ct. at 2390.
53. *Id.* at 2385.
54. *Id.*
55. *Id.*
56. *Id.*

> *that imprisonment is not an appropriate means of promoting correction and rehabilitation*. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).[57]

The question in *Tapia* was whether the imprisonment-factors clause authorizes a sentencing court to impose or lengthen a prison term in order to promote a defendant's rehabilitation.[58] The Supreme Court granted certiorari to consider the Ninth Circuit's contention that this clause distinguishes between a judge's decision to *impose* a term of imprisonment and her decision about *how long* that term of imprisonment should be.[59] Since the United States conceded this point, siding with Tapia's interpretation of the statute (i.e., that it bars both of these decisions),[60] the Court appointed an amicus curiae to defend the Ninth Circuit's judgment affirming Tapia's term of imprisonment.[61]

Writing for a unanimous Court, Justice Kagan held that the SRA precludes federal courts from imposing or lengthening a prison term to promote a defendant's rehabilitation.[62] To divine the SRA's intent, the Court looked at the statute's language and the language it lacked.[63] Specifically, the Court found significance in "the absence of any provision granting courts the power to ensure that offenders participate in prison rehabilitation programs."[64] On the one hand, the SRA tells courts to consider whether an offender would benefit from rehabilitation when deciding whether to impose a sentence of probation or supervised release.[65] When a court is imposing one of these two sentences, the court may order participation in rehabilitative programs.[66] On the other hand, Congress did not authorize courts to order such participation when imposing a sentence of incarceration.[67] This statutory silence supported the Court's

57. 18 U.S.C. § 3582(a) (2012) (emphasis added); *Tapia*, 131 S. Ct. at 2386.

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

59. *Id.* at 2386 (noting that this issue resulted in a circuit split).

60. *Id.*

61. *Id.*

62. *Id.* at 2385.

63. *Id.* at 2390.

64. *Id.* (referring to this absence as a "statutory silence").

65. *Id.* (citing 18 U.S.C. §§ 3562(a), 3583(c) (2012)).

66. *Id.* When a court is deciding whether to impose a term of probation, the SRA states that the court "shall consider the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3562(a). Likewise, when a court is deciding whether to include a term of supervised release after imprisonment as part of the sentence, the SRA states that the court "shall consider" the factors set forth in § 3553(a)(2)(D). *Id.* § 3583(c).

67. *Tapia*, 131 S. Ct. at 2390–91 ("That incapacity speaks volumes.").

contention that "Congress did not intend that courts consider offenders' rehabilitative needs when imposing prison sentences."[68] Thus, given the SRA's language and the absence of express authority for judges to order participation in prison rehabilitation programs, the *Tapia* Court held that the imprisonment-factors clause "prohibits federal courts from considering a defendant's rehabilitative needs when imposing or lengthening a prison sentence."[69]

Although the Court did not decide whether the district court lengthened Tapia's prison term in order to foster her rehabilitation, it stated the sentencing transcript "suggests the possibility" that this happened.[70] For instance, the district court commented that "[Tapia's] sentence has to be sufficient . . . to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program."[71] The district court also explained that the "number one" factor driving its decision was "the need to provide treatment. In other words, so [Tapia] is in [prison] long enough to get the 500 Hour Drug Program."[72] However, Tapia never enrolled in this program—thus demonstrating the risk of crafting a prison sentence based upon something the court has no control over.[73]

In a concurring opinion, Justice Sotomayor expressed doubt that the district court impermissibly calculated Tapia's sentence.[74] As Justice Sotomayor observed, "Even the . . . mandatory minimum would have qualified Tapia for participation in the RDAP."[75] Thus, it

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68. *Id.* at 2391. Even though the district court judge wanted Tapia to participate in the Residential Drug Abuse Program, Tapia was neither admitted to the program nor placed in the prison recommended by the court. *Id.*

69. United States v. Vandergrift, 754 F.3d 1303, 1309 (11th Cir. 2014) (citing *Tapia*, 131 S. Ct. at 2389); *see Tapia*, 131 S. Ct. at 2393 ("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.").

70. *Tapia*, 131 S. Ct. at 2392. On remand, the Ninth Circuit determined that the district court committed plain error by considering rehabilitation when calculating Tapia's term of imprisonment. United States v. Tapia, 665 F.3d 1059, 1060 (9th Cir. 2011).

71. *Tapia*, 131 S. Ct. at 2392.

72. *Id.* at 2392–93.

73. *Id.* at 2391 (stating that Tapia was not even placed in the prison recommended by the district court).

74. *See id.* at 2393 (Sotomayor, J., concurring) ("I write separately to note my skepticism that the District Judge violated this proscription in this case."). Justice Alito joined this sole concurring opinion. *Id.*

75. *Id.* at 2394. Justice Sotomayor's factual analysis was informed by more than the sentencing-hearing transcript; she considered the totality of the circumstances, including the statutory realities. So even though the court *said* it was imposing a fifty-one-month term for this reason, she was willing to overlook those statements because they were illogical (a fifty-one-month term was sufficient but not necessary to get Tapia into the RDAP). *See* BOP PROGRAM STATEMENT NO. P5331.02, *Early Release Procedures Under 18 U.S.C. § 3621(e)* (Mar. 16, 2009)

seemed unlikely that the district court lengthened Tapia's prison term because of this program.[76] Despite her skepticism, Justice Sotomayor joined the Court's opinion in full because she could not be certain whether the district court lengthened Tapia's prison sentence to promote rehabilitation.[77]

D. Circuit Split over What Amounts to Tapia *Error*

A violation of *Tapia*'s holding, known as a *Tapia* error,[78] occurs when a court imposes or lengthens a prison term to promote a defendant's rehabilitation. However, appellate courts disagree on what exactly amounts to a *Tapia* error. In Part IV of its decision, the *Tapia* Court drew a distinction between permissible "discussion" and impermissible "consideration" of prison rehabilitation programs.[79] Specifically, the Court stated that a sentencing court may "discuss" rehabilitation once it has decided to send someone to prison for a specific period of time, but it may not "consider" rehabilitation when deciding whether to send that person to prison or lengthen her prison term.[80] Though only dicta, this distinction between discussion and consideration has created confusion among the Courts of Appeals.

(stating that a prison sentence of thirty-seven months or longer is necessary to be eligible for the maximum sentence reduction allowed for successful completion of RDAP, a twelve-month reduction). Granted, a sentencing judge's statements need not be logical to be technically violative of the SRA. Section 3582(a) does not provide an escape hatch for such mistaken assumptions.

76. *See Tapia*, 131 S. Ct. at 2394 (Sotomayor, J., concurring) (reasoning that the sentence selected had no connection to eligibility for the recommended rehabilitation program).

77. *Id.* Justice Sotomayor elaborated as follows:

> I acknowledge that [the judge's] comments at sentencing were not perfectly clear. Given that Ninth Circuit precedent incorrectly permitted sentencing courts to consider rehabilitation in setting the length of a sentence . . . and that the judge stated that the sentence needed to be 'long enough to get the 500 Hour Drug Program,' . . . . I therefore agree with the Court's disposition . . . .

Id.

78. A *Tapia* error is a type of procedural error. *See, e.g.*, Gall v. United States, 552 U.S. 38, 51 (2007) (explaining types of "significant procedural error"); United States v. Del Valle-Rodríguez, 761 F.3d 171, 176 (1st Cir. 2014) (explaining that the "procedural dimension" of a reasonableness determination regarding sentencing "includes errors such as failing to consider appropriate sentencing factors").

79. *See Tapia*, 131 S. Ct. at 2392–93.

80. *See id.* ("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." (emphasis added)). Further, the Court noted that "a court may urge the BOP to place an offender in a prison treatment program. . . . Section 3582(a) itself provides . . . that a court may 'make a recommendation concerning the type of prison facility appropriate for the defendant' . . . ." *Id.* at 2392.

The *Tapia*-error circuit split has two main factions. The vast majority of circuits subscribes to a "dominant factor" (or "primary consideration") test.[81] Under this test, a *Tapia* error exists only where rehabilitation is a dominant factor in a court's decision to impose or lengthen a prison term.[82] A minority of circuits rejects the dominant-factor test.[83] These courts argue that any consideration of rehabilitation when deciding to impose or lengthen a prison term—regardless of how dominant the consideration is among other factors—constitutes error.[84] This circuit split is complicated by the lack of clarity between the concepts of "consideration" and "discussion."[85]

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81. *See, e.g.*, *Del Valle-Rodríguez*, 761 F.3d at 175 (holding that *Tapia* error exists where "the record indicates that rehabilitative concerns were the driving force behind, or a dominant factor in, the length of a sentence"); United States v. Lifshitz, 714 F.3d 146, 150 (2d Cir. 2013) (finding that no *Tapia* error occurred where "the district court's primary considerations in sentencing" focused on "promoting respect for the law and protecting the public from further crimes" even though the court "discuss[ed]" rehabilitation); United States v. Deen, 706 F.3d 760, 768 (6th Cir. 2013) (holding that the district court abused its discretion by "expressly rest[ing defendant's] revocation sentence on his rehabilitative needs"); United States v. Garza, 706 F.3d 655, 660–62 (5th Cir. 2013) (finding *Tapia* error where rehabilitation is a "dominant factor" in the court's decision); United States v. Replogle, 678 F.3d 940, 943 (8th Cir. 2012) (holding that a "fleeting reference" to rehabilitation does not satisfy the "dominant factor[ ]" test for *Tapia* errors); United States v. Lucas, 670 F.3d 784, 795 (7th Cir. 2012) (holding that the district court's statement that defendant's sentence would "provide the opportunity for rehabilitative programs" was not a *Tapia* error but rather permissible "discuss[ion]"); United States v. Grant, 664 F.3d 276, 279 (9th Cir. 2011) (finding *Tapia* error where rehabilitation was the judge's "express purpose").

82. *See, e.g.*, *Del Valle-Rodríguez*, 761 F.3d at 175 (holding that *Tapia* error exists where "the record indicates that rehabilitative concerns were the driving force behind, or a *dominant factor* in, the length of a sentence" (emphasis added)); *Lifshitz*, 714 F.3d at 150 (finding *Tapia* error where "the district court's *primary considerations* in sentencing" focus on rehabilitation (emphasis added)).

83. *See* United States v. Vandergrift, 754 F.3d 1303, 1311 (11th Cir. 2014) (agreeing with the Fourth Circuit's *Bennett* opinion that *Tapia* error exists "regardless of how dominant the error was in the court's analysis"); United States v. Bennett, 698 F.3d 194, 201 (4th Cir. 2012) (finding procedural error but no effect on defendant's substantial rights because "rehabilitative needs clearly constituted only a minor fragment of the court's reasoning").

Arguably, the Fourth Circuit has tried to realign itself with the circuit-split majority. *See* United States v. Alston, 722 F.3d 603, 609 (4th Cir. 2013) ("Clearly, *Tapia* does not prevent a district court from considering the § 3553(a)(2)(D) factor [i.e., rehabilitation] in the course of a sentencing proceeding. Rather, *Tapia* stands for the proposition that a court cannot *impose* or *lengthen* a sentence to ensure that a defendant can complete a training or rehabilitation program."); *see also* United States v. Lemon, 777 F.3d 170, 173–75 (4th Cir. 2015).

84. *See Vandergrift*, 754 F.3d at 1311 (stating that consideration of rehabilitation when deciding to impose or lengthen a prison term is an error "regardless of how dominant the error was in the court's analysis and regardless of whether we can tell with certainty that the court relied on rehabilitation").

85. *See infra* Section II.B (analyzing the distinction between the terms "consideration" and "discussion").

E. Applicable Standards of Review

Most *Tapia*-error objections are raised for the first time on appeal, as opposed to at the sentencing hearing.[86] In this context, an appellate court reviews the potential misstep under a "plain error" standard of review.[87] In order for a defendant-appellant to show that the district court committed plain error, she must meet four separate prongs.[88] First, she must show that the district court erred.[89] Generally, an "error" is a deviation from a legal rule.[90] Second, she must show that the error was "plain," which means it "must be clear or obvious, rather than subject to reasonable dispute."[91] Third, she must show that the error affected her "substantial rights."[92] This usually means that the error was "prejudicial," and that it "affected the outcome of the district court proceedings."[93] Finally, if a defendant-appellant establishes these first three prongs, the court must determine that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."[94]

If a defendant instead raises a *Tapia*-error objection at the time of sentencing, an appellate court reviews the potential error for abuse of discretion.[95] Under this standard of review, the appellate court determines whether the district court committed a "significant" procedural error.[96] This includes "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a

86. *See, e.g.*, *Vandergrift*, 754 F.3d at 1307 (stating "Vandergrift did not object to the procedural reasonableness at the time of his sentencing"); *Bennett*, 698 F.3d at 199–200 ("[W]hen the district court made what Bennett now contends were erroneous comments about his rehabilitative needs, his counsel stood silent. We therefore find that the defendant failed to preserve the objection asserted here."); *see also infra* Section III.B (providing a possible explanation for why *Tapia* errors are not objected to at sentencing).

87. *See Vandergrift*, 754 F.3d at 1307 (reviewing for plain error). A court evaluating a potential *Tapia* error will apply one of two standards of review—either the abuse-of-discretion standard or the plain-error standard—depending on when the defendant raises an objection. *Id.*

88. United States v. Cotton, 535 U.S. 625, 631 (2002); United States v. Olano, 507 U.S. 725, 732, 734 (1993).

89. *Olano*, 507 U.S. at 732.

90. *Id.* at 732–33.

91. Puckett v. United States, 556 U.S. 129, 135 (2009); *Olano*, 507 U.S. at 734.

92. *Olano*, 507 U.S. at 734.

93. *Id. But see id.* at 735 ("We need not decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.' ").

94. *Id.* at 732; *see also id.* at 737 ("[A] plain error affecting substantial rights does not, without more, satisfy the *Atkinson* standard, for otherwise the discretion afforded by [Federal Rule of Criminal Procedure] 52(b) would be illusory.").

95. United States v. Vandergrift, 754 F.3d 1303, 1307 (11th Cir. 2014).

96. Gall v. United States, 552 U.S. 38, 51 (2007).

sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range."[97]

The four-prong plain-error standard of review is considerably more deferential to a district court's judgment than the abuse-of-discretion standard.[98] Thus, *Tapia*-error objections are at a distinct procedural disadvantage to the extent that they are raised for the first time on appeal, thereby triggering the highly deferential plain-error standard of review.

II. DECONSTRUCTING THE *TAPIA*-ERROR CIRCUIT SPLIT

The proper calibration of *Tapia* errors[99] affects more than the defendants subject to sentencing decisions—it affects the criminal justice system as a whole. If the *Tapia*-error threshold is too low (i.e., if appellate courts are inclined to find more *Tapia* errors), then sentencing decisions could be subject to more reversals, resulting in wasted court resources.[100] To forestall these reversals, sentencing judges might not only resist making seemingly innocent "compassionate remarks," such as those conveying sympathy for a defendant's condition,[101] they might also cease making rehabilitative recommendations altogether. And while a judge's recommendation that a convict serve a prison term in a certain facility or participate in a prison rehabilitation program such as the RDAP has no binding effect on the Bureau of Prisons,[102] "every effort is made [by the BOP] to comply with the court's recommendation."[103] Indeed, judges are well positioned to make such recommendations, given their intimate

97. *Id.*; *see also id.* (stating that once an appellate court determines there are no significant procedural errors, it will "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard"); United States v. Cavera, 550 F.3d 180, 189–90 (2d Cir. 2008) (stating that an appellate court generally defers to a district court's substantive determination "once we are satisfied that the district court complied with the Sentencing Reform Act's *procedural* requirements," which requires that the appellate court "be confident that the sentence resulted from the district court's considered judgment as to what was necessary to address the various, often conflicting, purposes of sentencing").

98. *See* United States v. Wilcox, 631 F.3d 740, 751–52 (5th Cir. 2011) ("[A]ppellate courts give considerable deference to the judgment of the district court when conducting plain error review.").

99. That is, determining what amounts to a *Tapia* error—the subject of the circuit split.

100. *See* Johnson v. United States, 520 U.S. 461, 470 (1997) (" 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.' " (quoting ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970))).

101. *See supra* Introduction (discussing "compassionate remarks").

102. 18 U.S.C. § 3621(b) (2012).

103. LEGAL RESOURCE GUIDE TO THE FED. BUREAU OF PRISONS § IV.C.1 (2014).

knowledge of a convict's situation.[104] Congress has recognized as much—the imprisonment-factors clause, 18 U.S.C. § 3582(a), authorizes judges to "make a recommendation concerning the type of prison facility appropriate for the defendant."[105]

Conversely, if the *Tapia*-error threshold is too high (i.e., if appellate courts are inclined to find fewer *Tapia* errors), then sentencing courts could more easily circumvent the SRA by crafting prison sentences with rehabilitation in mind.[106]

A. Tapia *Does Not Specify How to Enforce § 3582(a)*

The *Tapia* Court insisted that the Sentencing Reform Act was clear but understated how difficult the statute might be to enforce.[107] Specifically, the Court stated that its analysis "starts with the text of 18 U.S.C. § 3582(a)—and given the clarity of that provision's language, could end there as well."[108] To support its statutory interpretation, the Court cited common definitions of the words "recognize" and "appropriate."[109] It concluded that these words as used in the imprisonment-factors clause—"*recognizing* that imprisonment is not an *appropriate* means of promoting correction and rehabilitation"[110]—tell courts "that they should *acknowledge* that imprisonment is not suitable for the purpose of promoting rehabilitation."[111] This may have been Congress's command, but the Court's characterization of this clause belies its clarity. For instance, what does it mean for a judge to "acknowledge" this fact? Is the mere mental recognition of the fact sufficient, or is verbal recognition in open court required?

The Court's assertion that the imprisonment-factors clause is "clear"[112] is valid only insofar as the term "consideration"[113] is clear.

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104. Tapia v. United States, 131 S. Ct. 2382, 2392 (2011) (noting that "the sentencing court here did nothing wrong—and probably something very right—in trying to get Tapia into an effective drug treatment program.").

105. 18 U.S.C. § 3582(a) (2012).

106. *See generally* United States v. Krul, 774 F.3d 371, 378 (6th Cir. 2014) (Griffin, J., concurring in the judgment) ("A federal court may send a defendant to prison and keep him there in order to punish, deter, or incapacitate him, *see* 18 U.S.C. § 3553(a)(2)(A)–(C), but it cannot use the blunt instrument of institutional incarceration to try to mold him into a socially acceptable citizen.").

107. *See Tapia*, 131 S. Ct. at 2388 (2011).

108. *Id.*

109. *Id.*

110. 18 U.S.C. § 3582(a) (emphasis added).

111. *Tapia*, 131 S. Ct. at 2388 (emphasis added).

112. *Id.* ("[Our analysis] starts with the text of 18 U.S.C. § 3582(a)—and given the clarity of that provision's language, could end there as well.").

The ex ante instruction to a federal judge who must make a sentencing decision seems straightforward: "consideration" in its statutory context means "[d]o not think about prison as a way to rehabilitate an offender."[114] Yet while Congress may have intended to control what judges think in certain circumstances, that does not mean that Congress's instruction is necessarily enforceable. After all, how can an appellate court—or anyone for that matter—know to an absolute certainty what crossed a sentencing judge's mind when she made a decision? The *Tapia* Court's assertion about the imprisonment-factors clause was only half right: the statute provides a clear instruction to district courts about impermissible consideration, but the statute is unclear as to how this instruction should be enforced by reviewing courts.[115]

Congress's command to judges—to acknowledge that rehabilitation is inappropriate in certain circumstances—is problematic in part because the imprisonment-factors clause is more than just a suggestion: it is an enforceable instruction. The amicus in *Tapia* tried to argue that this clause "is not a flat prohibition but only a 'reminder' or a 'guide [for] sentencing judges' cognitive processes.' "[116] If the Court accepted this interpretation, then the imprisonment-factors clause would be advisory at best. But the Court explicitly rejected the amicus's reasoning, stating that Congress's command was clear, "even if armchair legislators might come up with something even better."[117]

B. The Desired Distinction Between Thought and Speech

On a rudimentary level, *Tapia v. United States* tries to distinguish between what a judge is allowed to think ("consideration") and what a judge is allowed to say ("discussion"). The Court's central holding involves impermissible forms of *thought*—specifically, a sentencing court shall not "consider" rehabilitation when imposing or

113. *Id.* at 2392 ("[Congress] prohibited consideration of rehabilitation in imposing a prison term.").

114. *Id.* at 2390.

115. *See id.* at 2386–92 (discussing the history of sentencing models and the language of the sentencing provisions).

116. *Id.* at 2388.

117. *Id.* at 2389 ("Congress could have inserted a 'thou shalt not' or equivalent phrase to convey that a sentencing judge may never, ever, under any circumstances consider rehabilitation in imposing a prison term. But when we interpret a statute, we cannot allow the perfect to be the enemy of the merely excellent.").

lengthening a prison term.[118] Indeed, in its analysis of the imprisonment-factors clause, 18 U.S.C. § 3582(a), the Court stated, "Each actor at each stage in the sentencing process receives the same message: *Do not think about* prison as a way to rehabilitate an offender."[119] Conversely, the caveat in Part IV of the majority opinion pertains to permissible forms of *speech*—specifically, a sentencing court may "discuss[ ] the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs."[120]

This distinction between thought and speech has ex ante value for a sentencing court because it provides parameters for a judge's "cognitive processes,"[121] i.e., her internal decisionmaking. But this distinction has virtually no ex post value for an appellate court trying to discern a *Tapia* error.[122] This is because an appellate court is limited in its review to the sentencing hearing transcript, which includes only what the judge said—not what she thought. In effect, the *Tapia* Court's delineation of thought and speech collapses into a single category at the ex post stage: speech. Albeit, there are two relevant kinds of speech here: speech that signifies permissible "discussion" and speech that signifies impermissible "consideration." An appellate court cannot enforce the imprisonment-factors clause's command to the extent that it focuses purely on a judge's thoughts; it can look only to a sentencing judge's speech manifesting those thoughts.[123]

Even in the abstract, "consideration" and "discussion" are overlapping concepts. The best illustration of this is the first definition of "*discussion*" in Webster's Third New International Dictionary of the English Language (the same dictionary used by the *Tapia* Court): "*consideration* of a question in open usually informal debate."[124] In other words, "discussion" is a type of "consideration."

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118. United States v. Vandergrift, 754 F.3d 1303, 1309 (11th Cir. 2014) (citing *Tapia*, 131 S. Ct. at 2389).

119. *Tapia*, 131 S. Ct. at 2390 (emphasis added).

120. *Id.* at 2392.

121. *Id.* at 2388 (quoting the Brief for Court-Appointed Amicus Curiae in Support of Judgment Below).

122. To reiterate, a *Tapia* error is a violation of *Tapia*'s holding that a federal court shall not consider a defendant's rehabilitative needs when imposing or lengthening a prison sentence.

123. Arguably, Congress should not be in the business of regulating judges' thoughts. But absent a congressional amendment, the SRA's mandate as interpreted by the *Tapia* Court is that "[e]ach actor at each stage in the sentencing process receives the same message: Do not think about prison as a way to rehabilitate an offender." *Tapia*, 131 S. Ct. at 2390.

124. *Discussion*, WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (2002) (emphasis added).

Meanwhile, the first non-obsolete definition of "*consideration*" is "continuous and careful thought."[125] Thus, "discussion" is a type of "consideration," which itself is a type of "thought," typically manifested in speech.[126] However, the "consideration" at issue in *Tapia*-error cases is also manifested in speech. And in the setting of a sentencing hearing, the portion of a judge's speech in which she recites her reasons for imposing a prison sentence is more akin to a monologue than a dialogue with the defendant. If it were the latter, then perhaps a judge's comments could enjoy a rebuttable presumption of "discussion," because discussion usually occurs in "open . . . debate,"[127] and a debate implies the participation of at least one other person. But given the unique context of sentencing hearings, definitions alone do not help us distinguish between a judge's "consideration" and "discussion."[128]

C. The Circuit Split Is Magnified by Misapplications of the Plain-Error Standard of Review

While ambiguity over what constitutes "consideration" partially explains the circuit split over *Tapia* errors, it is also attributable to misapplications of the plain-error standard of review.[129] Arguably, these misapplications have proliferated because many circuit courts conceive of *Tapia* error as not simply procedural error but rather reversible error, and appellate courts generally want to avoid gratuitous sentencing reversals.[130]

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125. *Consideration*, WEBSTER'S THIRD NEW INT'L DICTIONARY.

126. Assuming that most "debates" are spoken as opposed to written.

127. *Discussion*, WEBSTER'S THIRD NEW INT'L DICTIONARY.

128. Meanwhile, the *Tapia* Court principally relied on common definitions of the terms "recognize" and "appropriate" to support its interpretation of the imprisonment-factors clause. *Tapia*, 131 S. Ct. at 2388 ("[Our analysis] starts with the text of 18 U.S.C. § 3582(a)—and given the clarity of that provision's language, could end there as well.").

129. *See supra* Section I.E (describing the plain-error standard of review). Under the four-prong plain-error standard, a defendant-appellant must show (1) that the district court "erred;" (2) that the error was "plain;" (3) that the error affected her "substantial rights;" and (4) after establishing the first three prongs, the court must determine that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *See id.* (citations omitted).

130. Alternatively, these misapplications may have proliferated because of the administrative ease of circumventing the plain-error standard of review. *See, e.g.*, United States v. Krul, 774 F.3d 371, 376 (6th Cir. 2014) (Griffin, J., concurring in the judgment) ("Admittedly, [the majority's] approach has the potential merit of being relatively simple to administer on appeal. But it has the distinct disadvantage of being incompatible with what *Tapia* commands.").

On its face, a "rigid"[131] reading of *Tapia*—that *any* consideration of rehabilitation when imposing or lengthening a prison term amounts to *Tapia* error—seems to promote more sentencing reversals. Thus, the majority of circuits have reacted by superimposing a "dominant factor" test on the *Tapia* decision. However, an accurate application of the plain-error standard of review safeguards against such reversals, even when a court is inclined to find more *Tapia* errors.

1. The Majority's Dominant-Factor Test

Under the dominant-factor test, a *Tapia* error occurs only when rehabilitation is a dominant factor (or a "primary"[132] factor) in a court's decision to impose or lengthen a prison term.[133] Effectively, this merges the second and third prongs of the plain-error standard of review into the first prong. In other words, under the dominant-factor test, it is impossible to satisfy the first prong of the plain-error standard (showing that the district court erred) without also satisfying the second and third prongs (showing that the error was plain and that it affected the defendant's substantial rights, respectively). This "confuses the question of whether there was a *Tapia* error with the question of whether the error was prejudicial and therefore remediable upon appellate review."[134] As a result, this conflation "minimizes the shift in penological attitudes enshrined in § 3582(a) and recognized in *Tapia* as binding on the federal courts."[135]

United States v. Lifshitz[136] provides an example of this misapplication of the plain-error standard of review. There, the defendant-appellant, Brandon Lifshitz, argued that the district court committed a *Tapia* error by imposing a two-year prison sentence so he could receive medical treatment for his mental illness.[137] Lifshitz did

131. United States v. Del Valle-Rodríguez, 761 F.3d 171, 175 n.2 (1st Cir. 2014) (citing United States v. Vandergrift, 754 F.3d 1303, 1310 (11th Cir. 2014)).

132. United States v. Lifshitz, 714 F.3d 146, 150 (2d Cir. 2013).

133. *See supra* text accompanying note 81.

134. *Krul*, 774 F.3d at 376 (Griffin, J., concurring in the judgment).

135. *Id.*; *see also id.* at 378 ("[T]he statutory prohibition against sending a federal defendant to prison in order for him to become a 'better' person is not simply a matter of semantics. It involves questions foundational to the federal penological enterprise—issues that have been debated literally for centuries.").

136. 714 F.3d 146 (2d Cir. 2013).

137. *Id.* at 149.

not object to his sentence for procedural unreasonableness, so his *Tapia*-error objection was reviewed for plain error.[138]

The Second Circuit held that the district court did not commit a procedural error, even though "the district court also *considered* Lifshitz's need for medical care"—that is, his need for rehabilitation—in its decision to impose a prison term.[139] Specifically, the district court made the following comments upon sentencing Lifshitz to prison:

> In thinking about this sentence, the most important factors do seem to be promoting respect for the law and protecting the public from further crimes of the defendant. It also appears, although to a lesser extent, important to be sure that Mr. Lifshitz continues to get the type of medical care he is obviously in need of.[140]

Thus, rehabilitation was clearly a factor, albeit a lesser factor, in the district court's decision to sentence Lifshitz to a two-year prison term.[141]

But the Second Circuit did not find an error here, much less a plain error that prejudiced Lifshitz. This seems directly contrary to *Tapia*'s holding.[142] After all, the *Tapia* Court did not articulate an exception for *some* consideration of rehabilitation, especially given its characterization of the Sentencing Reform Act's instruction: "Do not think about prison as a way to rehabilitate an offender."[143]

Instead, the Second Circuit relied on *Tapia*'s dicta about discussion to find no procedural error whatsoever.[144] Immediately after citing these dicta, the Second Circuit noted how the district court's "primary considerations" in sentencing Lifshitz were permissible factors (promoting respect for the law and protecting the public).[145] But the predominance of a court's permissible considerations is irrelevant to finding a *Tapia* error in the first place, and surely does not cleanse the court of procedural error itself.

Because the district court expressly considered Lifshitz's need for rehabilitation in its decision to impose a prison sentence, it committed an error under the first prong of the plain-error standard of

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138. *Tapia* was actually decided after Lifshitz was sentenced in April 2011. *Id.* at 149. Nevertheless, the Second Circuit could review for *Tapia* error under the plain-error standard of review. *Id.* Thus, the court's analysis here would have been the same had *Tapia* already been decided and Lifshitz failed to object to the potential *Tapia* error upon sentencing. *See id.*

139. *Id.* at 150 (emphasis added).

140. *Id.* at 148.

141. *See id.*

142. Tapia v. United States, 131 S. Ct. 2382, 2393 (2011) ("As we have held, a court may not impose or lengthen a prison term to enable an offender to complete a treatment program or otherwise to promote rehabilitation.").

143. *Id.* at 2390.

144. *Lifshitz*, 714 F.3d at 150 (quoting *Tapia*, 131 S. Ct. at 2392).

145. *Id.*

review. All this prong requires is that the district court *erred*.[146] The Second Circuit's focus on "primary considerations" would have been appropriate if it were analyzing whether Lifshitz's substantial rights were affected under the third prong of the plain-error standard. But the court never made it past the first prong.

2. The Minority's Reasonable Approach

A minority of circuit courts rejects the dominant-factor test. While only the Eleventh Circuit falls squarely in this camp,[147] the Fourth Circuit arguably does as well.[148] This minority argues that any consideration of rehabilitation when deciding to impose or lengthen a prison term, regardless of how dominant the consideration is among other factors, constitutes error—thereby satisfying the first prong of the plain-error standard of review.[149]

The *Tapia*-error factions share some common ground. For instance, in *United States v. Del Valle-Rodríguez*, the First Circuit (which subscribes to the majority's dominant-factor test) stated that "the mere mention of rehabilitative needs, without any indication that those needs influenced the length of the sentence imposed, is not *Tapia* error."[150] The minority would likely support this statement alone because the circumstances described therein lack any indicia of impermissible consideration. However, the First Circuit deliberately distinguished itself from the minority (specifically, the Eleventh Circuit) in the following footnote to the above sentence:

> The Eleventh Circuit held that *any* consideration of rehabilitation by a sentencing court amounts to *Tapia* error. This rigid formulation is inconsistent not only with the consensus view of the other circuits but also with the *Tapia* Court's statement approving some discussion of rehabilitation by a sentencing court. We find this interpretation unnecessarily restrictive and choose to take a more balanced view.[151]

The minority's approach can seem unduly rigid in isolation. But when placed in the context of the SRA's penological goals, the minority's approach is abundantly reasonable. As described by Judge

146. United States v. Olano, 507 U.S. 725, 734 (1993).

147. United States v. Vandergrift, 754 F.3d 1303 (11th Cir. 2014).

148. United States v. Bennett, 698 F.3d 194, 201 (4th Cir. 2012). *But see supra* text accompanying note 83 (citing Fourth Circuit opinions from 2013 and 2015 that seem inconsistent with *Bennett*).

149. *Vandergrift*, 754 F.3d at 1311 (stating that consideration of rehabilitation when deciding to impose or lengthen a prison term is an error "regardless of how dominant the error was in the court's analysis and regardless of whether we can tell with certainty that the court relied on rehabilitation").

150. United States v. Del Valle-Rodríguez, 761 F.3d 171, 175 (1st Cir. 2014).

151. *Id.* at 175 n.2 (citations omitted).

Griffin of the Sixth Circuit, "*Tapia*'s insistence that rehabilitation be taken off the table when determining whether or how long to send a defendant to prison is not a mere technicality. Instead, as *Tapia* recognized, § 3582(a)'s prohibition of using incarceration for rehabilitative ends represents a *fundamental shift in penological theory*."[152] By failing to recognize that *any* consideration of rehabilitation when deciding to impose or lengthen a prison term is a procedural error, the majority is not only "incorrect as a matter of law"[153] but also disruptive of the SRA's underlying goals.

3. Shortcomings of the Dominant-Factor Test

The majority's dominant-factor test understandably tries to provide breathing room for sentencing judges to engage in "some discussion of rehabilitation."[154] Further, this test focuses on patently problematic remarks—those that constitute the "dominant factors in the district court's analysis."[155] However, the third prong of the plain-error standard of review *already accounts for* these concerns. The third prong requires that the procedural error affected the defendant's "substantial rights," which generally means that the error affected the outcome of the district court proceedings.[156]

Admittedly, courts ascribing to the dominant-factor test have some congressional support. Justice Sotomayor's concurring opinion in *Tapia* references Senate Report No. 98-225, which discusses the provision of the Sentencing Reform Act that became 28 U.S.C. § 994(k).[157] This section of the Senate Report reads: "Subsection (k) makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided. A term imposed for another purpose of sentencing may, however, have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence."[158] This language seemingly sanctions a dominant-factor test.

However, this single piece of legislative history does not trump the *Tapia* majority opinion, which was joined in full by all nine

152. United States v. Krul, 774 F.3d 371, 378 (6th Cir. 2014) (Griffin, J., concurring in the judgment); *see also supra* Section I.A (describing the impetus for sentencing reform).

153. *Krul*, 774 F.3d at 378.

154. *Del Valle-Rodríguez*, 761 F.3d at 175 n.2.

155. United States v. Replogle, 678 F.3d 940, 943 (8th Cir. 2012).

156. United States v. Olano, 507 U.S. 725, 734 (1993).

157. Tapia v. United States, 131 S. Ct. 2382, 2394 (2011) (Sotomayor, J., concurring).

158. S. REP. NO. 98-225, at 176 (1983).

Justices.[159] And the majority opinion simply does not allow *any* consideration of rehabilitation when a sentencing judge is imposing or lengthening a prison term.[160] Instead, the *Tapia* Court references a "flat prohibition"[161] and crystalizes Congress' message as such: "Do not think about prison as a way to rehabilitate an offender."[162] The dominant-factor test cannot be reconciled with these proscriptions.

These concerns about the dominant-factor test would be benign if the majority and minority's approaches always achieved the same outcomes. However, in certain circumstances they would not. Consider the hypothetical in the Introduction. Imagine that Paul Pennybags's guidelines sentencing range is thirty to thirty-seven months in prison. Pennybags is eligible for the RDAP at both the low and high ends of the sentencing range.[163] However, his maximum sentence reduction for successful completion of the RDAP now ranges from six months (with a thirty-month prison sentence) to twelve months (with a thirty-seven-month prison sentence).[164] Judge Battleship sentences Pennybags to thirty-seven months in prison, stating that he "was going to go with thirty-six months, but this extra month will help you take full advantage of the RDAP."

Under the majority's approach, the judge likely did not commit *Tapia* error—it would stretch the meaning of "dominant" to call one month out of a thirty-seven-month prison sentence (or 2.7 percent of the overall length of the sentence) a "dominant factor." But under the minority's approach, Judge Battleship may have committed reversible error: he erred from *Tapia*'s proscription of lengthening a prison term to promote rehabilitation; his error was plain; and his error affected Pennybags's substantial rights by altering the outcome of the sentencing proceedings—in the absence of this error, Pennybags would have had a shorter sentence by one month.[165]

Perhaps a circuit court would be disinclined to find that this situation satisfies the fourth prong of the plain-error standard of review (at which point the *Tapia* error would rise to reversible error).

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159. Though Justice Sotomayor, joined by Justice Alito, wrote separately, both Justices joined the majority opinion. *Tapia*, 131 S. Ct. at 2394 (Sotomayor, J., concurring).

160. United States v. Krul, 774 F.3d 371, 377 (6th Cir. 2014) (Griffin, J., concurring in the judgment) ("*Tapia* directs that no portion of a prison sentence may be imposed for the purpose of rehabilitating the defendant, regardless of whether the prison sentence also serves other, legitimate penological ends.").

161. *Tapia*, 131 S. Ct. at 2388.

162. *Id.* at 2390.

163. *See* BOP PROGRAM STATEMENT NO. P5331.02, *Early Release Procedures Under 18 U.S.C. § 3621(e)* (Mar. 16, 2009).

164. *Id.*

165. *See supra* Section I.E (describing the plain-error standard of review).

But to the extent that the court believes Judge Battleship flouted the "fundamental shift in penological theory" represented by 18 U.S.C. § 3582(a) and defied the Supreme Court's holding in *Tapia*,[166] it may be inclined to determine that this error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."[167]

C. Problems with Quarantining Parts of a Sentencing Transcript

Tapia errors are manifested in a judge's speech; a circuit court seeking *Tapia* error must determine whether the district judge's speech as recorded in the sentencing-hearing transcript signifies permissible "discussion" or impermissible "consideration." Given this emphasis on speech, a court might be inclined to root out *Tapia* errors by specifying which words a sentencing judge should or should not use. Indeed, this would be consistent with the Fourth Circuit's admonition of the district court in *United States v. Lemon*:[168] "To be sure, the court could have more clearly separated its discussion of Lemon's rehabilitative needs from its discussion of the factors that affected the length of her sentence."[169]

For instance, a judge could be prohibited from talking about a defendant's rehabilitative needs until she announced the term of imprisonment and only after giving her reasons for prescribing the punishment as required under 18 U.S.C. § 3553(c).[170] The judge could then safely transition from her reasoning for the sentence (i.e., her "considerations" for imposing or lengthening the prison term) to permissible discussion of prison rehabilitation programs by giving some sort of verbal cue. This could be as simple as stating, "These are my only reasons for imposing this sentence." Once a judge gave the right cue, she would then be "address[ing] *a person who is about to begin a prison term* about these important [rehabilitative] matters," to quote Part IV of the *Tapia* opinion.[171] In other words, there is

166. United States v. Krul, 774 F.3d 371, 378 (6th Cir. 2014) (Griffin, J., concurring in the judgment); *see also supra* Section I.A (describing the impetus for sentencing reform).

167. United States v. Olano, 507 U.S. 725, 732 (1993).

168. 777 F.3d 170 (4th Cir. 2015).

169. *Id.* at 175 (repeating the *Bennett* court's reasoning that "[b]y keeping these distinct concepts distinct, courts will preclude the possibility of confusion on appeal over whether a *Tapia* error has occurred" (quoting United States v. Bennett, 698 F.3d 194, 199 (4th Cir. 2012))).

170. 18 U.S.C. § 3553(c) (2012) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence . . . .").

171. Tapia v. United States, 131 S. Ct. 2382, 2392 (2011) (emphasis added).

arguably a temporal point at which a defendant is no longer awaiting a sentence but rather is "about to begin a prison term" because the judge imposed a sentence of imprisonment and provided her reasons for doing so. The verbal cue would help identify this point in time at which a judge could safely discuss rehabilitation.

Yet this approach is fundamentally flawed, not least because it lacks statutory support. While a judge must explain why she chose a particular punishment, she is not required to explain her decision in any particular order.[172] There may be an appetite to amend the SRA given the relative unenforceability of the imprisonment-factors clause, 18 U.S.C. § 3582(a), which the *Tapia* Court effectively interpreted as mind control for judges ("*Do not think about* prison as a way to rehabilitate an offender.").[173] But if the original provision amounted to overreach, then a verbal cue would amount to ventriloquism.

Any remedy to the *Tapia*-error circuit split should not be at the expense of a sentencing judge's speech. A judge's ability to deliver "compassionate remarks"[174] is emblematic of what the Supreme Court has called "the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate . . . the crime and the punishment to ensue."[175] And a judge's recommendations of particular prison facilities and programs are a congressionally authorized manifestation of this federal judicial tradition.[176]

The circuit-split majority is cognizant of these concerns about a sentencing judge's speech because its dominant-factor test tries to provide breathing room for sentencing judges to engage in "some discussion of rehabilitation."[177] But the minority's approach provides this breathing room without rewriting *Tapia* and shortchanging the penological goals of the SRA.

III. FINDING MORE *TAPIA* ERRORS AND FORESTALLING SENTENCING REVERSALS

As discussed above, the distinction between "consideration" and "discussion"—or what a judge is allowed to think and what a

172. 18 U.S.C. § 3553(c).

173. *Tapia*, 131 S. Ct. at 2390 (emphasis added).

174. *See supra* Introduction (discussing "compassionate remarks").

175. *See* Koon v. United States, 518 U.S. 81, 113 (1996).

176. *Tapia*, 131 S. Ct. at 2390–91 (citing 18 U.S.C. § 3582(a) (2012)).

177. United States v. Del Valle-Rodríguez, 761 F.3d 171, 175 n.2 (1st Cir. 2014).

judge is allowed to say—has ex ante value for a sentencing court because it provides parameters for a judge's internal decisionmaking.[178] But this distinction lacks ex post value for an appellate court trying to discern a *Tapia* error. In fact, permissible discussion may be virtually indistinguishable from impermissible consideration once reduced to a transcript. An appellate court may be inclined to find as few *Tapi*a errors as possible to avoid gratuitous sentencing reversals. However, *Tapia* errors must be considered in the context of their applicable standards of review, which provide the needed buffer against reversals.

A. Relying upon the Substantial-Rights Prong

Contrary to the circuit-split majority's approach, in which a *Tapia* error occurs only when rehabilitation is a dominant factor in a court's decision to impose or lengthen a prison term, the circuit-split minority does not impose such a threshold. Rather, the minority reads *Tapia* as "prohibit[ing] *any* consideration of rehabilitation" in a court's decision to impose or lengthen a prison term.[179] While this approach is faithful to *Tapia*'s holding, it sets a low threshold for finding *Tapia* errors. The Eleventh Circuit justified this approach by noting that "[e]rrors need not be severe or obvious to be errors."[180] Likewise, *Tapia* errors need not rise to the level of reversible errors.

Although the minority's approach sets a sensitive tripwire for *Tapia* errors, thereby finding more *Tapia* errors than the majority's approach, this tripwire is tempered by the third prong of the plain-error standard of review, which requires that the error affected the defendant's substantial rights. The opinions constituting the circuit-split minority demonstrate this dynamic. In *Bennett* and *Vandergrift*, the plain-error standard of review applied because the defendant-appellants did not preserve their *Tapia*-error objections.[181] In both cases, the district courts' sentences were affirmed—even though the appellate courts found *Tapia* errors, they did not find that these errors affected the defendant-appellants' substantial rights.[182]

178. *See supra* Section II.A.

179. United States v. Vandergrift, 754 F.3d 1303, 1310 (11th Cir. 2014) ("Because it is impermissible to consider rehabilitation, a court errs by relying on or considering rehabilitation in any way when sentencing a defendant to prison.").

180. *Id.* at 1310–11 (citations omitted).

181. *Vandergrift*, 754 F.3d at 1307; United States v. Bennett, 698 F.3d 194, 199 (4th Cir. 2012).

182. *Vandergrift*, 754 F.3d at 1312 ("[D]espite our finding of *Tapia* error, the district court is affirmed."); *Bennett*, 698 F.3d at 202 ("Bennett's challenge fails under *Olano*'s third prong . . . .").

Portions of the *Bennett* and *Vandergrift* opinions analyzing the third prong of the plain-error standard of review are consistent with an application of the dominant-factor test. For instance, in *Bennett* the Fourth Circuit noted that "when properly situated within the entire sentencing proceeding, Bennett's rehabilitative needs clearly constituted *only a minor fragment* of the court's reasoning," whereas other permissible considerations "far outweighed any other concerns and provided independent justification for the sentence."[183] Likewise, in *Vandergrift* the Eleventh Circuit stated that the sentencing court's "primary considerations" were permissible factors.[184] This functional equivalence between the minority's analysis of the substantial-rights prong and the majority's dominant-factor test suggests that the majority's approach is at best duplicative.[185]

B. Surviving Either Standard of Review

Although the circuit-split minority's approach finds more *Tapia* errors than the majority's dominant-factor test, the minority's approach appreciates that procedural error is merely the first of four prongs in the plain-error standard of review, and that the third prong (the substantial-rights prong) safeguards against sentencing reversals. Of course, the plain-error standard is relevant only if a defendant fails to "object to the procedural reasonableness at the time of his sentencing."[186] Otherwise, the abuse-of-discretion standard applies to post-sentencing objections.[187] At present, *Tapia*-error objections are generally not preserved and are therefore subject to plain-error review.[188] But what would happen if defendants realized the relative ease with which a *Tapia* error can be asserted at the sentencing level, thereby sidestepping the more deferential plain-error standard of review?

Consider Judge Battleship's comments in the hypothetical in the Introduction. There, while explaining his rationale for imposing a prison term, the judge said, "And furthermore, Mr. Pennybags—I

183. *Bennett*, 698 F.3d at 201 (emphasis added).

184. *Vandergrift*, 754 F.3d at 1312.

185. Although given the concerns described in Part II *supra*, the majority's approach is more aptly described as disruptive.

186. *Vandergrift*, 754 F.3d at 1307.

187. *Id.*

188. *See, e.g.*, *id.* (stating "Vandergrift did not object to the procedural reasonableness at the time of his sentencing"); *Bennett*, 698 F.3d at 199–200 (4th Cir. 2012) ("[W]hen the district court made what Bennett now contends were erroneous comments about his rehabilitative needs, his counsel stood silent. We therefore find that the defendant failed to preserve the objection asserted here.").

sincerely hope you avail yourself of the Residential Drug Abuse Program while in prison. You will qualify for that program with this fifty-one-month sentence."[189] At that point, Paul Pennybags could have raised a *Tapia*-error objection, thereby preserving his *Tapia* claim. While the plain-error standard would no longer apply on appeal, the sentencing judge would have an opportunity to clarify his comments, now keenly aware of the potential *Tapia* error.[190] Judge Battleship could then immediately explain that the RDAP in no way factored into his consideration of the fifty-one-month sentence itself. On appeal, despite being reviewed under the less deferential abuse-of-discretion standard, Pennybags's objection might be counteracted by the judge's clarification on that very point.

Granted, the chance for a judge to supplement the sentencing hearing transcript in this way is not foolproof. For instance, a judge's attempted clarification may be unconvincing in the context of other damaging comments. Simply because a judge tries to correct herself after a defendant makes a *Tapia*-error objection does not mean that a reviewing court will buy the judge's explanation.

Perhaps *Tapia*-error objections are generally not raised at the sentencing stage[191] because trial counsel are less familiar with this creature of appellate litigation. Or perhaps the decision to not object at sentencing is strategic—because the defense does not want to give the judge an upper hand. In other words, instead of alerting the judge to the potential *Tapia* error, the defense may prefer to let the judge dig herself into a hole by continuing to espouse rehabilitation—even if it means the *Tapia*-error objection will be subject to the more deferential plain-error standard of review later on.[192]

In practice, it should not matter whether the failure to object to a *Tapia* error at sentencing is a ploy or an oversight. On the one hand, if a defendant raises a *Tapia*-error objection at sentencing to secure the less deferential abuse-of-discretion standard, then the judge has the benefit of clarifying her comments. On the other hand, if a defendant remains mum and gambles on overcoming the plain-error standard of review, then the judge has the benefit of that more deferential standard before her sentence can be reversed. And if a

189. *See supra* Introduction (posing the original hypothetical).

190. United States v. Krul, 774 F.3d 371, 381 (6th Cir. 2014) (Griffin, J., concurring in the judgment) ("The specter of plain-error review for an unpreserved *Tapia* challenge incentivizes a criminal defendant to make a contemporaneous *Tapia* objection at sentencing, thereby giving the district court an opportunity to ensure that impermissible rehabilitative goals are not influencing its sentencing decision.").

191. *See, e.g.*, *Vandergrift*, 754 F.3d at 1307; *Bennett*, 698 F.3d at 199–200.

192. *But see* text accompanying note 190.

defendant *does* overcome that hurdle, then this is simply the point at which a defendant's individual rights outweigh the judiciary's interest in deferring to a district-court decision.

CONCLUSION

Both sides of the *Tapia*-error circuit split want to avoid needless sentencing reversals. In practice, so far both sides have succeeded. But the majority has done so using an administrative shortcut—a dominant-factor test, which the minority's approach already accounts for under the substantial-rights prong of the plain-error standard of review. Furthermore, this dominant-factor test will fail to consistently achieve the same outcomes as the minority's approach.[193]

The *Tapia* Court was unequivocal in its characterization of the Sentencing Reform Act: "Each actor at each stage in the sentencing process receives the same message: Do not think about prison as a way to rehabilitate an offender."[194] While this instruction may be difficult to enforce, simply ignoring it disrupts the statute's penological goals.

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193. *See supra* Section II.C.3.

194. Tapia v. United States, 131 S. Ct. 2382, 2390 (2011).

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