No. 10-5400

In The
Supreme Court of the United States

ALEJANDRA TAPIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

REUBEN CAMPER CAHN*
STEVEN F. HUBACHEK
JAMES FIFE
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Reuben_Cahn@fd.org

Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

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?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

FEDERAL STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OPINIONS BELOW

The court of appeals' decision is unpublished, *United States v. Tapia*, 376 F. App'x 707, 2010 WL 1513838 (9th Cir. Apr. 16, 2010). *See* Joint Appendix ("JA") at 43-44. There is no district court decision, but the transcript of the sentencing hearing is at JA 9-33.

JURISDICTION

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

STATUTORY PROVISIONS

Relevant statutory provisions are in the appendix attached hereto. App. 1-7.

STATEMENT

Petitioner Alejandra Tapia is 31 years old. She lived with her parents until they divorced when she was six. After the divorce, Petitioner lived with her mother and her mother's boyfriend. When she was only eight, Petitioner was regularly sexually abused by her mother's boyfriend. Petitioner's mother knew about the abuse but did nothing to stop it. The molestations continued for about four years, until Petitioner was sent to live with her aunt in Tijuana,

Mexico. Supplemental Joint Appendix Under Seal ("S. JA") at 7-8.

A year later, Petitioner ran away with a boyfriend who also physically abused her. Petitioner became pregnant and, at 14, gave birth to her first child. In 1995, Petitioner, now 16, became pregnant again and fled to California. Once there, she gave birth to a daughter, who died days later. S. JA 8.

In 2000, Petitioner married a man who would physically abuse her. She had two children with this man before leaving him. During this time, she was convicted of two offenses: driving without a license and selling marijuana. S. JA 6, 8.

In January 2008, Petitioner and her friend, Tinamarie Debenedetto, were driving from Mexico into the United States. At the border, an immigration official questioned both about their plans. The official noticed that Ms. Debenedetto was acting nervously. He also smelled gasoline. He scrutinized the car more closely. He eventually found two individuals – later determined to be undocumented aliens – concealed in the car's gas tank compartment. Petitioner and Ms. Debenedetto were arrested and taken into custody. S. JA 3.

Petitioner was 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. JA 4-5. Two days after Petitioner's arrest, the district court released Petitioner and ordered her to comply with various conditions. S. JA 4.

In March 2008, Petitioner failed to appear in court for a motion hearing. A bench warrant was issued for her arrest. Petitioner was apprehended six months later in an apartment that contained methamphetamine, a shotgun, and mail that belonged to other individuals. S. JA 4, 6. Prior to conclusion of the federal case, Petitioner pled guilty to a state gun-possession charge. S. JA 6.

The Government filed a superseding indictment, adding a third count charging bail jumping in violation of 18 U.S.C. §3146. JA 6-8. On December 19, 2008, a jury found Petitioner guilty on all three counts.

At sentencing, the district court calculated the adjusted Guideline offense level for Petitioner's alien smuggling conviction as 20.[1] JA 20-21. Because Petitioner fell into Criminal History Category III, her Guideline range was 41 to 51 months. JA 13.

---

[1] The district court reached that result because the base offense level for each offense is 12. U.S.S.G. §2L1.1(a)(3). That offense level was then increased to 18 for the way in which the aliens were smuggled, putting them at a substantial risk of death or bodily injury. U.S.S.G. §2L1.1(b)(6). JA 20-21. The district court also imposed a two-level increase for obstructing or impeding justice for fleeing while on bail. JA 21; *see* U.S.S.G. §3C1.1.

Petitioner maintained she should receive a sentence of no more than three years, the mandatory minimum penalty. She argued that a higher sentence would be greater than sufficient to meet the congressionally mandated goals of sentencing in 18 U.S.C. §3553(a), given the abuse she suffered throughout her life and the fact that she had never served even one year in custody before. JA 18-19.

The district court acknowledged the physical and sexual abuse Petitioner had suffered, stating, "I'm concerned about that and she needs help." JA 25. Reviewing the relevant sentencing factors, the district court opined that Petitioner needed to take part in the 500-hour drug-treatment program (the Residential Drug Abuse Program, or RDAP), which the Bureau of Prisons offers in some of its facilities to selected prisoners. The district court stated, "[t]he sentence has to be sufficient to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program." JA 27.

The court imposed a sentence of 51 months, focusing on the importance of the drug-treatment program:

> Here I have to say that one of the factors that – I am going to impose a 51-month sentence, 46 months [for alien smuggling] plus five months for the bail jump, and one 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.

JA 27.

The district court noted the importance of deterrence, given Petitioner's escalating criminal conduct but returned to the drug-treatment program a third time, stating,

> I think that a sentence less than what I am imposing would not deter her and provide for sufficient time so she could begin to address these problems. And I am going to recommend that she serve her sentence at FCI Dublin where they have facilities to really help her, and I think that this is the necessary sentence for all the reasons I stated, and it's the least sentence that can be imposed to effect all those reasons.

JA 28.

For a fourth and final time, the district court cited the treatment goal in its custodial housing recommendation:

> The court recommends, 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.

JA 29. The court ordered that Petitioner serve three years of supervised release. Here, too, the district court, consistent with its reasoning on the custodial sentence, expressed concern with substance-abuse issues: It required that Petitioner participate in a drug-abuse program and made a particular point that she stay away from drug users or dealers. JA 29, 31.

On appeal, Petitioner challenged the district court's imposition of increased imprisonment for rehabilitative purposes, based upon its hope that she would qualify for the Bureau of Prisons RDAP program. She acknowledged that, in *United States v. Duran*, 37 F.3d 557, 561 (9th Cir. 1994), the Ninth Circuit sanctioned imposing lengthier prison sentences based upon rehabilitation considerations. Finding no conflict with the language in 18 U.S.C. §3582(a) "that imprisonment is not an appropriate means of promoting correction and rehabilitation," *Duran* held that this language restricted only the decision to impose a prison term, that once a court decided to imprison, it was free to lengthen a selected term to promote rehabilitation. *See id.* Petitioner argued that *Duran* was wrongly decided in light of *In re Sealed Case,* 573 F.3d 844 (D.C. Cir. 2009), and *United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007), and inconsistent with the later decision in *United States v. Kikuyama*, 109 F.3d 536 (9th Cir. 1997).

The Ninth Circuit affirmed, stating that there was no error in basing Petitioner's sentence on anticipation of RDAP enrollment, citing *Duran*. *See Tapia*, 376

F. App'x at 707. In fact, the district court's expectation has proven wrong, and the Bureau of Prisons has not allowed Petitioner entry into its RDAP program.

SUMMARY OF ARGUMENT

When Congress restructured federal criminal sentencing law in 1984, it rejected the "rehabilitative model," whereby imprisonment is viewed as a legitimate tool to reform offenders. Congress expressed its disapproval of using incarceration for rehabilitative purposes in several parts of the Sentencing Reform Act.

One of those places Congress repudiated incarceration for rehabilitative purposes was in its instructions to sentencing judges on the procedure for imposing imprisonment at 18 U.S.C. §3582(a):

> **Factors to be considered in imposing a term of imprisonment.** – The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements

issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

As recognized by the Third and District of Columbia Circuits,[2] the plain language of this statute bars imposing or increasing a prison term to promote rehabilitation. The ordinary rules of grammar require that the language in §3582(a) reflecting Congress's rejection of the "rehabilitative model" ("recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation") be parsed in one of only two ways: as a participial phrase modifying the subject of the sentence or as an absolute construction modifying the sentence as a whole. Under either analysis, the "recognizing" phrase includes within its grammatical scope *both* the first "in determining" phrase describing imposition of imprisonment and the second one referencing length of imprisonment.

The contrary analysis of the Ninth, Eighth, and Sixth Circuits,[3] linking the "recognizing" phrase to the first "in determining" phrase only, has no grammatical basis and contravenes the last antecedent rule by construing the restrictive language as applying exclusively to a more distant antecedent, the phrase referencing the imposition of sentence – in

---

[2] *Manzella*, 475 F.3d 152; *Sealed Case*, 573 F.3d 844.

[3] *Duran*, 37 F.3d 557; *United States v. Hawk Wing*, 433 F.3d 622 (8th Cir. 2006); *United States v. Jimenez*, 605 F.3d 415 (6th Cir. 2010).

effect skipping over the phrase discussing the length of incarceration.

This conclusion of the D.C. and Third Circuits is confirmed by resort to extrinsic interpretation aids. First, the structure of the Sentencing Reform Act, when viewed under the traditional rule of specific-over-general, indicates that the potential conflict perceived in *Duran* does not exist: There is no conflict between §3582(a)'s recognition that prison-based rehabilitation is an inappropriate consideration in determining length of sentence and the mandate to consider 18 U.S.C. §3553(a)'s sentencing factors. The specific ban on considering rehabilitation applies only to sentencing decisions imposing or increasing incarceration; the general exhortation to consider rehabilitative goals applies to sentencing decisions in general.

Further confirmation is seen in the way Congress drafted the *in pari materia* directives to the Sentencing Commission in 28 U.S.C. §§991 & 994. For these latter provisions, other circuits have recognized that the ban on rehabilitative considerations for imprisonment is fully compatible with rehabilitation as a general goal of criminal sentencing.[4] Moreover, the *Duran* approach requires attributing to Congress at least two illogical choices. First, *Duran* supposes that Congress would not allow placing defendants in prison for rehabilitative purposes, yet would allow keeping

---

[4] *See United States v. Harris*, 990 F.2d 594 (11th Cir. 1993); *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992).

defendants in prison longer for the same reasons. Second, *Duran* attributes to Congress a restriction on use of rehabilitative concerns that would apply to only a small minority of sentencings after passage of the Sentencing Reform Act, those in which a sentence of probation is possible. And, as illustrated by the facts of this case, the *Duran* analysis ties mandatory judicial sentencing policy to factors over which judges have no control but that are wholly within the discretion of the Bureau of Prisons.

Further confirmation lies in the legislative history of the Sentencing Reform Act. The adoption of the Sentencing Reform Act demonstrates Congress's intentions regarding three central points: to reject the "rehabilitative model"; to reserve imprisonment to serve the goals of deterrence, incapacitation, and retribution only; and to use §3582(a) to codify these findings for *both* imposing and setting the length of prison terms. The principal Senate committee report on the Sentencing Reform Act, as well as the Court's discussion in *Mistretta v. United States*, 488 U.S. 361, 367 (1989), prominently acknowledges Congress's rejection of the discredited "rehabilitative model." The Senate report likewise demonstrates – consistent with this rejection – that rehabilitative concerns were to be addressed by non-custodial sentencing options; incarceration was meant to serve other sentencing goals. Finally, the history of amendment of §3582(a) during the legislative process manifests a deliberate excision of rehabilitation as a consideration in the decisions to impose a prison term or to extend its

length. Hence, legislative history entirely accords with the plain-reading analysis of the Third and D.C. Circuits and refutes the Ninth Circuit's contention that the statute was poorly or inattentively drafted.

Even if the plain meaning, interpretative aids, and legislative history did not unwaveringly point to the broad-scope reading of §3582(a), the significant ambiguity perceived by those courts following *Duran* must be resolved by application of the Rule of Lenity. That rule, which applies equally to sentencing provisions as to substantive penal statutes, requires courts to adopt the alternative reading more favorable to the accused when such ambiguity arises. If §3582(a) is indeed ambiguous, permitting the reading adopted in *Duran*, Petitioner's interpretation is nonetheless required by the Rule of Lenity and accords with the policy underpinnings of the Rule.

ARGUMENT

I. 18 U.S.C. §3582(a) Bars District Courts Imposing or Increasing Prison Terms to Promote Rehabilitation.

A. Introduction

Because the district court ensured that Petitioner's term of imprisonment was sufficiently lengthy to permit Petitioner to participate in a prison-based rehabilitation program, the legality of her sentence

turns on interpretation of 18 U.S.C. §3582(a), a provision entitled "Imposition of a sentence of imprisonment."[5] Section 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.

18 U.S.C. §3582(a).

The D.C. and Third Circuits have construed §3582(a) to preclude district courts from increasing the length of a sentence of imprisonment in order to accomplish the defendant's rehabilitation. *See Sealed Case*, 573 F.3d 844; *Manzella*, 475 F.3d 152.[6] That proscription applies both when a sentencing court makes the decision to sentence the defendant to a term of imprisonment, rather than imposing lesser

---

[5] *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("not[ing] that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute") (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)).

[6] *But see Jimenez*, 605 F.3d at 424; *Hawk Wing*, 433 F.3d at 629-30; *Duran*, 37 F.3d at 561.

sanctions such as a term of probation, *see* 18 U.S.C. §3551(b)(1), or a fine, *see id.* § (b)(2), and to the determination of the length of the term of imprisonment. *See Manzella*, 475 F.3d at 160 (holding that "the plain language of §3582(a) . . . extend[s] its prohibition to a court's determination of the length of the sentence.") (quotation omitted). *Accord Sealed Case*, 573 F.3d at 849. *See also United States v. Tsosie*, 376 F.3d 1210, 1220-21 (10th Cir. 2004) (O'Brien, J., dissenting) (citing §3582(a) and 28 U.S.C. §994(k) and observing that "[e]ven a tin ear can discern the *leitmotif* – defendant rehabilitation, treatment or care cannot drive the incarceration decision either at the threshold or as to length"). The Court's traditional approach to statutory construction, under which it examines the statute's "text, structure, purpose and history," *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 861 (2005) (quotation omitted), reveals that the Third and D.C. Circuits have interpreted §3582(a) correctly.

B. Because the "Recognizing" Phrase Either Modifies "the Court" or the Entire Sentence, It Applies to Both of the Sentencing Court's Tasks: Determining Whether to Imprison and Determining the Length of Any Term of Imprisonment.

Under "settled principles of statutory construction," the Court "first determine[s] whether the statutory text is plain and unambiguous." *Carcieri v.*

Salazar, 129 S. Ct. 1058, 1063 (2009). *See also Alexander v. Sandoval*, 532 U.S. 275, 288 n.7 (2001) (observing that "the interpretive inquiry begins with the text and structure of the statute . . . "). "If it is, [the Court] appl[ies] the statute according to its own terms." *Id.* at 1063-64.

The statutory language is indeed plain and unambiguous. Congress set forth the general power to imprison in 18 U.S.C. §3581(a): "A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment." Section 3582(a) addresses the district court's imposition of a sentence of imprisonment as authorized by §3581(a). The plain language of §3582(a) provides direction to district courts in undertaking two separate duties. The first is "determining whether to impose a term of imprisonment." *See* 18 U.S.C. §3582(a). The second duty is "determining," in the event that a term of imprisonment is imposed, "the length of the term." *See id.* ("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"). In undertaking those two functions, the statute directs district courts to "consider the factors set forth in section 3553(a) to the extent that they are applicable. . . ." *Id.* The final phrase in the sentence – "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" – is most properly read to refer back to "[t]he court," the entity that has been directed, in performing its two functions, to "consider the factors set forth in section 3553(a) to the extent

that they are applicable. . . ." *Id.* Thus, decisions by sentencing courts on (1) the threshold question of whether to incarcerate and (2) the secondary question of how long a particular term of imprisonment should be, must be based upon the understanding that serving time in prison does not "promot[e] correction and rehabilitation." *Id.* The district court therefore erred in sentencing Petitioner to a lengthier term of imprisonment for the purpose of affording her an opportunity to participate in a prison-based drug-treatment program.

While §3582(a) is perhaps not elegantly structured, the reading adopted by the Third and D.C. Circuits vindicates the Court's observation that "[t]he primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar." *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897). The phrase "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" is a participial phrase,[7] and such phrases "always serve as adjectives, modifying nouns or pronouns." *See* H. Ramsey Fowler & Jane E. Aaron, *The Little, Brown Handbook* 179 (7th ed. 1998). The subject of the sentence contained in §3582(a) is, of course, "the court" while the object is "the factors set

[7] *See generally* Diana Hacker, *The Bedford Handbook* 806 (6th ed. 2002).

forth in section 3553(a)." The most sensible reading of the sentence is one in which the "recognizing" participial phrase modifies "the court"[8] rather than "the factors."[9] Thus, the sentencing court, in performing its dual obligations to determine whether to impose a term of imprisonment and, if it chooses to impose such a term, to determine the length of the term of imprisonment, must "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. §3582(a).[10]

---

[8] *See The Oxford Guide to English Usage* 204 (E. S. C. Weiner & Andrew Delahunty, eds., 2d ed. 1993) ("A participle used in place of a verb in a subordinate clause must have an explicit subject to qualify. If no subject precedes the participle within the clause, the participle is understood to qualify the subject of the main sentence.").

[9] Of course, if the §3553(a) factors could somehow "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. §3582(a), that reading would also benefit Petitioner: because §3582(a) directs the sentencing court to consider those factors, to the extent that the factors "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation," the district court must do so also.

[10] Petitioner's reading, under which the participial phrase at the end of the sentence modifies a noun at the beginning of the sentence, is grammatically sound. While a participial phrase is perhaps best placed near the noun it modifies, *see generally* Roy H. Copperud, *American Usage and Style: The Consensus* 250 (1980), "participial phrases are often movable[, and] may . . . appear at some distance from the word they modify." *See* Hacker, *The Bedford Handbook* 806-07. Moreover, the notion that the court would simultaneously (1) consider the factors and (2) recognize that the commencement or continued service of a term of

(Continued on following page)

The only other plausible reading of the "recognizing" phrase is as an absolute construction.[11] While an absolute construction "usually consists of a noun followed by a participle or participial phrase," Hacker, *The Bedford Handbook* 394, that subject can be implied. *See, e.g., American Heritage Book of English Usage* 2 (American Heritage Dictionaries eds. 1996) (providing the following example of an absolute construction currently in use in conversation: "*Barring bad weather,* we plan to go to the beach tomorrow.") (emphasis in original). Such a phrase "modifies the whole sentence." Hacker, *The Bedford Handbook* 394. *Accord American Heritage Book of English Usage* 1 ("[A]n absolute construction modifies the rest of the sentence, not the subject of the sentence (as a participial phrase does)."). Thus, if the "recognizing" phrase here is read as an absolute construction, it modifies the entire sentence, which necessarily includes both of the sentencing court's two functions: determining whether to impose a term of imprisonment and determining how long any term of imprisonment will be. This reading of the phrase as an absolute construction is also consistent with the placement of

---

imprisonment does not promote rehabilitation is also consistent with the use of a present participle ("recogniz*ing*") in the participial phrase: "The present participle shows action occurring *at the same time* as that of the verb." Fowler & Aaron, *The Little, Brown Handbook* 223 (emphasis in original). *Accord* Copperud, *American Usage and Style: The Consensus* 250.

[11] An absolute construction may also be referred to as an absolute phrase or an ablative absolute.

the "recognizing" phrase at the end of the sentence: "Absolute phrases may appear at the beginning or at the end of a sentence." Hacker, *The Bedford Handbook* 394. *Accord id.* 810 (noting that "[a]n absolute phrase . . . may appear nearly anywhere in the sentence"). Thus, whether read as a participial phrase or an absolute construction, the "recognizing" phrase supports Petitioner's reading under which the court must "recogniz[e]" that it can neither decide to imprison nor lengthen the term of imprisonment for the purpose of prison-based rehabilitation.

The Ninth Circuit's contrary reading, based upon its prior decision in *Duran*, 37 F.3d 557, does not honor the plain language of §3582(a). According to *Duran*,

> [s]ection 3582 distinguishes between the determinations of whether to impose a term of imprisonment and of the actual length of the imprisonment. It admonishes the court to recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation. Once imprisonment is chosen as a punishment, however, §3582 does not prohibit consideration of correction and rehabilitation in determining the length of imprisonment.

Id. at 561.[12] The Ninth Circuit provides no explanation why it believes the statute "distinguishes" between the two "determinations" at issue, the initial decision to impose a sentence of imprisonment and the determination of the term's length. The structure of the sentence strongly suggests otherwise; it has a single subject ("the court"), a single verb ("shall consider"), and a single object ("the factors"). Thus, in making both determinations – which are described in two prepositional phrases joined by a conjunction – "[t]he court . . . shall consider the factors set forth in section 3553(a) to the extent that they are applicable. . . ." 18 U.S.C. §3582(a). Nothing in that structure suggests that the determination of the length of a term of imprisonment is in any way analytically distinct from the initial determination to impose a sentence of imprisonment. Nor does anything in the structure of that sentence suggest that the description of the court as "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" would not equally inform each of these determinations.

Duran also suggested that Congress might have drafted a different statute if it had not intended to

---

[12] Petitioner will address only *Duran*, as the Third Circuit correctly observed that the Eighth Circuit's decision in *Hawk Wing* adds nothing to the Ninth Circuit's analysis. *See Manzella*, 475 F.3d at 160 (citing *Hawk Wing*, 433 F.3d at 629-30). Nor does the Sixth Circuit's decision in *Jimenez* contain any additional reasoning. *See* 605 F.3d at 424.

limit the court's "recogni[tion] that imprisonment is not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. §3582(a), to the initial determination whether to impose a term of imprisonment at all.

> If Congress had intended to prohibit sentencing judges from considering correction and rehabilitation in setting the length of the sentence, it could have enacted a statute that admonished judges to recognize "that imprisonment *or the length of imprisonment* is not an appropriate means of promoting correction and rehabilitation." It did not enact such a statute in 18 U.S.C. §3582. We decline to extend the prohibition in §3582 to sentence length determinations.

Duran, 37 F.3d at 561 (emphasis in original). The meaning of the statute, as set forth above, is plain enough, and, as the Third Circuit observed: "The possibility that a clearly worded statute might be even more clearly worded does not negate the fact that it is already clear." *Manzella*, 475 F.3d at 160. In short, "Congress had no need to provide such clarification given the statute's express instruction that sentencing courts must recognize the inappropriateness of imprisonment for rehabilitation both in choosing imprisonment rather than a non-incarceration sentence and 'in determining the length of the term.' " *Sealed Case*, 573 F.3d at 850 (quoting 18 U.S.C. §3582(a)).

Although it offered no reasoning in support of that conclusion,[13] the Ninth Circuit appears to have found that the term "imprisonment" in the last phrase of §3582(a) refers to only the initial decision to imprison the defendant and not to the determination of the duration of the imprisonment. That reading is not supported by the dictionary meaning of the term:

> Nor would the addition of the phrase "or the length of imprisonment" [– as suggested in *Duran* –] add anything that the term "imprisonment" on its own doesn't already convey. According to the dictionary, "imprisonment" means "[t]he action of imprisoning, *or* [the] fact or condition of being imprisoned." OXFORD ENGLISH DICTIONARY (2d ed.1989) (emphasis added). In context as well, "imprisonment" encompasses the decision to imprison a defendant for a longer period of time.

Sealed Case, 573 F.3d at 850. Thus, under the standard definition, a court complying with the statutory command to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation" would neither impose nor extend a term of imprisonment for rehabilitative purposes.

---

[13] *See Manzella*, 475 F.3d at 159 ("It is unclear what legal basis this argument has. . . .").

As the D.C. Circuit explained, application of both aspects of the dictionary definition of "imprisonment" makes sense in the context of §3582(a):

> [a] sentencing court deciding to keep a defendant locked up for an additional month is, as to that month, in fact choosing imprisonment over release. If the sentencing court adds the extra month to make a defendant eligible for a prison drug treatment or educational program, it fails to recognize that "imprisonment" is not an appropriate means of promoting rehabilitation.

Id. Indeed, contrary to the Ninth Circuit's suggestion, Congress would likely have added words had it intended to limit the term "imprisonment" to only one component of its traditional meaning, rather than perceiving a need to add additional words to capture what is already a standard definition of the term.[14]

The Ninth Circuit's reading also introduces an odd asymmetry into an otherwise symmetrical sentence. It addresses two sentencing decisions – the decision to impose a term and the determination of its length – and it does so by way of a subject, verb, and object that are equally applicable to each function: It is the court that is directed to consider the §3553(a) factors in connection with each function. Given this

---

[14] If the Ninth Circuit's reading of §3582(a) is, in fact, based upon choosing the most narrow possible reading of the term "imprisonment," that holding suggests ambiguity in that term, thus implicating the Rule of Lenity. *See* Part II, *infra*.

structure, it would be surprising to learn that the sentence also contained a participial clause that modified the noun "court" but only as to one of the two functions.[15]

Perhaps the Ninth Circuit's interpretation would be plausible if anything contained in the two prepositional phrases suggested the specialized meaning of "imprisonment" that *Duran* attributes to the participial phrase. There is nothing that does so. Rather, the word "imprisonment" is employed in both of the prepositional phrases that describe the court's activities: "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. . . ." 18 U.S.C. §3582(a). Thus, the word "imprisonment" is equally associated with both of the sentencing duties addressed in §3582(a).

Section 3582(a)'s prepositional phrases do not employ the term "imprisonment" in the special sense that the Ninth Circuit suggests: The term is not used to refer to the threshold decision to incarcerate. Rather, Congress employed the verb "to impose," not "to imprison" in both phrases. Using the verb "to imprison" (only) in the first of the two phrases would be a far more natural choice if Congress had intended (1) to adopt the specific meaning of imprisonment

[15] If the phrase is read as an absolute construction, it would modify the entire sentence and would therefore apply to both functions by definition.

advocated in *Duran* and (2) to create different analytical models applicable to the decisions to impose a term of imprisonment and to determine the length of the term.

The D.C. Circuit surmised that the distinction advocated by the Ninth Circuit – which, at the time the decision in *Sealed Case* was issued, was also advocated by the government[16] – was based on the belief that the participial phrase modified only one of the "in determining" prepositional phrases.

> Section 3582(a)'s straightforward language leaves no room for the government's distinction between selecting prison rather than a non-prison sentence and imposing a longer term of imprisonment. As a textual matter, the government nowhere explains how the phrase "recognizing that imprisonment is not an appropriate means of promoting . . . rehabilitation" can modify section 3582(a)'s first clause ("in determining whether to impose a term of imprisonment") but not its second ("in determining the length of the term").

573 F.3d at 849. *Sealed Case* correctly notes that nothing in the participial clause suggests that it modifies only one of the two prepositional phrases.

Moreover, a reading of the "recognizing" phrase under which it modified the first of the prepositional

---

[16] The Solicitor General agrees with Petitioner's reading of the statute.

phrases but not the second would be inconsistent with the last antecedent rule. *See generally Barnhart v. Thomas*, 540 U.S. 20, 26-27 (2003). Under that rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase it immediately follows. . . ." *Id.* at 26. Here, the "recognizing" phrase does not "immediately" follow the two prepositional phrases – it follows the phrase directing consideration of the §3553(a) factors – but if it is nonetheless to be read as modifying one of the two prepositional phrases, reading it to modify the first, rather than the last, is hardly consistent with the last antecedent rule. This rule suggests that the limiting phrase, if it applies to either prepositional phrase, would apply to the second, or last, such phrase.[17] Similarly, if the D.C. Circuit has correctly identified the rationale for *Duran*'s reading of §3582(a), that rationale's failure to comport with standard grammatical

[17] The last antecedent rule does not undercut either interpretation of the "recognizing" phrase offered by Petitioner. If the phrase is interpreted as an absolute construction, Petitioner's reading comports with the last antecedent rule, as it follows the entire sentence, which is what is modified by an absolute construction. If the "recognizing" phrase is read as a participial phrase, *Thomas* is not to the contrary: The "rule is not an absolute and can assuredly be overcome by other indicia of meaning. . . ." *See Thomas*, 540 U.S. at 26. The "recognizing" phrase cannot sensibly be read to apply to the noun "factors" or the verb phrase "shall consider the factors." *See supra* at 15-16. Indeed, the participial phrase would be better placed at the beginning of the sentence, *see generally* William Strunk, Jr. & E. B. White, *The Elements of Style* 13-14 (3d ed. 1979), but "may appear nearly anywhere in the sentence." Hacker, *The Bedford Handbook* 810.

rules – i.e., that participial phrases modify nouns and absolute constructions modify entire sentences – is yet another reason to reject it.

Last, it is clear that the "recognizing phrase" is mandatory and not merely a guideline. Because the "recognizing" phrase is either a participial phrase modifying the "the court" or an absolute construction modifying the entire sentence, Congress's decision to prohibit courts from either imposing a term of imprisonment or increasing the length of such a term based upon a desire for prison-based rehabilitation is pellucid.[18] As an initial matter, the predicate of the sentence contained in §3582(a) – "shall consider" – is mandatory, signaling that Congress is *directing* district courts how to proceed in imprisonment decisions. *See generally United States v. Navarro-Vargas*, 408 F.3d 1184, 1205 (9th Cir. 2005) (en banc) (describing "shall" as mandatory terminology).

A court "recognizing," as it must under this mandatory provision, that "imprisonment is not an appropriate means of promoting correction and rehabilitation," *see* 18 U.S.C. §3582(a), does not act rationally if it chooses to imprison in order to afford a defendant an opportunity to participate in an in-prison rehabilitation program, nor does it act

[18] "To acknowledge the existence or truth of; to admit knowledge or awareness of; to confess or avow," is an accepted definition of the verb *recognize*. *See Oxford English Dictionary*, http://www.oed.com/ (last visited Jan. 24, 2011).

rationally when it ensures that the defendant's sentence is long enough to permit such participation. A court purposefully imposing a term of imprisonment for those reasons necessarily chooses a "means" that it knows (or "recognizes") is "inappropriate" to effectuate its goals. That is an abuse of discretion. *Cf. Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). Thus, even the courts that mistakenly limit the reach of the "recognizing" phrase do not question that its effect is mandatory, not precatory. *See, e.g., Duran*, 37 F.3d at 561 (finding that §3582(a) "admonishes the court to recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation," and describing that admonition as a "prohibition" that *Duran* declined to extend "to sentence length determinations").

In short, regardless of whether the "recognizing" phrase is read as a participial phrase or an absolute construction, Congress requires district courts to "recogniz[e]" that neither the initial decision to imprison nor a decision to lengthen the term can advance the goal of rehabilitation. Because rational judges cannot both acknowledge that fact and conclude otherwise in a single case, Congress has barred imposing or lengthening terms of imprisonment on that basis.

C. The Structure of the Sentencing Reform Act Reveals a Purposeful Congressional Decision to Allow Courts to Consider Rehabilitative Concerns in Connection with Sentencing Decisions Except for Those That Involve Incarceration.

The Ninth Circuit also believed the structure of the Sentencing Reform Act and, in particular, §3582(a)'s reference to the factors set forth in §3553(a) support its reading of §3582(a). *See Duran*, 37 F.3d at 561 (noting that "§3553(a) includes 'correctional treatment' as a factor to be considered in determining sentence length."). While it is true that the Court looks to the structure of congressional enactments in construing their meaning, *see, e.g., McCreary County,* 545 U.S. at 861, the structure of the Sentencing Reform Act strongly supports Petitioner's reading of §3582(a).

The Sentencing Reform Act, in Chapter 227, sets forth a sentencing scheme that consists of four subchapters (A-D), entitled "General Provisions," "Probation," "Fines," and "Imprisonment." The first of these subchapters sets out the purposes that guide all sentencing: just punishment, deterrence, incapacitation, and rehabilitation. *See* 18 U.S.C. §§3553(a)(2)(A)-(D). The succeeding subchapters address the imposition of the three main types of sanctions available: probation, fines, and imprisonment. The general purposes of sentencing inform any sentence imposed. The individual subchapters guide the sentencing court in

the imposition of particular sanctions. And, as is the norm, the more specific implementation subchapters necessarily take precedence over the broader purposes contained in Subchapter A, "General Provisions."

The scheme directs that defendants be sentenced "so as to achieve the purposes set forth in subparagraphs (A) through (D) of §3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case." 18 U.S.C. §3551(a). That scheme contemplates three general categories of sanctions (probation, fines, and imprisonment), each of which is addressed in a separate subchapter:

> An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to –
>
> (1) a term of probation as authorized by subchapter B;
>
> (2) a fine as authorized by subchapter C; or
>
> (3) a term of imprisonment as authorized by subchapter D.

Id., §§(b)(1)-(3). A fine may be imposed in addition to probation or a term of imprisonment, but at least one of these sanctions must be imposed in every case. *See id.* ("An individual . . . shall be sentenced. . . .").[19]

[19] Other sanctions are also available. Section 3551(b) also refers to additional sanctions in the form of forfeiture (18 U.S.C.

(Continued on following page)

Thus, the §3553(a) factors inform the entire sentencing scheme, and imprisonment is but one option among three types of sanctions from which a court must choose in imposing sentence. *See* 18 U.S.C. §3551(b).

Section 3553(a) is entitled "Factors to be considered in imposing sentence." It provides that "[t]he court, in determining the particular sentence to be imposed, shall consider [the various factors set forth in subparagraphs (1) through (7)]." 18 U.S.C. §3553(a). As part of that mandate, the court must 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. §3553(a)(2)(D). Even so, §3553(a), like §3551(b), employs the generic term "sentence." Section 3553(a) does so both in its general mandate ("[t]he court, in determining the particular *sentence* to be imposed, shall consider. . . ."), and in the specific direction contained in its subparagraph (2) ("[t]he court . . . shall consider . . . the need for the *sentence* imposed [to accomplish the four goals of sentencing]"). *See* 18 U.S.C. §3553(a), (a)(2)(A)-(D) (emphases added). The

---

§3554), notice to victims (*id.*, §3555), and restitution (*id.*, §3556) that may be imposed in addition to those required by §3551(b). Imposition of a sentence of imprisonment, one of the alternative sanctions set forth in §3551(b), also gives rise to the authority to impose an additional sanction, a term of supervised release. *See* 18 U.S.C. §3583.

term "sentence" incorporates §3551(b)'s three potential sanctions – probation, fine, and imprisonment – at least one of which must be chosen by the sentencing court. *See id.*, §3551(b)(1)-(3). In light of that incorporation, the Ninth Circuit's claim that "§3553(a) includes 'correctional treatment' as a factor to be considered *in determining sentence length*," *see Duran*, 37 F.3d at 561 (emphasis added), is misinformed: Section 3553(a) contains no specific language referencing "sentence length" but rather is applicable to sentencing as a general matter and contemplates that the district court will choose from among the §3551(b) options: probation, fine, and imprisonment. *See* 18 U.S.C. §§3551(b)(1)-(3).

Imposition of each of the three penalties set forth in §3551(b) is governed by a separate statute. Each directs the court to consider the §3553(a) factors, and each has a structure that mirrors that of §3582(a). *See* 18 U.S.C. §3562(a) ("The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.").[20] Section 3562(a), which addresses the decision to impose a term of probation and decisions as to its length,

[20] *See also* 18 U.S.C. §3572(a) ("In determining whether to impose a fine, and the amount, time for payment and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a), [various additional factors].").

plainly directs that the §3553(a) factors are relevant to both determinations. And yet, the Ninth Circuit concludes that the identically structured reference to §3553(a) contained in §3582(a) refers only to "determining sentence length," *see Duran*, 37 F.3d at 561, and not the decision to impose a term of imprisonment in the first instance. This is contrary to the structure of the scheme as a whole, in which §3553(a)'s purposes inform both the decision to select a particular sanction and the more quantitative decision regarding the length of a term of probation or imprisonment (or the amount of a fine).

It may be that the Ninth Circuit comes to its conclusion by supposing there is a conflict between §3553(a)'s mandate that a sentencing court consider the purpose of rehabilitation and §3582(a)'s command that courts "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. §3582(a). The conflict that the Ninth Circuit apparently sees is readily resolved by invocation of the familiar canon that "'a more specific statute will be given precedence over a more general one. . . .'" *Corley v. United States*, 129 S. Ct. 1558, 1568 (2009) (quoting *Busic v. United States*, 446 U.S. 398, 406 (1980)). Here, §3553(a) is the general statute.[21] It sets out the aims of sentencing in general and makes no reference to the specific sentences available

[21] It is contained within Subchapter A of Ch. 227, entitled "General Provisions."

under §3551(b). It interacts with more specific statutes that govern the imposition of particular types of sentence. *See Manzella*, 475 F.3d at 158 ("'Sentence' has a broad meaning. It includes many types of possible punishment [as set forth in §3551(b) and 18 U.S.C. §3583], only one of which is 'imprisonment.'").

Each of the specific statutes directs sentencing courts to "consider the factors set forth in section 3553(a)," but only "to the extent that they are applicable." *See, e.g.*, 18 U.S.C. §3582(a). Thus, Congress generally foresaw that there will be individual cases where certain §3553(a) factors will be inapplicable. However, it also made the more specific determination that a court deciding whether to impose a term of imprisonment, and deciding upon the length of that term, must "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." *Id.* That admonition obviously limits the contexts in which a sentencing court may 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 . . . ," *see id.*, §3553(a)(2)(D), but *only* as to two determinations, (1) whether to impose a term of imprisonment, and (2) if such a term is imposed, how long it should be. This result "give[s] precedence" to the specific statute over the general. *See Corley*, 129 S. Ct. at 1568. Section 3553(a)(2)(D) still informs many sentencing decisions, including decisions regarding sentences to terms of probation, *see* 18 U.S.C. §3562(a), and sentences

to or including a fine. *See* 18 U.S.C. §3572(a). "So understood, the 'conflict' between §§ 3582(a) and 3553(a)(2)(D) wanes away: courts 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))." *Manzella*, 475 F.3d at 158 (emphasis in original).[22]

Once a court makes the determination to impose a term of imprisonment and decides upon its length – inquiries that do not implicate rehabilitative concerns – the sentencing court must nonetheless then turn to §3553(a)(2)(D), honoring its directive to consider the defendant's rehabilitative needs, "in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release. . . ." 18 U.S.C. §3583(c).[23] Because courts choosing a term of imprisonment will necessarily consider rehabilitation in connection with the decision to impose supervised release, *see id.*, and every sentence of probation or a fine also requires such consideration, *see id.*, §§3562(a), 3572(a), every *sentencing* decision necessarily implicates the rehabilitative concerns that courts are directed to "consider"

---

[22] *Accord Sealed Case*, 573 F.3d at 850-51; *Harris*, 990 F.2d at 596.

[23] Here, again, the relevant factors are considered with respect to both the imposition of the term of supervised release and its length.

under §§3553(a) and (a)(2)(D). "Thus, far from creating the conflict [that *Duran* and its progeny] fear[], these provisions[, sections 3553(a) and 3582(a),] harmonize comfortably with each other in a rational scheme that retains the sentencing goal of rehabilitation but pursues this goal through means other than incarcerating a defendant or keeping him in prison longer." *Sealed Case*, 573 F.3d at 851.

The overall structure of the Sentencing Reform Act, as described in *Sealed Case*, is repeated and reinforced in directions that Congress gave to the Sentencing Commission. Congress identified, as a "purpose" of the Commission, "establish[ing] sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2). . . ." 28 U.S.C. §991(b)(1)(A). Congress imposed the duty to consider those factors on sentencing courts as well. *See* 18 U.S.C. §§3553(a) & (a)(2). Even so, the Commission was directed to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 U.S.C. §994(k). The last phrase, of course, is identical to that contained in §3553(a)(2)(D). Thus, Congress again excepted imprisonment decisions from the scope of its directive to consider the rehabilitative concerns set forth in §3553(a)(2)(D). As the Court put it, the Sentencing Reform Act "rejects imprisonment as a means

of promoting rehabilitation, 28 U.S.C. §994(k), and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals, 18 U.S.C. §3553(a)(2)." *Mistretta,* 488 U.S. at 367.

A number of circuit courts have interpreted §994(k) so as to complement Petitioner's interpretation of §3582(a). *See, e.g.*, *Manzella*, 475 F.3d at 157-58. *Manzella* agreed with "[t]he Second Circuit . . . that rather than prohibiting rehabilitation as a goal of *sentencing*, §994(k) 'stands for the significantly different proposition that rehabilitation is not an appropriate goal for *imprisonment*.'" *Id.* at 157 (quoting *Maier*, 975 F.2d at 946) (emphases in original). *Accord Harris*, 990 F.2d at 596. *See also Maier*, 975 F.2d at 946 (interpreting §994(k) to demonstrate that "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. Incarceration would have to be justified by such traditional penological purposes as incapacitation, general deterrence, specific deterrence, and retribution."). Section 994(k)'s "'prohibition relates only to the imprisonment part of a sentence and not to any other terms of a sentence. In fact, the precise factors that are not to be considered in imposing *imprisonment* are set forth by statute as factors to be considered in imposing *sentence*.'" *Manzella*, 475 F.3d at 159 (quoting *Harris*, 990 F.2d at 596) (emphases in original). The interpretation of the Second, Third, and Eleventh Circuits thus "give[s] precedence" to the specific injunction contained in §994(k) over the general edict contained

in §991(b)(1)(A). *See Corley*, 129 S. Ct. at 1568. Section 994(k) thus sets the Sentencing Commission on the same path Congress laid out for sentencing courts: It carves out imprisonment as the one aspect of sentencing to which rehabilitative concerns are largely inapposite.

D. The *Duran* Construction Conflicts with Congress's Conclusion That Incarceration Does Not Reform. It Permits Courts to Ignore This Conclusion in the Vast Majority of Sentencing Decisions and to Lengthen Imprisonment Based on Uncertain Placement in Prison Rehabilitation Programs.

While Petitioner's construction is fully supported by the text and structure of §3582(a) – as well as the text and structure of the Sentencing Reform Act – should the Court move beyond them to consider the "purpose[ ] and history," *see McCreary County*, 545 U.S. at 861 (citation omitted), of the Sentencing Reform Act, they only confirm Petitioner's construction. Even the cases following *Duran* acknowledge that Congress at least prohibited district courts from making the initial decision to imprison – rather than choose probation or a fine – based upon rehabilitative concerns. *See, e.g., Hawk Wing*, 433 F.3d at 630; *Duran*, 37 F.3d at 561. The cases adopting that interpretation have not offered a policy rationale; indeed, one acknowledged that "it is difficult to see a distinction between the imposition of a sentence of

imprisonment and the length of imprisonment. . . ." *United States v. Jackson*, 70 F.3d 874, 879-80 n.6 (6th Cir. 1995).

It is "difficult to see [such] a distinction" because, "[a]s a matter of logic, the [*Duran*] position is . . . untenable. If, as the [*Duran* line of cases] concedes, imprisonment is not an appropriate means of promoting rehabilitation, how can *more* imprisonment serve as an appropriate means of promoting rehabilitation?" *Sealed Case*, 573 F.3d at 849 (emphasis in original). *See also id.* at 850 (observing that "[a] sentencing court deciding to keep a defendant locked up for an additional month is, as to that month, in fact choosing imprisonment over release"). The D.C. Circuit illustrated its point with the facts of *Sealed Case*, a case in which the district court imposed a sentence long enough to ensure that an addicted defendant convicted of distributing controlled substances would have an opportunity to participate in prison-sponsored rehabilitative programs. *See id.* at 847.

> Under the [*Duran*] theory, the district court would err by choosing imprisonment rather than, say, probation to help defendant "benefit from some of the programs and educational training and the medical treatment that is available in the federal prison system," Sentencing Tr. 31, yet would commit no error by choosing to keep defendant in prison longer to benefit from those same programs that would be "more available and more useful for [him] over a somewhat longer period

> of time than . . . over a very short period of time," *id.* at 31-32.

Sealed Case, 573 F.3d at 849.[24] Ultimately, the *Duran* interpretation must be based upon a congressional determination that *sending* someone to prison is "not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. §3582(a), but *keeping* someone there is.[25] Nothing in the Sentencing Reform Act reveals why that would be the case.

Sealed Case discusses one way in which *Duran* supposes Congress to have acted irrationally, by concluding that prison does not rehabilitate while allowing courts to increase imprisonment for rehabilitative purposes. A further incongruity is *Duran*'s assumption that Congress, having rejected the rehabilitative model, nevertheless allowed it to flourish in the majority of cases. It would be odd for a Congress that was so concerned about the inefficacy of prison-based

---

[24] As a further illustration, it would be permissible under *Duran* for a district court planning to sentence a defendant to 30 days in custody to increase that sentence to a year based on a 12-month prison drug treatment program, but it would be error to impose the same 12-month sentence if the sentencing court had initially contemplated a term of probation including, as a condition, a 30-day term in a halfway house.

[25] The legislative history, *see* Part I.E, *infra*, demonstrates that Congress almost certainly did not reach that conclusion. *See generally Mistretta*, 488 U.S. at 366 ("referr[ing] to the 'outmoded rehabilitation model' for federal criminal sentencing, and recogniz[ing] that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed") (quoting S. Rep. No. 98-225 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182).

rehabilitation[26] to draft a statute that permitted rehabilitation concerns to play a significant role in the majority of judicial decisions regarding imprisonment. Under the *Duran* reading of §3582(a), the limitation on considering prison-based rehabilitation applied only when a court was deciding whether there should be any imprisonment at all. Only then would the sentencing court be barred from ordering imprisonment for the purpose of "promoting correction and rehabilitation." 18 U.S.C. §3582(a).

But after passage of the Sentencing Reform Act, such decisions constitute a distinct minority of a sentencing court's decisions regarding imprisonment. There are numerous offenses for which a sentence of probation simply may not be imposed. *See generally* 18 U.S.C. §§3561(a)(1) (a sentence of probation is not permitted for Class A or Class B felonies),[27] (b)(2) (a sentence of probation is not permitted when expressly precluded by statute).[28] Moreover, upon passage of the Sentencing Reform Act, district court sentencing discretion was tightly cabined by Congress's decision to make compliance with the Sentencing Commission's Guidelines mandatory:

> the court shall impose a sentence of the kind, and within the [Guideline] range, referred to

---

[26] *See Mistretta*, 488 U.S. at 366-67.

[27] A Class A felony carries a maximum sentence of life in prison, while the maximum for a Class B felony is 25 years in prison. *See* 18 U.S.C. §§3581(b)(1), (2).

[28] *See, e.g.*, 21 U.S.C. §841(b)(1)(A) (barring probation for certain drug offenses).

> in [18 U.S.C. §3553(a)(4)] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. §3553(b)(1).[29] Thus, sentences not involving imprisonment were authorized only in the relatively unusual situation in which a probationary sentence was authorized by the Sentencing Commission.

Initially, the Guidelines Manual authorized probation only where the minimum sentence in the Guideline range was six months or less. *See* U.S.S.G. §5B1.1(a)(2) (1988). The 1988 Guideline Manual contained 43 offense level designations and six Criminal History Categories, resulting in 258 potential Guideline ranges, only 42 of which permitted a sentence of 6 months or less. *See id.* Thus, the great majority of sentencing decisions offered little or no opportunity for courts to contemplate meaningfully the merits of a probationary sentence – or a fine – as an alternative to a sentence to a term of imprisonment. Yet §3582(a), as read by *Duran*, authorized courts to impose additional prison time for the purpose of "promoting correction and rehabilitation" – by way of sentences within the Guideline range or based upon upward departure – in cases where imprisonment was a certainty and only the length of the term was in

---

[29] The Guidelines are now advisory. *See United States v. Booker*, 543 U.S. 220 (2005).

question. That category of sentencing decisions embraced the vast majority of post-Sentencing Reform Act cases. There is no policy reason explaining why a Congress that rejected the rehabilitative model[30] would have crafted a statute of such limited application.[31]

Finally, it is unlikely that Congress would adopt a policy allowing courts to fix the length of prison sentences based on prison-run rehabilitation programs. Unlike conditions of probation or supervised release, which the sentencing court may dictate, district courts have no authority to place prisoners in the custody of the Bureau of Prisons into particular facilities or programs. As the Third Circuit observed,

---

[30] *See Mistretta*, 488 U.S. at 367.

[31] In enacting the Sentencing Reform Act, Congress specifically instructed the Sentencing Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." 28 U.S.C. §994(m). Numerous commentators view §994(m) as "inviting the commission to set guidelines that would result in more persons being imprisoned for longer prison terms." *See, e.g.,* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 268 (1993). *Accord* Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 Stan. L. Rev. 37, 41 & n.14 (2005); Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 Wash. U. L.Q. 205, 212 & n.36 (1993). The likelihood that Congress sought longer prison terms makes it even less plausible to construe §3582(a) as limiting the role of rehabilitative concerns only to those cases where imprisonment was uncertain.

> sentencing judges have no authority to order the Bureau of Prisons to place a defendant in any given rehabilitative program that might be offered, though they may offer recommendations. . . . Allowing a judge to issue a specific term of imprisonment based on the uncertain placement of a defendant in a rehabilitative program is a practice Congress was unwilling to endorse.

Manzella, 475 F.3d at 158.

The instant case illustrates *Manzella*'s point: Petitioner has neither participated in the drug-treatment program contemplated by the district court nor is she housed in the facility it recommended. Although the district court "strongly" recommended that Petitioner be enrolled in RDAP and that she be housed at FCI Dublin, specifically because of the facilities and treatment options available there, JA 29, 36, neither of these requests will seemingly be honored by the Bureau of Prisons. Petitioner has, to date, not had the clinical interview required for enrollment in RDAP, although that interview must normally be scheduled no less than 24 months from the inmate's scheduled release date. *See* Bureau of Prisons, *Program Statement P5330.11* §2.5.9 (Mar. 16, 2009). The deadline for Petitioner's interview was October 17, 2010. Moreover, the RDAP requires a minimum of six to nine months to complete. *See id.* §2.5.10; 28 C.F.R. §550.53(a)(1). The inmate must be eligible to complete all three components of the program *at the time of intake* to be enrolled in the first place. *See* 28 C.F.R.

§550.53(a)(1). These rules create a cut-off time for Petitioner's enrollment of no later than January 2011, if she is to obtain the benefit of early release, allowing her to go on to the community-based component of RDAP. *See* 28 C.F.R. §550.53(a)(3).[32] Moreover, even the district court's request for placement at FCI Dublin, due to its specific programs and facilities, has not come to fruition; Petitioner is currently housed at FMC Carswell. *See* Bureau of Prisons, *Inmate Locator*, http://www.bop.gov (last visited Jan. 21, 2011). Consequently, none of the rehabilitative "benefits" intended by the district court's increased custodial sentence will be achieved.

In short, Congress adopted in §3582(a) a policy under which courts would neither commit defendants to prison nor extend those commitments for rehabilitative purposes and, rather, saw the courts' role as limited to making recommendations as to prison facilities. *See* 18 U.S.C. §3582(a) ("In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 USC §994(a)(2)."). *Duran*'s reading of

[32] There is also some question whether the Bureau of Prisons has classified Petitioner as categorically ineligible for RDAP for having a firearm conviction on which she is still serving a state probationary term. *See* 28 C.F.R. §550.55(b)(5)(ii) (inmates ineligible for RDAP if they have a "current felony conviction" for firearm possession).

§3582(a) is thus inconsistent with policy goals of the Sentencing Reform Act taken as a whole.

E. Legislative History Confirms the Plain Meaning of the Act.

Where statutory language is clear, there is no need to consider extrinsic sources in determining meaning. This is a fundamental rule of statutory interpretation: "When . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." *Rubin v. United States*, 449 U.S. 424, 430 (1981) (quotation and citations omitted). This Court has said that "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461 (1987) (quoting *United States v. James*, 478 U.S. 597, 606 (1986), *abrogated on other grounds by Central Green Co. v. United States*, 531 U.S. 425, 436 (2001)).

But this rule contains its own limitation: "[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (citing *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940)). So although the meaning of 18 U.S.C. §3852 is plain on its face, an examination of its legislative history is appropriate to confirm that Congress's intent is not contrary to that plain meaning.

See, e.g., James, 478 U.S. at 606-08 (examining the historical record in order to "conclude that the legislative history fully supports attributing to the unambiguous words of the statute their ordinary meaning").

The legislative history of the Sentencing Reform Act "fully supports attributing to the unambiguous words of the statute their ordinary meaning." *Id.* at 608. An examination of that history yields three relevant conclusions. First, Congress rejected the rehabilitative model of sentencing and the practice of "coercive rehabilitation" which previously held sway in federal courts. Second, Congress intended that imprisonment would be used for the aims of deterrence, incapacitation, and just punishment, while probation and supervised release would be used to promote rehabilitation. Third, Congress intended §3582 to prevent courts from imposing or lengthening a term of imprisonment for rehabilitation.

1. Congress rejected the "rehabilitative model" of sentencing.

Title 18 U.S.C. §3582 became law as part of the Sentencing Reform Act of 1984. The Act rejected the rehabilitative model, which supposed offenders would be reformed while in prison and then be released under supervision. For much of the country's history, federal criminal statutes set maximum penalties for crimes and left judges wide discretion to impose a fine, a term of probation, or a prison sentence on a

convicted offender. *See Mistretta,* 488 U.S. at 363. Beginning in 1910, the judge's role was supplemented by a system of parole: Having served some portion of their custodial sentence, offenders could be released from prison under the supervision of a parole officer. *Id.*; *see also Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938). The aim of this regime was the offender's rehabilitation. *Mistretta*, 488 U.S. at 363. It was thought that the parole commission's power to release an offender encouraged inmates to reform themselves. Reform took place in prison: The parole commission released only those offenders who, in its view, had been sufficiently rehabilitated. S.Rep. No. 98-225, at 40 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3223 ("Senate Report"); Stith & Koh, *supra*, at 227.

In passing the Sentencing Reform Act, Congress rejected the rehabilitative model. By the 1970s, there was widespread dissatisfaction with it. Chief amongst the criticisms was that the rehabilitative model had failed on its own terms: It did not reform offenders. This criticism is given broad airing in the Senate Report which accompanied the Act. That report is the primary extrinsic evidence of Congress's intent in enacting sentencing reform. *See Mistretta*, 488 U.S. at 366. It is replete with evidence of Congress's dissatisfaction with then current sentencing practice:

> [A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can

> really detect whether or when a prisoner is rehabilitated.

Senate Report at 38, *as reprinted in* 1984 U.S.C.C.A.N. at 3221. Congress explicitly rejected the practice of "coercive rehabilitation," whereby a prisoner's release depends upon his completion of correctional programs.

> At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of "coercive" rehabilitation – the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons.
>
> Recent studies suggest that this approach has failed, and most sentencing judges as well as the Parole Commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.

Senate Report at 40, *as reprinted in* 1984 U.S.C.C.A.N. at 3223.

Congress not only believed the old model had failed to achieve its goals but also feared that the use of prison for rehabilitation had led to needless incarceration of the poor and disadvantaged. And so, in drafting the Sentencing Reform Act, Congress sought

to ensure the end of such practices. For example, explaining the Act's directive to the Sentencing Commission to "assure that the guidelines and policy statements, in recommending a term of imprisonment *or length of a term of imprisonment*, reflect the general inappropriateness of considering education, vocational skills, employment record, family ties and responsibilities, and community ties," 28 U.S.C. §994(e) (emphasis added), the Senate Report states:

> As discussed in connection with subsection (d), each of these factors [listed in §994(e)] may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community.
>
> The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.

Senate Report at 174-75, *as reprinted in* 1984 U.S.C.C.A.N. at 3357.

Similarly, in discussing the Act's directive to the Sentencing Commission that the guidelines and policy statements should be "entirely neutral as to race, sex, national origin, creed, and socioeconomic status of offenders," 28 U.S.C. §994(d), the Senate Report explained:

> The Committee added [this] provision to make it absolutely clear that it was not the purpose . . . to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training.

Senate Report at 171, *as reprinted in* 1984 U.S.C.C.A.N. at 3357-58. It further provided:

> Indeed, in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training. This qualifying language in subsection (d), when read with the provisions in proposed §3582(a) of Title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the sole purpose[33] of rehabilitation, makes clear that *a defendant should not be sent to prison only because the prison has a program that "might be good for him."*

---

[33] Congress's use of "sole purpose" here is ambiguous. There are two possible readings of this sentence. The first is that §994(k) bars the imposition of imprisonment only when rehabilitation is the "sole" purpose that incarceration would serve. The second possible reading is that imprisonment may be imposed for any of the purposes of sentencing, except rehabilitation, the "sole" purpose that may not justify imprisonment. The former reading may seem more natural. But the latter is far more consistent with the whole of the Senate Report.

Senate Report at 171, n.531 (emphasis added), *as reprinted in* 1984 U.S.C.C.A.N. at 3357-58.

Congress did not dismiss rehabilitation as an aim of sentencing, but it intended that, even where imprisonment might aid in reform, courts would incarcerate only for other purposes:

> Subsection (k) makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided. A term imposed for another purpose may, however, have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence.

Senate Report at 176, *as reprinted in* 1984 U.S.C.C.A.N. at 3359.

Where incarceration is required for other purposes, but rehabilitation is an appropriate secondary purpose of a sentence, courts are to address it other than by lengthening a prison term:

> Subsection (a) specifies, in light of current knowledge, that the judge should recognize, in determining whether to impose a term of imprisonment, "that imprisonment is not an appropriate means of promoting correction and rehabilitation." This caution concerning the use of rehabilitation as a factor to be considered in imposing sentence is 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. This does not mean, of course, that

> if a defendant is to be sentenced to imprisonment for other purposes, the availability of rehabilitative programs should not be an appropriate consideration, for example, in recommending a particular facility.

Senate Report at 119, *as reprinted in* 1984 U.S.C.C.A.N. at 3302. *See also Sealed Case*, 573 F.3d at 851 (court may consider "rehabilitative needs for other reasons, such as in selecting a *shorter* term of imprisonment or in imposing a non-incarceration sentence.") (emphasis in original).

Congress's consistent view that a need for rehabilitation could not justify imposing or lengthening prison sentences is reflected, as well, in its judgment concerning what extraordinary circumstances might support reducing a sentence. Having renounced the use of prison to rehabilitate an offender, the Act rejects the idea that the offender's actual rehabilitation could justify reducing a prison sentence:

> The subsection specifically states, *consistent with the rejection by the committee of the rehabilitation theory as a basis for determining the length of a term of imprisonment*, that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" for reducing the sentence.

Senate Report at 179, *as reprinted in* 1984 U.S.C.C.A.N. at 3362 (discussing what was codified as 28 U.S.C. §994(t)'s directive that the Commission formulate guidelines for reduction of long sentences pursuant to 18 U.S.C. §3582(c)(1)(A)) (emphasis added).

Because imprisonment is to be employed only for deterrence, incapacitation, or punishment, and rehabilitation is to play no role in selection of a particular term, an offender's actual rehabilitation will not justify reducing his sentence. Using "rehabilitation theory to determine the length of a term of imprisonment" was the way the old regime worked. The Sentencing Reform Act was intended to, and did, sweep away this sentencing practice. *See Mistretta,* 488 U.S. at 366.

2. Congress intended that prison would be used to deter, incapacitate, and punish and that probation and supervised release would be used to rehabilitate.

While Congress rejected the former rehabilitative model, it did not reject rehabilitation as an aim in sentencing. Congress instructed that courts should consider deterrence, incapacitation, just punishment, *and* rehabilitation in selecting among sentencing options. But Congress intended that a court will make use of probation or supervised release when its primary concern is rehabilitation. On the other hand, when that court's primary aim is deterrence, incapacitation, or punishment, Congress intended that it achieve these aims through imprisonment. Throughout the Senate Report, Congress contrasts the very different purposes of these sentencing options:

> The purpose of rehabilitation may play an important role in sentencing an offender to a term of probation with the condition that he

> participate in a particular course of study, while the purposes of just punishment and incapacitation may be important considerations in sentencing a repeated or violent offender to a relatively long term of imprisonment.

Senate Report at 68, *as reprinted in* 1984 U.S.C.C.A.N. at 3251; *see also id.* at 91, *as reprinted in* 1984 U.S.C.C.A.N. at 3274 (imprisonment more effective for punishment, deterrence, or incapacitation while probation preferable for correction or rehabilitation).

Where concerns for punishment, deterrence, and incapacitation predominate, imprisonment is to be imposed:

> [I]f the Commission finds that the primary purpose of sentencing in a particular kind of case should be deterrence or incapacitation, and that a secondary purpose should be rehabilitation, the recommended guideline sentence should be imprisonment.

Senate Report at 76, n.288, *as reprinted in* 1984 U.S.C.C.A.N. at 3259, n.288.

On the other hand, where rehabilitation is the primary aim in imposing sentence, Congress intended courts to utilize probation. *Id.* at 76, *as reprinted in* 1984 U.S.C.C.A.N. at 3259 (rehabilitation is particularly important in formulating conditions of probation); *id.* at 76-77, *as reprinted in* 1984 U.S.C.C.A.N. at 3259-60 (rehabilitation important in determining

whether a sanction other than a term of imprisonment appropriate in a particular case).

Where concerns of deterrence, incapacitation, or punishment otherwise required a prison sentence, Congress intended that supervised release would serve the rehabilitative purposes of probation:

> The committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release – that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term . . . or to provide rehabilitation to a defendant who has spent a fairly short period in prison.

Id. at 124, *as reprinted in* 1984 U.S.C.C.A.N. at 3307.

When particular offender characteristics point to a need for rehabilitation, that may call for a sentence of probation, intermittent confinement, or community service, rather than imprisonment, for example:

> A defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service . . . as a condition of probation or supervised release.

Id. at 173 n.532, *as reprinted in* 1984 U.S.C.C.A.N. at 3356 n.532. The Committee also believed that:

> The Commission might conclude that a particular set of offense and offender characteristics called for probation with a condition of

> psychiatric treatment, rather than imprisonment.

Id. at 173, *as reprinted in* 1984 U.S.C.C.A.N. at 3356.

Similarly,

> [o]ther health problems of the defendant might cause the Commission to conclude that in certain circumstances involving a particularly serious illness a defendant who might otherwise be sentenced to prison should be placed on probation. . . . Of course, the physical condition of the defendant would play an appropriate role in the determination of conditions of probation and the programs that would be made available to the defendant in prison, such as drug or alcohol treatment programs.

Id.

And finally, with regard to the need for drug treatment, the need that informed the trial judge's decision to increase Petitioner's prison sentence:

> Drug dependence, in the Committee's view, generally should not play a role in the decision whether or not to incarcerate the offender. In an unusual case, however, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison for 'drying out,' as a condition of probation.

Id.

Congress was equally clear in insisting that, though they might counsel a sentence of probation, educational, vocational, psychiatric, medical, or drug-treatment needs should not be considered in determining either to imprison or the length of any imprisonment:

> Subsection (e) specifically requires that the Sentencing Commission insure that the Sentencing Guidelines and Policy Statements reflect the "general inappropriateness" of considering education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant in recommending a term of imprisonment or the length of a term of imprisonment. . . .
>
> * * *
>
> The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.

Id. at 174-75, *as reprinted in* 1984 U.S.C.C.A.N. at 3357-58.

3. Congress revised §3582, eliminating a provision that would have allowed imposing a term of imprisonment for rehabilitation.

Finally, the evolution of what became §3582 confirms that this provision was intended to bar courts from imposing *or* lengthening a prison term for the

purpose of rehabilitation. As originally written, the provision would have allowed imprisonment for rehabilitative purposes in exceptional cases. But as Congress's views on the rehabilitative model hardened, that allowance was eliminated.

Legislation that would evolve into the Sentencing Reform Act first passed either house of Congress in the Senate as S. 1437. *See* Senate Report at 37, *as reprinted in* 1984 U.S.C.C.A.N. at 3220. That bill contained a general prohibition against rehabilitative imprisonment. This was contained in a directive to the United States Sentencing Commission in a provision that would become 28 U.S.C. §994(k):

> The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed education or vocational training, medical care, or other correctional treatment.

However, this general provision, as then written, set out an exception. It would not apply "in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact." S. 1437, 95th Cong. §124 (as reported by S. Comm. on the Judiciary, Nov. 15, 1977). Eventually, Congress abandoned this approach, doing away with all rehabilitative imprisonment. In the 96th Congress, the Senate Judiciary Committee again reported a bill that included sentencing reform. S. 1722, 96th Cong.

(as reported by S. Comm. on the Judiciary, Jan. 17, 1980).[34] This new bill eliminated the provision authorizing the use of coercive rehabilitation in exceptional cases, making the Sentencing Reform Act's ban on imprisonment for rehabilitative purposes complete. *See id.*, §125.

The entirety of the legislative history shows that Congress believed imprisonment did not rehabilitate offenders and that it had been used inappropriately to warehouse the poor and disadvantaged. In enacting the Sentencing Reform Act, Congress intended that prison be used to deter, to incapacitate, and to punish, not to rehabilitate. In crafting §3582, Congress intended to bar imposing or extending a term of imprisonment for rehabilitative purposes. In sum, there is nothing in the legislative history of the Act which conflicts with the statute's plain meaning.

II. If the Court Finds §3582(a) Ambiguous, the Rule of Lenity Applies to Prohibit Increased Incarceration to Promote Rehabilitation.

Petitioner maintains, along with the Third and D.C. Circuits, that the language of §3582(a) is clear and unambiguous in constraining the use of rehabilitation both as a basis to impose imprisonment and to lengthen the term of custody. *See* Parts I.A-D, *supra*. The legislative history of the Sentencing Reform Act

---

[34] *See* Stith & Koh, *supra*, at 240 & n.108, for a discussion of this proposed legislation.

fully confirms that conclusion. *See* Part I.E, *supra*. Nonetheless, should the Court find that the statute is not clear, but is ambiguous as to the scope or function of the "recognizing" phrase, the Rule of Lenity requires the matter should still be decided as Petitioner and the Solicitor General urge.

"It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom penalties are sought to be imposed." 3 N. Singer & J. Singer, *Sutherland Statutes and Statutory Construction* §59:3 (7th ed. 2009) (footnotes omitted) (henceforth *Sutherland*). The Rule of Lenity has been applied by the Court as a corollary to the strict-interpretation rule. *See id.* §59:4 (citing *Staples v. United States*, 511 U.S. 600 (1994), and *Busic,* 446 U.S. 398). Indeed, its long and repeated application by the Court justifies its characterization as a "venerable rule" of construction. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion).[35]

"[W]hen a court is faced with two reasonable interpretations of a criminal statute and congressional

---

[35] Since Chief Justice Marshall's first application of lenity in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820), the Court has had many occasions to discuss the role of lenity in construing ambiguous, penal statutes. *See, e.g., McBoyle v. United States,* 283 U.S. 25 (1931); *Ladner v. United States*, 358 U.S. 169 (1958); *United States v. Bass*, 404 U.S. 336 (1971); *Liparota v. United States*, 471 U.S. 419 (1985); *Crandon v. United States*, 494 U.S. 152 (1990); *Reno v. Koray*, 515 U.S. 50 (1995); *Holloway v. United States*, 526 U.S. 1 (1999); *Barber v. Thomas*, 130 S. Ct. 2499 (2010).

intent is ambiguous, the doctrine of lenity requires the court to adopt the less punitive alternative." *Sutherland* §59:4 (footnote omitted). "'[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.'" *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (quoting *Lewis v. United States*, 445 U.S. 55, 65 (1980)). "In past cases the Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Id.* The rule applies equally to statutes setting severity of punishment as to those defining substantive offenses, as the doctrine is "rooted in 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *R.L.C.*, 503 U.S. at 305 (plurality opinion) (quoting *Bass*, 404 U.S. at 348) (internal quotations omitted).

Here, the case law limiting the "recognizing" phrase in §3582(a) to only imposition, not length, of a prison term appears to be based on two types of potential ambiguity: a structural one and a lexical one. The first involves a question of the scope of the "recognizing" phrase: The *Duran* reasoning suggests that "recognizing" has narrow and selective semantic scope, encompassing only the first conjunct of the complex prepositional phrase, that is, the prepositional phrase referencing the initial imposition of imprisonment. *See* 37 F.3d at 561 ("[Section 3582(a)] admonishes the court to recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation. Once imprisonment is chosen as a punishment, however, §3582 does not prohibit consideration of

correction and rehabilitation in determining the length of imprisonment."). As discussed above, the more plausible and grammatically supported analysis of the "recognizing" phrase affords it wide scope, encompassing both conjuncts, the imposition *and* the length of imprisonment.

The potential lexical ambiguity identified in *Duran* involves the meaning of the word *imprisonment*: *Duran* takes it to mean only the imposition of incarceration. *See id.* ("If Congress had intended to prohibit sentencing judges from considering correction and rehabilitation in setting the length of the sentence, it could have enacted a statute that admonished judges to recognize 'that imprisonment *or the length of imprisonment* is not an appropriate means of promoting correction and rehabilitation.'"). However, as recognized in *Sealed Case*, a more common meaning is the "'fact or condition of being imprisoned.'" 573 F.3d at 850 (quoting the *Oxford English Dictionary*).

A third possible ambiguity, not discussed in the case law, is one involving the illocutionary force[36] of the "recognizing" clause, that is, whether the clause is intended to be directive or precatory. *Amicus curiae* may contend, regardless of the grammatical structure

---

[36] Relating to "[a]n act such as ordering, warning, undertaking, performed in saying something." *Oxford English Dictionary*, *illocution,* http://www.oed.com/ (last visited Jan. 21, 2011). *See also* John L. Austin, *How to Do Things with Words* 98-109 (1962).

or the lexical nuances of individual words, that Congress may have intended the "recognizing" phrase to be a guideline, not a mandate, permitting sentencing courts to consider rehabilitation for imprisonment decisions, despite its express disfavor. However, as argued above, Part I.B, the directive nature of the "recognizing" language has never been questioned in the caselaw, and a precatory interpretation is inconsistent with the mandatory language used in the main clause.

In Petitioner's view, there is no ambiguity sufficient to trigger the application of the Rule to the provision at issue. The Court has emphasized that the ambiguity necessary to trigger the Rule of Lenity must be such that "[one] can make 'no more than a guess as to what Congress intended.'" *Koray*, 515 U.S. at 65 (quoting *Ladner*, 358 U.S. at 178); *see also Holloway*, 526 U.S. at 12 n.14. If the Court indeed can no more than guess whether Congress intended to: (1) follow the usual rules of grammar; (2) include the common meanings of the words used; and (3) continue its generally directive intent in the Sentencing Reform Act, by including *both* the imposition and length-of-imprisonment decisions within the scope of the "recognizing" clause, then, under the Rule of Lenity, the statute nonetheless must be construed in a defendant's favor to prohibit using rehabilitative reasons to increase incarceration. *See R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring in part and concurring in judgment) ("The more lenient interpretation must prevail."). The lenient construal is to prohibit extra prison time for rehabilitation, requiring instead

that treatment needs be addressed by non- or post-custodial sentencing options.

This makes sense in light of the policy considerations underlying the Rule of Lenity. The strict construction principle "is founded upon the public policy of protecting the interests of those against whom penalties are sought to be enforced." *Sutherland* §59:5. Consequently, where the meaning of applicable penal statutes is in doubt, "courts must weigh the interests of the individual against the interests of the public." *Id.* Here, the balance of interests starkly supports Petitioner's interpretation. That is because she has a strong liberty interest in avoiding an illegal sentence resulting in excessive imprisonment. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). On the other hand, as reflected in Congress's express findings regarding the non-correlation between prison and rehabilitation, *see* Part I.E, *supra*, there is *no* public interest in imprisoning someone for more time than is otherwise appropriate to punish, deter, or incapacitate, solely on a discredited and ineffectual theory of rehabilitation. The lack of a public interest is particularly striking here, where the hoped-for enrollment in the RDAP program will not even take place, *see supra*, at 43-44, and so the excessive prison time imposed by the district court benefits no one. Moreover, any genuine public interest in Petitioner's rehabilitation can – and should properly – be addressed by

the conditions of supervised release, following the punitive portion of the sentence served in prison.

The application of the Rule of Lenity is particularly appropriate here. Even if there is reasonable ambiguity about the proper scope, word choice, or intended force in the drafting of §3582(a), the Rule of Lenity requires the Court effect the will of Congress by prohibiting imposition of prison terms for rehabilitative purposes.

CONCLUSION

Petitioner's sentence should be reversed and her case remanded for resentencing.

Respectfully submitted,

REUBEN CAMPER CAHN*
STEVEN F. HUBACHEK
JAMES FIFE
FEDERAL DEFENDERS OF
SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California
92101-5008
Telephone: (619) 234-8467
Reuben_Cahn@fd.org

**Counsel of Record*

18 U.S.C. § 3551. Authorized sentences

(a) In general. – Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals. – An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to –

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

* * *

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) 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. Imposition of a sentence of imprisonment

(a) Factors to be considered in imposing a term of imprisonment. – The court, in determining

whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

* * *

---

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

* * *

(b) The purposes of the United States Sentencing Commission are to –

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) 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; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

---

28 U.S.C. § 994. Duties of the Commission

* * *

(b)

(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that

range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

* * *

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance –

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

* * *

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

* * *

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that,

as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.