A Failing System: The Opioid Crisis, Recidivism, and the Desperate Need for Prison Reform

“As the opioid epidemic rages on, citizens are expecting governing bodies to take action. This is an issue that touches rural, suburban, and urban populations. It impacts incarcerated populations as well as the general population. As it expands, more individuals are in need of therapeutic intervention and legal representation. As such, governmental agencies must be collaborative and creative in crafting policy and law to fight this crisis.”

I. INTRODUCTION

The opioid crisis is a public-health emergency affecting millions of Americans. Approximately 130 Americans die every day from misuse of opioids, including prescription pain relievers, heroin, and fentanyl, while millions more suffer the social, economic, and public health repercussions associated with addiction. Among these consequences is an increasing incarceration rate among opioid users.

As the increasing incarceration rate suggests, opioid related cases fill state and federal court dockets. When determining sentences, judges must balance the need to impose a proper sentence for criminal violations with addressing the

3. See id. (documenting casualties and annual economic burden of opioid misuse). In the United States, “[t]he Centers for Disease Control and Prevention estimates that the total ‘economic burden’ of prescription opioid misuse alone . . . is $78.5 billion a year, including the costs of healthcare, lost productivity, addiction treatment, and criminal justice involvement.” Id.
underlying issue of drug addiction. The Sentencing Reform Act of 1984 (SRA) provides that, on its own, “imprisonment is not an appropriate means of promoting correction and rehabilitation[,]” and the Supreme Court affirmed this provision in Tapia v. United States. Nevertheless, the federal circuits have split on the issue of whether a judge may consider the possibility of drug rehabilitation when imposing a sentence. The Seventh, Ninth, Tenth, and Eleventh Circuits have held that a court violates Tapia and the SRA when it considers a defendant’s need for rehabilitation in sentencing. In contrast, the First, Second, Fourth, Fifth, Sixth, and Eighth Circuits have held that courts may consider a defendant’s need for rehabilitation when imposing a sentence, as long as it is not the determinative factor.

Most recently, in United States v. Schonewolf, the Court of Appeals for the Third Circuit joined the latter position. Nonetheless, the Third Circuit failed to adequately address the specific issue of drug rehabilitation in prison and on parole.

The opioid crisis is only worsening: Between July 2016 and September 2017, areas in as many as forty-five states saw a 30% increase in opioid overdoses. Additionally, the United States has a high rate of incarceration—a condition the opioid crisis worsened—and better policies are necessary to prevent recidivism among opioid users. At the same time, however, the courts’ hands are tied, as the SRA and its interpretation prohibit judges in the Seventh, Ninth, Tenth, and Eleventh Circuits from considering the possibility of rehabilitation in prison when imposing prison sentences.

Fortunately, research has proven that newer

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8. See Schonewolf, 905 F.3d at 690-91 (discussing circuit split).

9. See id. at 691 (discussing circuit split); see also infra note 74 and accompanying text (citing Seventh, Ninth, Tenth, and Eleventh Circuit cases).

10. See Schonewolf, 905 F.3d at 691 (explaining narrow approach to Tapia error); see also infra note 75 (citing First, Second, Fourth, Fifth, Sixth, and Eighth Circuit cases). A Tapia error occurs when a court considers rehabilitation when imposing or determining a sentence. See United States v. Vandergrift, 754 F.3d 1303, 1310 (11th Cir. 2014) (defining Tapia error).

11. See Schonewolf, 905 F.3d at 691-92 (explaining narrower approach to Tapia error).


13. See Opioid Overdose Crisis, supra note 2 (detailing crisis of opioid epidemic). In 2017, more than 47,000 Americans died from opioid overdoses and approximately 1.7 million Americans suffered from substance abuse disorders related to prescription opioids. See id.


15. See Tapia v. United States, 564 U.S. 319, 332 (2011) (holding SRA prohibits judges from considering rehabilitation when determining sentences); infra Section II.C (detailing circuit split and Tapia).
rehabilitation methods, including drug courts and cognitive-behavior therapy (CBT), effectively reduce recidivism.\textsuperscript{16}

This Note will examine the rise and fall of rehabilitation as a sentencing concern in the United States, the history of the SRA, and subsequent litigation over proper sentencing considerations related to rehabilitation.\textsuperscript{17} This Note will also discuss the reemergence of rehabilitation considerations in sentencing and scientifically-proven rehabilitation methods.\textsuperscript{18} Moreover, this Note will analyze the Third Circuit’s recent decision in \textit{Schonewolf} and the circuit split regarding the role rehabilitation plays in determining prison sentences.\textsuperscript{19} Finally, this Note will conclude by recommending the implementation of more drug courts and the use of CBT at the community level so that policymakers can better address the role of rehabilitation in sentencing.\textsuperscript{20}

II. \textsc{History}

\textit{A. Tracing Rehabilitation as a Goal of Punishment}

\textbf{1. The Development of Rehabilitation as a Penological Theory}

There are four traditional penological goals behind sentencing: deterrence, incapacitation, punishment, and rehabilitation.\textsuperscript{21} The first goal, deterrence, suggests that punishing crime both dissuades the public from committing crimes and discourages the offender from repeating crimes.\textsuperscript{22} Incapacitation theory asserts that imprisoning offenders prevents them from committing additional crimes.\textsuperscript{23} The third goal, punishment, asserts that offenders should receive a penalty in


\textsuperscript{17}. See \textit{infra} Section II.A (detailing rehabilitation history in United States); \textit{infra} Section II.B (discussing SRA and legislative history); \textit{infra} Section II.C (elucidating circuit split and \textit{Tapia}).

\textsuperscript{18}. See \textit{infra} Section II.E (explaining rehabilitation methods proven effective).

\textsuperscript{19}. See \textit{infra} Section III.A (stating Third Circuit properly applied precedent but erred not discussing need for rehabilitation in prison).

\textsuperscript{20}. See \textit{infra} Section III.B (outlining policy recommendation).


\textsuperscript{22}. See Robert McKay, \textit{It’s Time to Rehabilitate the Sentencing Process}, 60 \textit{JUDICATURE} 223, 225 (1976) (defining deterrence theory). Despite deterrence theory’s sound objectives, it has been ineffective, as both first-time-offender and recidivism rates continue to rise when deterrence is the primary concern. See \textit{id.} (exposing deterrence theory’s flaws).

\textsuperscript{23}. See \textit{id.} at 225-26 (explaining reasoning behind incapacitation). While incapacitation prevents an offender from committing crimes while in prison, most offenders are eventually released back into the public. See \textit{id.} at 226 (stating likelihood of recidivism when released from prison). Once released from prison, offenders are more likely to reoffend if they do not have a stable home life or employable skills. See \textit{id.}
proportion to their offense. Every prison sentence is retributive because it restricts a defendant’s freedom, penalizing their crime. Finally, rehabilitation is an ambitious sentencing goal that aims to decrease criminal acts in three key ways: by increasing one’s ability to become employed; by decreasing one’s propensity to commit crimes by “redirecting [one’s] value system[;]” and by increasing one’s “control over antisocial needs and desires by restructuring his personality.”

Notably, of the four theories, rehabilitation is currently the most controversial.

Rehabilitation’s penological roots go as far back as the Bible and Ancient Greece. Despite this history, incarceration in America was based on retribution, not rehabilitation, until that began to change at the end of the nineteenth century. Prior to the nineteenth century, legislatures imposed fixed sentences rather than leaving sentencing to judicial discretion. Imprisonment did not emerge as a form of sentencing until the 1790s, and legislatures initially continued to impose fixed sentences.

In 1790, Quakers in Pennsylvania opened the world’s first penitentiary, the Walnut Street Jail. The Walnut Street Jail focused on rehabilitation and...
prisoner reform, which the Quakers viewed as superior to corporal punishment.\footnote{See Ryan, supra note 16, at 272-73 (explaining ideology behind Walnut Street Jail). The Quakers “sought to transform, rather than simply punish, criminal offenders.” Id. at 272. One of the Walnut Street Jail’s main purposes was to transform offenders into productive members of society through “religious instruction, solitary confinement, and hard labor.” See id. at 273 (discussing Walnut Street Jail’s goals).} The Quakers emphasized rehabilitation because they believed that crime was not simply an individual choice, but that society influenced people to commit crime.\footnote{See id. at 272 (explaining Quakers’ emphasis on rehabilitation).} Thus, the Quakers believed that it was “unfair to take retributive measures against offenders who were not entirely at fault.”\footnote{See id. at 273 (discussing Walnut Street Jail’s goals).} After the Quakers established the Walnut Street Jail, other penitentiaries began to appear throughout New England that similarly emphasized rehabilitation, but through other means such as vocational training and living in silence.\footnote{See id. at 273 (describing rehabilitation models in New England penitentiaries). Instead of emphasizing rehabilitation through religious transformation like the Quakers, some New England penitentiaries used vocational training to rehabilitate prisoners. See id. This model became the leading approach to criminal rehabilitation in the United States. See id.}

2. The Rise and Fall of Indeterminate Sentencing in the United States

In 1870, the National Congress on Penitentiary and Reformatory Discipline (National Congress) argued that rehabilitation should be the primary penological goal in the United States.\footnote{See Nagel, supra note 21, at 893. The National Congress’s Declaration of Principles, as distributed to the voting members in 1870, stated: “[C]rime is a sort of moral disease, of which punishment is the remedy. The efficiency of the remedy is a question of social therapeutics, a question of the fitness and the measure of the dose.” Principles of Penitentiary and Reformatory Discipline Suggested for Consideration by the National Congress, in Transactions of the National Congress on Penitentiary and Reformatory Discipline, 548, 548 (E.C. Wines ed., Albany: The Argus Company 1871) [hereinafter Principles]; see Nagel, supra note 21, at 893.} The National Congress concluded that indeterminate sentencing was the best way to achieve this goal.\footnote{See Declaration of Principles Adopted and Promulgated by the Congress, in Transactions of the National Congress on Penitentiary and Reformatory Discipline, 541, 541-42 (E.C. Wines ed., Albany: The Argus Company 1871) [hereinafter Declaration] (establishing indeterminate sentencing); Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 227 (1993) (stating rehabilitation motive behind indeterminate sentencing); see also Marvin Zalman, The Rise and Fall of the Indeterminate Sentence, 24 Wayne L. Rev. 45, 51 (1977) (stating small group of penologists advocated for rehabilitation via indeterminate sentencing in 1870s). The National Congress resolved that “[p]eremptory sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.” Declaration, supra, at 541-42.} Under indeterminate sentencing, the prisoner is not released until he or she is reformed—which takes an indeterminate and subjective amount of time—giving the judiciary greater sentencing discretion.\footnote{See Nagel, supra note 21, at 893-94 (explaining indeterminate sentencing and highlighting judiciary’s new role in sentencing and rehabilitation). Zebulon Brockway, a member of the National Congress, advocated for a reformatory board of governors, called “guardians,” would determine when each prisoner should be released. See Zalman, supra note 38, at 48 (detailing how indeterminate sentencing functions). Parole officers

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began implementing forms of indeterminate sentencing laws in the late 1800s. By the 1920s, rehabilitation was the primary penological goal in the United States, as evidenced by the majority of states adopting indeterminate sentencing schemes; by 1960, every state had some type of indeterminate sentencing structure.

Throughout the early to mid-1900s, criminal rehabilitation became more individualized and the medical model of rehabilitation emerged. This model supports the idea that individuals do not commit crimes out of free will, and its emergence resulted in society recognizing criminals as ill individuals who need treatment to cure their illness. Traditional rehabilitation methods include counseling, psychotherapy, education, and vocational therapy, but prisons also used more extreme methods such as psychosurgery, brainwashing techniques, drug therapy, and behavioral conditioning. Following Professor Robert Martinson’s highly influential article in 1974, it became commonly accepted among policy makers that rehabilitation did not work as a penological goal. The also shared this new discretionary power. See Stith & Koh, supra note 38, at 227 (explaining power of parole officers).

40. See Zalman, supra note 38, at 52 (acknowledging states began implementing indeterminate sentencing in late 1800s). By 1911, twenty-eight states had indeterminate sentencing laws. See Zalman, supra note 38, at 52. State supreme courts upheld indeterminate sentencing laws by concluding that such laws did not usurp the judiciary’s power. See id. at 53-54 (describing state court cases). The formation of the federal parole system in 1910 also helped facilitate the spread of indeterminate sentencing because parole officers played a sizeable role in determining federal prisoners’ release dates. See Stith & Koh, supra note 38, at 226-27 (emphasizing parole officers’ role in rehabilitation). By 1922, thirty-seven states used indeterminate sentencing schemes and seven others had parole systems that functioned as indeterminate sentencing. See Dershowitz, supra note 26, at 128 (charting expansion of indeterminate sentencing).

41. See Nagel, supra note 21, at 894 (stating every state had indeterminate sentencing in 1960s); Ryan, supra note 16, at 274-76 (outlining timeline of rehabilitation constituting penological goal).

42. See Ryan, supra note 16, at 275 (introducing medical model of rehabilitation).

43. See id. (discussing medical model of rehabilitation). In a penological system focused on rehabilitation, it seems unfair to punish criminals after they are reformed, so judges are given significant sentencing discretion. See id. (describing ideology behind rehabilitation). Indeterminate sentencing is necessary in a rehabilitation-focused system because clinicians, including psychologists, educators, and social workers, need flexibility to properly treat each individual offender. See Dershowitz, supra note 26, at 128 (emphasizing need for indeterminate sentencing in rehabilitation).

44. See Ryan, supra note 16, at 276 (listing rehabilitation methods). Some more extreme methods are described as follows:

A program operated within the Federal Bureau of Prisons placed new prisoners in solitary confinement and allowed them to earn their freedom by acting in conformity with prison authorities’ special demands. In some prisons, surgeons went so far as to intentionally destroy portions of offenders’ brains by applying small, high-frequency currents to electrodes implanted in their cerebella. This technique was directed at disabling the violence loci of the offenders’ brains.

Id.

45. See id. at 278 (explaining Martinson’s conclusions). Penal institutions did not properly implement rehabilitation efforts and, consequently, fell short of their rehabilitation goals. See id. at 277 (discussing decline of rehabilitative services). Instead, prisons began to focus more on security and punishment, and rehabilitative efforts declined. See id. (describing loss of focus on rehabilitative ideal and consequential loss of rehabilitation principal).
article and corresponding study concluded that most prison reform programs failed to reduce recidivism. 46 Moreover, indeterminate sentencing resulted in judges administering widely-varying sentences. 47 These phenomena led to the belief that indeterminate sentencing facilitated discrimination because judges and parole boards might use racial bias when imposing a sentence. 48

B. Sentencing Reform Act of 1984

1. Legislative History

In 1975, as the public’s faith in rehabilitation and indeterminate sentencing waned, Senator Edward Kennedy introduced a sentencing reform bill. 49 The bill proposed uniform goals and guidelines for judges to follow when determining sentences, but ultimately never passed due to several shortcomings, such as a lack of guidance for judges. 50 Legislators introduced similar bills in subsequent years, but none gained traction until 1983 when Senator Kennedy introduced the Comprehensive Crime Control Act. 51 In defending the bill, the Senate

46. See Robert Martinson, What Works?—Questions and Answers About Prison Reform, PUB. INT., Spring 1974, at 22, 25 (concluding rehabilitation did not work). Martinson stated: “With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.” Id.

47. See Nagel, supra note 21, at 897 (highlighting disparities in sentencing); Marvin E. Frankel, Lawlessness in Sentencing, 41 U. CHI. L. REV. 1, 29 (1972) (introducing basic premise of indeterminate sentencing). Judge Marvin Frankel noted: “The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the differences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes.” MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 21 (1973). This variance was referred to as “justice as a lottery.” See Nagel, supra note 21, at 897. Three factors caused the disparity in sentencing: (1) [L]ack of clearly defined and accepted sentencing goals, priorities, and criteria; (2) substantial discretion exercised by sentencing judges and paroling authorities in the absence of such goals and criteria; and (3) the procedures under which this discretion is customarily exercised.” See Peter B. Hoffman & Michael A. Stover, Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function, 7 HOFFSTRA L. REV. 89, 96 (1978).


50. See Stith & Koh, supra note 38, at 230 (explaining bill’s provisions and reasons for failure); Michael Tonry, Functions of Sentencing and Sentencing Reform, 59 STAN. L. REV. 37, 40 (2005) (summarizing evolution of Kennedy’s proposed reform). The 1975 bill also proposed the creation of a federal sentencing commission. See Stith & Koh, supra note 38, at 230. Scholars criticized the bill for lacking clearly-defined sentencing goals and specific instructions for judges. See id. The bill maintained indeterminate sentencing and failed to promote an assumption against incarceration. See id. at 230-31 (presenting criminal justice scholars’ criticisms of Senator Kennedy’s bill).

51. See Stith & Koh, supra note 38, at 232-36 (discussing life cycle and details of several sentencing reform bills from 1975 to 1980); Nagel, supra note 21, at 887 n.21 (establishing passage of Sentencing Reform Act). In 1983, a bipartisan coalition introduced the Sentencing Reform Act of 1983; several days later the Reagan Administration introduced its own bill, which included several of the core provisions of the coalition’s bill. See Nagel, supra note 21, at 900 (outlining Sentencing Reform Act of 1983’s timeline). The major components of
Judiciary Committee (Committee) concluded that an ineffective model of rehabilitation plagued the current federal sentencing system.\footnote{37} The Committee opined that when determining a sentence, judges should consider all four purposes of sentencing: deterrence, incapacitation, punishment, and rehabilitation.\footnote{38}


Congress enacted the SRA in 1984.\footnote{39} The SRA abolished the Parole Commission and created the United States Sentencing Commission (Sentencing Commission), which established the United States Federal Sentencing Guidelines (Sentencing Guidelines) for judges to use in sentencing and took away the judge’s sentencing power and discretion.\footnote{40} The SRA also made all sentences

both bills were included in a new bill, which became known as the Comprehensive Crime Control Act of 1983. See id. at 900 n.103.

\footnote{42} See S. REP. NO. 98-225, at 38-39 (1983) (explaining outdated model of rehabilitation and need for reform). After noting that rehabilitation does not work in the prison setting, the Committee stated:

Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive wildly differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely.

Id. at 38.

\footnote{43} See id. at 50 (listing four purposes of sentencing). The Committee recognized that “imprisonment is not an appropriate means of promoting correction and rehabilitation,” but retained it as a factor that judges should consider in sentencing. See id. at 76 (internal quotations omitted). The Committee noted that rehabilitation is a powerful tool and prisons should continue implementing rehabilitation programs. See id. Nevertheless, the Committee clarified that rehabilitation cannot be the only factor justifying incarceration. See id. (emphasizing inappropriateness of incarcerating offender for purpose of rehabilitation).


provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices...
essentially determinate and provided that only good behavior in custody could reduce a sentence.\textsuperscript{56}

Initially, the Sentencing Guidelines were mandatory.\textsuperscript{57} Now, judges must follow the Sentencing Guidelines, but maintain some discretion when imposing sentences.\textsuperscript{58} Judges may depart from the Sentencing Guidelines in cases where there is an “aggravating or mitigating factor present that the Commission did not adequately consider when formulating the guidelines.”\textsuperscript{59} Sentencing judges are more familiar with the intricacies of the case and the individual defendant than the court of appeals or the Sentencing Commission, placing them in a better position to determine a sentence.\textsuperscript{60} The SRA also authorizes appellate review of the sentence, and appellate courts review decisions under an abuse of discretion standard.\textsuperscript{61} On appeal, the court looks to see if the district court judge committed any procedural errors and then determines if the sentence was substantively reasonable by considering the circumstances and any departure from the Sentencing Guidelines.\textsuperscript{62}

\section*{C. Tapia and the Subsequent Circuit Split}
\subsection*{1. Initial Circuit Split and Subsequent Ruling in Tapia}

After the Supreme Court determined that judges must consult the Sentencing Guidelines during sentencing but are not bound by them, a circuit split developed over whether a judge may consider a defendant’s rehabilitative needs when

\textit{Id.} § 991(b)(1)(B).

\textsuperscript{56} See 18 U.S.C. § 3624(a)-(b)(2) (stating how sentence can get reduced). The SRA also specified that the maximum length of a prison sentence cannot exceed the minimum length by more than 25\% or six months, whichever is greater. See 28 U.S.C. § 994(b)(2); Avila, supra note 6, at 410 (detailing limitations on judicial discretion in sentencing).

\textsuperscript{57} See Booker, 543 U.S. at 226 (noting judges previously bound by guidelines).


\textsuperscript{59} See 18 U.S.C. § 3553(b) (instructing courts to impose sentences within guidelines); Booker, 543 U.S. at 264 (requiring federal judges to consult Sentencing Commission’s guidelines). A court must give a specific reason for departing from the Sentencing Guidelines. See 18 U.S.C. § 3553(c) (requiring judges provide basis for imposing sentence or departing from guidelines).

\textsuperscript{60} See Rita v. United States, 551 U.S. 338, 357-58 (2007) (explaining why sentencing judge must list reasons for sentence). Sentencing judges must explain their reasoning for imposing a sentence and the sentence length because it assures appellate courts and society that the sentencing process is fair and thoughtful. See id. at 357 (reasoning why sentencing judges must justify sentence).


\textsuperscript{62} See Gall, 552 U.S. at 51 (explaining appellate court procedure when reviewing sentencing decisions). Procedural errors that the appellate court looks for include, “failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” Id.
determining the length of a prison sentence.\textsuperscript{63} One provision of the SRA provided that judges cannot use imprisonment to promote rehabilitation, while another provision stated that judges should consider the need for medical care or correctional treatment when imposing a sentence.\textsuperscript{64} The Sixth, Eighth, and Ninth Circuits held that courts could not impose a sentence of imprisonment for the sole purpose of rehabilitation, but could impose a longer sentence to promote rehabilitation.\textsuperscript{65} In contrast, the Third and D.C. Circuits held that the SRA prohibits a court from considering rehabilitation when imposing a prison sentence or determining the length of a sentence.\textsuperscript{66}

In \textit{Tapia v. United States}, the Supreme Court addressed the issue that this circuit split posed.\textsuperscript{67} The Court sided with the Third and D.C. Circuits, holding that the SRA prevents judges from considering rehabilitation when imposing sentences and determining sentence lengths.\textsuperscript{68} In addition to a textual analysis, the Court looked to the SRA's legislative history and acknowledged Congress's skepticism of rehabilitation in a prison setting.\textsuperscript{69} The Court concluded that

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\item \textsuperscript{63} See Kristen Ashe, Note, \textit{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 \textit{VILL. L. REV.} 283, 293 (2015) (explaining lack of clarity in SRA). The SRA stated that “imprisonment is not an appropriate means of promoting ... rehabilitation.” See S. REP. NO. 98-225, at 76 (1983). Nonetheless, the SRA did not clarify whether a court may consider the possibility of rehabilitation in prison when determining sentence length. See Ashe, supra, at 293-94.
\item \textsuperscript{64} See Brown, supra note 58, at 387 (articulating statutory tension). 18 U.S.C. § 3582(a) states, “imprisonment is not an appropriate means of promoting correction and rehabilitation[,]” while 18 U.S.C. § 3553(a)(2) instructs courts to consider “the need for the sentence imposed ... to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3582(a); id. § 3553(a)(2).
\item \textsuperscript{65} See Brown, supra note 58, at 388-89 (explaining one approach to reconciling conflicting provisions). The Ninth Circuit posited that if Congress intended 18 U.S.C. § 3582(a) to apply to sentence lengths, the statute would read “imprisonment or the length of imprisonment is not an appropriate means of promoting correction and rehabilitation.” See United States v. Duran, 37 F.3d 557, 561 (9th Cir. 1994).
\item \textsuperscript{66} See Brown, supra note 58, at 389 (explaining Third and D.C. Circuits’ holdings). The Third Circuit noted that “imprisonment” refers to a prison term, while a “sentence” refers to several different types of punishment, including imprisonment, fines, and probation, among others. See United States v. Manzella, 475 F.3d 152, 158 (3d Cir. 2007) (resolving conflict through examining statutory context). The Third Circuit concluded: “[C]ourts must consider a defendant’s need for rehabilitation when devising an appropriate sentence (pursuant to § 3553(a)(2)(D)), but may not carry out that goal by imprisonment (pursuant to § 3582(a)).” See id.
\item \textsuperscript{67} See Tapia v. United States, 564 U.S. 319, 332 (2011).
\item \textsuperscript{68} See id. (holding use of possibility of rehabilitation in prison unconstitutional when determining sentence lengths). The Court, using a textual approach, stated that § 3582(a)’s use of the word “recognize” extends to the first clause of the sentence, meaning that Congress intended that imprisonment is not an appropriate means for promoting rehabilitation when “determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, [when] determining the length of the term.” See id. at 327-29 (explaining textual and grammatical interpretation of § 3582(a)). Moreover, the Court noted that if Congress intended for courts to consider rehabilitation when determining sentence lengths, it would have given courts the power to place offenders in prison correctional programs. See id. at 330-31 (reasoning courts do not have plenary power over rehabilitation). Nevertheless, the Bureau of Prisons maintains control of which, if any, treatment programs an offender takes part in. See id. at 331 (emphasizing Bureau of Prisons plenary power over treatment).
\item \textsuperscript{69} See id. at 331-32 (explaining Senate Report accompanying SRA contained Congress’s hesitations about rehabilitation).
\end{itemize}
sentencing courts cannot use the possibility of rehabilitation in prison when determining sentence lengths.\footnote{See id. at 332. The Court held: “And so this is a case in which text, context, and history point to the same bottom line: Section 3582(a) precludes sentencing courts from imposing or lengthening a prison term to promote an offender’s rehabilitation.” Id.}

2. The Circuit Split Following Tapia

After Tapia, the circuits split again on how to “measure the Tapia error.”\footnote{See Ashe, supra note 63, at 293 (introducing concept of Tapia error).} Courts commit a Tapia error when they consider the possibility of rehabilitation in prison when imposing or determining a sentence.\footnote{See United States v. Vandergrift, 754 F.3d 1303, 1310 (11th Cir. 2014) (stating holding of case).} The circuits have developed two approaches to the Tapia error.\footnote{See Ashe, supra note 63, at 294 (explaining Tapia error tests).} The Seventh, Ninth, Tenth, and Eleventh Circuits held that a court violates Tapia and the SRA when it considers rehabilitation in any capacity when determining sentence length.\footnote{See United States v. Schonewolf, 905 F.3d 683, 691 (3d Cir. 2018), cert. denied, 139 S. Ct. 1587 (2019) (explaining stricter interpretation of Tapia); United States v. Thornton, 846 F.3d 1110, 1116 (10th Cir. 2017) (holding Tapia violated if rehabilitation considered); United States v. Spann, 757 F.3d 674, 675 (7th Cir. 2014) (emphasizing prohibition against considering rehabilitation during any part of sentencing process); Vandergrift, 754 F.3d at 1310 (stating courts cannot consider rehabilitation when determining sentence); United States v. Joseph, 716 F.3d 1273, 1281 n.10 (9th Cir. 2013) (prohibiting factor of rehabilitation in sentencing). Nonetheless, these circuits seem to indicate that a district court may consider rehabilitation without violating Tapia if the court makes clear that the possibility of rehabilitation in prison carried zero weight in determining the sentence length. See Schonewolf, 905 F.3d at 691.} Conversely, the First, Second, Fourth, Fifth, Sixth, and Eighth Circuits held that courts may consider a defendant’s need for rehabilitation when imposing a sentence so long as it is not the determinative factor.\footnote{See Schonewolf, 905 F.3d at 691 (explaining dominant factor test); United States v. Del Valle-Rodriguez, 761 F.3d 171, 174-75 (1st Cir. 2014) (prohibiting “driving force” of rehabilitation in determining sentence length); United States v. Lifshitz, 714 F.3d 146, 150 (2d Cir. 2013) (holding court cannot base length of sentence on need for treatment); United States v. Bennett, 698 F.3d 194, 201 (4th Cir. 2012) (holding no Tapia error where rehabilitation constituted minor factor in court’s reasoning); United States v. Garza, 706 F.3d 655, 660 (5th Cir. 2013) (holding no Tapia error where rehabilitation constitutes only secondary factor in reasoning); United States v. Deen, 706 F.3d 760, 768 (6th Cir. 2013) (concluding court violates Tapia when imposing longer sentence for purpose of completing rehabilitation program); United States v. Replogle, 678 F.3d 940, 943 (8th Cir. 2012) (holding no Tapia violation where rehabilitation only secondary factor).}

D. United States v. Schonewolf

1. Factual Background and Procedural History

In United States v. Schonewolf, the Third Circuit joined the First, Second, Fourth, Fifth, Sixth, and Eight Circuits’ Tapia interpretation.\footnote{See 905 F.3d at 691-92 (summarizing sister circuits’ interpretation of Tapia).} The defendant, Janet Schonewolf, spent most of her life surrounded by people with substance
abuse issues. Schonewolf began using drugs at age fourteen and dropped out of school at age fifteen. Later, Schonewolf became addicted to opiates and started using heroin when she was no longer prescribed painkillers.

Schonewolf’s drug abuse led to run-ins with the law—in 2010 she was charged with one count of possessing methamphetamine with intent to distribute. During a relapse, police arrested Schonewolf for attempting to purchase heroin, and the subsequent charges violated the terms of her supervised release. In October 2016, after a few stays in treatment programs, Schonewolf admitted to selling heroin out of her house, which led to additional charges.

The court held a revocation hearing on August 15, 2017. Pointing to her struggles with substance abuse, Schonewolf asked for the minimum recommended sentence, while the government asked for an upward variance that would have resulted in a forty-eight month sentence. The United States District Court

See Schonewolf, 905 F.3d at 686 (explaining Schonewolf’s struggle with a history with drugs). Schonewolf began using opiates after a car accident, when she was prescribed Percocet and then a fentanyl patch for back pain. See id. This opiate use later led to a heroin addiction. See id.

See United States v. Schonewolf, 905 F.3d 683, 685 (3d Cir. 2018), cert. denied, 139 S. Ct. 1587 (2019) (describing government’s sentencing request). The range that the Sentencing Guidelines provides for Schonewolf’s crime is twenty-four to thirty months in prison. See id. Schonewolf requested a twenty-four-month sentence because of:

1. her long history of struggles with bipolar disorder and substance abuse;
2. the fact that her sales were solely to finance her own habit and did not involve violence; and
3. her existing two to four year state sentence, which she asserted would give her time to complete drug treatment.

See id. (justifying Schonewolf’s sentencing request). The government requested an upward variance of forty-eight months because “Schonewolf had previously benefitted from a lesser sentence because she had promised to stop using drugs[,]” and Schonewolf received a downward variance in 2012. See id. (describing government’s sentencing request).
Court for the Eastern District of Pennsylvania sentenced Schonewolf to forty months in prison to be served consecutively with her state sentence. The court imposed a ten-month upward variance based on the danger Schonewolf posed to herself and society, and based on the government’s recommendation in the Sentencing Guidelines. Schonewolf appealed her sentence, arguing that the court violated the SRA by improperly lengthening her sentence based on the belief that imprisonment itself would serve rehabilitative goals. The Third Circuit reviewed Schonewolf’s claim for plain error.

2. The Third Circuit’s Holding and Reasoning

In its decision, the Third Circuit first discussed whether Tapia applies to post-revocation prison sentencing in addition to post-conviction prison sentencing. The Third Circuit determined that Tapia applied to post-revocation prison sentencing for the same reasons set forth in the Tapia decision. In making this determination, the Third Circuit joined the First, Second, Fourth, Fifth, Sixth, and Eighth Circuits in holding that a Tapia error occurs only if rehabilitation is the dominant factor when imposing a prison sentence.

85. See id. This sentence is a ten-month upward variance from the highest prison term that the Sentencing Guidelines recommend. See id.

86. See United States v. Schonewolf, 905 F.3d 683, 686 (3d Cir. 2018), cert. denied, 139 S. Ct. 1587 (2019) (offering several reasons for upward variance from Sentencing Guidelines). The court based its decision, in part, on Sentencing Guidelines § 7B1.4, application note number 4, which allows a judge to adopt an upward variance if an offender was previously given a downward variance. See id. (offering legal basis for sentence length). The judge explained that Schonewolf was given a significant downward departure from the Sentencing Guidelines after her first violation of supervised release, but noted that her behavior had worsened. See id. Moreover, the judge based his sentencing decision on the risk that Schonewolf posed to both herself and society, stating:

And I—you know, I have reached a conclusion that you are a significant danger to yourself, you’re a significant danger to those who have lived with you, and you’re a significant danger to society. And the last step we have in order to give you a fighting chance to recover from whatever addictions you have is to—is to limit your contact with the outside world for a significant period of time.

See id.

87. See id. (stating Schonewolf appealed and her reason for doing so).

88. See id. at 687 (stating standard of review for unpreserved claim). Under a plain error standard of review, Schonewolf needed to show: “(1) error, (2) that is plain or obvious, and (3) that affects a defendant’s substantial rights.” See id.

89. See id. at 688-90 (discussing interplay of Tapia and post-revocation sentencing). Prior to Tapia, in United States v. Doe, the Third Circuit held that it was not a violation of the SRA to “set . . . the duration of [a defendant’s] post-revocation incarceration based, in part, on his need for drug rehabilitation.” 617 F.3d 766, 774 (3d Cir. 2010) (contrasting Supreme Court’s later holding in Tapia).

90. See Schonewolf, 905 F.3d at 690 (holding Tapia overrules Doe). In explaining the basis for its decision, the Third Circuit cited the Supreme Court’s textual analysis of the relevant SRA provisions and reiterated that Congress did not intend for courts to consider rehabilitation in any capacity when imposing prison sentences. See id. at 688-89 (acknowledging Supreme Court’s reasoning in Tapia).

91. See id. at 689, 691, 689 n.39 (listing sister circuits and their reasoning). The Third Circuit adopted the dominant factor approach because Tapia “left open the door for a District Court to ‘discuss[] the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs.’” See id. at 692 (quoting Tapia v. United States, 564 U.S. 319, 334 (2011)). Although Schonewolf argued that the court should not
The Third Circuit further held that there was no *Tapia* error in Schonewolf’s sentencing. 92 Schonewolf argued the lower court gave her an upward variance from the Sentencing Guidelines so she would receive rehabilitative services in prison. 93 Nonetheless, the Third Circuit concluded that there was no *Tapia* error because the lower court’s sentence was based on past sentencing leniency towards Schonewolf—not rehabilitation. 94

E. The Reemergence of Rehabilitation in Sentencing

Although the SRA did not consider rehabilitation to be an effective sentencing goal, it is slowly reappearing as a sentencing objective. 95 Today, scientific studies demonstrate that rehabilitation is a more effective strategy for crime prevention than it was in the 1970s. 96 Studies also show that penal institutions can reduce recidivism when they properly implement drug treatment, anger management, and educational and vocational skills programs. 97 One study considered rehabilitation at all in post-revocation sentencing, the Third Circuit held that the dominant factor approach was more similar to the test employed in *Tapia*. See id. at 691-92 (discussing reasoning for adopting dominant factor approach).


93. See id. at 692-93 (discussing Schonewolf’s argument on appeal). Schonewolf based her argument on the trial court’s comments at the revocation hearing, including the statement that “the last step we have in order to give you a fighting chance to recover from whatever addictions that you have is to – is to limit your contact with the outside world for a significant period of time.” See id. Schonewolf argued that this statement, among others, demonstrated that the trial court imposed an upward variance to promote her rehabilitation from drug addiction. See id.

94. See id. (asserting trial court’s sentence not based on Schonewolf’s addiction or potential rehabilitation).

In making this decision, the Third Circuit relied on the trial court’s statement that the upward variance was based on Sentencing Guidelines § 7B1.4, application note 4, which states, “[w]here the original sentence was the result of a downward departure . . . an upward departure may be warranted.” See id. (upholding trial court’s sentencing decision).

95. See Ryan, supra note 16, at 278 (acknowledging rehabilitation no longer penological goal); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIMI & JUST. 1, 2 (2006) (discussing how U.S. sentencing policy changed over years); supra notes 52-54 and accompanying text (describing SRA’s legislative history); supra note 68-69 and accompanying text (describing Court’s interpretation of SRA’s view on rehabilitation). Throughout the twentieth century, courts began introducing rehabilitative programs in sentencing, including drug courts, mental health courts, and community-based treatment programs. See Tonry, supra, at 2 (introducing significant increase in courts’ use of rehabilitative programs).

96. See Tonry, supra note 95, at 32-33 (describing shift in sentencing objectives). When Congress passed the SRA, the prevailing view was that rehabilitation and indeterminate sentencing did not help prevent future crimes, which led to using determinate sentencing. See id. (discussing fall of indeterminate sentencing); supra notes 52-54 and accompanying text (outlining legislative history). In contrast, today there are several studies indicating that rehabilitation can be an effective method of preventing crime. See Tonry, supra note 95, at 33 (reviewing several studies supporting rehabilitation’s effectiveness).

97. See Tonry, supra note 95, at 33 (highlighting studies of effective rehabilitation programs). One study of the English criminal justice system estimated that “if the [treatment] programmes are developed and applied as intended, to the maximum extent possible, reconviction rates might be reduced by 5-15 percentage points (i.e., from the present level of 56% within two years, to (perhaps) 40%).” See JOHN HALLIDAY ET AL., *MAKING PUNISHMENTS WORK: REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES* 7 (2001), https://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk/documents/halliday-report-
found that, on average, CBT treatment programs reduced recidivism by 27%. 98 Nevertheless, the current rigid sentencing policies make it significantly more difficult to prevent crime by implementing offender rehabilitation. 99

Recently, the Supreme Court acknowledged the positive role rehabilitation can play in reducing recidivism. 100 In Graham v. Florida, 101 the Court held that imposing life sentences on minors without the possibility of parole undermines rehabilitation as a penological goal. 102 Graham was the first time the Supreme Court discussed rehabilitation as a penological interest, and it ushered in “a new emphasis on rehabilitation as a sentencing goal.” 103 Moreover, the Supreme Court’s declaration that the Sentencing Guidelines are advisory, not binding, gave courts more power to account for offenders’ individual characteristics and circumstances when imposing sentences and determining sentence length. 104

In light of the opioid crisis, recent legislation at both the federal and state levels has reintroduced rehabilitation as a sentencing goal. 105 The First Step Act, passed in 2018, mandated that the Bureau of Prisons reconsider its ability to reduce recidivism through vocational and educational programs. 106 Additionally,


99 See Tonry, supra note 95, at 33-34 (recognizing rehabilitation’s obstacles in U.S. criminal justice system). Successful rehabilitation programs are highly individualized, considering specific characteristics of each offender. See id. (explaining rehabilitation best practices). Currently, this has not been implemented on a large scale in the United States. See id. (stating need for large scale rehabilitative programs).

100 See Ryan, supra note 16, at 297-98 (noting Supreme Court’s past hesitance in discussing penological goals).


102 See id. at 73-74 (acknowledging penological goal of rehabilitation). In Graham, the Court recognized that minors are more likely to change their character than adults, therefore imposing life sentences without the possibility of parole on minors for crimes other than homicide does not serve the goal of rehabilitation and also violates the Eighth Amendment’s clause against cruel and unusual punishment. See id. (emphasizing importance of rehabilitation in minors). Similarly, in Miller v. Alabama, the Supreme Court reiterated its opinion in Graham, again emphasizing the importance of rehabilitation in minors. See 567 U.S. 460, 472, 479 (2012) (prohibiting mandatory life sentences without parole for minors).

103 See Ryan, supra note 16, at 298-99 (highlighting significance of Court’s opinion).


several states have implemented specialty courts, including drug courts and mental health courts, with the goal of rehabilitating offenders to prevent future crime. For example, in 2010 the re-arrest rate for drug court graduates in New Jersey was 16%, while the reconviction rate was 8%, a significant difference from offenders who did not participate in the drug court.

Modern rehabilitation models focus on changing offender behavior rather than character. Today, rehabilitation aims to successfully reintegrate offenders into society, which is measured by recidivism rates. A British study found that rehabilitation is successful in reducing recidivism rates when the treatment methods are specifically crafted to meet the offender’s individual characteristics and circumstances. Another comprehensive study found that CBT programs reduced reoffending rates by 27%.

Drug courts have also proven successful on a small scale. Drug courts and deferred prosecution, which redirects eligible offenders to treatment as an alternative to prosecution, have been so impactful that some states are mandating

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Step Act, aimed at reforming the criminal justice system in light of the opioid crisis, reintroduced the idea of rehabilitation at the federal level by “[r]quiring the Bureau of Prisons to examine its capabilities in creating evidence-based recidivism reduction programs.” See Exam, supra note 105, at 956.

107. See Ryan, supra note 16, at 302-03 (discussing goals of specialty courts in various states). Drug courts integrate addiction treatment services into the criminal justice system as an alternative to incarceration. See Hunter et al., supra note 105, at 806-07 (stating components of drug court). If offenders complete the drug court program, their sentences are waived, and the charges may be erased from their record. See Anna Armistead, Comment, Epidemics Collide: The Opioid Crisis in Prisons, 7 WAKE FOREST J.L. & POL’Y: SUA SPONTI 49, 52-53 (2017) (explaining function of drug courts). Participants in drug courts must meet certain conditions, including, “attending status meetings, remaining drug and arrest free, and sometimes finding employment or housing.” See id. at 53.

108. See Hunter et al., supra note 105, at 810 (highlighting success of drug court). In comparison, the re-arrest rate for offenders released from prison who did not participate in the drug court was 54%, and their reconviction rate was 43%. See id. Moreover, drug courts are less expensive than incarceration. See id. (comparing government expenses on drug offenders). In New Jersey, the average annual cost for drug court participants in 2010 was $11,379, whereas the average annual cost to incarcerate an offender in state prison was $38,900. See id.

109. See Ryan, supra note 16, at 327 (discussing differences between old and new rehabilitation models). Rehabilitation efforts prior to the SRA “focused on removing the offender from his corrupt surroundings and treating his character through religious and vocational training,” while new rehabilitation models focus on reintegrating the offender into society. See id.

110. See E. Lea Johnston, Theorizing Mental Health Courts, 89 WASH. U. L. REV. 519, 577 (2012) (stating recidivism rate most tangible measure of success in rehabilitation). Other measures of success could include the psychological health or welfare of offenders, but studies have collected little data on these measures. See id. (commenting on need to measure offenders’ personal success after rehabilitation).

111. See supra note 97 and accompanying text (stating impact of individualized treatment on drug offenders).

112. See Lipsey & Landenberger, supra note 98, at 65 (providing scientific findings); Tonry, supra note 95, at 33 (contextualizing findings of meta-analysis study). CBT operates under the assumption “that cognitive defects are learned, not inherent.” See Lipsey & Landenberger, supra note 98, at 58 (describing CBT’s basis). CBT emphasizes free choice, and during treatment offenders “are taught how to consider all aspects of a situation” before deciding how to act. See id. (emphasizing CBT’s focus on individual accountability).

113. See supra note 108 and accompanying text (highlighting impact of drug courts in reducing recidivism rates and prison costs).
their implementation.\textsuperscript{114} A study of U.S. drug court programs found that, in general, offenders who participated in adult drug court programs had lower recidivism rates.\textsuperscript{115} The same study also found that re-arrest rates for offenders who completed the drug court program were lower than for those who went through the criminal court system.\textsuperscript{116} Drug court participants that finish the program have lower recidivism rates; thus, to properly rehabilitate offenders, it is imperative that participants complete their drug court programs.\textsuperscript{117}

\section*{III. Analysis}

\subsection*{A. The Third Circuit Did Not Properly Decide Schonewolf, as Rehabilitation Should Not Be Considered in Sentencing}

In Schonewolf, the Third Circuit failed to properly interpret the SRA and the subsequent Tapia ruling.\textsuperscript{118} The SRA makes clear that rehabilitation in prison is not a desirable sentencing goal.\textsuperscript{119} Congress enacted the SRA partly because it considered indeterminate sentencing, which is based on rehabilitation theory,

\begin{itemize}
  \item [114] See Don Stemen, Beyond the War: The Evolving Nature of the U.S. Approach to Drugs, 11 Harv. L. & Pol’y Rev. 375, 411 (2017) (discussing different states’ use of drug courts). Kentucky presumes deferred prosecution for first and second-time drug possession offenses, and West Virginia mandates drug courts in every judicial district in the state. See id. at 411-12 (comparing states’ rehabilitation efforts). In deferred prosecution, if offenders complete the program, they are not prosecuted. See Armistead, supra note 107, at 52 (explaining deferred prosecution).
  \item [115] See U.S. Gov’t Accountability Off., GAO-12-53, Adult Drug Courts: Studies Show Courts Reduce Recidivism, but DOJ Could Enhance Future Performance Measure Revision Efforts 19 (2011), https://www.gao.gov/assets/590/586793.pdf [https://perma.cc/UVL3-8L87] (discussing recidivism rates across drug court programs). Additionally, the study found that re-arrest rates were lower for participants than for offenders who did not participate. See id. (stating re-arrest rates 6-26% lower for drug court participants). It is important to note that drug court participants are prescreened, and usually the court only selects low-to-medium-risk offenders. See id. at 5.
  \item [116] See id. at 19 (discussing differences in offenders who completed program). The study stated, “[t]he re-arrest rates for program completers ranged from 12 to 58 percentage points below those of the comparison group.” Id. at 19-20. The comparison group members were drawn from the criminal court system. See id. at 19 (describing research methods used).
  \item [118] See United States v. Schonewolf, 905 F.3d 683, 691-92 (3d Cir. 2018), cert. denied, 139 S. Ct. 1587 (2019) (holding courts may consider rehabilitation if not determinative factor); Tapia v. United States, 564 U.S. 319, 332 (2011) (holding consideration of rehabilitation not allowed when imposing prison sentence or determining sentence length).
  \item [119] See 18 U.S.C. § 3582(a) (stating imprisonment not appropriate means for promoting rehabilitation); supra note 68 and accompanying text (explaining Supreme Court’s interpretation of SRA’s view on rehabilitation).
\end{itemize}
ineffective. In passing the SRA, Congress signaled that judges wielded too much power in the sentencing process and should not only consider rehabilitation in determining prison sentences. Nevertheless, Congress recognized that rehabilitation is a powerful tool and prisons should continue employing rehabilitation programs.

In light of the SRA’s history and purpose, the Supreme Court held that judges cannot impose or lengthen sentences based on the possibility of rehabilitation in prison. In Tapia, the Supreme Court clearly stated that judges “may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.” While judges cannot mandate rehabilitation, the Supreme Court admitted that judges can urge a defendant to complete a rehabilitation program and recommend that the Bureau of Prisons place the defendant into a prison rehabilitation program.

Therefore, in Schonewolf the Third Circuit violated both the SRA and Tapia in holding that judges may consider rehabilitation in prison when imposing or lengthening a sentence as long as it is not the dominant factor. The Third Circuit adopted the dominant factor approach because Tapia mentioned that judges may discuss the benefits of rehabilitation with a defendant. In doing so, the Third Circuit misinterpreted Tapia, which explicitly states that although courts can discuss rehabilitation with the defendant and recommend that the Bureau of Prisons place the defendant into a rehabilitation program while in prison, courts may not impose a prison sentence or calculate a sentence based on the


121. See supra notes 52-53 and accompanying text (emphasizing judge’s disproportionate power in sentencing). By this time, public support for indeterminate sentencing had waned. See Nagel, supra note 21, at 895 (revealing consensus in implementing uniform sentencing).

122. See 18 U.S.C. § 3553(a)(2) (stating prisons may provide correctional treatment); S. Rep. No. 98-225, at 57 (stating support for rehabilitation programs in prison).

123. See Tapia, 564 U.S. at 332 (utilizing § 3582(a) and prohibiting judge from calculating sentences based on possible rehabilitation in prison).

124. Tapia v. United States, 564 U.S. 319, 335 (2011). The Tenth Circuit interpreted this to mean that a judge violates Tapia when they lengthen a sentence because a defendant may receive rehabilitative treatment in prison. See United States v. Thornton, 846 F.3d 1110, 1116 (10th Cir. 2017) (stating no need for direct link between prison sentence and rehabilitative program).

125. See Tapia, 564 U.S. at 330-31, 334 (recognizing judges may discuss rehabilitation idea with defendant but Bureau of Prisons retains decision-making authority).

126. Compare United States v. Schonewolf, 905 F.3d 683, 691-92 (3d Cir. 2018), cert. denied, 139 S. Ct. 1587 (2019) (holding courts may consider rehabilitation one, non-dominant factor), with 18 U.S.C. § 3582(a) (stating imprisonment not appropriate means for promoting rehabilitation), and Tapia, 564 U.S. at 332 (holding judges may not consider rehabilitation when imposing or lengthening sentence).

127. See Schonewolf, 905 F.3d at 692 (justifying adoption of dominant factor test). The Third Circuit stated that Tapia “specifically left open the door for a District Court to ‘discuss the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs.’” See id. (quoting Tapia, 564 U.S. at 334).
possibility of rehabilitation in prison. Moreover, in its Schonewolf decision, the Third Circuit failed to discuss the SRA, which prohibits judges from considering the possibility of rehabilitation in prison when imposing sentences or determining sentence lengths. The Third Circuit’s affirmation of extraordinary judicial power in sentencing is precisely what Congress intended to curtail through the SRA.

The Third Circuit’s misunderstanding of Tapia resulted in Schonewolf receiving an improper prison sentence based on the possibility of rehabilitation in prison. The Third Circuit stated that the district court complied with Tapia because it did not base Schonewolf’s upward variance sentence on the possibility that she could receive rehabilitation services in prison. Despite the Third Circuit’s claim, the district court made numerous comments about the risk Schonewolf posed to herself and others and her need for rehabilitative services. Most notably, the district court stated that “the last step we have in order to give you a fighting chance to recover from whatever addictions that you have is to limit your contact with the outside world for a significant period of time.” Although the district court pointed to the Sentencing Guidelines as the basis for the upward variance in sentencing, the court’s repeated references to rehabilitation, including that Schonewolf must “recover[,"]” indicate that the court’s motive for imposing the sentence was to ensure the defendant’s rehabilitation.

128. See Tapia, 564 U.S. at 330-32, 334 (distinguishing between discussing prison with defendant and imposing sentence for rehabilitation purposes).
129. See 18 U.S.C. § 3582(a) (stating imprisonment not appropriate means for promoting rehabilitation); Schonewolf, 905 F.3d at 692 (omitting discussion of SRA in holding).
130. See supra note 52 and accompanying text (highlighting judge’s vast sentencing power before SRA); supra notes 126-27 and accompanying text (analyzing Third Circuit’s holding).
131. See Schonewolf, 905 F.3d at 693 (holding no Tapia error in district court’s decision); Tapia v. United States, 564 U.S. 319, 332 (2011) (stating courts may not consider rehabilitation when imposing prison sentence); infra note 133 (describing district court’s improper reasoning).
132. See United States v. Schonewolf, 905 F.3d 683, 693-94 (3d Cir. 2018), cert. denied, 139 S. Ct. 1587 (2019) (citing reasoning for district court’s sentence calculation). The district court stated that it gave Schonewolf a longer sentence because the Sentencing Guidelines allow for an upward variance when the original sentence was a downward departure. See id. at 693.
133. See id. at 693 n.58. The district court stated, “I have reached a conclusion that you are a significant danger to yourself, you’re a significant danger to those who have lived with you, and you’re a significant danger to society.” See id. The district court also commented that Schonewolf needed “to be contained not only for the benefit of society, but . . . for her own benefit.” See id.
134. Id. at 693. Here, the district court indicated that Schonewolf needed prison time to “recover[,]” which Tapia prohibits. See id. (stating reasons for sentence); Tapia, 564 U.S. at 332 (stating court may not consider rehabilitation when determining sentence length).
135. See supra note 94 and accompanying text (explaining SRA allows upward variance when past sentence resulted from downward departure); Schonewolf, 905 F.3d at 693 n.58 (recounting court’s references to defendant’s recovery during sentencing); United States v. Thornton, 846 F.3d 1110, 1116 (10th Cir. 2017) (holding direct link between rehabilitation and sentence length not necessary for Tapia violation); United States v. Vandergrift, 754 F.3d 1303, 1311 (11th Cir. 2014) (holding Tapia violation occurs when court considers rehabilitation in any way during sentencing). Similar to Schonewolf, the court in Vandergrift concluded that a court violates Tapia when it imposes a longer sentence that may save the defendant’s life. See Vandergrift, 754 F.3d at 1311 (explaining lower court’s error).
Consequently, the Third Circuit violated the SRA and Tapia because it impermissibly connected Schonewolf’s rehabilitation to her prison sentence.136

B. Policy Proposals

Since Congress limited judicial sentencing power, legislatures at both the state and federal levels must find ways to curb drug use, reduce recidivism, and lower the United States’ incarceration rate.137 Longer sentences alone do not deter drug use or promote rehabilitation.138 Rather, rehabilitation is the only way to ensure offenders do not return to drug use.139 Thus, legislatures must implement effective policies that give offenders a better chance of abstaining from drug use once released from prison, as current legislation prohibits judges from doing so.140 Such policies may include the implementation of CBT and an increase in the use of drug courts.141

1. Cognitive-Behavioral Therapy

CBT is an evidence-backed method of rehabilitation that can be carried out while an individual is in prison.142 Through self-monitoring and identifying “risky or deficient thinking patterns[,]” CBT aims to correct cognitive deficits

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136. See Schonewolf, 905 F.3d at 693 (noting district court correlated defendant’s potential for recovery with limiting contact with outside world); Thornton, 846 F.3d at 1116 (setting forth Tapia interpretation). The Tenth Circuit highlighted that Tapia prevents courts from lengthening a sentence to allow a person to “complete a treatment program or otherwise to promote rehabilitation.” See Thornton, 846 F.3d at 1116 (quoting Tapia, 564 U.S. at 335). The Tenth Circuit interpreted this to mean that “the prohibition against imposing a sentence for rehabilitative purposes must extend beyond that narrow set of circumstances where the sentence is lengthened specifically to qualify the defendant for a known rehabilitation program.” See id.

137. See Warren, supra note 14, at 1241-43. Drug abusers are sentenced to prison based on the theory that prison will deter their drug use and keep society safe. See id. at 1241-42 (describing presumption attached to “tough on crime” approach, drug abuse, prison, and recidivism cycle). Unfortunately, this policy has led to increased drug use, recidivism rates, and prison populations. See id. at 1242 (detailing effects of current sentencing policy). This trend is partly because offenders are not offered effective treatment options in prison. See id. at 1242-43 (explaining increase in prison population and number of inmates who abuse drugs).

138. See id. at 1243 (explaining criminal justice leaders’ movement away from long sentences for non-violent drug offenders).

139. See Armistead, supra note 107, at 70. Addiction causes drug abusers to focus primarily on short-term goals, such as obtaining their next high, instead of long-term visions including life-long happiness and health. See id. (recognizing need for rehabilitative services in justice system). “Imposing prison sentences for opioid addicts without any effort to divert and reset their decision-making calculus and personal goals is tantamount to making alcoholics and smokers quit cold turkey but leaving them in a liquor store or cigarette warehouse in handcuffs and telling them not to think about it.” Id. It is critical that offenders receive rehabilitative services. See id.

140. See Warren, supra note 14, at 1286 (emphasizing most offenders re-offend and incarceration not treatment for substance abuse); supra note 123 and accompanying text (setting forth Supreme Court’s interpretation of SRA). One study found that only 11% of inmates with substance abuse disorders received treatment during their time in prison. See Warren, supra note 14, at 1286.

141. See infra Sections III.B.1-2 (presenting policy proposals).

142. See Warren, supra note 14, at 1287 (noting studies highlighting effectiveness of CBT in reducing recidivism).
that lead to re-offending.\textsuperscript{143} Importantly, CBT teaches offenders “to consider all aspects of a situation” before acting, thus allowing them to retain their free will.\textsuperscript{144} CBT is an ideal program for those with substance use disorders because it teaches valuable skills, including, “interpersonal problem-solving . . . abstract thinking, critical reasoning, causal thinking, goal setting, long-term planning, and perspective taking[,]” as well as relapse prevention.\textsuperscript{145}

CBT is an effective therapy that can be replicated on a larger scale, as evidenced by its successful implementation in several states’ penological systems.\textsuperscript{146} Legislatures can take several steps to ensure that CBT is effective in routine practice, including utilizing small group settings, close monitoring of offender participation in programs, and employing providers with mental health backgrounds.\textsuperscript{147} Legislatures should also caution against implementing CBT programs in prison and instead employ them at the community level, where offenders are at the greatest risk of recidivism.\textsuperscript{148} CBT is more effective on the highest risk individuals, so programs can have the greatest impact if they are implemented on the community level.\textsuperscript{149}

2. Increasing Use of Drug Courts on the Federal Level

Drug courts have been profoundly impactful at the state level.\textsuperscript{150} Instead of promoting rehabilitation in prison, drug courts encourage offender rehabilitation as an alternative to prison.\textsuperscript{151} In this setting, judges play a more active role in offender rehabilitation, as they encourage the offender to complete substance abuse treatment instead of imposing a sentence.\textsuperscript{152} A judge’s continued

\textsuperscript{143} See Lipsey & Landenberger, supra note 98, at 58 (defining CBT and programs used for offenders). CBT programs for offenders, “emphasize individual accountability and attempt to teach offenders to understand the thinking processes and choices that immediately preceded their criminal behavior.” Id.

\textsuperscript{144} See id. (stating CBT does not require offenders to adopt “superior set of morals”).

\textsuperscript{145} See id. (recognizing CBT’s goals during training); supra note 142 (providing benefits of CBT for inmates with substance abuse disorders). Relapse-prevention CBT programs have become increasingly popular and aim to arm offenders with cognitive strategies. See Lipsey & Landenberger, supra note 98, at 58.

\textsuperscript{146} See Lipsey & Landenberger, supra note 98, at 68 (indicating CBT replicable in prisons if programs follow certain characteristics); Ryan, supra note 16, at 303 (describing Illinois, Indiana, and Vermont laws). Illinois, Indiana, and Vermont enacted legislation that provides for CBT and rehabilitation-based drug treatment programs, and several other states followed suit. See Ryan, supra note 16, at 303.

\textsuperscript{147} See Lipsey & Landenberger, supra note 98, at 69 (detailing creating effective CBT programs at community level).

\textsuperscript{148} See id. (stating CBT less effective in prison setting).

\textsuperscript{149} See id. (explaining optimization of CBT effects).

\textsuperscript{150} See supra note 108 and accompanying text (highlighting success of state drug courts in reducing recidivism).

\textsuperscript{151} See Armistead, supra note 107, at 51-52 (identifying role of drug courts in overcoming addiction). Drug courts utilize a “disease model,” where offenders are treated as ill patients in need of treatment. See id. at 51.

\textsuperscript{152} See Hunter et. al., supra note 105, at 809-10 (explaining district court judge leads team of individuals who supervise defendant and drug court processes).
presence and guidance in the drug court process is a motivator for the defendant that leads to more successful outcomes.\textsuperscript{153}

Since drug courts typically exist at the jurisdictional level, it is difficult to replicate them on a federal level.\textsuperscript{154} Thus, although it is not feasible for Congress to create a single drug court at the federal level, it can encourage federal jurisdictions to create their own drug courts through federal funding incentives.\textsuperscript{155} Federal jurisdictional drug courts can ensure success through replicating a common model that most drug courts follow.\textsuperscript{156} The common model includes the following factors: “offender screening and assessment of risks, needs, and responsiveness; judicial interaction; monitoring (drug testing) and supervision; graduated sanctions and incentives; and treatment and rehabilitation services.”\textsuperscript{157}

It is crucial that drug courts are staffed with addiction experts and base their therapies on scientifically proven methods, such as CBT.\textsuperscript{158}

If Congress offered incentives to create federal jurisdiction drug courts, more jurisdictions would create drug courts and thus see reduced recidivism rates as well as taxpayer savings.\textsuperscript{159} One study measured the average annual cost to house an inmate as $23,000, while the average annual cost per individual participating in a drug court is approximately $4,300.\textsuperscript{160} Additionally, several studies found sizeable reductions in re-arrest and recidivism rates for drug court participants, leading to less overall crime and drug use in communities.\textsuperscript{161}

\textsuperscript{153} See Armistead, supra note 107, at 52 (acknowledging positive role of judge in drug court rehabilitation process). High-risk participants tend to benefit from this effect the most. See id. The role of a judge in a drug court humanizes the judge, and they act as a motivator, holding the individual accountable. See id. (noting role of same judge throughout drug court process).

\textsuperscript{154} See Armistead, supra note 107, at 51-52 (recognizing difficulty in creating uniform drug court system). Nonetheless, the small, jurisdictional approach of drug courts allows them to tailor their methods to meet the needs of the individuals in their community. See id. (balancing strengths and weaknesses of jurisdictional drug court approach).

\textsuperscript{155} See Warren, supra note 14, at 1256 (highlighting Department of Justice’s drug court incentive grants); Armistead, supra note 107, at 51-52 (stating challenges in creating single drug court). One report found that in 2014, 44% of U.S. counties did not have adult drug courts because of lack of funding, indicating the need for congressional action to fill this gap. See Warren, supra note 14, at 1271 (citing Department of Justice’s recommendation to create drug courts in each federal district).

\textsuperscript{156} See Warren, supra note 14, at 1269 (explaining function of drug court).

\textsuperscript{157} Id. (listing factors of typical drug courts). Sanctions may include a warning, increased supervision, jail time, or expulsion from the drug court. See KING & PASQUARELLA, supra note 117, at 10 (exploring effects of sanctions). Incentives include positive acknowledgement for making all court appearances or a public ceremony at the court after achieving a specific milestone. See id. at 9-10.

\textsuperscript{158} See Warren, supra note 14, at 1271-72 (emphasizing drug court success dependent on quality of care offered).

\textsuperscript{159} See Armistead, supra note 107, at 54-55 (noting community impact of drug courts); KING & PASQUARELLA, supra note 117, at 8 (listing taxpayer cost-saving studies); supra note 155 and accompanying text (underscoring need for congressional incentives to establish drug courts). One study of seven drug courts found that taxpayers saved anywhere from $1,000 to $15,000 per drug court participant due to lower recidivism rates. See KING & PASQUARELLA, supra note 117, at 8.

\textsuperscript{160} See KING & PASQUARELLA, supra note 117, at 8 (explaining cost-saving role of drug courts).

\textsuperscript{161} See supra notes 115-16 and accompanying text (reporting recidivism study findings); KING & PASQUARELLA, supra note 117, at 5-6 (providing results of recidivism and re-arrest studies). A Government
IV. CONCLUSION

The opioid crisis is worsening and prisons in the United States are increasingly overpopulated. Offenders are not receiving the treatment necessary to address their underlying conditions while in prison, resulting in high recidivism rates. While experts once discouraged rehabilitation as a sentencing goal, new studies indicate it has the potential to significantly decrease recidivism among those with substance use disorders. Nevertheless, the SRA states that imprisonment is not a proper means of achieving rehabilitation, and a circuit split has developed on whether a judge may consider rehabilitation at all when imposing a sentence. Both the context in which the SRA was passed and subsequent Supreme Court rulings indicate that a judge cannot consider rehabilitation when imposing a sentence. Still, society must find ways to treat those with substance use disorders and reduce recidivism. Both CBT and drug courts have proven effective on small, local scales. Congress should consider legislation that increases funding for these programs in individual federal and state districts, enabling jurisdictions to reduce recidivism while maintaining the features that make these programs so effective at the local level.

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Accountability Office study found that thirteen drug courts reported anywhere from a 4-25% reduction in recidivism. See KING & PASQUARELLA, supra note 117, at 5.