

Number ____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 2018

THOMAS CASCIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

FELDMAN and FELDMAN
Attorneys at Law
626 Reckson Plaza
West Tower, 6th Floor
Uniondale, NY 11556
(516) 522-2828

Arza Feldman
of counsel

QUESTION PRESENTED

1. Should certiorari be granted to find that a *Tapia* error occurs anytime a district court considers rehabilitative needs in imposing prison time, even for a single day, without regard to whether, as here, Petitioner received a below-guidelines sentence?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
POINT 1: CERTIORARI SHOULD BE GRANTED TO FIND THAT A <i>TAPIA</i> ERROR OCCURS ANYTIME A DISTRICT COURT CONSIDERS REHABILITATIVE NEEDS IN IMPOSING PRISON TIME, EVEN FOR A SINGLE DAY, WITHOUT REGARD TO WHETHER, AS HERE, PETITIONER RECEIVED A BELOW-GUIDELINES SENTENCE	6
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Henderson v. United States</i> , 568 U.S. 266, 133 S. Ct. 1121, 185 L. Ed. 2d 85 (2013).....	7
<i>Tapia v. United States</i> , 564 U.S. 319, 131 S. Ct. 2382, 180 L. Ed. 2d 357 (2011).....	6
<i>United States v. Cascio</i> 2019 U.S. App. LEXIS 19170 (2d Cir. June 27, 2019).....	1, 10
<i>United States v. Cordery</i> , 656 F.3d 1103 (10 th Cir. 2011).....	8
<i>United States v. Del Valle-Rodriguez</i> , 761 F.3d 171 (1 st Cir. 2014) .	8
<i>United States v. Garza</i> , 706 F.3d 655 (5 th Cir. 2013).....	8
<i>United States v. Lifshitz</i> , 714 F.3d 146 (2d Cir. 2013).....	7
<i>United States v. Schonewolf</i> , No. 17-2846, 2018 U.S. App. LEXIS28112 (3 rd Cir. Oct. 4, 2018).....	8

FEDERAL STATUTES

18 U.S.C. § 3582(a)	2, 7
18 U.S.C. §2113(a).....	4

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

THOMAS CASCIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

OPINION BELOW

There was one decision below, which is attached to this petition.

See United States v. Cascio, No. 18-2306-cr, 2019 U.S. App. LEXIS 19170 (2d Cir. June 27, 2019).

JURISDICTION

The order of the Court of Appeals was decided on June 27, 2019, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C.S. § 3582.

STATEMENT OF THE CASE

Petitioner was convicted of Bank Robbery, in violation of 18 U.S.C. §2113(a) and Entering a Bank with Intent to Commit a Larceny, in violation of 18 U.S.C. §2113(a), entered on July 13, 2018, in the Western District of New York (Hon. Lawrence J. Vilardo) and was sentenced to 180 months' imprisonment. The Second Circuit Court of Appeals affirmed on June 27, 2019.

STATEMENT OF FACTS

On March 6, 2017, at about 1:00 p.m., Navyjot Kaur was working as a teller at KeyBank at 5200 Main Street, Williamsville, New York, which is insured by the Federal Deposit Insurance Corporation, when a man entered the bank and her a note that said “Robbery.” She gave him \$308 and he left. Petitioner was convicted of Bank Robbery. In imposing sentence, the district court said “... *I think most important in my mind*, is the fact that drugs triggered your life going off the rails, and that you just can’t seem to beat that addiction. That’s the reason I’ve recommended a facility that can provide you with the drug treatment that you need. I think that[,] if that drug problem gets controlled, that you – you will lead a productive and law-abiding life” (emphasis added).

SUMMARY OF ARGUMENT

Certiorari should be granted to find that a *Tapia* violation occurs when a district court imposes a below Guidelines sentence, of even one day, where rehabilitative needs are a part of the sentencing calculus, because imprisonment is not an appropriate means of promoting rehabilitation.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED TO FIND THAT A *TAPIA* ERROR OCCURS ANYTIME A DISTRICT COURT CONSIDERS REHABILITATIVE NEEDS IN IMPOSING PRISON TIME, EVEN FOR A SINGLE DAY, WITHOUT REGARD TO WHETHER, AS HERE, PETITIONER RECEIVED A BELOW-GUIDELINES SENTENCE.

At sentence, defense counsel argued 144 months' imprisonment was "certainly ... enough." The district court disagreed, reasoning:

... I think most important in my mind, is the fact that drugs triggered your life going off the rails, and that you just can't seem to beat that addiction. That's the reason I've recommended a facility that can provide you with the drug treatment that you need. I think that[,] if that drug problem gets controlled, that you – you will lead a productive and law-abiding life.

Now, I'm not willing to take the risk that Judge Skretny took, you know, 16 or 17 years ago and that the state court judge took giving you a relatively short sentence or the sentence that your lawyer suggested. I'm not willing to take that risk because it hasn't worked so far. But I think with 15-year term of imprisonment and drug treatment during that term, the chances of your finally beating that problem are pretty good.

The sentence violates this Court's ruling in *Tapia v. United States*, 564 U.S. 319, 131 S. Ct. 2382, 2391, 180 L. Ed. 2d 357 (2011)(18

U.S.C. § 3582(a). There, this Court “preclude[d] sentencing courts from imposing or lengthening a prison term to promote an offender’s rehabilitation.” *Id.* 321. *See also Henderson v. United States*, 568 U.S. 266, 270, 133 S. Ct. 1121, 1125, 185 L. Ed. 2d 85 (2013)(In *Tapia*, “ ... we held that it is error for a court to “impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.””).

As a preliminary matter, the district court’s reasoning was flawed. It found, in sentencing Petitioner, the single most important factor was his drug addiction, and thus imposed a 180-month term so that a drug treatment program would enable him to overcome his problem.

Numerous Circuit courts have found that where rehabilitative concerns are either the driving force behind, or a dominant factor in, the length of a sentence, a *Tapia* error has occurred. *Compare United States v. Lifshitz*, 714 F.3d 146, 150 (2d Cir. 2013)(“The sentencing colloquy demonstrates that the district court’s primary considerations in sentencing Lifshitz were ‘promoting respect for the law and protecting the public from further crimes of this defendant.’ While the district court also considered Lifshitz’s need for medical care, there is no indication

in the record that the district court based the length of Lifshitz’s sentence on his need for treatment.”). *See also United States v. Del Valle-Rodríguez*, 761 F.3d 171, 175 (1st Cir. 2014)(“Where, however, the record indicates that rehabilitative concerns were the driving force behind, or a dominant factor in, the length of a sentence, courts have found *Tapia* error”); *United States v. Schonewolf*, No. 17-2846, 2018 U.S. App. LEXIS 28112, at *15 (3rd Cir. Oct. 4, 2018)(“ ... the First, Second, Fourth, Fifth, Sixth, and Eighth Circuits have articulated a narrower standard, requiring that rehabilitation must have been the determining factor in a prison sentence before finding a *Tapia* violation. Under this standard, rehabilitation may be a factor granted some weight in selecting a prison sentence, so long as it is not the primary or dominant consideration); *United States v. Garza*, 706 F.3d 655, 662 (5th Cir. 2013)(finding *Tapia* error where “rehabilitative needs were the dominant factor” for the sentence); *United States v. Cordery*, 656 F.3d 1103, 1105-06 (10th Cir. 2011)(finding *Tapia* error where court imposed

“a longer term of imprisonment in order to make [the defendant] eligible for” a particular rehabilitation program).¹

Clearly, a district court may properly “discuss[] the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs” and make recommendations to the Bureau of Prisons concerning rehabilitation. *Tapia*, 564 U.S. at 334. It may also consider other rehabilitation as well as other factors. *Id.* But that is not what occurred here.

Indeed, the district court itself openly stated that rehabilitation *vis a vis* the sentence was the most important factor in its mind. Hence, it would be incorrect to argue that the district court merely “discussed the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs,” *Tapia*, 131 S. Ct. at 2392. Based on the tenor, context and totality of the district court’s comments, Petitioner’s rehabilitative needs were clearly the driving force in its sentencing

1. Given that this Court never used that test, or even used those words, certiorari should also be granted because this expansive test is at odds with this Court’s holding that an error occurs even when the transcript “... *suggests* the possibility that [the] sentence was based on ... rehabilitative needs.” *Tapia*, 564 U.S. at 334 (emphasis added). A suggestion is far less than a driving force or a dominant factor. Regardless, *Tapia* would have been violated here under either test.

calculus. The dominant factor in the district court’s sentence was to use prison as a way to provide drug rehabilitation for the defendant.

Even if the transcript merely *suggested* the possibility Petitioner’s sentence was based on his rehabilitative needs, a resentencing would be appropriate, because the district court relied heavily on rehabilitation as a justification for the 15-year sentence. *Tapia*, 131 S. Ct. at 2392 (“In this case, the sentencing transcript suggests the possibility that Tapia’s sentence was based on her rehabilitative needs.”). *See also United States v. Neal*, 517 Fed. Appx. 20, 22 (2d Cir. 2013)(“Because Neal’s rehabilitative needs clearly factored into his sentencing, we remand the case and direct the district court to vacate the sentence and proceed to resentencing without considering those rehabilitative needs in determining the length of the sentence.”).

The Second Circuit Court of Appeals ruled that “... there is no indication that the District Court imposed or otherwise lengthened the defendant’s sentence in order to promote his rehabilitation. To the contrary, the District Court mentioned Cascio’s drug addiction as the most compelling mitigating factor at sentencing and the principal reason why the District Court was choosing to impose a sentence significantly

below the advisory Guidelines range.” *United States v. Cascio*, No. 18-2306-cr, 2019 U.S. App. LEXIS 19170, at *3 (2d Cir. June 27, 2019).

The Second Circuit is wrong on both counts. The district court clearly said it was imposing a 180-month sentence to promote Petitioner’s rehabilitation. Indeed, it said the single “most important” factor “in [its] mind” was getting Petitioner’s “drug problem ... controlled” and refused to “take the risk” the state court did by “giving [him] a relatively short[er] sentence,” adding that this longer prison term would increase “the chances of your finally beating [the drug] problem.” Rehabilitation was thus the driving force behind, and dominant factor in, the length of the sentence.

The Second Circuit was also wrong when it rationalized this *Tapia* error by claiming that the district court cited the drug addiction as a compelling mitigating factor to “impose a sentence significantly below the advisory Guidelines range.” This misreads *Tapia*’s clear holding that a district court may not “... *impos[e] or lengthen[]* a prison term to promote an offender’s rehabilitation.” *Id.* 321 (emphasis added). The language of this Court specifically bars any sentence, of any kind, that

is imposed, not just lengthened, to promote an offender's rehabilitation. It is thus irrelevant, as the Second Circuit believed, that the sentence is below the Guideline range.

This Court's rationale in *Tapia* underscores the Second Circuit's error. There, this Court reasoned that "imprisonment is not an appropriate means of promoting rehabilitation." *Tapia*, 564 U.S. at 327. Hence, it makes no difference whether the sentence is above or below the Guideline range, because *any* sentence imposed for rehabilitative purposes--even for a day--is improper. Certiorari should thus be granted to define the contours of a *Tapia* violation, and find that even a below guidelines sentence that is imposed for rehabilitative purposes violates *Tapia*.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE
GRANTED.

Dated: July 15, 2019
Uniondale, New York

Respectfully Submitted,

Arza Feldman
Arza Feldman

UNITED STATES
SUPREME COURT

THOMAS CASCIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on July 15, 2019, we served a copy of Petitioner's petition for writ of certiorari, by first class United States mail, on United States mail, on the United States Attorney, Western District of New York, 138 Delaware Avenue, Buffalo, NY 14202, on the Office of the Solicitor General, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001, and on Thomas Cascio, 10488-055, McDowell FCI, 101 Federal Drive, Welch, WV 24801. Contemporaneous with this filing, we have also transmitted a digital copy to the United States Supreme Court.

Arza Feldman
Arza Feldman