No._____

IN THE SUPREME COURT OF THE UNITED STATES

JANET SONJA SCHONEWOLF,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT EPSTEIN
Assistant Federal Defender
Counsel of Record

JACOB SCHUMAN
Research and Writing Attorney

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals

LEIGH M. SKIPPER
Chief Federal Defender

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Suite 540 West - Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100

Counsel for Petitioner

QUESTION PRESENTED

The Sentencing Reform Act requires courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). In *Tapia v. United States*, 564 U.S. 319 (2011), this Court held that § 3582(a) "precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation." *Id.* at 332.

The question presented is whether § 3582(a) prohibits sentencing courts from taking rehabilitation into consideration *at all* in selecting a prison sentence (as the Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have held), or whether it merely prohibits them from making rehabilitation the *primary or dominant* consideration in selecting a prison sentence (as the First, Second, Third, Fourth, Fifth, and Eighth Circuits have held).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Janet Sonja Schonewolf respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on October 4, 2018.

OPINION BELOW

The opinion of the court of appeals affirming the district court's judgment is reported at 905 F.3d 683 (3d Cir. 2018), and is attached as Appendix A. The order denying rehearing is attached as Appendix B.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Section 3582(a) of Title 18, United States Code, provides:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. …

STATEMENT OF THE CASE

In *Tapia v. United States*, 564 U.S. 319 (2011), this Court held that 18 U.S.C. § 3582(a) prohibits sentencing courts from imposing or lengthening a sentence of imprisonment in order to promote a defendant's rehabilitation. Yet a split has emerged among the courts of appeals regarding whether rehabilitation may factor into the selection of a prison sentence. Five circuits hold that § 3582(a) forbids "any consideration" of rehabilitation in sentencing a defendant to imprisonment, citing *Tapia*'s categorical language and its finding of error based on the mere possibility that the defendant's sentence was based on rehabilitative concerns. Six circuits, by contrast, hold that § 3582(a) permits some consideration of rehabilitation, so long as it is not the "primary or dominant consideration," citing *Tapia*'s observation that sentencing courts still may properly recommend treatment programs to defendants and the Bureau of Prisons.

In this case, Janet Schonewolf violated her supervised release by using and selling heroin, and was sentenced to 40 months' imprisonment. On appeal, the Third Circuit adopted the "primary or dominant consideration" interpretation of § 3582(a), holding that there was no *Tapia* violation despite the sentencing court's "numerous references to her drug addiction and its hope that she discontinue her drug use," because the determining factor in her sentence was not rehabilitation but instead the prior leniency she had received at her original sentencing.

The near-even split between eleven courts of appeals on the proper interpretation of § 3582(a) and *Tapia* implicates a fundamental question of criminal justice that demands a uniform, national answer. Where a defendant is sentenced should not determine what role rehabilitation plays in determining a term of imprisonment. Indeed, the Sentencing Reform Act was enacted precisely to end this kind of geographic disparity in federal criminal punishment. The "primary or dominant consideration" approach adopted by the Third Circuit, moreover, is

incorrect. *Tapia* held that a sentence violates § 3582(a) if the court engages in *any* consideration of rehabilitation in setting a prison sentence, even if it is not the primary or dominant consideration. Because rehabilitation is potentially a factor in every sentencing decision and because the proper test under *Tapia* will be outcome-determinative in many cases – including Ms. Schonewolf's – the Court should grant the petition for certiorari and reverse the judgment of the Third Circuit.

A. Legal Background

Before 1984, the federal criminal justice system "was premised on a faith in rehabilitation." *Tapia*, 564 U.S. at 324. But this theory of punishment "eventually fell into disfavor," as "[l]awmakers and others increasingly doubted that prison programs could 'rehabilitate individuals on a routine basis' – or that parole officers could 'determine accurately whether or when a particular prisoner ha[d] been rehabilitated.'" *Id.* at 324-25. In 1984, therefore, Congress passed the Sentencing Reform Act "to overhaul federal sentencing practices." *Id.* at 325. At 18 U.S.C. § 3582(a), the Act officially abandoned the rehabilitative model of imprisonment, directing that sentencing courts, "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 purposes of punishment] to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation*." (emphasis added).

The Court interpreted § 3582(a) in *Tapia*. There, the defendant was convicted of smuggling unauthorized aliens and sentenced to 51 months of imprisonment. 564 U.S. at 321. The district court gave two reasons for the prison sentence: first, to provide the defendant drug treatment (specifically, the Bureau of Prisons's 500-hour Residential Drug Abuse Program), and

second, to deter her from committing additional crimes. *See id.* at 322; *see also id.* at 335-36 (Sotomayor, J., concurring).

This Court held that the prison sentence violated § 3582(a), which "precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation," because there was a "possibility" that the sentence was based on the defendant's rehabilitative needs. *Id.* at 321, 334. "Congress expressed itself clearly in § 3582(a)," the Court explained, by instructing 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." *Id.* at 328. "The context of § 3582(a) puts an exclamation point on this textual conclusion," the Court noted, as the Act also directs the Sentencing Commission to craft Sentencing Guidelines that "reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." *Id.* at 329-30 (quoting 28 U.S.C. § 994(k)). "Equally illuminating," the Court added, "is a statutory silence – the absence of any provision granting courts the power to ensure that offenders participate in prison rehabilitation programs." *Id.* Finally, the Act's legislative history offered "one last piece of corroborating evidence" showing that imprisonment should not serve as a means of rehabilitation. *Id.* at 331-32. "[T]ext, context, and history" therefore all supported the same interpretation of § 3582(a): "Do not think about prison as a way to rehabilitate an offender." *Id.* at 330, 332.

Applying this standard to the facts of the case, the Court found that the 51-month sentence violated § 3582(a) because "the sentencing transcript suggests the possibility that [the

defendant's] sentence was based on her rehabilitative needs." *Id.* at 334.[1] The Court also "note[d]," however, "what we do *not* disapprove about [the defendant's] sentencing." *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," the Court observed, and "properly may address a person who is about to begin a prison term about these important matters." *Id.* at 334.

While *Tapia* involved a prison sentence imposed for a criminal conviction, every court of appeals to consider the question has since concluded that its holding applies to a sentence imposed for a violation of supervised release. *See United States v. Molignaro*, 649 F.3d 1, 5 (1st Cir. 2011) (Souter, J.); *United States v. Lifshitz*, 714 F.3d 146, 150 (2d Cir. 2013); *United States v. Schonewolf*, 905 F.3d 683, 687-690 (3d Cir. 2018); *United States v. Bennett*, 698 F.3d 194, 198 (4th Cir. 2012); *United States v. Garza*, 706 F.3d 655, 657 (5th Cir. 2013); *United States v. Deen*, 706 F.3d 760, 766 (6th Cir. 2013); *United States v. Taylor*, 679 F.3d 1005, 1006 (8th Cir. 2012); *United States v. Grant*, 664 F.3d 276, 280 (9th Cir. 2011); *United States v. Mendiola*, 696 F.3d 1033, 1043 (10th Cir. 2012) (Gorsuch, J., concurring); *United States v. Vandergrift*, 754 F.3d 1303, 1309 (11th Cir. 2014).

B. Factual and Procedural Background

Ms. Schonewolf's father was a methamphetamine user and dealer who exploited her devotion by encouraging her to sell diet pills in school for him when she was a child. (C.A. App. 72, 101-02); (PSR ¶¶ 15, 32-33). She started using drugs at age 14, and a year later dropped out of school and started working at a "gentlemen's club." (C.A. App. 111); (PSR ¶¶ 33, 42, 44).

[1] Because the defendant did not object to the prison sentence at the time it was imposed, the Court remanded for the further proceedings to determine whether she met the standard for plain error. *Tapia*, 564 U.S. at 335. On remand, the Ninth Circuit found that the error was plain, vacated the sentence, and remanded for resentencing. *See United States v. Tapia*, 665 F.3d 1059 (9th Cir. 2011).

She developed an alcohol addiction and attempted suicide multiple times, eventually being diagnosed with bipolar disorder. (C.A. App. 72); (PSR ¶¶ 40, 42). She also used marijuana, cocaine, methamphetamine, and heroin. (C.A. App. 72, 102, 111); (PSR ¶ 42).

In 2010, a trooper stopped Ms. Schonewolf driving on a highway in Utah. (PSR ¶ 5). She started to cry, admitting that there was several pounds of methamphetamine in the trunk of her car. (PSR ¶ 9). It turned out that her father had told her to buy the drugs for him in Nevada and bring them back to Pennsylvania. (C.A. App. 91-93, 101); (PSR ¶¶ 11, 15). She pled guilty to one count of possessing methamphetamine with intent to distribute. (C.A. App. 9); (PSR ¶ 2). At her sentencing hearing in 2012, the district court emphasized her "very troubled life" and other mitigating circumstances, varying downward from the Sentencing Guidelines range and imposing a sentence of time served followed by 60 months of supervised release. (C.A. App. 110-14, 126).

Ms. Schonewolf did well for the next few years, but in the fall of 2015, she started using heroin again, suffered a drug overdose, and was discharged from drug treatment, prompting her probation officer to file a petition in district court to revoke her supervised release. (C.A. App. 9-14, 16-22, 26, 28). At the revocation hearing, the court noted that she was back in treatment and sentenced her to only one day in prison, followed by her pre-existing term of supervised release. (C.A. App. 29-31, 40, 42, 54). The court told her, "I know you have a serious addiction and you're addressing it in a very, very serious manner now." (C.A. App. 42).

Unfortunately, Ms. Schonewolf soon relapsed and started using drugs again. In October 2016, she was caught selling heroin out of her house. (C.A. App. 59). She pled guilty in state court to several drug-related charges and was sentenced to two to four years of imprisonment. (C.A. App. 59, 67, 74). Based on these new charges, her probation officer filed a new petition to

revoke her supervised release. (C.A. App. 57-60). At the revocation hearing, the district court calculated a sentencing range of 24 to 30 months of imprisonment. (C.A. App. 78). The government asked the district court to sentence her to 48 months' imprisonment, arguing that under U.S.S.G. § 7B1.4, application note 4, the court should vary upward because she had previously received a downward variance for the original 2010 offense. (C.A. App. 70-71, 77). Defense counsel asked the court to impose a 24-month sentence, emphasizing her ongoing struggles with drug addiction and mental illness and noting that she had been selling heroin only to finance her own addiction. (C.A. App. 72-73, 75-76).

In announcing Ms. Schonewolf's sentence, the district court emphasized that "[t]he facts just scream for the conclusion that the defendant in this case needs to be contained not only for the benefit of society, but … for her own benefit." (C.A. App. 76). "I have reached a conclusion," the court told her, "that you are a significant danger to yourself, you're a significant danger to those who have lived with you, and you're a significant danger to society. And the last step we have in order to give you a fighting chance to recover from whatever addictions that you have is to … limit your contact with the outside world for a significant period of time." (C.A. App. 76, 84). The court also noted that she had received a downward variance at her original sentencing for the 2010 methamphetamine offense, yet her behavior "has just grown more and more severe, worse." (C.A. App. 84). The court said that it was varying upward from the recommended sentence pursuant to § 7B1.4, application note 4, and sentenced Ms. Schonewolf to 40 months of imprisonment, consecutive to her state sentence, with no supervised release to follow. (C.A. App. 84-85).

Ms. Schonewolf appealed, arguing that the sentence violated 18 U.S.C. § 3582(a) because the district court had sentenced her to imprisonment in part to promote her

rehabilitation. The Third Circuit affirmed in a published opinion. *See United States v. Schonewolf*, 905 F.3d 683 (3d Cir. 2018). The opinion identified the key issue in the case as "the standard to be applied in considering whether a post-revocation sentence violates *Tapia* by impermissibly contemplating rehabilitation," observing that "a circuit split has emerged" on the question. *Id.* at 690-91. "On one hand, the Seventh, Ninth, Tenth, and Eleventh Circuits impose a stringent standard by which seemingly any consideration of rehabilitation is impermissible under *Tapia*." *Id.* at 691. "On the other hand, the First, Second, Fourth, Fifth, Sixth, and Eighth Circuits have articulated a narrower standard," under which "rehabilitation may be a factor granted some weight in selecting a prison sentence, so long as it is not the primary or dominant consideration." *Id.*[2]

The Third Circuit held that "the second, narrower standard ought apply" because "this approach tracks *Tapia* more closely." *Schonewolf*, 905 F.3d at 692. The court explained that *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,'" and that barring any consideration of rehabilitation "would run afoul [of] *Tapia* and risk a chilling effect on district courts 'discussing the opportunities for rehabilitation within prison,' a subject that 'a court properly may address.'" *Id.* (quoting *Tapia*, 564 U.S. at 321-22, 334-35). The court concluded that a district court does not violate § 3582(a) if it merely "discusses rehabilitation" or cites rehabilitation as "one reason" for a prison sentence. *Id.* at 693 (quoting *United States v.*

[2] Although the opinion lists the Sixth Circuit as finding error only where rehabilitation is the primary or dominant consideration, the case it cites does not actually endorse that standard. *See Schonewolf*, 905 F.3d at 691 n.48 (citing *Deen*, 706 F.3d at 768). Instead, as noted in Section A, below, the Sixth Circuit finds error if a district court "at least in part" considers rehabilitation, even if it is "not the deciding factor." *United States v. Rucker*, 874 F.3d 485, 486-88 (6th Cir. 2017).

Zabielski, 711 F.3d 381, 391 (3d Cir. 2013)). Instead, a court errs only if it "impose[s] a longer sentence to ensure that [the defendant] receive[s] … treatment." *Id.* at 693-94 (quoting *Zabielski*, 711 F.3d at 391).

Applying this standard to Ms. Schonewolf's case, the Third Circuit found that the sentence does not violate § 3582(a) because the court had not made rehabilitation "the primary or dominant consideration" when deciding the sentence. *Schonewolf*, 905 F.3d at 691-94. While "the District Court did make numerous references to [Ms. Schonewolf's] drug addiction and its hope that she discontinue her drug use," the determining factor in her sentence was not rehabilitation "but, instead, … past lenity." *Id.* at 693. "Accordingly, … Schonewolf's sentence did not violate the Sentencing Reform Act or *Tapia*." *Id.* at 694.

REASONS FOR GRANTING THE WRIT

Tapia interpreted § 3582(a) to set a simple rule for sentencing courts: "Do not think about prison as a way to rehabilitate an offender." 564 U.S. at 330. A court violates this rule if the record "suggests the possibility" that a term of imprisonment was based on the defendant's rehabilitative needs. *Id.* at 334.

This rule may seem straightforward, yet its application has divided the courts of appeals. Five circuits hold that § 3582(a) prohibits any consideration of rehabilitation when imposing a prison sentence. Six circuits hold that § 3582(a) permits some consideration of rehabilitation, so long as it is not the primary or dominant consideration. As a result of the split, the location where a defendant is sentenced determines the extent to which the court may consider rehabilitation as a justification for a term of imprisonment.

The question of what role rehabilitation should play when deciding a prison sentence is fundamental to the criminal justice system and requires a clear and uniform answer from this Court. This Court's intervention is necessary to settle the entrenched split and resolve the proper interpretation of *Tapia* and § 3582(a).

A. The Courts of Appeals are Split as to Whether Rehabilitation May Be a Factor to Any Degree in Imposing a Sentence of Imprisonment.

Tapia held that § 3582(a) requires a sentencing court to "consider the specified rationales of punishment *except for* rehabilitation, which it should acknowledge as an unsuitable justification for a prison term." 564 U.S. at 327 (emphasis in original). *Tapia* also held that a sentence violates § 3582(a) if "the sentencing transcript suggests the possibility that [the defendant's] sentence was based on her rehabilitative needs." *Id.* at 334. Application of this decision has nearly evenly divided eleven courts of appeals.

Five circuits hold in light of *Tapia* that a prison sentence violates § 3582(a) if the court engages in any consideration of rehabilitation, even if it was not the dominant factor in the analysis. *See United States v. Rucker*, 874 F.3d 485, 487-89 (6th Cir. 2017); *United States v. Thornton*, 846 F.3d 1110, 1115-16 (10th Cir. 2017); *United States v. Vandergrift*, 754 F.3d 1303, 1310 (11th Cir. 2014); *see also United States v. Spann*, 757 F.3d 674, 675 (7th Cir. 2014); *United States v. Joseph*, 716 F.3d 1273, 1281 n.10 (9th Cir. 2013).

Six circuits, by contrast, hold under *Tapia* that a prison sentence violates § 3582(a) only if rehabilitation is the court's primary or dominant consideration, meaning that secondary consideration of rehabilitation is permitted. *See United States v. Del Valle-Rodriguez*, 761 F.3d 171, 174-75 & n.2 (1st Cir. 2014); *United States v. Lifshitz*, 714 F.3d 146, 150 (2d Cir. 2013) (per curiam); *Schonewolf*, 905 F.3d at 691-92; *United States v. Garza*, 706 F.3d 655, 659-60 (5th Cir. 2013); *see also United States v. Bennett*, 698 F.3d 194, 201-02 (4th Cir. 2012); *United States v. Replogle*, 678 F.3d 940, 943 (8th Cir. 2012).[3]

The circuits permitting some consideration of rehabilitation in the imprisonment decision do so based on *Tapia*'s observation that "[a] court commits no error by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs." 564 U.S. at 334. These courts misread *Tapia* to permit some consideration rehabilitation when imposing a prison sentence, so long as it is not a primary or dominant consideration.

[3] The Fifth Circuit has acknowledged, however, that rehabilitation need not be the sole consideration for a district court to violate § 3582(a): "*Tapia* error occurs when rehabilitation is *a* dominant factor in the court's sentencing decision … even when the sentencing court relies on other, proper factors to determine the sentence." *United States v. Wooley*, 740 F.3d 359, 366-67 (5th Cir. 2014) (emphasis in original).

The courts of appeal are thus intractably divided on the extent to which courts may consider rehabilitation when imposing a sentence of imprisonment. Further percolation of the question will not be helpful, as nearly every circuit has now weighed in. Only this Court can resolve this dispute by deciding, once and for all, whether § 3582(a) bars any consideration of rehabilitation or only making rehabilitation the primary or dominant consideration in the imprisonment decision.

B. The Question of What Role Rehabilitation May Play in Sentencing a Defendant to Imprisonment is Both Important and Recurring.

The question of whether a district court may consider rehabilitation to any degree in sentencing a defendant to imprisonment is of profound importance to the criminal justice system. The issue lurks at virtually every sentencing proceeding, so litigants and courts need to correctly understand the dictates of *Tapia* and § 3582(a).

Because criminal defendants often struggle with drug addiction, mental illness, and lack of education, rehabilitative concerns features prominently at many sentencing hearings. As the Third Circuit noted, Ms. Schonewolf's sad story is "far too common," and "[p]redictably … led to trouble with the law." *Schonewolf*, 905 F.3d at 684-85. According to the Department of Justice, 63% of sentenced inmates meet the criteria for drug dependence or abuse, compared to just 5% of the general population. Dept. of Justice, Bureau of Justice Statistics, J. Bronson et al., *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009*, at 1 (June 2017). Approximately 40% of inmates have been diagnosed with a mental disorder and 14% report serious psychological distress, more than three times the typical rate. Dept. of Justice, Bureau of Justice Statistics, J. Bronson and M. Berzofsky, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates*, at 1, 3 (June 2017). Finally, over 40% of inmates have not completed high school or its equivalent, over twice the general population.

Dept. of Justice, Bureau of Justice Statistics, C. Harlow, *Education and Correctional Populations*, at 1 (Jan. 2003). The recent epidemic of opioid addiction has exacerbated these concerns. *See generally* Dept. of Health and Human Servs., Office of the Surgeon General, *Facing Addiction in America: The Surgeon General's Spotlight on Opioids* (Sept. 2018).

A few features of federal sentencing law also tend to direct courts' attention toward rehabilitation, even though they precluded from imposing a sentence of imprisonment on this basis. The Sentencing Reform Act requires district courts to consider all the purposes of punishment (including rehabilitation) when fixing a defendant's overall sentence, which may include supervised release and fines in addition to imprisonment. *See* 18 U.S.C. § 3553(a)(2); *see also United States v. Krul*, 774 F.3d 371, 374 (6th Cir. 2014) (district court did not err in considering rehabilitation at sentencing where its consideration was limited to supervised release). The Sentencing Guidelines also recommend that a term of supervised release, which is imposed at the same time as the term of imprisonment, include rehabilitative conditions such as drug testing, addiction and mental health treatment, and mandated full-time employment. *See* 5D1.3. Because rehabilitation is a common issue discussed at nearly all sentencing hearings, courts need guidance as to whether and what extent they may consider it in making the imprisonment decision.

Finally, the purpose of imprisonment is a significant philosophical and policy question that has defined debates over the criminal justice system for the past 100 years. *See Mistretta v. United States*, 488 U.S. 361, 363-67 (1989). In the Sentencing Reform Act, Congress sought to reduce sentence disparities and provide certainty in punishment by adopting a national sentencing policy rejecting the rehabilitative model of imprisonment. *See id.* at 366 (citing S. Rep. No. 98-225 (1983)). That goal has been undermined by the circuit split here.

C. The Third Circuit Was Wrong to Adopt the "Primary or Dominant Consideration" Interpretation of § 3582(a), as *Tapia* and the Statutory Language Both Favor the "Any Consideration" Interpretation.

The Third Circuit was wrong to adopt the "primary or dominant consideration" interpretation of § 3582(a), since *Tapia* and the plain language of the statute both make clear that any consideration of rehabilitation is impermissible in sentencing a defendant to imprisonment. The Court should therefore use Ms. Schonewolf's case to adopt the "any consideration" interpretation of § 3582(a).

Tapia read § 3582(a) to require a sentencing court to "consider the specified rationales of punishment *except for* rehabilitation, which it should acknowledge as an unsuitable justification for a prison term." *Tapia*, 564 U.S. at 327 (emphasis in original). Again and again, *Tapia* used categorical language to explain this rule, barring any consideration of rehabilitation without exception. *See id.* at 328 ("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"); *id.* ("A sentencing judge shall recognize that imprisonment is not appropriate to promote rehabilitation when the court considers the applicable factors"); *id.* at 330 ("Do not think about prison as a way to rehabilitate an offender."); *id.* at 331 ("Congress did not intend that courts consider offenders' rehabilitative needs when imposing prison sentences."); *id.* at 332 ("Section 3582(a) precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation."); *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.").

Tapia also held that a sentence violates § 3582(a) if "the sentencing transcript suggests the possibility that [the defendant's] sentence was based on her rehabilitative needs." *Id.* at 334;

see also id. (finding error because "the record indicates that the court … may have selected the length of the sentence to ensure that [the defendant] could complete the 500 Hour Drug Program); *id.* at 334-35 ("These statements suggest that the court may have calculated the length of [the defendant's] sentence to ensure that she receive certain rehabilitative services. And that a sentencing court may not do."). This modest threshold for error suggests that any consideration of rehabilitation violates § 3582(a), since whenever a district court includes rehabilitation as a consideration when imposing a sentence of imprisonment, there will be a "possibility" that the sentence is based on that prohibited factor. *Id.* at 334.

The "any consideration" interpretation of § 3582(a) is also a better reading of the statute, for three reasons. First, it hews closer to the statutory language, which instructs sentencing courts to "consider" all the applicable sentencing factors, while recognizing that prison is "not an appropriate means" of rehabilitation. 18 U.S.C. § 3582(a). The statute does not include any qualifying language, thereby making clear that prison may never be considered an appropriate means of rehabilitating a defendant. Second, the "any consideration" interpretation makes more sense because § 3582(a) mandates that courts imposing a term of imprisonment consider all the other sentencing factors besides rehabilitation. *See id.* Since "there will almost always be some valid reasons advanced by the district court for imposing the sentence issued," "[a] rule requiring reversal only when rehabilitation is the sole motivation would not make sense." *Thornton*, 846 F.3d at 1116. Finally, this interpretation of § 3582(a) is more consistent with the broad policy judgment informing the Sentencing Reform Act, which is that the prison system's "attempt to 'achieve rehabilitation of offenders had failed.'" *Tapia*, 564 U.S. at 324-25 (citation omitted). Congress's intent to "bar[] courts from considering rehabilitation in imposing prison terms" would be undermined by the more limited rule that district courts may still consider

rehabilitation when imposing a prison sentence so long as they do not make it a primary or dominant consideration. *Id.* at 332 (citation omitted).

By instead adopting the "primary or dominant consideration" interpretation of § 3582(a), the Third Circuit placed unwarranted emphasis on *Tapia*'s observation that "[a] court commits no error by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs." *See Schonewolf*, 905 F.3d at 692 (quoting *Tapia*, 564 U.S. at 334-35). Based on that observation, the Third Circuit reasoned that some consideration of rehabilitation must be permissible in selecting a term of imprisonment, concluding that a sentence violates the statute only if rehabilitation was a "primary or dominant consideration" in the sentencing explanation. *See id.* at 692-94.

Yet this approach fails to accurately capture *Tapia*'s distinction between permissible and impermissible discussions of rehabilitation at sentencing. Contrary to the reading of the Third Circuit, *Tapia* held that a sentencing court must "not think about prison as a way to rehabilitate an offender," but that it "may urge the BOP to place an offender in a prison treatment program" and "address a person who is about to begin a prison term about these important matters." *Tapia*, 564 U.S. at 331, 334. This distinction turns on the *role* that rehabilitation plays during the sentencing hearing, not its *prominence* in the court's sentencing analysis. A district court may discuss rehabilitation separately from its decision to imprison as a recommendation to the defendant or the Bureau of Prisons, but it may not consider rehabilitation as a reason to imprison. As the Sixth Circuit explained in adopting the "any consideration" approach, a district court may "discuss[] the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs," but "the court's discussion of those things must not be its explanation for the sentence it imposes. Instead, to comply with § 3582(a), the court must set forth a rationale

independent of rehabilitative concerns." *Rucker*, 874 F.3d at 488 (quoting *Tapia*, 564 U.S. at 334).

D. This Case is an Ideal Vehicle for Answering the Question Presented.

Ms. Schonewolf's case is an ideal vehicle for resolving the circuit split as to the proper interpretation of § 3582(a). Because the district court considered rehabilitation in sentencing her to imprisonment, but did not make it a primary or dominant consideration, the Court's decision as to which side of the split is correct will determine the outcome of her case.

It is clear that the district court considered rehabilitation in sentencing Ms. Schonewolf to imprisonment. The court made "numerous references to her drug addiction" and in fact specifically told her that it had "reached a conclusion that you are a significant danger to yourself … [a]nd the last step we have in order to give you a fighting chance to recover from whatever addictions you have is to – is to limit your contact with the outside world for a significant period of time." *Schonewolf*, 905 F.3d at 686, 693. The court declared that "[t]he facts just scream for the conclusion that the defendant in this case needs to be contained not only for the benefit of society, but … for her own benefit." (C.A. App. 76).

Nevertheless, the Third Circuit concluded that rehabilitation was not the primary or dominant consideration for Ms. Schonewolf's prison sentence because the primary reason for her sentence was instead the "past lenity" she had received – a downward departure at the 2010 sentencing for the original offense. *Schonewolf*, 905 F.3d at 693. As the district court noted at the end of its sentencing explanation, "I have decided to grant an upward variance. And the basis for the upward variance is Section 7B1.4 … Application Note number 4 [stating that upward departure may be warranted where original sentence was the result of a downward departure]." *Id.* at 686.

The validity of Ms. Schonewolf's 40-month sentence therefore turns on resolution of the circuit split on the proper interpretation of § 3582(a), making her case an ideal one for deciding the question presented. If the Court adopts the "any consideration" interpretation of § 3582(a), then the sentencing court will have erred by considering rehabilitation, requiring reversal of the Third Circuit's decision and remand for further proceedings. But if the Court adopts the "primary or dominant consideration" interpretation, then the sentencing court will not have erred because the court of appeals determined that rehabilitation was not a primary or dominant consideration, and the sentence may be affirmed.[4]

[4] The fact that Ms. Schonewolf did not object to the sentence in district court should pose no obstacle to this Court's review. The same was true in *Tapia* itself, and the Court still granted certiorari to decide the proper interpretation of § 3582(a), find error, and remand for determination of whether the error was plain. *See* 564 U.S. at 335.

CONCLUSION

For the foregoing reasons, Ms. Schonewolf respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Robert Epstein
ROBERT EPSTEIN
Assistant Federal Defender
Counsel of Record

JACOB SCHUMAN
Research and Writing Attorney

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals

LEIGH M. SKIPPER
Chief Federal Defender

Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 540 West, Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100