IN THE SUPREME COURT OF THE UNITED STATES

No. 10-5400

ORIGINAL

ALEJANDRA TAPIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(7) and S. Ct. R. 39, petitioner, Alejandra Tapia, asks leave to file the attached Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit without pre-payment of fees or costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed pursuant to 18 U.S.C. § 3006A in the district court and on appeal to the Ninth Circuit.

Respectfully submitted,

Dated: July 9, 2010

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10-5400

NO._____

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ALEJANDRA TAPIA,

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

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[1]I would like to thank Jaymes Sanford for his help in writing this petition. Mr. Sanford will be a third year law student at Howard University in the Fall.

12

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

DOCKETED CASES

FEDERAL STATUTES

MISCELLANEOUS

QUESTION PRESENTED

May a district court give a defendant a longer prison sentence to promote rehabilitation, as the Eighth and Ninth Circuits have held, or is such a factor prohibited, as the Second, Third, Eleventh, and D.C. Circuits have held?

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRA TAPIA,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

Ms. Alejandra Tapia respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The decision of the court of appeals is an unpublished decision. It is attached as Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3582(a) provides, in relevant part, the following:

> 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.

INTRODUCTION

This petition presents this Court with the opportunity to address a clear split among the circuits: May a district court give a defendant a longer prison sentence to promote rehabilitation?

The circuits are sharply divided over the issue. On one end of the spectrum lie the Eighth and Ninth Circuits, which allow rehabilitation to be used as a factor in deciding the length of a defendant's prison sentence, once the court decides that a prison sentence is appropriate. *See United States v. Hawk Wing*, 433 F.3d 622, 629–30 (8th Cir. 2006);*United States v. Duran*, 37 F.3d 557, 561 n.3 (9th Cir. 1994). On the other end of the spectrum are the Second, Third, Eleventh, and D.C. Circuits, which do not allow rehabilitation to be used as a factor in deciding the length of a defendant's prison sentence. *See In re Sealed Case*, 573 F.3d 844, 849 (D.C. Cir. 2009); *United States v. Manzella*, 475 F.3d 152, 159 (3d Cir. 2007); *United States v. Harris*, 990 F.2d 594, 596 (11th Cir. 1993); *United States v. Maier*, 975 F.2d 944, 946 (2d Cir. 1992).

Ms. Tapia's case presents an excellent example of the disparate treatment among the circuits. The Ninth Circuit affirmed Ms. Tapia's prison sentence, even though the district court admitted that a factor in its sentencing calculus was its desire to make sure Ms. Tapia was in prison long enough to qualify for the Bureau of Prison's drug treatment program. In other words, the district court gave Ms. Tapia a longer sentence to promote her rehabilitation. While this is currently appropriate in the Ninth Circuit, it is not in the Third, Eleventh, and D.C. Circuits. Each has reversed sentences under identical circumstances concerning the BOP's drug treatment program. *See In re Sealed Case*, 573 F.3d at 849; *Manzella*, 475 F.3d at 159; *Harris*, 990 F.2d at 596. Moreover, such a sentence could not stand in the Second Circuit, which has reversed a sentence under similar circumstances. *See* Maier, 975 F.2d at 946.

Accordingly, this Court should grant this petition to resolve this entrenched circuit split. In the alternative, this Court should hold this case in abeyance until it issues a decision in *Pepper v. United States*, Case No. 09-6822, which involves a similar issue. Once it issues a decision in *Pepper*, this Court should remand this case to the Ninth Circuit in light of that decision.

STATEMENT OF THE CASE

A. Petitioner's crime

In January 2008, Ms. Tapia, the petitioner, and her friend were driving from Mexico into the United States. At the border, an immigration official questioned both about their plans. The official noticed that Ms. Tapia's friend was acting nervous. He also smelled gasoline. That prompted him to scrutinize the car more closely. He eventually found two individuals—later determined to be illegal aliens—concealed in the car's gas tank compartment. Ms. Tapia was then arrested.

Ms. Tapia would thereafter be indicted on two counts: (1) bringing in illegal aliens for financial gain and aiding and abetting in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2 and (2) bringing in illegal aliens without presentation and aiding and abetting in violation of 8 U.S.C. § 1324(a)(2)(B)(iii) and 18 U.S.C. § 2.

Two days after Ms. Tapia's arrest, the district court released her and ordered her to comply with various conditions.

In March 2008, Ms. Tapia failed to show up in court for a motion hearing. A bench warrant was then issued for her arrest. She was apprehended six months later, when she was found in an apartment that contained methamphetamine, a shotgun, and mail that belonged to other individuals.

Thereafter, the Government filed a superseding indictment, adding a third count for bail jumping in violation of 18 U.S.C. § 3146.

Three months later, Ms. Tapia was convicted on the two counts of alien smuggling and one count of bail jumping.

B. Petitioner's sentencing

At sentencing, the district court determined that Ms. Tapia's Guideline range was 41 to 51 months.

Ms. Tapia asked to be sentenced to three years in prison, the mandatory minimum penalty. She argued that a higher sentence would be greater than sufficient to meet the congressionally mandated goals of sentencing, given the abuse she had suffered throughout her life and given the fact that she had never served even a year in prison before.

The district court acknowledged that the physical and sexual torment Ms. Tapia had suffered was a mitigating factor. The court also expressed concern about the fact that she had failed to appear earlier in the proceedings and was then found with a gun, drugs, and stolen mail.

The court then mentioned that he thought that Ms. Tapia needed to take part in the 500-hour drug treatment program the Bureau of Prisons offers in some of its facilities to some prisoners: "The sentence has to be sufficient to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program."

Shortly thereafter, the court announced a sentence of 51 months, focusing on the importance of the drug treatment program:

> I am going to impose a 51-month sentence[:] 46 months [for alien smuggling] plus five months for the bail jump[.] [O]ne of the factors that affects this is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program, number one.

The court then discussed the importance of deterrence, given Ms. Tapia's escalating criminal

conduct. Thereafter, the court asked Ms. Tapia's counsel if he needed to go through any of the other sentencing factors and counsel responded "no."

The court then again returned to the drug treatment program, stating: "The court . . . strongly recommends[] that she participate in the 500 Hour Drug Program and that she serve her sentence at FCI Dublin/Pleasanton. ¶ I recommend that institution because I think they have the appropriate tools and rehabilitation, people there to help her, to start to make a recovery here."

The court also ordered Ms. Tapia to serve three years of supervised release. Among the conditions of her release is that she participate in a drug abuse program.

On appeal to the Ninth Circuit, Ms. Tapia contended that the district court had erred by speculating that she would be allowed to enter into the drug treatment program. Ms. Tapia pointed out that it was up to the discretion of the BOP whether she could enter the program and the district court should therefore not have considered her potential placement in the program as a sentencing factor. Ms. Tapia also noted that 18 U.S.C. § 3582(a) prevented a district court from relying on rehabilitation in selecting a prison sentence and that at least two circuits had held that such a prohibition meant a court could not consider the BOP's drug treatment program in selecting a defendant's sentence. *See In re: Sealed Case*, 573 F.3d 844 (D.C. Cir. 2009); *United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007). She noted, however, that the Ninth Circuit had reached the opposite conclusion in *United States v. Duran*, 37 F.3d 557 (9th Cir. 1994). She conceded that *Duran* controlled and asked to "preserve the issue of whether *Duran* is rightly decided for en banc and Supreme Court review."

In an unpublished memorandum decision, the Ninth Circuit affirmed Ms. Tapia's sentence by, among other things, citing to *Duran*. *See* Appendix A.

REASONS FOR GRANTING THE PETITION

In 1984, Congress made a comprehensive change to the structure of federal sentencing. This change came after Congress decided to abandon the "outmoded rehabilitation model" of the previous sentencing structure to face the reality that "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting." S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221, *quoted in United States v. Manzella*, 475 F.3d 152, 159 (3d Cir. 2007). The changes were codified in the Sentencing Reform Act of 1984, the statute that governs a district court's sentencing discretion. 18 U.S.C. §§ 3551 *et seq.* (2006). One way in which the Sentencing Reform Act revised the old sentencing process is by instructing the Sentencing Commission to reject imprisonment as a means of promoting rehabilitation. 28 U.S.C. § 994(k) (2006). Congress reinforced this concept by instructing courts to avoid using rehabilitation as a factor for selecting a term of imprisonment or its length:

> 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) (emphasis added).

According to the Senate report, Congress did this "to discourage the employment of a term of imprisonment on the sole ground that a prison has a program that *might* be of benefit to the prisoner." S. REP. NO. 98-225, at 95 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3302 (emphasis added). As the Second Circuit put it, "Congress wanted to be sure that no defendant was locked up in order to put him in a place where it was hoped that rehabilitation would occur." *United States v. Maier*, 975 F.2d 944, 946 (2nd Cir. 1992).

The prohibition against using *imprisonment* as a way to achieve rehabilitation did not mean that Congress abandoned rehabilitation as an overall goal for *sentencing*. While Congress prohibited the consideration of rehabilitation in selecting a prison sentence, it requires courts to consider rehabilitation when selecting the defendant's overall sentence. Of the sentencing factors listed in 18 U.S.C. § 3553(a) that courts must taken into account, one requires them to consider what sort of sentence would provide the defendant "with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). Congress's command in section 3582—the section block quoted above—is consistent with its command in section 3553(a). Read together, Congress has ordered courts to consider rehabilitation in sentencing a defendant, but has banned them from facilitating that goal through imprisonment. Congress armed district courts with a series of sentencing options besides imprisonment. *Manzella*, 475 F.3d at 158. Probation, fines, victim notice, restitution and supervised release are all forms of sentencing. 18 U.S.C. §§ 3551(b), 3555, 3583, 3663). Congress did not prohibit rehabilitation when considering these other forms of sentencing. *Manzella*, 475 F.3d at 158. As a result, a court could craft a supervised release plan that would, post-release, help to rehabilitate the defendant.

Despite the clarity of the statute's language and the supporting legislative intent, a circuit split has developed regarding the applicability of rehabilitation as a reason for imprisonment. The Second, Third, Eleventh, and D.C. Circuits are in agreement that rehabilitation is not an appropriate consideration for deciding whether imprisonment should be imposed or deciding the length of the defendant's prison sentence. *See Maier*, 975 F.2d at 946-47; *Manzella*, 475 F.3d at 158; *United States v. Harris*, 990 F.2d 594, 596 (11th Cir. 1993); *In re Sealed Case*, 573 F.3d 844, 849 (D.C. Cir 2009). On the other hand, the Eighth and Ninth Circuits have interpreted § 3582 to mean that rehabilitation can be considered when selecting the length of a defendant's prison sentence. *United States v. Duran*,

37 F.3d 557, 561 (9th Cir. 1994); *United States v. Hawk Wing*, 433 F.3d 622, 630 (8th Cir. 2006).

The circuits that have determined that rehabilitation cannot be considered in selecting a defendant's prison sentence have just followed the plain language of 18 U.S.C. § 3582 that "imprisonment is not an appropriate means of promoting correction and rehabilitation." For example, in *Manzella,* the Third Circuit vacated a defendant's sentence because the district court, as here, had imposed a prison sentence so that the defendant would qualify for the 500-hour drug treatment program; in doing so, the court stated that "[a]llowing a judge to issue a . . . term of imprisonment based on the uncertain placement . . . in a rehabilitative programs [sic] is a practice Congress was unwilling to endorse." 475 F.3d at 158. Additionally, the Eleventh Circuit in *Harris* vacated the district court's imposition of consecutive sentences to allow the defendant time in federal prison to enter a drug treatment program, explaining that "[r]ehabilitative considerations have been declared irrelevant for purposes of deciding whether or not to impose a prison sentence and, if so, what prison sentence to impose." 990 F.2d at 596 (internal citation and quotation marks omitted). The Second Circuit also rejected rehabilitation as an imprisonment factor: "[R]ehabilitation may not be a basis for incarceration but must be considered as a basis for sentencing . . . ." *Maier*, 975 F.2d at 947. Most recently, the D.C. Circuit—which was likewise reviewing a district court's sentencing decision that factored in the BOP's drug treatment program—accepted the plain language interpretation of the statute as well, stating that it agreed "with the Third and Second Circuits that sentencing courts may not treat rehabilitation as a reason for a longer term of imprisonment." *In re Sealed Case*, 573 F.3d at 849.

Conversely, the Eighth and Ninth Circuits have concluded that rehabilitation is a permissible reason for determining a defendant's length of sentence. The Ninth Circuit in *Duran* affirmed the defendant's sentence, even though the district court used rehabilitation as a factor for determining the

length of the defendant's sentence; it reached that conclusion by reasoning that "[o]nce imprisonment is chosen as a punishment[], § 3582 does not prohibit consideration of correction and rehabilitation in determining the length of imprisonment." The Eighth Circuit has also adopted this interpretation, holding that "[b]ecause the district court considered §3553(a)(2)(D) in determining the length of the sentence of incarceration rather than whether to incarcerate, we find no error." *Hawk Wing*, 433 F.3d at 630. The Eighth Circuit, however, offered no analysis beyond a citation to *Duran*. *See id.*

The Eighth and Ninth Circuit decisions, however, contradict the plain language of § 3582, which provides that "*imprisonment* is not an appropriate means of promoting correction and rehabilitation" for both "determining whether to impose a term of imprisonment *and* . . . in determining the length of the term." (emphasis added). Textually, if the phrase "imprisonment is not an appropriate means of promoting . . . rehabilitation" modifies the clause "determining whether to impose a term of imprisonment," it must also be true that the phrase modifies the clause "in determining the length of the term" by the use of the conjunction "and." *See In re Sealed Case*, 573 F.3d at 849. Moreover, legislative history is no help to these courts' position, since that history supports the plain language of the statute. Indeed, the plain meaning of the statute best reflects Congress's intent to eliminate incarceration as a medium for promoting rehabilitation and to protect defendants from terms of imprisonment based on rehabilitation programs—programs like the BOP's drug treatment program—that is outside of the judge's control. S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221

Indeed, as the Third Circuit observed, "[i]t is unclear what legal basis" the Eighth and Ninth Circuits have for their position. *Manzella*, 475 F.3d at 159. It is possible the courts were confused because Congress ordered to courts to take rehabilitation into consideration when crafting a defendant's sentence in § 3553(a)(2)(D)—confusion that would stem from assuming that

imprisonment is the only sentencing option. As discussed above, there is no conflict that must be resolved by the courts from reading § 3582(a) concurrent with § 3553(a)(2)(D). Section 3553 contains factors that must be considered for *sentencing*, while § 3582 are factors that must be considered for a term of *imprisonment*. Harmonizing the language of the two statutes, it is clear Congress intended to prohibit the promotion of rehabilitation by imprisonment, but saw that rehabilitation is a necessary goal and should be achieved by other methods of sentencing. *See* 18 U.S.C. §§ 3553(a)(2)(D), 3582(a), 3551.

Furthermore, the Eighth and Ninth Circuits analyses—prohibiting consideration of rehabilitation in deciding whether to sentence the defendant to a term of prison but allowing consideration of rehabilitation in selecting the length of a defendant's sentence—makes a distinction without a difference. As the D.C. Circuit explained, if "imprisonment is not an appropriate means of promoting rehabilitation, how can *more* imprisonment serve as an appropriate means of promoting rehabilitation?" *In re Sealed Case*, 573 F.3d at 849. Simply put, whenever a district court decides to "keep a defendant locked up for additional months is, as to that month, in fact choosing imprisonment over release." *Id.* at 850. Any additional time a judge adds to a sentence for purposes of access to a corrective or rehabilitative program is failing to recognize that incarceration is not an appropriate means for promoting rehabilitation. *Id.*

Ms. Tapia's case presents an excellent example of how this circuit split affects sentencings. Under *Duran*, the district court in this case did not commit any error by considering rehabilitation—specifically, Ms. Tapia's eligibility for the BOP's drug treatment program—in selecting a prison sentence. On the other hand, the Third Circuit, Eleventh Circuit, and the D.C. Circuit each reversed sentences under identical fact patterns. *See In re Sealed Case*, 573 F.3d at 849; *Manzella*, 475 F.3d at 159; *Harris*, 990 F.2d at 596.

This Court should resolve the circuit split and uphold the plain language of § 3582, banning rehabilitation as a reason for deciding whether a term of imprisonment should be given *and* for deciding length of imprisonment. The Eighth and Ninth Circuits' understanding of § 3582 conflicts with both the plain language and legislative intent of the statute, fails grammatical and logical understanding, and has confused the meaning of an otherwise clear law.

Alternatively, Ms. Tapia would ask that her case be held in abeyance until this Court issues a decision in *Pepper v. United States*, Case No. 09-6822. That case presents the follow question: "Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. § 3553(a) after *Gall v. United States*?" Given the question presented, any decision in that case will discuss the sentencing goal of rehabilitation. Thus, there will likely be overlap in the Court's discussion and the issue this case raises. Ms. Tapia would therefore ask that this Court grant cert. in this case after issuing a decision in *Pepper* and remand to the Ninth Circuit, so that it can determine what effect *Pepper* has on Ms. Tapia's argument.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: July 21, 2010

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ALEJANDRA TAPIA, Defendant - Appellant.	No. 09-50248 D.C. No. 3:08-CR-00249-BTM MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Submitted April 5, 2010**

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

Alejandra Tapia appeals from the 51-month sentence imposed following her jury-trial conviction for bringing in an illegal alien for financial gain, in violation of 8 U.S.C. § 1324(a)(2)(B)(ii), bringing in an illegal alien without presentation, in

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violation of 8 U.S.C. § 1324(a)(2)(B)(iii), aiding and abetting, in violation of 18 U.S.C. § 2, and bail jumping, in violation of 18 U.S.C. § 3146. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Tapia contends that the district court committed plain error by basing her 51-month sentence on speculation about whether and when Tapia could enter and complete the Bureau of Prison's 500-hour drug abuse treatment program. No reversible error was committed. *See United States v. Duran*, 37 F.3d 557, 561 (9th Cir. 1994); *see also United States v. Waknine*, 543 F. 3d 546, 554 (9th Cir. 2008).

AFFIRMED.