

No. 10-5400

In the Supreme Court of the United States

ALEJANDRA TAPIA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
SUPPORTING VACATUR**

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QUESTION PRESENTED

Whether 18 U.S.C. 3582(a) precludes a district court from imposing a longer term of imprisonment in order to promote a defendant's rehabilitation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted in 376 Fed. Appx. 707.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2010. The petition for a writ of certiorari was filed on July 9, 2010, and the petition was granted on December 10, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-20a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of bringing an unauthorized alien into the United States for financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii); bringing an unauthorized alien into the United States without presentation, in violation of 8 U.S.C. 1324(a)(2)(B)(iii); and failing to appear before a court as required by the conditions of release, in violation of 18 U.S.C. 3146. Pet. App. A1-A2. The district court sentenced her to 51 months of imprisonment, to be followed by three years of supervised release. *Id.* at A2; 4/30/2009 Sent. Tr. 20-21 (Sent. Tr.). The court of appeals affirmed her sentence. Pet. App. A1-A2.

1. The Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.* and 28 U.S.C. 991 *et seq.*, provides a comprehensive criminal sentencing law for the federal system. In 18 U.S.C. 3553(a), the SRA sets out factors that a district court must consider when fashioning a defendant's overall sentence. Among other things, the court must consider 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. 3553(a)(2).

Other provisions of the SRA give more specific guidance on how the Section 3553(a) factors apply in the context of the various sentencing options, which include not only imprisonment but also probation, fines, and supervised release. Thus, 18 U.S.C. 3562(a) addresses how the factors apply when the court is imposing probation; 18 U.S.C. 3572(a) addresses how they apply when the court is imposing a fine; 18 U.S.C. 3583 (2006 & Supp. III 2009) addresses how they apply when the court is imposing or revoking supervised release; and 18 U.S.C. 3582(a) addresses how the factors apply when the court is imposing a term of imprisonment.

Section 3582(a) provides:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

18 U.S.C. 3582(a).¹

The SRA also provides for the promulgation by the United States Sentencing Commission of federal Sentencing Guidelines for district courts to use in determining the appropriate sentence. 28 U.S.C. 994(a)(1). The SRA includes a variety of instructions to the Sentencing Commission on the content of the Guidelines. Among

¹ Section 3582(a) also provides that “[i]n 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.” 18 U.S.C. 3582(a).

other things, the SRA directs the Commission to ensure that the Guidelines restrict the use of imprisonment to promote a defendant's rehabilitation. 28 U.S.C. 994(k). Specifically, Section 994(k) provides:

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.

Ibid.

2. On January 14, 2008, petitioner and an accomplice, Tinamarie Debenedetto, were arrested at the border crossing in San Ysidro, California, when they attempted to smuggle two illegal aliens into the United States. 12/16/2008 Tr. 510, 538-551, 637-639; 12/17/2008 Tr. 681, 698-699. The day before, petitioner and Debenedetto had traveled from Los Angeles, California, to Tijuana, Mexico, where they checked into a hotel. *Id.* at 681-683. On the morning of January 14th, they met with their "boss" to discuss "payment arrangements" for the alien smuggling. *Id.* at 689. Later that day, they were driven to a house where a jeep for transporting the aliens was located. *Id.* at 689-691. The jeep had been re-engineered to operate on an alternative fuel source, so that people could be secreted in the gas tank compartment. 12/16/2008 Tr. 610, 614, 623. Petitioner helped fit the two aliens into the hidden compartment. 12/17/2008 Tr. 691-692. Debenedetto then drove the jeep, with petitioner in the passenger seat, to the border crossing. *Id.* at 692; Presentence Investigation Report (PSR) 1. A border officer smelled a strong odor of gasoline emanating from the jeep. 12/16/2008 Tr. 538-543.

Upon further inspection, border authorities discovered the two illegal aliens jammed into the modified gas tank compartment. *Id.* at 546-551, 605-608.

On January 30, 2008, petitioner and Debenedetto were indicted by a grand jury sitting in the United States District Court for the Southern District of California on one count of bringing an unauthorized alien into the United States for financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii); and one count of bringing an unauthorized alien into the United States without presentation, in violation of 8 U.S.C. 1324(a)(2)(B)(iii). Indictment 1-2.

While petitioner was released on bond pending further proceedings, she fled, and a bench warrant was issued for her arrest. 12/17/2008 Tr. 863-865; PSR 2. She was apprehended six months later, in possession of paraphernalia for using methamphetamine, a sawed-off shotgun, and mail belonging to other persons, which petitioner admitted she intended to use to commit identity theft. 12/16/2008 Tr. 587-593, 597; Sent. Tr. 19; Gov't Mot. for Upward Adjustment and Upward Departure 5; PSR 4-5.

On November 25, 2008, the government filed a superseding indictment that added a third count charging petitioner with failing to appear before a court as required by the conditions of her release, in violation of 18 U.S.C. 3146. Superseding Indictment 1-3. A jury subsequently found petitioner guilty of all three charges. Judgment 1.

3. At petitioner's sentencing hearing on April 30, 2009, the district court, following the recommendations in the PSR, grouped the three counts of conviction and assigned petitioner a base offense level of 12 under Sentencing Guidelines § 2L1.1(a)(2). Sent. Tr. 12; PSR 11.

The court imposed a six-level enhancement because petitioner's offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury, Guidelines § 2L1.1(b)(6), and a two-level enhancement for obstruction of justice, Guidelines §§ 2J1.6, comment. (n.3), 3C1.1. Sent. Tr. 12-13; PSR 11. The enhancements yielded a total offense level of 20. PSR 12. Petitioner had three prior criminal convictions, which generated six criminal history points and placed her in criminal history category III. PSR 4-5. Petitioner's recommended sentencing range under the Guidelines was 41 to 51 months of imprisonment. PSR 12. The district court sentenced her to a total term of 51 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 20-21.

The district court justified the sentence under the general sentencing criteria in 18 U.S.C. 3553(a). Sent. Tr. 16-20. Regarding petitioner's history and characteristics, the court acknowledged that petitioner had a history of sexual and physical abuse. *Id.* at 16-17. The court observed, however, that she had failed to get help when it was available and had instead associated with the wrong people and become involved in alien smuggling. *Ibid.* The court further noted that petitioner had jumped bail after she was arrested and "engaged in a lot more serious activity" while she was a fugitive, including using methamphetamine, possessing a sawed-off shotgun, and taking steps to commit identity theft. *Id.* at 17-18. Regarding the nature and circumstances of the offense of conviction, the court stressed that smuggling aliens was "serious," *id.* at 18, that petitioner committed the offense in a way that "created a substantial risk of death or serious bodily injury," *id.* at 17, and that "a sufficient sentence has to be imposed for that," *id.* at 18.

The district court emphasized that “the sentence has to deter criminal conduct by others, and it has to protect the public from further crimes” by petitioner. Sent. Tr. 18. The court stated that those concerns were “a big factor here,” *ibid.*, noting that this offense was “not [petitioner’s] first felony conviction” and emphasizing that petitioner’s criminal conduct while a fugitive was “of serious concern to the court,” *id.* at 17-18. See *id.* at 18 (stating that this conduct was “really, really of concern to the court”); *id.* at 19 (reiterating that “the fact that she was launching into a new criminal career while she was a fugitive really is of concern to the court and that’s something that motivates imposing a sentence that in total is at the high end of the guideline range”).

The district court also stated that “one of the factors” affecting the length of imprisonment was that the sentence be “sufficient to provide needed correctional treatment.” Sent. Tr. 18-19. For that reason, the court explained, it wanted petitioner to be imprisoned “long enough to get the 500 Hour Drug Program” administered by the Bureau of Prisons (BOP). *Id.* at 19.²

The district court also noted that the sentence had to be sufficient but not greater than necessary to achieve the purposes of sentencing. Sent. Tr. 18-19. The court stated 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 that the sentence it was imposing was “necessary * * * for all the reasons” previously stated. *Id.* at 20.

² The court noted that it would “strongly recommend[.]” to the BOP that petitioner serve her sentence at FCI Dublin/Pleasanton and that she participate in the 500 Hour Drug Program at that institution. Sent. Tr. 20-21.

After announcing the sentence, the district court asked petitioner's counsel whether she had any objections. Sent. Tr. 23. Counsel stated that she had none. *Id.* at 24.

4. The court of appeals affirmed petitioner's sentence in an unpublished memorandum opinion. Pet. App. A1-A2.

The court explained that petitioner argued on appeal that "the district court committed plain error by basing her 51-month sentence on speculation about whether and when [she] could enter and complete the Bureau of Prison's 500-hour drug abuse treatment program." Pet. App. A2. As part of that claim, petitioner argued, for the first time, that 18 U.S.C. 3582(a) precludes a district court from lengthening a term of imprisonment to promote a defendant's rehabilitation. Pet. C.A. Br. 18-23. Petitioner acknowledged that the court of appeals had previously rejected that argument in *United States v. Duran*, 37 F.3d 557 (9th Cir. 1994), but petitioner contended that *Duran* had been incorrectly decided, noting that its analysis had been rejected by at least two other circuits. Pet. C.A. Br. 18-23 (citing *In re Sealed Case*, 573 F.3d 844 (D.C. Cir. 2009), and *United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007)).

The court of appeals held that the district court had committed "[n]o reversible error." Pet. App. A2. In support, the court of appeals cited *Duran*, which had held that, although Section 3582(a) prohibits a sentencing court from considering rehabilitation in determining whether to impose a term of imprisonment in the first instance, the statute allows a court to rely on rehabilitation to increase the length of a term imposed for other reasons. *Duran*, 37 F.3d at 561. The *Duran* court reasoned that "Section 3582 distinguishes between the de-

terminations of whether to impose a term of imprisonment and of the actual length of the imprisonment” and “admonishes the court to recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation.” *Ibid.* “If Congress had intended to prohibit sentencing judges from considering correction and rehabilitation in setting the length of the sentence,” the court stated, “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.’” *Ibid.* The *Duran* court further reasoned that limiting Section 3582(a)’s prohibition to the determination whether to impose a term of imprisonment in the first instance harmonizes Section 3582(a) with Section 3553(a), which “includes ‘correctional treatment’ as a factor to be considered” at sentencing. *Ibid.*

SUMMARY OF ARGUMENT

The SRA “rejects imprisonment as a means of promoting rehabilitation.” *Mistretta v. United States*, 488 U.S. 361, 367 (1989). To that end, 18 U.S.C. 3582(a) states that a district “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 [general sentencing] factors set forth in [18 U.S.C.] 3553(a) to the extent they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.” Section 3582(a) categorically prohibits a sentencing court from either imposing or lengthening a term of imprisonment in order to rehabilitate the defendant.

A. Section 3582(a)’s text makes clear that its restriction on the consideration of rehabilitation applies both

when a court decides whether to impose a term of imprisonment and when the court decides how long a term to impose. The statute expressly states that a sentencing court must “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation” both “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). The statutory text also makes clear that Section 3582(a)’s prohibition on using rehabilitation to justify imprisonment is categorical. Whenever a sentencing court imposes a term of imprisonment, or increases the length of the term, in order to facilitate the defendant’s rehabilitation, the court fails to “recogniz[e]” that imprisonment is not an “appropriate” means of promoting rehabilitation.

B. The statutory context supports giving Section 3582(a) its natural meaning. Another provision of the SRA directs the United States Sentencing Commission to “insure” that the Sentencing Guidelines “reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” 28 U.S.C. 994(k). Congress intended Sections 994(k) and 3582(a) to work in tandem to implement its determination that “imprisonment is not an appropriate means of promoting correction and rehabilitation.” S. Rep. No. 225, 98th Cong., 1st Sess. 76 (1983) (Senate Report). Other portions of Section 994 make clear that the restriction in Sections 994(k) and 3582(a) is categorical. Unlike Section 994(k), several other subsections instruct the Commission to ensure only that the guidelines reflect the “general” inappropri-

ateness of considering specified factors at sentencing. By omitting the qualifier “general” from Sections 994(k) and 3582(a), Congress signaled that those provisions are a flat bar, rather than non-binding “general” guidance.

Interpreting Section 3582(a) as a categorical bar on imposing or lengthening a term of imprisonment to promote a defendant’s rehabilitation is also consistent with 18 U.S.C. 3553(a)(2)(D). That provision directs courts to consider a defendant’s rehabilitative needs in determining the overall sentence, which can include other sanctions, such as probation and supervised release, in lieu of or in addition to imprisonment. 18 U.S.C. 3551(b). The provisions governing non-incarcerative sentencing options permit, and sometimes require, consideration of rehabilitation. *E.g.*, 18 U.S.C. 3562, 3563 (2006 & Supp. III 2009), 3583 (2006 & Supp. III 2009). Section 3582(a), however, prohibits courts from relying on a defendant’s rehabilitative needs in deciding to impose or lengthen a term of imprisonment.

C. Construing Section 3582(a) as prohibiting courts from relying on rehabilitation to justify either imposing a term of imprisonment at all or lengthening the term imposed best advances the SRA’s goal of eliminating rehabilitation as a purpose of imprisonment. Moreover, the practice of tying a defendant’s release date from prison to a determination that the defendant had been rehabilitated was a central component of the sentencing system that Congress rejected in enacting the SRA. Interpreting Section 3582(a) to bar sentencing courts from imposing or lengthening a term of imprisonment to facilitate a defendant’s rehabilitation also makes sense because a court cannot guarantee that a defendant will actually be able to participate in a rehabilitative program. Although sentencing judges can recommend that

defendants be placed in particular facilities or programs, the BOP has sole discretion to make placement decisions.

D. The legislative history of the SRA and the evolution of the congressional bills that culminated in the SRA's enactment confirm that Section 3582(a) imposes a categorical bar on using rehabilitation to justify imposing or lengthening a term of imprisonment. Congress considered legislation that would have allowed courts to rely on rehabilitation as a justification for a term of imprisonment in the exceptional case, but Congress chose to enact statutory language that eliminated that exception. And the committee reports accompanying the evolving legislation consistently stated that the restrictions on relying on rehabilitation applied both to decisions whether to impose a term of imprisonment and to decisions about how long a term to impose.

E. Although no court of appeals has interpreted Section 3582(a)'s directive against using rehabilitation to justify imprisonment as anything less than a categorical ban, some circuits have concluded that the prohibition applies only to a court's determination whether to impose a term of imprisonment in the first instance. The reasoning of those courts is not persuasive. They have read the word "imprisonment" to encompass only initial placement in prison and not continued incarceration. Both dictionary definitions and context, however, make clear that "imprisonment" includes both the "action of imprisoning" and the "condition of being imprisoned." *In re Sealed Case*, 573 F.3d 844, 850 (D.C. Cir. 2009) (quoting 7 *Oxford English Dictionary* 746 (2d ed. 1989) (*OED*)). The courts have also relied on the absence of the phrase "the length of imprisonment" from the directive that courts "recogniz[e] that imprisonment is not an

appropriate means of promoting correction and rehabilitation.” 18 U.S.C. 3582(a). But including that phrase was unnecessary given the statute’s explicit statement that the directive applies “in determining the length of the term” of imprisonment. *Ibid.* Finally, the courts have relied on a perceived conflict between the broader reading of Section 3582(a) and Section 3553(a)(2)(D), as well as an isolated statement in the legislative history. Sections 3582(a) and 3553(a)(2)(D) do not conflict, however, and the legislative and drafting history, in their entirety, confirm that Section 3582(a)’s prohibition on considering rehabilitation applies with equal force to a court’s decision whether to impose a term of imprisonment and its decision about how long a term to impose.

ARGUMENT

SECTION 3582(a) PRECLUDES A DISTRICT COURT FROM IMPOSING OR LENGTHENING A TERM OF IMPRISONMENT TO PROMOTE A DEFENDANT’S REHABILITATION

In the SRA, Congress enacted “sweeping reforms” of the federal criminal sentencing system. *Mistretta v. United States*, 488 U.S. 361, 366 (1989). Congress abandoned the prior system of indeterminate sentencing and parole, which was based on the theory that rehabilitation is the primary goal of sentencing and that defendants should be kept in prison until they have been rehabilitated. *Id.* at 363-368; Senate Report 38, 40. Concluding that “this model of ‘coercive’ rehabilitation” had not only “failed” but also caused widespread and unjustified sentencing disparities, Congress enacted a determinate sentencing system in which rehabilitation played a much more limited role. *Id.* at 40; see *id.* at 40-50; *Mistretta*, 488 U.S. at 366-368.

Although rehabilitation remains a purpose of sentencing, 18 U.S.C. 3553(a)(2)(D), which encompasses a range of components other than imprisonment, 18 U.S.C. 3551(b), the SRA “rejects imprisonment as a means of promoting rehabilitation.” *Mistretta*, 488 U.S. at 367 (emphasis added). To that end, the SRA requires a sentencing 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,” to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.” 18 U.S.C. 3582(a). The courts of appeals agree that Section 3582(a) prohibits sentencing courts from imposing a term of imprisonment, rather than some other form of sentence, in order to promote a defendant’s rehabilitation. The circuits disagree, however, on whether Section 3582(a) also prohibits a court that has decided to impose a term of imprisonment for other reasons from increasing the term to promote rehabilitation.³

³ Compare *In re Sealed Case*, 573 F.3d 844, 849-851 (D.C. Cir. 2009) (Section 3582(a) prohibits both imposing and lengthening a term of imprisonment to promote rehabilitation.), and *United States v. Manzella*, 475 F.3d 152, 157-161 (3d Cir. 2007) (same), with *United States v. Jimenez*, 605 F.3d 415, 424-425 (6th Cir. 2010) (Section 3582(a) prohibits only imposing a prison term for that purpose, not lengthening the term.); *United States v. Hawk Wing*, 433 F.3d 622, 629-630 (8th Cir. 2006) (same); and *United States v. Duran*, 37 F.3d 557, 561 (9th Cir. 1994) (same). See *United States v. Higdon*, 531 F.3d 561, 564 (7th Cir. 2008) (suggesting that Section 3582(a) precludes lengthening a prison term to promote rehabilitation); *United States v. Anderson*, 15 F.3d 278, 280-281 (2d Cir. 1994) (endorsing that interpretation of Section 3582(a), but explaining that it does not apply to the revocation of supervised release); see also *United States v. Giddings*, 37 F.3d 1091, 1094 (5th Cir. 1994) (endorsing the contrary interpretation of Section 3582(a)).

In this case, the Ninth Circuit, following its earlier decision in *United States v. Duran*, 37 F.3d 557 (1994), held that Section 3582(a) permits a district court to increase a defendant's term of imprisonment in order to promote the defendant's rehabilitation. Pet. App. A1-A2. The Ninth Circuit's holding is incorrect. The statutory text, related provisions of the SRA, the statute's purposes, and the legislative and drafting history all indicate that Section 3582(a) prohibits a district court both from imposing and from lengthening a term of imprisonment in order to rehabilitate the defendant.

A. The Plain Text Of Section 3582(a) Precludes A District Court From Either Imposing Or Lengthening A Term Of Imprisonment In Order To Rehabilitate The Defendant

1. Under the SRA, a district court has a range of options when sentencing a defendant following his or her conviction for a crime. The court may impose a term of imprisonment, a term of probation, or a fine. 18 U.S.C. 3551(b). The court may impose a fine in addition to any other sanction, and the court may order restitution, forfeiture, or notification of victims. *Ibid.*; 18 U.S.C. 3554, 3555, 3556. If the court imposes a term of imprisonment, the court may also require that the defendant serve a term of supervised release after completing the prison term. 18 U.S.C. 3583(a).

In determining an appropriate sentence, the court must consider the general sentencing criteria in 18 U.S.C. 3553(a), including the need for the sentence imposed:

in a case involving revocation of supervised release), cert. denied, 514 U.S. 1008 (1995).

(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. 3553(a)(2). These four considerations—“just deserts,” deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing, and the court must impose sentence “so as to achieve the[se] purposes * * * to the extent they are applicable in light of all the circumstances of the case.” 18 U.S.C. 3551(a).⁴

In imposing “a term of imprisonment,” however, the court must also comply with Section 3582(a), which restricts the court’s reliance on the purpose of rehabilitation. Section 3582(a) states that “[t]he 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 appropri-

⁴ The other factors that Section 3553(a) requires sentencing courts to consider are: the nature and circumstances of the offense and the history and characteristics of the defendant, 18 U.S.C. 3553(a)(1); the kinds of sentences available, 18 U.S.C. 3553(a)(3); the Sentencing Guidelines, 18 U.S.C. 3553(a)(4) and (5); the need to avoid unwarranted sentence disparities, 18 U.S.C. 3553(a)(6); and the need to provide restitution, 18 U.S.C. 3553(a)(7).

ate means of promoting correction and rehabilitation.” 18 U.S.C. 3582(a).

By its express terms, Section 3582(a)’s restriction on the consideration of rehabilitation applies to both the sentencing court’s decision whether to impose a term of imprisonment at all and its decision about how long a term to impose. Under standard rules of grammar and statutory construction, the qualifying phrase “recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation” modifies the preceding phrase “shall consider the factors set forth in section 3553(a) to the extent that they are applicable.” See Norman J. Singer, *Statutes and Statutory Construction* § 47:33, at 371 (6th ed. 2000) (explaining that “a proviso usually is construed to apply to the provision or clause immediately preceding it”); William Strunk, Jr. and E.B. White, *The Elements of Style* 30 (4th ed. 2000) (noting that modifiers are placed next to the words they modify). The statute explicitly requires that the court consider the Section 3553(a) factors both “in determining whether to impose a term of imprisonment” and “in determining the length of the term.” 18 U.S.C. 3582(a). The directive that the court “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation” therefore also necessarily applies both when the court decides whether to impose a term of imprisonment and when the court decides how long a term to impose. See *In re Sealed Case*, 573 F.3d 844, 849 (D.C. Cir. 2009).

The directive’s use of the word “imprisonment” confirms that it limits both the decision whether to impose a term of imprisonment and the decision about how long the term should last. “Imprisonment” includes not only “the act of imprisoning” but also “the state of being im-

prisoned.” *Webster’s Third New International Dictionary* 1137 (1993) (*Webster’s Third*); see *In re Sealed Case*, 573 F.3d at 850 (explaining that “‘imprisonment’ means ‘[t]he action of imprisoning, or [the] fact or condition of being imprisoned’”) (quoting *OED* 746). Thus, the statute requires a sentencing court to recognize that neither placing nor keeping someone in the status of imprisonment is an appropriate means of promoting rehabilitation. As the D.C. Circuit has explained, “[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.” *Ibid.*

2. Section 3582(a)’s restriction on using rehabilitation to justify imprisonment is a categorical prohibition, not merely an advisory recommendation. Section 3582(a) directs the sentencing court to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.” 18 U.S.C. 3582(a). The word “recognize” means “to admit the fact, truth, or validity of.” *Webster’s Third* 1896; accord *The Random House Dictionary of the English Language* 1611 (2d ed. 1987) (*Random House*) (defining “recognize” as “to acknowledge or treat as valid”). The word “appropriate” means “suitable or fitting for a particular purpose.” *Random House* 103; accord *Webster’s Third* 106 (defining “appropriate” as “specifically suitable”). Whenever a sentencing court imposes a term of imprisonment or increases the length of the term for the purpose of rehabilitating the defendant, the court fails “to acknowledge

or treat as valid” that imprisonment is not a “suitable or fitting” means of promoting rehabilitation.

Consistent with that reasoning, the courts of appeals have uniformly construed the prohibition imposed by Section 3582(a) as a categorical one. See *United States v. Jimenez*, 605 F.3d 415, 424 (6th Cir. 2010) (explaining that the court has “construed § 3582(a) as barring the sentencing court from choosing prison, rather than a non-incarceration sentence, to promote rehabilitation”); *In re Sealed Case*, 573 F.3d at 846 (stating that Section 3582(a) “expressly prohibits sentencing courts from treating rehabilitation as a reason for imposing a longer term of imprisonment”); *United States v. Manzella*, 475 F.3d 152, 160-161 (3d Cir. 2007) (holding that Section 3582(a) provides that a “defendant not be sent to prison or held there for a specific length of time for the sole purpose of rehabilitation”); *United States v. Hawk Wing*, 433 F.3d 622, 629-630 (8th Cir. 2006) (“For purposes of initial sentencing, a court may not consider rehabilitative goals in considering whether to impose a sentence of imprisonment.”) (citation omitted); *United States v. Giddings*, 37 F.3d 1091, 1096 (5th Cir. 1994) (referring to “the prohibition against considering rehabilitative needs”), cert. denied, 514 U.S. 1008 (1995); *Duran*, 37 F.3d at 561 (referring to “the prohibition in § 3582”); *United States v. Anderson*, 15 F.3d 278, 280-281 (2d Cir. 1994) (stating that, under Section 3582(a), “a court may not ‘imprison[] as a means of promoting rehabilitation’ or serving medical needs”) (quoting *Mistretta*, 488 U.S. at 367).

Section 3582(a)’s categorical prohibition applies with equal force to prevent a court from relying on rehabilitation both in imposing a term of imprisonment and in imposing a longer term than the court would otherwise

have imposed. When a court would not have imposed a term of imprisonment of any length, or would have imposed a shorter term, except for its desire to promote the defendant's rehabilitation, the court, in imposing the term if has selected, fails to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a). Thus, a court may not impose a longer term of imprisonment because it believes that the defendant will benefit from participating in prison rehabilitation programs over a longer period of time, *e.g.*, *In re Sealed Case*, 573 F.3d at 851, or because it wants to enable the defendant to participate in a particular rehabilitative program, *e.g.*, *Manzella*, 475 F.3d at 161.

B. The Statutory Context Supports Giving Section 3582(a) Its Natural Meaning

Construing Section 3582(a), in accordance with its natural meaning, to preclude sentencing courts from relying on a defendant's need for rehabilitation to justify either imposing or lengthening a term of imprisonment is consistent with and reinforced by other sentencing provisions in the SRA, including 28 U.S.C. 994 and 18 U.S.C. 3553(a)(2)(D).

1. a. Section 994 directs the Sentencing Commission to promulgate the Sentencing Guidelines, which inform the sentencing determinations of the federal district courts. 28 U.S.C. 994(a). As enacted, the SRA made the Guidelines binding on the district courts, which were required to impose sentences of the kind and within the range mandated by the Guidelines except in limited circumstances. See *United States v. Booker*, 543 U.S. 220, 233-235 (2005). Although *Booker* held that the mandatory Guidelines system violated the Sixth Amendment,

and it remedied that violation by rendering the Guidelines advisory only, the Guidelines continue to provide important guidance for district court sentencing decisions. See *id.* at 259-260, 264.

Subsection (k) of Section 994 directs the Sentencing Commission 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). As *Mistretta* recognized, this language categorically “rejects imprisonment as a means of promoting rehabilitation.” 488 U.S. at 367; see *United States v. Harris*, 990 F.2d 594, 596 (11th Cir. 1993) (interpreting Section 994(k) as a “prohibition” on imprisoning or extending the term of imprisonment); *United States v. Mogel*, 956 F.2d 1555, 1563 (11th Cir.) (citing Section 994(k) for the proposition that “[r]ehabilitative considerations have been declared irrelevant for purposes of deciding whether or not to impose a prison sentence and, if so, what prison sentence to impose”), cert. denied, 506 U.S. 857 (1992).

Section 994(k) sheds lights on the meaning of Section 3582(a) because Congress intended the two provisions to work in tandem to implement its determination that “imprisonment is not an appropriate means of promoting correction and rehabilitation.” Senate Report 76. Section 994(k) prohibits the Sentencing Commission from recommending a term of imprisonment or a longer term based on a defendant’s rehabilitative needs. Section 3582(a) prohibits district courts from imposing or lengthening a defendant’s term of imprisonment when selecting a sentence from within the Guidelines range or when sentencing outside the range.

b. The other subsections of Section 994 reinforce the conclusion that Sections 994(k) and 3582(a) impose a categorical bar on using imprisonment to promote a defendant's rehabilitation. Some of the subsections (including Section 994(k)) instruct the Commission to ensure that the guidelines reflect the "appropriateness" or the "inappropriateness" of considering certain factors for specified purposes at sentencing. See, *e.g.*, 18 U.S.C. 994(l)(1) (requiring the Commission to ensure that the Guidelines reflect "the appropriateness of imposing an incremental penalty for each offense" when the defendant has committed "multiple offenses" at different times, including when the subsequent offense is for failure to appear, in violation of 18 U.S.C. 3146). In contrast, other subsections instruct the Commission to ensure only that the guidelines reflect the "general appropriateness" or the "general inappropriateness" of considering certain other factors. See, *e.g.*, 28 U.S.C. 994(e) (requiring the Commission to ensure that the Guidelines, "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"); 28 U.S.C. 994(l)(2) (requiring the Commission to ensure that the Guidelines reflect "the general inappropriateness" of imposing consecutive terms for conspiracy or solicitation and for the offense that was the object of the conspiracy or solicitation).

As several courts of appeals have recognized, Congress used the term "general" when it was not imposing an absolute rule about whether a particular factor could be considered but instead was merely providing guidance on how it envisioned the factor should ordinarily be

treated. See, e.g., *United States v. Kapaev*, 199 F.3d 596, 599 (2d Cir. 1999) (holding that Section 994(l)(2) does not “prohibit all consecutive sentences for conspiracy and the substantive crime that was the object of the conspiracy”), cert. denied, 529 U.S. 1081 (2000); *United States v. Saccoccia*, 58 F.3d 754, 787 (1st Cir. 1995) (same), cert. denied, 517 U.S. 1105 (1996); *Mogel*, 956 F.2d at 1562 (declining to interpret Section 994(e) as “categorically prohibiting” consideration of the listed offender characteristics).

Notably, Congress omitted the term “general” from Section 994 and the parallel prohibition in Section 3582(a). The omission of that qualifier strongly indicates that Congress intended those provisions as an absolute prohibition, rather than non-binding, “general” guidance. See *Kucana v. Holder*, 130 S. Ct. 827, 838 (2010) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009) (internal quotation marks omitted)).

2. Interpreting Section 3582(a) as a categorical bar on imposing or lengthening a term of imprisonment to promote a defendant’s rehabilitation is also consistent with the other sentencing provisions of the SRA, including Section 3553(a)(2)(D). That provision directs a sentencing court to consider “the need for the sentence imposed * * * to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. 3553(a)(2)(D). It requires the court generally to consider rehabilitative purposes in fashioning a defendant’s *sentence*, while Section 3582(a) specifically pro-

hibits the court from relying on rehabilitation as a justification for imposing or lengthening a defendant's term of *imprisonment*.

As described above, a defendant's sentence need not include imprisonment or imprisonment alone, but can include other components, such as probation, supervised release, a fine, and restitution. See p. 15, *supra*; *In re Sealed Case*, 573 F.3d at 851; *Manzella*, 475 F.3d at 158; *United States v. Maier*, 975 F.2d 944, 946-947 (2d Cir. 1992). Section 3553(a)(2)(D), like the rest of Section 3553(a), provides general guidance for a district court in determining that overall sentence. Other statutory provisions provide more specific guidance on how the Section 3553(a) factors apply to each of the available sentencing options. See, *e.g.*, 18 U.S.C. 3562(a) (probation); 18 U.S.C. 3572(a) (fines); 18 U.S.C. 3583(c) (supervised release).

For example, Section 3562(a) provides that, “in determining whether to impose a term of probation,” and “in determining the length of the term,” the court shall consider the Section 3553(a) factors “to the extent that they are applicable.” 18 U.S.C. 3562(a). Section 3572(a) provides that, in determining whether to impose a fine, and in determining the amount of any fine and the repayment method and schedule, the court must consider not only the factors in Section 3553(a) but also additional considerations, such as the defendant's income, earning capacity, and financial resources. 18 U.S.C. 3572(a). And Section 3583(c) expressly requires a sentencing court to consider the need to promote the defendant's rehabilitation, in addition to a specified subset of other Section 3553(a) factors, in deciding whether to impose a

term of supervised release and how long a term to impose. 18 U.S.C. 3583(e).⁵

Together with these provisions, Section 3553(a)(2)(D) makes clear that “the purpose of rehabilitation is still important in determining whether a sentence other than a term of imprisonment is appropriate in a particular case.” Senate Report 76-77. Thus, when the principal goal of a particular sentence is rehabilitation, a court may, to the extent permitted by the statutory sentencing range, elect to impose probation rather than imprisonment. *Id.* at 91-92. Or supervised release may be used “to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.” *Id.* at 124. And rehabilitative conditions may be placed on terms of probation or supervised release. *Id.* at 76, 124; 18 U.S.C. 3563(a)(4) and (b)(9), 3583(d) (Supp. III 2009); see *United States v. Watson*, 482 F.3d 269, 276 (3d Cir. 2007); *Harris*, 990 F.2d at 596. For example, a court may require a defen-

⁵ A court is also required to consider a defendant’s rehabilitative needs when the defendant has violated a condition of supervised release and the court is deciding whether to revoke the supervised release and to require the defendant to spend time in prison instead. 18 U.S.C. 3583(e)(3). Courts of appeals have concluded that Section 3582(a) is not applicable in that circumstance because the court is not imposing “a term of imprisonment,” 18 U.S.C. 3582(a), but is instead “requir[ing] the defendant to serve in prison all or part of the *term of supervised release*,” 18 U.S.C. 3583(e)(3) (emphasis added). See *United States v. Tsosie*, 376 F.3d 1210, 1216 (10th Cir. 2004), cert. denied, 543 U.S. 1155 (2005); see also *id.* at 1214 (noting that the circuits uniformly agree that courts may rely on rehabilitative interests when requiring a defendant to serve time in prison upon revocation of supervised release); accord *United States v. Doe*, 617 F.3d 766, 771-774 (3d Cir. 2010), petition for cert. pending, No. 10-7592 (filed Nov. 15, 2010).

dant sentenced to a term of probation or supervised release to participate in a residential drug treatment program. See 18 U.S.C. 3563(b)(9) and (11), 3583(d) (Supp. III 2009).

Moreover, when a court determines to impose a term of imprisonment and sets the length of the term based on other valid penological purposes, such as “just deserts,” deterrence, or incapacitation, Section 3582(a) does not preclude the court from discussing rehabilitation. Thus, the court can express its hope that the defendant will receive treatment while incarcerated or note that an otherwise validly imposed term of imprisonment will provide the collateral benefit that the defendant will receive treatment. See *Jimenez*, 605 F.3d at 424; *Watson*, 482 F.3d at 275; *United States v. Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005). The court can also take rehabilitation into account in recommending that the defendant be placed in a particular facility or type of facility or that she participate in a particular program. 18 U.S.C. 3582(a) (requiring court, in recommending a particular type of facility, to consider any policy statements issued by the Sentencing Commission); 28 C.F.R. 550.51(b)(1)(iii) (stating that the BOP will consider sentencing courts’ recommendations in determining priority for placing prisoners in drug and alcohol education courses); see *United States v. Hoffa*, 587 F.3d 610, 615 (3d Cir. 2009); *United States v. Jackson*, 70 F.3d 874, 878 (6th Cir. 1995); *e.g.*, Judgment 2 (recommending that the BOP place petitioner at FCI Dublin/Pleasanton and that she participate in the 500 Hour Drug Program at that facility).⁶ Thus, Sections 3553(a)(2)(D) and

⁶ Pursuant to statutory direction, the BOP operate several different rehabilitative programs in prison facilities. See 18 U.S.C. 3621(e) (sub-

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.” *In re Sealed Case*, 573 F.3d at 851.

C. Construing Section 3582(a) To Prohibit Courts From Imposing Or Lengthening A Term Of Imprisonment To Rehabilitate The Defendant Furthers The Purposes Of The Sentencing Reform Act

1. As noted above, the SRA overhauled federal criminal sentencing practices. Before the SRA, the federal government “employed in criminal cases a system of indeterminate sentencing,” complemented by “the utilization of parole, by which an offender was returned to society under the ‘guidance and control’ of a parole officer.” *Mistretta*, 488 U.S. at 363. In this indeterminate sentencing scheme, “Congress defined the maximum [sentence], the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch’s parole official eventually determined the actual duration of imprisonment” based on the parole officer’s assessment of the defendant’s rehabilitation. *Id.* at 365; Senate Report 38. As *Mistretta* explained, “[b]oth indeterminate sentencing and parole were based on the offender’s possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society.” 488 U.S. at 363. The SRA eliminated indeterminate sentencing and parole and

stance abuse treatment); 18 U.S.C. 3621(f) (sex offender treatment); 18 U.S.C. 3624(f) (functional literacy).

replaced them with a determinate sentencing scheme governed by the then-mandatory Sentencing Guidelines. *Id.* at 367. In so doing, Congress rejected as “outmoded” the prior “rehabilitation model” of sentencing. Senate Report 38; see *Mistretta*, 488 U.S. at 366; *Manzella*, 475 F.3d at 157.

The Senate Report accompanying the bill that became the SRA explained that “almost 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 38. Accordingly, Congress “retained rehabilitation and correction as an appropriate purpose of a sentence, while recognizing, in light of current knowledge, that ‘imprisonment is not an appropriate means of promoting correction and rehabilitation.’” *Id.* at 76 (quoting proposed 18 U.S.C. 3582(a)). Interpreting Section 3582(a) as prohibiting courts from relying on rehabilitation not only to justify imposing a term of imprisonment in the first place, but also to justify lengthening the term imposed, more fully advances Congress’s goals. Indeed, as the D.C. Circuit has explained, that is the only reading of Section 3582(a) that makes logical sense: if “imprisonment is not an appropriate means of promoting rehabilitation, how can *more* imprisonment serve as an appropriate means of rehabilitation?” *In re Sealed Case*, 573 F.3d at 849.

Moreover, as the Senate Report indicates, in rejecting the rehabilitation model, Congress specifically rejected the notion that the length of a defendant’s imprisonment should be determined by whether or when he or she becomes rehabilitated. As the Report explains, the rehabilitation model “tie[d] prison release dates to the

successful completion of certain vocational, educational, and counseling programs within the prisons.” Senate Report 40. Congress rejected the model largely because “studies suggest[ed] that this approach ha[d] failed, and most sentencing judges as well as the Parole Commission agree[d] that the rehabilitation model is not an appropriate basis for sentencing decisions.” *Ibid.* Congress therefore could not have intended district courts under the new system to lengthen a defendant’s term of imprisonment based on speculation that the increased period of incarceration would promote the defendant’s rehabilitation.

2. Interpreting Section 3582(a) to bar sentencing courts from imposing or lengthening a term of imprisonment in order to facilitate the defendant’s rehabilitation also accords with the courts’ lack of authority to place defendants in particular facilities or rehabilitative programs.

“After a district court sentences a federal offender, the Attorney General, through the BOP, has the responsibility for administering the sentence.” *United States v. Wilson*, 503 U.S. 329, 335 (1992) (citing 18 U.S.C. 3621(a)). The BOP has broad discretion to “designate the place of the prisoner’s imprisonment” based on BOP’s determination of the facility that is “appropriate and suitable.” 18 U.S.C. 3621(b) (Supp. III 2009). The BOP’s authority encompasses the prerogative to determine in what rehabilitative programs a prisoner may participate, subject to statutory constraints, such as the requirement that the BOP “make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse.” *Ibid.* See, *e.g.*, 18 U.S.C. 3621(e) (requiring the BOP to give priority for treatment based on a

prisoner’s proximity to release date). Accordingly, although sentencing judges may recommend placement in particular facilities or programs, see p. 26, *supra*, actual placement “decisions [are] within the sole discretion of the [BOP].” *United States v. Melendez*, 279 F.3d 16, 18 (1st Cir.) (quoting *Thye v. United States*, 109 F.3d 127, 1130 (2d Cir. 1997) (citation and internal quotation marks omitted)), cert. denied, 535 U.S. 1120 (2002). See *Jackson*, 70 F.3d at 877-878; *United States v. Williams*, 65 F.3d 301, 307 (2d Cir. 1995).

Given the limitations on judicial authority, Section 3582(a) should not be construed to empower judges to impose “a specific term of imprisonment based on the uncertain placement of a defendant in a rehabilitative program.” *Manzella*, 475 F.3d at 158. That construction would allow a defendant to be “locked up in order to put [her] in a place where it [is] hoped that rehabilitation [will] occur” without any guarantee that she will participate in the desired rehabilitative program. *Maier*, 975 F.2d at 946.⁷

D. The Drafting And Legislative History Confirms That Section 3582(a) Prohibits Using Rehabilitation To Justify Imposing Or Lengthening A Term Of Imprisonment

1. The SRA’s drafting history reinforces the conclusions that Section 3582(a)’s prohibition is categorical and that it encompasses both imposing a term of imprisonment and lengthening the term for the purpose of promoting the defendant’s rehabilitation.

⁷ Indeed, according to BOP records, petitioner did not participate in the drug treatment program recommended by the district court. Instead, petitioner participated in a 12-hour drug education course.

The SRA was the product of a years-long effort to comprehensively reform federal criminal law. The first major bills in that effort contained sentencing reform provisions, but they did not restrict courts from considering rehabilitation when imposing terms of imprisonment. See, *e.g.*, S. 1, 94th Cong., 1st Sess. § 2302 (as introduced Jan. 15, 1975) (directing courts, when imposing a term of imprisonment, to consider the defendant’s rehabilitative needs).

Restrictions on the consideration of rehabilitation first appeared in the Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess. (as reported by the S. Comm. on the Judiciary Nov. 15, 1977). As introduced, the bill did not contain any such restrictions, but the Senate Judiciary Committee amended the bill to limit the use of imprisonment to promote rehabilitation to exceptional cases. See *id.* § 101 (proposed 18 U.S.C. 101(b)(4)); *id.* § 124 (proposed 28 U.S.C. 994(j)).

Thus, as reported, S. 1437 contained a provision stating that the purposes of the federal criminal code include prescribing sanctions for criminal conduct that will deter such conduct, protect the public, assure just punishment, and “promote the correction and rehabilitation of persons who engage in such conduct, *recognizing that imprisonment is generally not an appropriate means of promoting correction and rehabilitation.*” S. 1437, § 101 (proposed 18 U.S.C. 101(b)(4)) (emphasis added). The phrase “recognizing that imprisonment is generally not an appropriate means of promoting correction and rehabilitation” is identical to the phrase in Section 3582(a) as enacted by the SRA, except that, unlike Section 3582(a), it includes the qualifier “generally.”

S. 1437, as reported, also included a provision that directed the Sentencing Commission to “insure that the

guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of providing the defendant with needed education or vocational training, medical care, or other correctional treatment, *other than 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, § 124 (proposed 28 U.S.C. 994(j)) (emphasis added). That provision is identical to Section 994(k) as enacted by the SRA, except that it permits the imposition of imprisonment as a means of promoting rehabilitation in the “exceptional case.”

The committee report accompanying S. 1437 made clear that the bill’s provisions reflected the view that, except in rare cases, rehabilitation is not an appropriate basis for either imposing a term of imprisonment in the first instance or lengthening of the term. The report explained that proposed Section 994(j) “makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided unless the judge finds that the sole way in which an appropriate program can be provided in order to achieve a purpose of sentencing in the particular case is to sentence the defendant to prison.” S. Rep. No. 605, 95th Cong., 1st Sess. 1168 (1977); see *id.* at 883 (referring to such a situation as “the rare case”). And, discussing the purposes of sentencing, the report stated that “the purpose of rehabilitation is not currently thought to be sufficient in most cases as the sole purpose of a sentence to a term of imprisonment or, where there are other reasons for imprisonment, such as deterrence or incapacitation, to be a fair basis for determining the length of a term of imprisonment.” *Id.* at 891.

In the 96th Congress, the Senate Judiciary Committee again reported a comprehensive criminal reform bill, S. 1722, 96th Cong., 1st Sess. (as reported Jan. 17, 1980). Like the bill reported in the previous Congress, S. 1722 contained provisions restricting reliance on rehabilitation as a justification for imprisonment. The provisions in S. 1722, however, differed from the previous provisions in critical ways.

In S. 1722, the language admonishing courts to recognize the inappropriateness of using imprisonment as a means of rehabilitation was moved from the section addressing the general purposes of the criminal code to a section equivalent to Section 3582(a). That section, entitled “Factors to be Considered in Imposing a Term of Imprisonment,” stated:

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 2003(a) [a provision similar to current Section 3553(a)] to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.*

S. 1722, § 101 (proposed 18 U.S.C. 2302(a)) (emphasis added). That language is substantively identical to the language of Section 3582(a) but differs from the language in the prior bill in a critical respect—it omits the qualifier “generally.”

S. 1722 also removed the language from the previous bill that would have been codified in Section 994(j) and that allowed for the imposition of a term of imprisonment based on a defendant’s rehabilitative needs in an “exceptional case.” Instead, S. 1722 contained a provi-

sion identical to Section 994(k) as enacted by the SRA, which categorically directed the Commission 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.” S. 1722, § 125 (proposed 28 U.S.C. 994(j)).

The committee report accompanying S. 1722 included language similar to the language in the report from the prior Congress, but the language in the new report contained significant changes reflecting the shift to a categorical ban on relying on rehabilitation. The report repeated the language from the prior report stating that proposed Section 994(j) “makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided,” but the report omitted the language that had recognized an exception to the rule. See S. Rep. No. 553, 96th Cong., 2d Sess. 1243 (1980). And, in the discussion of the purposes of sentencing, the report deleted the prior language stating that rehabilitation is not currently thought “to be sufficient in most cases as the sole purpose of a sentence to a term of imprisonment” and replaced it with categorical language. Thus, the report stated that “[t]he Committee recognizes that the purpose of rehabilitation is not currently thought to be an appropriate purpose of a sentence to a term of imprisonment or, where there are other reasons for imprisonment, such as deterrence or incapacitation, to be a fair basis for determining the length of a term of imprisonment.” *Id.* at 942. Notably, the new report retained the language from the prior report making clear that the restriction on relying on rehabilitation applies not only when a court determines whether to impose a term of

imprisonment but also when the court determines the length of the term.

Aside from renumbering changes, the relevant provisions of the sentencing reform bill reported by the Senate Judiciary Committee in the 97th Congress were essentially the same as the provisions in S. 1722. See S. 1630, 97th Cong., 1st Sess. (as reported Jan. 25, 1982). Substantively identical provisions were also included in the bill in the 98th Congress, S. 1762, 98th Cong., 1st Sess. (as reported Sept. 14, 1983), which ultimately became the SRA.

2. The Senate Report accompanying S. 1762 further evidences that Congress intended to enact an absolute prohibition against imposing or lengthening a term of imprisonment to promote a defendant's rehabilitation. The Report states that the SRA recognizes "four purposes of sentencing" and "has not favored one purpose of sentencing over another except where the sentence involves a term of imprisonment." Senate Report 67. The Report goes on to explain that "Section 3582(a) provides * * * that in determining whether to impose a sentence of imprisonment and *in determining the length of a term of imprisonment*, the sentencing judge should recognize that 'imprisonment is not an appropriate means of promoting correction and rehabilitation.'" *Id.* at 67 n.140 (emphasis added). This restatement of Section 3582(a) confirms that the directive against using rehabilitation to justify imprisonment applies with the same force when the sentencing court is "determining the length of a term of imprisonment" as when the court is determining "whether to impose a sentence of imprisonment" in the first instance.

A later passage of the Report underscores the point. In discussing a directive to the Sentencing Commission

about sentence modifications (currently codified at 28 U.S.C. 994(t)), which states that “[r]ehabilitation of the defendant alone shall not be considered” a ground for modifying a previously imposed sentence, the Report notes that this limitation is “consistent with the rejection by the Committee of the rehabilitation theory as the basis for *determining the length of a term of imprisonment.*” Senate Report 179 (emphasis added).

The Senate Report also shows that Congress intended Section 3582(a)’s prohibition to be categorical. In explaining an instruction to the Commission to ensure that the Guidelines are entirely neutral as to race, sex, national origin, creed, and socio-economic status, the Report states that this provision, “when read with the provisions in proposed section 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 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.’” Senate Report 172 n.410 (emphasis added).⁸

⁸ Moreover, the Report confirms that, as discussed above, when Congress intended merely to discourage rather than to prohibit consideration of a particular factor at sentencing, Congress used the modifier “general” in discussing the inappropriateness of considering the factor. See pp. 22-23, *supra*. In discussing 28 U.S.C. 994(e)’s instruction that the Sentencing Commission ensure that the Guidelines reflect the “general inappropriateness” of considering the defendant’s education, vocational skills, employment record, family ties and responsibilities, and community ties, the Report explains that “the Committee decided to describe these factors as ‘generally inappropriate,’ rather than always inappropriate, * * * in order to permit the Sentencing Commission to evaluate their relevance, and to give them applica-

In some instances, when the Senate Report describes Section 3582(a)'s restriction on the consideration of rehabilitation, the Report does not explicitly state that the restriction applies to a determination to lengthen the term as well as to impose imprisonment in the first instance. Thus, the Report states that Section 3582(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 119.

The absence of an express reference in this passage to the length of the term of imprisonment does not, however, overcome the clear statutory text and confirmation elsewhere in the Senate Report that Section 3582(a)'s restriction applies "in determining the length of the term." 18 U.S.C. 3582(a); see Senate Report 67 & n.140, 179. Instead, the passage's references to "impos[ing] a term of imprisonment" and "employment of a term of

tion in particular situations found to warrant their consideration." Senate Report 175. "[T]hus," the Report states, "the guidance in this subsection is cautionary rather than proscriptive." *Ibid.*

imprisonment” logically encompass determination of the length of the term, given that any decision to incarcerate necessarily includes a decision about the length of the incarceration and that the word “term” itself means “the time or period through which something lasts.” *Random House* 1958; accord *Webster’s Third* 2358. And the fact “[t]hat sentencing courts may consider rehabilitation in recommending a particular facility,” as the Senate Report observed, “hardly suggests that [courts] may keep a defendant in that or any other prison facility for a longer period of time for rehabilitative purposes.” *In re Sealed Case*, 573 F.3d at 850.

The SRA’s drafting and legislative history thus confirms what the other tools of statutory construction indicate: Section 3582(a) categorically precludes a sentencing court from imposing or lengthening a term of imprisonment in order to promote the defendant’s rehabilitation. The drafting history shows that Congress considered legislation that would have allowed courts to rely on rehabilitation as a justification for imprisonment in the exceptional case, but Congress chose to enact statutory language that eliminated that exception. And the committee reports accompanying the evolving legislation consistently made clear that the restrictions on relying on rehabilitation were intended to apply both when courts decide whether to impose a term of imprisonment and when they decide how long a term to impose.

E. The Reasons Offered By Some Circuits For Limiting Section 3582(a)’s Prohibition To The Determination Whether To Impose A Term Of Imprisonment In The First Instance Are Unpersuasive

Although no court of appeals has interpreted Section 3582(a)’s directive against using rehabilitation to justify

imprisonment as anything other than a categorical ban, several circuits have concluded that the prohibition applies only to a court's determination whether to impose a term of imprisonment in the first instance and not to a determination to lengthen the imprisonment term. The Ninth Circuit first adopted that interpretation of Section 3582(a) in *Duran*, 37 F.3d at 561, and the Sixth and Eighth Circuits then followed suit without much additional analysis. See *Hawk Wing*, 433 F.3d at 630-631; *Jackson*, 70 F.3d at 879-880; see also *Giddings*, 37 F.3d at 1096-1097. The reasoning of those courts is not persuasive.

In reaching its interpretation, the *Duran* court appears to have construed the word "imprisonment" to encompass only a defendant's initial placement in prison and not his or her continued incarceration. See p. 9, *supra*. As noted by the D.C. Circuit and explained above, however, the dictionary definition of "imprisonment" provides no support for that cramped construction. See *In re Sealed Case*, 573 F.3d at 850 ("According to the dictionary, 'imprisonment' means '[t]he action of imprisoning, or [the] fact or condition of being imprisoned.'" (quoting *OED* 746). "In context as well, 'imprisonment' encompasses the decision to imprison a defendant for a longer period of time," because when a court decides to imprison the defendant for an additional period, the court is, as to that period of time, choosing "imprisonment" over release. *Ibid*.

The court in *Duran* also reasoned that, if Congress had wanted to prohibit courts from using rehabilitation to justify lengthening a defendant's term of imprisonment, "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.’” 37 F.3d at 561. Congress’s failure to utilize that formulation is entirely understandable, however, because that language could be interpreted to prohibit sentencing courts from not only imposing longer terms of imprisonment to promote a defendant’s rehabilitation but also imposing shorter terms for that purpose. Congress did not intend to prohibit courts from imposing less imprisonment in order to promote a defendant’s rehabilitation. See *In re Sealed Case*, 573 F.3d at 851; *Maier*, 975 F.2d at 946-947. On the contrary, as discussed above, Congress specifically envisioned that courts might choose probation in lieu of imprisonment in order to promote the defendant’s rehabilitation or might impose a short term of imprisonment followed by a term of supervised release for that purpose. See Senate Report 91-92, 124; p. 25, *supra*.

Furthermore, as the Third and D.C. Circuits have pointed out, Congress had no need to use any different or additional language, because Section 3582(a) already contains an “express instruction that sentencing courts must recognize the inappropriateness of imprisonment for rehabilitation both in choosing [a term of] imprisonment rather than a non-incarceration sentence and ‘in determining the length of the term.’” *In re Sealed Case*, 573 F.3d at 850 (quoting 18 U.S.C. 3582(a)); see *Manzella*, 475 F.3d at 160. “[T]he possibility that a clearly worded statute might be even more clearly worded does not negate the fact that it is clear.” *In re Sealed Case*, 573 F.3d at 850 (citation omitted).

The courts of appeals that follow the *Duran* approach have also suggested that limiting Section 3582(a)’s prohibition to the decision whether to impose a term of imprisonment in the first instance is necessary to avoid a conflict with Section 3553(a)(2)(D)’s require-

ment that courts consider a defendant's correctional needs in fashioning the sentence. See *Jimenez*, 605 F.3d at 424; *Hawk Wing*, 433 F.3d at 629-630; *Duran*, 37 F.3d at 561. This "supposed conflict," however, "is illusory." *Manzella*, 475 F.3d at 157. As explained above, "[S]ection 3582(a) has a narrower scope than section 3553; the former deals specifically with *imprisonment*, while the latter addresses imposition of a *sentence*, a broader concept that encompasses imprisonment as well as probation and fines." *In re Sealed Case*, 573 F.3d at 851; see pp. 23-25, *supra*. "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. Thus, reading Section 3582(a) to prohibit sentencing courts from imposing or lengthening a term of imprisonment in order to rehabilitate the defendant "respects [the statute's] plain text and gives effect to each of its clauses, while allowing [both] section 3582(a) and section 3553(a) to play their unique roles in the statutory scheme." *In re Sealed Case*, 573 F.3d at 850-851.

Finally, one court, relying on a single passage in the Senate Report (discussed at pp. 37-38, *supra*), has asserted that "the legislative history * * * indicates that the prohibition against considering rehabilitative needs relates to the decision of *whether to impose* imprisonment, not to the *length of the term* of imprisonment." *Giddings*, 37 F.3d at 1096 & n.17. As explained above, however, an examination of the full legislative and drafting history strongly supports interpreting Section 3582(a) as barring a sentencing court from either impos-

ing or lengthening a term of imprisonment in order to rehabilitate the defendant.⁹

⁹ Under the government's interpretation of Section 3582(a), the district court erred to the extent that it lengthened petitioner's term of imprisonment in order to provide her with access to drug treatment. Petitioner did not, however, object at sentencing on that basis. See p. 8, *supra*. Accordingly, as the court of appeals recognized (Pet. App. A2), and petitioner has herself conceded (Pet. C.A. Br. 9; Pet. Reply Br. 4), she is entitled to resentencing only if she satisfies the plain-error standard. See Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 731 (1993). To satisfy that standard, petitioner would have to show (1) an "error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [her] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (citation omitted). If this Court agrees with the government's interpretation of Section 3582(a), petitioner will have satisfied the first two components of the plain-error standard. See *Johnson v. United States*, 520 U.S. 461, 467 (1997) (holding that the second component is satisfied if the error is clear at the time of appellate review, and the law at the time of trial was settled and clearly contrary to the law at the time of appeal). This Court should remand the case to the court of appeals, however, for that court to determine whether petitioner has satisfied the remaining components of the plain-error test.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to that court for consideration whether petitioner is able to demonstrate reversible plain error.

Respectfully submitted.

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APPENDIX

1. Section 3551 of Title 18, United States Code, provides in pertinent part:

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.

* * * * *

(1a)

2. Section 3553 of Title 18, United States Code, provides in pertinent part:

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;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into

amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.¹

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * * * *

3. Section 3562 of Title 18, United States Code, provides in pertinent part:

Imposition of a sentence of probation

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF PROBATION.—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.

* * * * *

¹ So in original. The period probably should be a semicolon.

4. Section 3563 of Title 18, United States Code, provides in pertinent part:

Conditions of probation

(a) Mandatory conditions.—The court shall provide, as an explicit condition of a sentence of probation—

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation;

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2) or (b)(12), unless the court has imposed a fine under this chapter, or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under subsection (b);

(3) for a felony, a misdemeanor, or an infraction, that the defendant not unlawfully possess a controlled substance;

(4) for a domestic violence crime as defined in section 3561(b) by a defendant convicted of such an offense for the first time that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant; and

(5) for a felony, a misdemeanor, or an infraction, that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant;

(6) that the defendant—

(A) make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and

(B) pay the assessment imposed in accordance with section 3013;

(7) that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments;

(8) for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act; and

(9) that the defendant cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000.

If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

(b) DISCRETIONARY CONDITIONS.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

- (1) support his dependents and meet other family responsibilities;
- (2) make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A));
- (3) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;
- (4) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;
- (5) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

(6) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

(7) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

(10) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release;

(11) reside at, or participate in the program of, a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all or part of the term of probation;

(12) work in community service as directed by the court;

(13) reside in a specified place or area, or refrain from residing in a specified place or area;

(14) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

(15) report to a probation officer as directed by the court or the probation officer;

(16) permit a probation officer to visit him at his home or elsewhere as specified by the court;

(17) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

(18) notify the probation officer promptly if arrested or questioned by a law enforcement officer;

(19) remain at his place of residence during nonworking hours and, if the court finds it appropriate, that compliance with this condition be monitored by telephonic or electronic signaling devices, except that a condition under this paragraph may be imposed only as an alternative to incarceration;

(20) comply with the terms of any court order or order of an administrative process pursuant to the law of a State, the District of Columbia, or any other possession or territory of the United States, requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living;

(21) be ordered deported by a United States district court, or United States magistrate judge, pursuant to a stipulation entered into by the defendant and the United States under section 238(d)(5) of the Immigration and Nationality Act, except that, in the

absence of a stipulation, the United States district court or a United States magistrate judge, may order deportation as a condition of probation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable;

(22) satisfy such other conditions as the court may impose or;

(23) if required to register under the Sex Offender Registration and Notification Act, submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

* * * * *

5. Section 3572 of Title 18, United States Code, provides in pertinent part:

Imposition of a sentence of fine and related matters

(a) Factors to be considered.—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)—

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

* * * * *

6. Section 3582 of Title 18, United States Code, provides in pertinent part:

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).

* * * * *

7. Section 3583 of Title 18, United States Code, provides in pertinent part:

Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the

defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

* * * * *

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, 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, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pur-

suant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

- (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

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(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;

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8. Section 994 of Title 28, United States Code, provides in pertinent part:

Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentenc-

ing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

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(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.

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(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.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) The appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions

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of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

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