No. 21–_____

IN THE
SUPREME COURT OF THE UNITED STATES

Raymond L. Crum,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Edward S. Zas
Counsel of Record

Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
Edward_Zas@fd.org
(212) 417-8742

Counsel to Raymond L. Crum

QUESTION PRESENTED

In *Tapia v. United States*, 564 U.S. 319, 321 (2011), this Court held that the Sentencing Reform Act of 1984 "precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation." A court must not even "consider" rehabilitation when sentencing an offender to prison "because imprisonment is not an appropriate means of pursuing that goal." *Id.* at 328.

Tapia has generated a circuit split over the following question presented: whether, as five circuits hold, a district court commits "plain" error—i.e., clear or obvious error—by relying to *any* extent on a defendant's rehabilitative needs in imposing a prison term, or whether, as six other circuits hold, a district court commits no "plain" error (and, in some of these circuits, no error at all) unless rehabilitation is the "primary consideration," "dominant factor," or "driving force" behind the prison sentence.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Federal Cases

Federal Statutes, Rules, and Guidelines

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Raymond L. Crum respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and sentence.

OPINIONS AND ORDERS BELOW

The Second Circuit's decision (Pet. App. 1-4) is reported at 843 F. App'x 404. The District Court's judgment (Pet. App. 5-11) and the transcript of petitioner's sentencing (Pet. App. 12-44) are unreported.

JURISDICTION

The Court of Appeals entered judgment on April 12, 2021. Pet. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The District Court had jurisdiction under 18 U.S.C. § 3231.

RELEVANT STATUTORY PROVISIONS

Section 3582(a) of title 18, U.S.C., provides in pertinent part:

> **§ 3582. Imposition of a sentence of imprisonment**
>
> **(a) Factors to be considered in imposing a term of imprisonment.**— 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.

18 U.S.C. § 3582(a).

Section 994(k) of title 28, U.S.C., provides:

> **(k)** The [United States Sentencing] Commission shall 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.

28 U.S.C. § 994(k).

INTRODUCTION

This case presents an opportunity for this Court to resolve an acknowledged and entrenched circuit split that has emerged in the aftermath of *Tapia v. United States*, 564 U.S. 319 (2011). *Tapia* sought to clarify the extent to which the Sentencing Reform Act of 1984 allows a district court to consider a defendant's rehabilitative needs when imposing a prison term. This Court held, unanimously, that "the Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation." *Id.* at 321. And this Court made clear that "rehabilitation" encompasses medical care and other treatment programs. *See id.* at 333-35; *see also* 28 U.S.C. § 994(k) (directing the Sentencing Commission to ensure that the Sentencing 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").

Despite *Tapia*'s effort to clarify this important area of federal sentencing law, the circuits are sharply divided over what *Tapia* means and how to apply it. Five circuits hold that *Tapia* means a district court commits "plain" error, i.e., "clear or obvious" error, *United States v. Marcus*, 560 U.S. 258, 262 (2010), by relying to *any* extent on rehabilitation when sending an offender to prison. Six other circuits hold that a court commits no "plain" error (and, in several of these jurisdictions, no error at all) unless rehabilitation is the "dominant factor," "primary consideration," or "driving force" behind the prison sentence. Resolving this circuit split is important to the day-to-day functioning of the federal criminal justice system; this case is an appropriate vehicle; and the Second Circuit's position is inconsistent with *Tapia*'s holding and the plain language of 18 U.S.C. § 3582(a). Accordingly, this Court should grant review.

STATEMENT OF THE CASE

The facts are simple and undisputed.

1. Raymond L. Crum is a 66-year-old husband, father, and military veteran who suffers from an extraordinary array of serious health problems, including congestive heart failure—he has endured six heart attacks, including two since being incarcerated—post-traumatic stress disorder, Graves' disease (an autoimmune disorder affecting the thyroid), major depression (resulting in multiple suicide attempts), degenerative spinal disease, arthritis, type 2 diabetes, high blood pressure, neuropathy, sleep apnea, and diabetic retinopathy. *See* Presentence Investigation Report ("PSR") ¶¶ 74, 78, 82-101. He served in the United States Army during the Vietnam War in the early 1970s, was awarded the National Defense Service Medal, and was honorably discharged. *See id.* ¶ 104. Until this case, he had no criminal history. *See id.* ¶¶ 50-57.

2. Mr. Crum pleaded guilty in 2017, pursuant to a written plea agreement, to a three-count information charging him with one count of violating 18 U.S.C. § 2252A(a)(5)(B) (knowingly possessing child pornography) and two counts of violating 18 U.S.C. § 2252A(a)(2)(A) (knowingly receiving child pornography). The receipt counts each carried a mandatory minimum prison term of 5 years and a maximum term of 20 years, *see id.* § 2252A(b)(1); the possession count carried no minimum prison

term and a maximum term of 10 years. *See id.* § 2252A(b)(2). The plea agreement contained a waiver of Mr. Crum's right to appeal any term of imprisonment up to and including 292 months (the bottom of the estimated Guidelines range of 292-365 months).

At sentencing, defense counsel requested the mandatory statutory minimum sentence of five years' imprisonment, emphasizing Mr. Crum's health problems and lack of any criminal history. Pet. App. 27-29. Counsel also asked the District Court to recommend that Mr. Crum be confined at a federal medical center so he could receive the treatment he needed. Pet. App. 29.

The District Court agreed to recommend confinement at a federal medical center, stating to petitioner "that getting you in sort some of treatment program as quickly as we can is going to benefit you and is going to benefit everyone. It's going to benefit society." Pet. App. 38-39. But then, instead of imposing the *minimum* possible prison sentence, the judge imposed the *maximum* term on each count—20 years on each of the two receipt counts and 10 years on the possession count, all to run concurrently. Pet. App. 39-40. One reason the judge gave for imposing this severe sentence was Mr. Crum's "very serious need … for medical and psychiatric treatment that will take a considerable amount of time." Pet. App. 39. The District

Court also cited several permissible sentencing factors under § 3553(a). The court summarized its sentencing rationale as follows:

> So I think the nature and circumstances of the offense, the need for the sentence to reflect the seriousness of the offense, to promote respect for the law and to provide a fair punishment, the need for general deterrence and to protect the public from your crimes, *and the very serious need that you have for medical and psychiatric treatment that will take a considerable amount of time*, they *all* led me to impose the maximum sentence that I could impose on each count, and I did that. 240 months, 240 months and 120 months are the maximum sentences that can be imposed on each of the counts and I did, because I think that's what this matter deserves.

Pet. App. 39 (emphases added).[1] Counsel failed to object.

3. On appeal, Mr. Crum argued the District Court committed plain error under *Tapia* by invoking his "very serious need … for medical and psychiatric treatment that will take a considerable amount of time" as a reason for imposing the maximum prison term on each count.

The Court of Appeals affirmed in a summary order. Pet. App. 1-4. The court first assumed without deciding that the appeal waiver in the plea agreement is unenforceable. Pet. App. 2; s*ee, e.g., United States v. Riggi,* 649 F.3d 143, 147 (2d Cir. 2011) (holding appeal waivers unenforceable when the sentence was arguably "based on unconstitutional factors" or otherwise

[1] The court also imposed a life term of supervised release, including mandatory sex offender treatment and any necessary mental health treatment. Pet. App. 7-9.

imposed "in a manner that the plea agreement did not anticipate"). On the merits, the court held, without dispute from petitioner, that the alleged *Tapia* error could be corrected only if petitioner satisfied the "plain error" test of *United States v. Olano*, 507 U.S. 725 (1993). Pet. App. 2; *see* Fed. R. Crim. P. 52(b). Under that four-part test, (1) there must be "error;" (2) it must be "plain," i.e., clear or obvious at the time of appellate review, *Henderson v. United States*, 568 U.S. 266, 269 (2013); (3) it must "affect[] substantial rights;" and (4) it must "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732-36.

The Second Circuit held that any *Tapia* error was not "clear or obvious" because rehabilitation was not among the sentencing court's "primary considerations" in setting the term of imprisonment. Pet. App. 4. The Circuit relied upon its precedential decision in *United States v. Lifshitz*, 714 F.3d 146, 150 (2d Cir. 2013), which held that no *Tapia* error occurred where rehabilitation was not one of the sentencing court's "primary considerations." Pet. App. 4.

Having found no "clear or obvious" violation of *Tapia*, the Court of Appeals affirmed petitioner's sentence without reaching the remaining prongs of plain-error analysis: i.e., whether the District Court's reliance on petitioner's medical needs affected his "substantial rights" or "seriously

affect[ed] the fairness, integrity or public reputation of judicial proceedings." Pet. App. 2-4; *see Olano*, 507 U.S. at 732.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted for four reasons. First, the circuits are deeply and openly divided over what *Tapia* does and does not prohibit. Second, the question presented is extremely important. Third, this case provides a good vehicle for resolving the conflict. Finally, the majority position of the circuits, including the Second Circuit's decision below, is incorrect, inconsistent with *Tapia,* and incompatible with the plain language of the Sentencing Reform Act.

I. The circuits are openly split on the question presented.

Review is merited because *Tapia* has generated an acknowledged, persistent, and deep circuit split over the standard for assessing whether a sentencing court committed "plain" error (if any error) by considering rehabilitative concerns in imposing a term of imprisonment. *See, e.g.*, *United States v. Schonewolf*, 905 F.3d 683, 691 (3d Cir. 2018) ("[A] circuit split has emerged regarding the standard to be applied in considering whether there has been a *Tapia* violation."); *United States v. Vandergrift*, 754 F.3d 1303, 1310-11 (11th Cir. 2014) (explicitly rejecting the "dominant factor" test for *Tapia* violations adopted by some other circuits); Owen M. Mattox, Comment,

Tapia v. United States: *The Appropriateness of Considering Rehabilitation at Sentencing*, 44 Am. J. Trial Advoc. 213, 221-29 (2020) (recognizing split).

The majority of circuits that have considered the question—six of them—hold that a court does not commit "plain" *Tapia* error (and, in several of these circuits, does not violate *Tapia* at all) unless rehabilitation is the "dominant factor" or "primary consideration" behind the court's decision to impose or increase a term of imprisonment. These courts rely 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. In contrast, five circuits hold that a court not only errs, but *plainly* errs, whenever it relies *at all* on rehabilitation in sentencing an offender to prison. Thus, judicial conduct that is "plain" error in five circuits is permissible—and certainly not "plain" error—in six others. Only this Court can resolve this conflict.

A. Legal background and the *Tapia* decision

Before 1984, the federal criminal justice system "was premised on a faith in rehabilitation." *Tapia*, 564 U.S. at 324. But this penological theory "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 (internal quotation marks omitted). In 1984, therefore, Congress passed the Sentencing Reform Act (the "Act" or "SRA") "to overhaul federal sentencing practices." *Id.* at 325. The Act 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 sentencing] to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation*." 18 U.S.C. § 3582(a) (emphasis added).

This Court interpreted § 3582(a) in *Tapia*. There, Tapia was sentenced to 51 months in prison for alien smuggling. 564 U.S. at 321. The district court selected this sentence, in part, to provide Tapia drug treatment (specifically, the Bureau of Prisons's 500-hour Residential Drug Abuse Program) and to deter her from committing additional crimes. *See id.* at 322. The court also reviewed other sentencing factors in § 3553(a), emphasizing the nature and seriousness of the offense, Tapia's misconduct while on bail, and her history of being abused. S*ee id.* at 335-36 (Sotomayor, J., concurring).

This Court held that § 3582(a) "precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's

rehabilitation," and remanded because of the "possibility" that Tapia's sentence was based on her rehabilitative needs. *Id.* at 321, 334 (majority opinion). "Congress expressed itself clearly in § 3582(a)," this 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," this 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," this 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.* at 330. Finally, the Act's legislative history offered "one last piece of corroborating evidence" showing that imprisonment should not be imposed to foster 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.

This Court went on to hold that Tapia's 51-month sentence may have violated § 3582(a) because "the sentencing transcript suggests the possibility

that [her] sentence was based on her rehabilitative needs." *Id.* at 334. This Court also "note[d]," however, "what we do *not* disapprove about Tapia's sentencing." *Id.* "A court commits no error by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs," this Court observed, and "properly may address a person who is about to begin a prison term about these important matters." *Id.*

Because Tapia did not object to the prison sentence when it was imposed, this Court remanded for further proceedings to determine whether she met the standard for reversible plain error. *Tapia*, 564 U.S. at 335. On remand, the Ninth Circuit ruled—upon the Government's concession—that the district court committed a "plain" or "obvious" error by "considering Tapia's correctional and rehabilitative needs at sentencing." *United States v. Tapia*, 665 F.3d 1059, 1061 (9th Cir. 2011). The Ninth Circuit held the error to be "plain" without any inquiry into whether rehabilitation was the "dominant" or "primary" sentencing factor. *Id.* The Circuit further ruled that the error affected "substantial rights" because there was a "'reasonable probability' that the district judge's consideration of Tapia's rehabilitative needs influenced the length of the sentence he imposed." *Id.* at 1062. The court also held that overlooking "a legal error that may have increased the length of a defendant's sentence" would "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1063.

Accordingly, the Ninth Circuit vacated the sentence and remanded for resentencing. *Id.* And on remand the district court resentenced Tapia to a reduced term of 46 months' imprisonment. *See* Amended Judgment After Remand, *United States v. Tapia*, No. 3:08-cr-249-BTM, Dkt. 218 (S.D. Cal. Mar. 26, 2012).

B. The majority position: Six circuits apply a "dominant factor" test for assessing alleged *Tapia* errors.

Despite *Tapia*'s effort to clarify the proper role of rehabilitation as a federal sentencing factor, the circuits are deeply divided over what *Tapia* means. Six circuits—the First, Second, Third, Fourth, Fifth, and Eighth—subscribe to a "dominant factor" (or "primary consideration") test for assessing alleged *Tapia* errors. Under this test, a sentencing court does not commit a "plain" *Tapia* error—and, in at least four of these circuits (the First, Third, Fourth, and Fifth), does not commit *Tapia* error at all—unless rehabilitation was a "dominant factor," "primary consideration," or "driving force" behind the court's decision to impose or increase a term of imprisonment. *See, e.g.*, *United States v. Del Valle–Rodriguez*, 761 F.3d 171, 174-75 (1st Cir. 2014) ("dominant factor" or "driving force"); *United States v. Lifshitz*, 714 F.3d 146, 150 (2d Cir. 2013) (per curiam) ("primary consideration[]"); Pet. App. 4 (decision below) (same); *Schonewolf*, 905 F.3d at 691–92 ("primary or dominant consideration"); *United States v. Garza*, 706

F.3d 655, 659-60 (5th Cir. 2013) ("dominant factor"); *United States v. Vaughn,* 837 F. App'x 189, 190 (4th Cir. 2020) (per curiam) ("driving force") (citing *United States v Alston*, 722 F.3d 603, 608-09 (4th Cir. 2013); *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) ("dominant factor"); *United States v. Pickar*, 666 F.3d 1167, 1169 (8th Cir. 2012) (same).

The Fifth Circuit's decision in *United States v. Rodriguez–Saldana,* 957 F.3d 576 (5th Cir. 2020), exemplifies the majority approach. There, the defendant was sentenced to 24 months' imprisonment for illegally reentering the United States. *Id.* at 577. The sentencing court stated, without objection, that it imposed this sentence "among other things, so that [the defendant] will have time to get his eye surgery." *Id.* at 578. On appeal, the Fifth Circuit rejected the defendant's argument that this partial reliance on the defendant's medical needs constituted "plain" error under *Tapia*. *Id.* at 581. The court applied its precedents holding that "[a] court commits no *Tapia* error"—and, *a fortiori*, no "plain" *Tapia* error—"if the need for rehabilitation is a 'secondary concern' of the court or an 'additional justification' for the sentence." *Id.* at 579 (quoting *United States v. Pillault*, 783 F.3d 282, 290 (5th Cir. 2015)). Rather, *Tapia* error occurs only "if a defendant's rehabilitative needs are a dominant factor that informs the district court's sentencing decision." *Id.* Applying this standard, the court found no "plain"

error because the defendant's need for eye surgery "was at most a secondary concern for the sentence." *Id.* at 581; *see also United States v. Walker*, 742 F.3d 614, 616 (5th Cir. 2014) ("Post-*Tapia*, this court has concluded that if consideration of the need for rehabilitation is a 'secondary concern' or 'additional justification' for a sentence, it is permissible. Conversely, a sentencing court errs if a defendant's rehabilitative needs are a 'dominant factor' … [that] inform[s] the district court's [sentencing] decision.") (quoting *Garza*, 706 F.3d at 660).

The Second Circuit's position aligns with the Fifth Circuit's. In *Lifshitz*, the defendant argued that the district court committed a "plain" *Tapia* error by imposing a two-year prison sentence, in part, so he could receive medical treatment for his mental illness. 714 F.3d at 149. The Second Circuit held that the district court did not violate *Tapia*, plainly or otherwise, 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. *Id.* at 150. Specifically, the sentencing court said:

> 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.*

Id. at 148 (emphasis added).

Thus, rehabilitation was clearly a factor, albeit a "lesser" factor, in the decision to sentence Lifshitz to a two-year prison term. *See id.* But the Second Circuit ruled that no *Tapia* error occurred because the sentencing court's "primary considerations" were permissible factors (promoting respect for the law and protecting the public). *Id.* Similarly, the Circuit in petitioner's case applied *Lifshitz* to hold that no "plain" error occurred because rehabilitation was not among the sentencing court's "primary considerations" in setting the term of imprisonment. Pet. App. 4.

The Third Circuit has likewise adopted the majority position and explicitly rejected the contrary position of other circuits. *Schonewolf*, 905 F.3d at 691-92. The First, Fourth, and Eighth Circuits ascribe to the majority view as well. *See Vaughn*, 837 F. App'x at 190; *Replogle*, 678 F.3d at 943; *Pickar*, 666 F.3d at 1169.

C. The minority position: Five circuits apply an "any consideration" test for assessing alleged *Tapia* errors.

Five circuits—the Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits—interpret *Tapia* to mean what it says: federal courts must not "think of imprisonment as a way of rehabilitating an offender." 564 U.S. at 330. Accordingly, these circuits hold that "plain" error occurs where, as here, a sentencing court considers rehabilitation *at all* in imposing or

lengthening a term of imprisonment—even if rehabilitation is not the "dominant factor" or "primary consideration."[2]

The Ninth Circuit first adopted this position on remand from this Court in *Tapia* itself. *United States v. Tapia*, 665 F.3d 1059 (9th Cir. 2011). This Court in *Tapia* had remanded for the Ninth Circuit to decide whether the district court's consideration of Tapia's rehabilitative needs was reversible "plain error" warranting resentencing. *See Tapia*, 564 U.S. at 335. Though, as here, rehabilitation was only one of several factors cited by the sentencing

---

[2] The Sixth Circuit agrees with these five circuits that *Tapia* prohibits *any* reliance on rehabilitation when sentencing an offender to prison. *See United States v. Krul*, 774 F.3d 371, 372 (6th Cir. 2014) (holding that *Tapia* "requires reversal … where there is an identifiable basis for concluding that the district court based the length of the sentence of incarceration *in part* on rehabilitation") (emphasis added); *United States v. Rucker*, 874 F.3d 485, 488, 489 (6th Cir. 2017) (reversing for *Tapia* error even though sentencing court said rehabilitation was "not the deciding factor"); *United States v. Censke*, 449 F. App'x 456, 462, 470-71 (6th Cir. 2011) (reversing for *Tapia* error where sentence was based in part on defendant's need for "medical and psychological treatment" that "would take a considerable amount of time"). But the Sixth Circuit, unlike all the other circuits, has not squarely decided whether an unpreserved *Tapia* error is a procedural error subject to plain-error review on appeal or, alternatively, a substantive error subject to "abuse of discretion" review. *See Krul*, 774 F.3d at 380-83 (Griffin, J., concurring); *see also United States v. Fowler*, 956 F.3d 431, 440 n.1 (6th Cir. 2020) (noting that "members of our Court disagree over whether challenging the district court's consideration of an improper factor is a substantive or procedural challenge") (collecting cases); *United States v. Goode*, 834 F. App'x 218, 222 (6th Cir. 2020) ("We have sometimes treated a defendant's claim that the district court considered an impermissible factor as a substantive-reasonableness challenge; other times we have treated it as a procedural-reasonableness challenge.").

court, the Ninth Circuit on remand held—indeed, the Government there "concede[d]"—that the *Tapia* violation was "clear or obvious," and therefore "plain." *Tapia*, 665 F.3d at 1061. The court further concluded that resentencing was required because the "plain" error affected Tapia's "substantial rights" and "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1061-63; *see also United States v. Grant*, 664 F.3d 276, 279 (9th Cir. 2011) (holding error "plain" under *Tapia* where the "express purpose" of an above-Guidelines prison term was "not only to protect society" but to enable the offender to receive treatment).

The Eleventh Circuit also falls in the minority camp. In *United States v. Alberts*, 859 F.3d 979, 981 (11th Cir. 2017), the defendant pleaded guilty to possessing and receiving child pornography. The court sentenced him to a substantial term of imprisonment (ten years) based, in part, on valid § 3553(a) factors, including the seriousness of his offense, the need for punishment and specific deterrence, and his "long term" and "very serious" preoccupation with "sex with very young children." *Id.* at 981, 982. But the court also told the defendant that "[y]our pattern of behavior over the years demonstrates to me you do pose a danger to the community and you need a period of time where you can receive the treatment that you should have." *Id.* at 982.

On appeal, the Eleventh Circuit held, contrary to the Second Circuit and other courts in the circuit-split majority, that a district court commits "plain" error by considering a defendant's rehabilitative needs *at all* in determining the prison sentence. *Id.* at 985-86. The court noted that its "binding precedent" after *Tapia* "clearly precludes consideration of rehabilitation when crafting a prison sentence," such that "the error was plain." *Id.* at 986 (citing *Vandergrift*, 754 F.3d at 1310). And the court added that it "has expressly declined to limit *Tapia* to 'situations where the district court makes rehabilitation the 'dominant factor in the sentencing court's calculus.'" *Id.* (quoting *Vandergrift*, 754 F.3d at 1310). "Instead, this Court applied *Tapia* to hold that a district court errs whenever it *considers* rehabilitation when imposing or lengthening a sentence of imprisonment." *Id.* at 985-86.

The Tenth Circuit similarly rejects the circuit-split majority's "dominant factor" approach. It holds that *Tapia* "spoke unequivocally in precluding federal courts from *considering* rehabilitation when imposing or lengthening a prison sentence." *United States v. Thornton*, 846 F.3d 1110, 1118 (10th Cir. 2017) (emphasis added). Accordingly, after *Thornton*, a court commits "plain" error whenever it relies at all on rehabilitation in imposing or lengthening a prison sentence, even if rehabilitation is not the "dominant factor" or "primary consideration." *See id.* at 1115-16; *also United States v.*

Lewis, 459 F. App'x 742, 743, 744 (10th Cir. 2012) (holding that district court committed "plain" error "when it imposed [the defendant's] sentence *in part* to promote his rehabilitation," even though the court also cited several proper § 3553(a) factors) (emphasis added); *United States v. Collins*, 461 F. App'x 807, 809 (10th Cir. 2012) (Gorsuch, J.) (assuming without deciding that district court committed "plain" error by resting its sentencing decision "*at least partially* on rehabilitation") (emphasis added).

The D.C. Circuit is also properly included in the minority camp. It held, even before *Tapia*, that any reliance on rehabilitation in selecting a prison term qualifies as "plain" error under the unambiguous language of § 3582(a). *In re Sealed Case*, 573 F.3d 844, 846, 849, 851-52 (D.C. Cir. 2009). And the court has reaffirmed after *Tapia* that rehabilitation must not even be "a factor" when imposing a prison term. *United States v. Godoy*, 706 F.3d 493, 498 (D.C. Cir. 2013); *see also id.* at 496 ("[P]rison time cannot be a means to the end of rehabilitation."). The Seventh Circuit agrees. *See United States v. Kopp*, 922 F.3d 337, 340 (7th Cir. 2019) (holding that "a judge may not *consider* rehabilitation when imposing a term of imprisonment") (emphasis added); *United States v. Spann*, 757 F.3d 674, 675 (7th Cir. 2014) (holding that *Tapia* prohibits a court from basing a prison term "even in part" on rehabilitative considerations).

In sum, the Courts of Appeals are sharply divided, six-to-five, over the question presented. If Mr. Crum had been prosecuted in the Seventh, Ninth, Tenth, Eleventh, or D.C. Circuits, the District Court's explicit reliance on his rehabilitative needs as a reason for imposing a decades-long prison term would qualify as a "plain" or "obvious" violation of the Sentencing Reform Act, as construed in *Tapia*. But because he was prosecuted in the Second Circuit, no "plain" error was found. This deep conflict is intolerable because the meaning of *Tapia* and the Sentencing Reform Act—and the propriety of often-lengthy federal prison sentences—should not turn on this accident of geography.

II. The question presented is extremely important.

For at least two reasons, it is critical that this Court resolve the conflict.

1. The question whether a court may consider rehabilitation at all in sentencing a defendant to imprisonment is profoundly important to the day-to-day functioning of the federal 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). *See* Matt J. Gornick, Note, *Finding "*Tapia *Error": How Circuit Courts Have Misread* Tapia v. United States *and Shortchanged the Penological Goals of the Sentencing*

Reform Act, 69 Vand. L. Rev. 845, 859 (2016) (noting that "[t]he proper calibration of *Tapia* errors affects more than the defendants subject to sentencing decisions—it affects the criminal justice system as a whole"); *Krul*, 774 F.3d at 378 (Griffin, J., concurring) (recognizing that the prohibition against rehabilitation as an imprisonment factor "is not a mere technicality" but rather "a fundamental shift in penological theory").

Because criminal defendants often struggle with drug addiction, mental and physical illness, and lack of education, rehabilitative concerns feature prominently at virtually all sentencing hearings, including those arising from violations of supervised release.[3] 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. Jennifer Bronson *et al.*, Bureau of Just. Statistics, U.S. Dep't of Just., *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates*, 2007-2009, at 1 (June 2017) (revised Aug. 10, 2020), https://bjs.ojp.gov/content/pub/pdf/dudaspji0709.pdf.

[3] While *Tapia* involved a prison sentence imposed for a criminal conviction, every court of appeals to consider the question has concluded that its holding also applies to a prison sentence imposed for a violation of supervised release. *See United States v. Molignaro*, 649 F.3d 1, 5 (1st Cir. 2011) (Souter, J., sitting by designation); *Lifshitz*, 714 F.3d at 150; *Schonewolf*, 905 F.3d at 687-90; *Bennett*, 698 F.3d at 198; *Garza*, 706 F.3d at 657; *United States v. Deen*, 706 F.3d 760, 766 (6th Cir. 2013); *Kopp*, 922 F.3d at 338, 340-43; *United States v. Taylor*, 679 F.3d 1005, 1006 (8th Cir. 2012); *Grant*, 664 F.3d at 280; *United States v. Mendiola*, 696 F.3d 1033, 1036 (10th Cir. 2012); *Vandergrift*, 754 F.3d at 1309.

Approximately 40% of inmates have been diagnosed with a mental disorder, and 14% report serious psychological distress, more than three times the typical rate. Jennifer Bronson & Marcus Berzofsky, Bureau of Just. Statistics, U.S. Dep't of Just., *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12,* at 1, 3 (June 2017), https://bjs.ojp.gov/content/pub/pdf/imhprpji1112.pdf. Over 40% of inmates have not completed high school or its equivalent, over twice the general population. Caroline Wolf Harlow, Bureau of Just. Statistics, U.S. Dep't of Just., *Education and Correctional Populations*, at 1 (Jan. 2003) (revised Apr. 15, 2003), https://bjs.ojp.gov/content/pub/pdf/ecp.pdf. And the Sentencing Guidelines 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* U.S.S.G. § 5D1.3. Because rehabilitation is discussed at nearly all sentencing hearings, appellate courts and district courts alike need guidance on the extent, if any, to which this factor may be considered in making imprisonment decisions.

2. Further, the continued uncertainty regarding the proper role of rehabilitation as a sentencing factor is unacceptable because it frustrates a central goal of the Sentencing Reform Act: uniformity. This Court in *Tapia*, like the drafters of the Act, recognized that § 3582(a) is not a condemnation of

rehabilitation per se, but a way to end sentencing disparities, limit the "almost unfettered discretion" traditionally possessed by sentencing courts, *Tapia*, 564 U.S. at 323, and ensure that an offender remains incarcerated only as long as necessary. But with circuits divided on how *Tapia* should be interpreted, the overarching goal of sentencing uniformity is being frustrated. The lack of a consistent, bright-line rule governing the role of rehabilitation at sentencing has contributed to disparate sentences, which undermine the intentions of both Congress and this Court. As a result of the current circuit split, two offenders in identical situations—convicted of the same offense, with the same criminal history, with the same recommended prison term under the Sentencing Guidelines, and with the same rehabilitative needs—can receive vastly different sentences depending solely upon the jurisdiction in which they were convicted.

This split should not be allowed to continue. As one commentator has recognized in urging this Court to intervene:

> As a result of the circuit split, the Sentencing Reform Act, enacted as an instrument for instituting uniformity at sentencing, cannot function as designed. Without some level of intervention by the Supreme Court, the consideration—or lack thereof—of rehabilitation at sentencing will continue to produce disparate prison sentences. In order to address this concern, the Court must decide on a clear and universal rule

> for district courts to abide by when sentencing an offender who has clear rehabilitative needs.

Mattox, *supra,* at 232.

III. This case is a suitable vehicle.

This case provides an appropriate opportunity to resolve the split.

1. The question dividing the circuits is cleanly presented for this Court's review. It is undisputed—and the Second Circuit itself recognized—that the District Court expressly relied, in part, on petitioner's "very serious need for medical and psychiatric treatment that will take a considerable amount of time" when it decided to impose the maximum prison term on each count. Pet. App. 3, 39. It is also undisputed that the court cited several proper § 3553(a) factors as well. *Id.* Accordingly, this case starkly presents the question dividing the Courts of Appeals: whether *any* reliance on rehabilitation in imposing a prison term is a "clear or obvious" error under *Tapia* (if it is error at all), or only when rehabilitation is the "dominant factor" or "primary consideration."

2. The issue also comes to this Court in a typical (and thus ideal) procedural posture. The absence of a contemporaneous objection in the district court ordinarily counsels against review. But that factor weighs in favor of review here because *Tapia* errors are almost always raised for the first time on appeal, thus triggering plain-error review only. *E.g.*, *Schonewolf*,

905 F.3d at 686-87; *Alberts*, 859 F.3d at 985; *see generally* Mattox, *supra*, at 230 (noting that "many *Tapia* violations brought before courts of appeals are reviewed for the first time at the appellate level"). That is the posture here as well. Accordingly, by resolving the circuit split in this "plain error" case, this Court's decision will affect virtually all appeals that raise *Tapia* errors. It will also provide badly needed clarity to federal sentencing courts around the country, many of which continue, despite *Tapia*, to rely, at least in part, on rehabilitation as a basis for imposing or increasing a term of imprisonment.

3. This case is also an appropriate vehicle because it is not burdened by alternative holdings (or factual disputes) that could complicate this Court's review. The Second Circuit's sole holding was that, under *Tapia*, as construed in *Lifshitz*, the District Court's partial reliance on petitioner's rehabilitative needs, if error at all, does not qualify as "plain" error under *Olano*'s second prong because rehabilitation was not one of the court's "primary considerations." Pet. App. 4. The court did not decide whether, if "plain" error did occur, petitioner would satisfy the remaining third and fourth prongs of plain-error analysis. *Cf., e.g., Alberts*, 859 F.3d at 985-86 (holding that *Tapia* error was "plain," but affirming because error did not affect "substantial rights").

The issue presented is thus dispositive. If this Court grants review and decides that the District Court committed a "plain" error under *Tapia* by

giving *any* weight to rehabilitation, petitioner would be entitled to vacatur and a remand for the Second Circuit to determine whether the remaining prongs of plain-error analysis warrant resentencing. And petitioner would have strong arguments on that score: the third prong of plain-error review ("affects substantial rights") requires only a "reasonable probability" that the error influenced the length of the sentence. *E.g.*, *Rosales–Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018). And this Court has made clear that "[t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004). Rather, a "reasonable probability" is merely a probability "sufficient to undermine confidence in the outcome." *Id.* at 83. Since petitioner's serious health problems were not only discussed at sentencing (*see* Pet. App. 28-29, 38–39; PSR ¶¶ 11-12, 82–101), but were specifically cited by the District Court as a reason for imposing the maximum prison sentence on each count (Pet. App. 3), the "reasonable probability" standard of *Olano*'s third prong is easily met. And this Court has held that "[t]he risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings," thus ordinarily satisfying *Olano*'s fourth prong as well. *Rosales–Mireles*, 138 S. Ct. at 1908.

Of course, a victory in this Court would not necessarily entitle petitioner to be resentenced. But that is no barrier to certiorari. This Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary. *See, e.g.*, *McFadden v. United States*, 576 U.S. 186, 197 (2015); *Rosemond v. United States*, 572 U.S. 65, 83 (2014); *Neder v. United States*, 527 U.S. 1, 25 (1999); *Tuggle v. Netherland*, 516 U.S. 10, 14 (1995). In fact, *Tapia* was such a case. *See* 564 U.S. at 335 (holding that Ninth Circuit misconstrued § 3582(a) but remanding for court to decide whether Tapia should be resentenced under plain-error review). As the Government has repeatedly argued, uncertainty as to "the ultimate outcome" does not render a case an improper "vehicle for the Court to consider important questions." *E.g.*, Reply Brief for the Petitioners 10, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (Nos. 11-246, 11-247), 2011 WL 5856209.

4. The Second Circuit's decision not to publish its ruling is not a basis to deny review. *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* 4-34 (11th ed. 2019). This Court reviews "with some frequency" (*id.*) unpublished circuit rulings that present important and divisive questions of federal law—including in *Tapia* itself, 564 U.S. at 322—particularly where, as here, a court of appeals simply applied binding circuit precedent to the particular facts. *E.g.*, *Gundy v. United States*, 139 S. Ct. 2116,

2122-23 (2019); *Descamps v. United States*, 570 U.S. 254, 260 (2013); *Kimbrough v. United States*, 552 U.S. 85, 93 & n.4 (2007); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006). Indeed, since 2007, when the appellate rules were amended to prohibit circuit courts from "restrict[ing] the citation of [unpublished, post-2006] federal judicial opinions" (Fed. R. App. P. 32.1(a)(1)), this Court has reviewed at least 96 unpublished rulings—an average of 7.4 per Term, or about 10% of the docket.[4]

5. Finally on this point, no further "percolation" is necessary. *Tapia* has spawned a six-to-five circuit split that shows no sign of abating. Because the division stems from confusion over what *Tapia* means, only this Court can settle the matter. The disagreement among the lower courts will not resolve itself.

IV. The Second Circuit's position is wrong.

The entrenched and important conflict over *Tapia*'s meaning provides ample reason to grant certiorari regardless of which circuits have the better view. But the fact that the Second Circuit's position is wrong makes review all the more warranted.

[4] These figures are based on a Westlaw search of this Court's decisions containing "unpublished," "summary order," "Fed. Appx.," "Fed. App'x," "F. Appx.," or "F. App'x," which counsel reviewed individually to determine which ones arose from unpublished decisions.

1. The Second Circuit and other courts in the circuit-split majority err by using an extra-textual "dominant factor" or "primary consideration" test to assess alleged *Tapia* errors. Both *Tapia* and the unambiguous text of § 3582(a) make clear (i.e., "plain") that *any* consideration of rehabilitation is impermissible when sentencing a defendant to imprisonment. As the Government conceded before this Court in *Tapia* itself, a court's reliance on rehabilitation in setting a term of imprisonment is "still improper" "even if the court invokes other factors justifying the chosen term." Reply Brief for the United States 18-19, *Tapia* (No. 10-5400), 2011 WL 1354417. *See also* id. at 17 (arguing that § 3582(a) imposes a "categorical ban" on using imprisonment to promote rehabilitation); Thomas J. Mehlich, Comment, *Criminal Law—Critiquing the Third Circuit's Reluctance to Find Error Where Prison Sentences Are Imposed to Promote Defendants' Rehabilitative Needs*—United States v. Schonewolf*, 905 F.3d 683 (3d Cir. 2018)*, 17 J. Health & Biomedical L. 156, 166 (2020) ("There is *nothing* in either the SRA or *Tapia* that suggests that the defendant's rehabilitation needs can be given even minimal weight in imposing a *prison* sentence, and therefore, the only correct application of the *Tapia* rule is the current minority view.").

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." *Tapia*, 564

U.S. at 327. Again and again, Justice Kagan's majority opinion used categorical language to explain this rule, barring any consideration of rehabilitation without exception. *See id.* at 328 ("[W]hen 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.").

This Court also expressly rejected the argument that § 3582(a) is merely "a kind of loosey-goosey caution not to put *too* much faith in the capacity of prisons to rehabilitate." 564 U.S. at 327. Rather, this Court held, *any* reliance on rehabilitation as a basis for imprisonment is "too much." *Id.* (emphasis removed).

Tapia also held that a remand was necessary because "the sentencing transcript suggest[ed] the possibility that Tapia's sentence was based on her rehabilitative needs." *Id.* at 334; *see also id.* (remanding because "the record indicates that the court … may have selected the length of the sentence to ensure that Tapia could complete the 500 Hour Drug Program"); *id.* at 334-35 ("These statements suggest that the court may have calculated the length of Tapia's sentence to ensure that she receive certain rehabilitative services. And that a sentencing court may not do."). This modest threshold for a remand underscores that *any* consideration of rehabilitation as a basis for imprisonment is a "plain" error under § 3582(a), especially when, as here, the sentencing court explicitly tied the length of the prison sentence to the "considerable amount of time" rehabilitation will take. Pet. App. 39.

The "any consideration" interpretation of § 3582(a) is also the best reading of the statute, for at least two reasons. First, it respects the unambiguous statutory language, which instructs sentencing courts to "consider" all the applicable sentencing factors, while requiring them to "recogniz[e]" that prison is "not an appropriate means" of rehabilitation. § 3582(a). The statute does not include any qualifying language, thereby making clear that prison may never be considered as a means of rehabilitating a defendant. Second, this interpretation of § 3582(a) is consistent with the broad policy judgment informing the Sentencing Reform

Act—that the prison system's "attempt to achieve rehabilitation of offenders had failed." *Tapia*, 564 U.S. at 324-25 (internal quotation marks omitted). Congress's intent to "bar[] courts from considering rehabilitation in imposing prison terms" would be undermined by a fuzzy, judge-made rule allowing district courts to consider rehabilitation when imposing a prison sentence so long as they do not make it a "primary" or "dominant" consideration. *Id.* at 332. *See also* Kristen Ashe, Note, *The District Court Tried to Make Me Go to Rehab, the Eleventh Circuit Said "No, No, No": The Divide Over Rehabilitation's Role in Criminal Sentencing and the Need for Reform Following* United States v. Vandergrift*,* 60 Vill. L. Rev. 283, 287 (2015) (arguing that the Eleventh Circuit has correctly "rejected the muddled *Tapia* interpretations adopted by other circuits in favor of a bright-line rule").

2. By adopting the "dominant factor" or "primary consideration" interpretation of § 3582(a), the Second Circuit, like other courts in the majority, misconstrues *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* Pet. App. 3-4; *Lifshitz,* 714 F.3d at 150. Based on that observation, the Second Circuit reasons that some secondary or "lesser" consideration of rehabilitation is permissible in selecting a term of imprisonment, and that a sentence violates the statute only if rehabilitation is among the court's "primary

considerations" in the sentencing explanation. Pet. App. 4; *Lifshitz,* 714 F.3d at 150.

This approach misapprehends *Tapia*'s distinction between merely discussing rehabilitation at sentencing (permissible) and considering rehabilitation as a basis for imposing or extending a term of imprisonment (impermissible). *Tapia* held that a sentencing court must "not think about prison as a way to rehabilitate an offender," but stated 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. Contrary to the Second Circuit's view, this distinction turns on the *role* that rehabilitation plays, not its *prominence* in the court's sentencing analysis. A district court may discuss rehabilitation in making recommendations to the defendant or the Bureau of Prisons, but it may not consider rehabilitation as a reason to imprison. As the Sixth Circuit has explained, 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).

3. Under the circuit-split minority's "any consideration" test, the "plainness" of the sentencing court's error in this case becomes evident. Though petitioner can receive any needed medical treatment outside of a prison setting—while serving his life term of supervised release—the court explicitly tied the length of his effective 20-year prison sentence to the "considerable amount of time" it will take to address his "very serious need" for medical and psychiatric treatment. Pet. App. 39. Unlike most cases involving an asserted *Tapia* error, the court here did not merely increase petitioner's prison term by a few months (or even by a few years) to enable him to participate in a particular treatment program. *Cf., e.g., Kopp*, 922 F.3d at 338, 342-43 (reversing for plain error where sentencing court increased defendant's prison sentence by two months to enable him to complete a treatment program). Rather, the court invoked petitioner's rehabilitative needs—explicitly—as a basis for imposing the *maximum* prison sentence on each count: an effective 20-year term (and likely death-in-prison sentence) for petitioner. Pet. App. 39. It is hard to imagine a more "clear or obvious" violation of *Tapia* and the Sentencing Reform Act. As then-Judge Gorsuch recognized when the Tenth Circuit vacated a sentence for "plain" *Tapia* error, "Congress expressly told federal courts they may not impose *any* 'term of imprisonment' to facilitate rehabilitation." *United States v. Mendiola*, 696 F.3d 1033, 1043 (10th Cir. 2012) (Gorsuch, J., concurring) (emphasis added;

quoting § 3582(a)). "After *Tapia*, we know § 3582(a) means what it says, ruling out *any* use of prison for rehabilitation." *Id.* at 1044 (emphasis added).

4. The Second Circuit nevertheless ruled that, under *Tapia* and *Lifshitz*, no "plain" error occurred here because rehabilitation was not among the court's "primary considerations." Pet. App. 4.

The Second Circuit's approach simply cannot be reconciled with *Tapia,* for at least three reasons. First, nothing in *Tapia* or the Sentencing Reform Act allows a court to rely in any way on rehabilitation when sentencing an offender to prison, even as a "lesser consideration," *Lifshitz*, 714 F.3d at 150. On the contrary, as the Eleventh Circuit has held, "it is clear that *Tapia* prohibits *any* consideration of rehabilitation when determining whether to impose or lengthen a sentence of imprisonment." *Vandergrift*, 754 F.3d at 1310 (emphasis added). Second, nothing in *Tapia* suggests that a prison term may be imposed or increased based on rehabilitative needs so long as the sentencing decision is not tied to a specific treatment program. In fact, *Tapia*'s explicit holding rejects that proposition. 564 U.S. at 335 ("As we have held, a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program *or otherwise to promote rehabilitation."*) (emphasis added). Third, by erroneously focusing on the *prominence* of rehabilitation in the sentencing decision, rather than its improper *role* as a sentencing factor, the Second Circuit's position "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." *Krul*, 774 F.3d at 376 (Griffin, J., concurring).

5. The Second Circuit further erred by implying that no "plain" error occurred because petitioner asked the sentencing court to consider his health problems. *See* Pet. App. 3. True, petitioner cited his poor health as a reason for imposing the lowest sentence possible and recommending confinement at a medical facility. But he did not ask the court to *increase* his sentence based on his health problems. As the Tenth Circuit has held, asking for a *reduced* sentence based on rehabilitative concerns does not permit a court to turn around and use those concerns as a reason for *increasing* the prison sentence, much less imposing the maximum sentence on each count, as the court did here. *See Thornton*, 846 F.3d at 1117 n.3 (holding that no "invited error" occurred where defendant "did not seek out or willingly approve a *longer* sentence based on rehabilitation—he in fact asked for just the opposite"). Indeed, that is exactly what *Tapia* prohibits.

In sum, the Second Circuit erroneously affirmed what *Tapia* and the Sentencing Reform Act plainly forbid: the imposition or prolongation of a prison term based, even in part, on rehabilitative concerns. Accordingly, this Court should grant review.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

_____

Edward S. Zas
Counsel of Record

Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
Edward_Zas@fd.org
(212) 417-8742

Counsel to Raymond L. Crum