

No. 10-5400

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRA TAPIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 3582(a) precludes a district court at an initial sentencing from considering a defendant's rehabilitative needs in setting the length of a term of imprisonment.

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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 at 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. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of bringing in an illegal alien for financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii) and 2; one count of bringing in an illegal alien without presentation, in violation of 8 U.S.C. 1324(a)(2)(B)(iii) and 2; and one count of jumping bail, in violation of 18 U.S.C. 3146. Pet. App. A1-A2. The district court sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Id. at A2; Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. A1-A2.

1. In January 2008, petitioner and an accomplice drove from Mexico to the port of entry at San Ysidro, California in a jeep re-engineered to operate on an alternate fuel source. Gov't C.A. Br. 4. A border official discovered two illegal aliens concealed in the car's gas tank compartment. Ibid.; Pet. 3.

Petitioner and her accomplice were indicted in the United States District Court for the Southern District of California on one count of bringing in an illegal alien for financial gain and aiding and abetting, in violation of 8 U.S.C. 1324(a)(2)(B)(ii) and 2 (Count 1); and one count of bringing in an illegal alien without presentation and aiding and abetting, in violation of 8 U.S.C. 1324(a)(2)(B)(iii) and 2 (Count 2). Gov't C.A. Br. 4; Pet. 3. While petitioner was released on bond pending further proceedings,

she fled, and a bench warrant was issued for her arrest. Ibid. Petitioner was apprehended six months later, in possession of methamphetamine, a sawed-off shotgun, and mail belonging to other persons (which was to be used for committing identity theft). Gov't C.A. Br. 4. The government filed a superseding indictment against petitioner that added a charge of jumping bail, in violation of 18 U.S.C. 3146 (Count 3). Gov't C.A. Br. 4; Pet. 3. A jury found petitioner guilty on all three counts. Pet. App. A1-A2.

2. Petitioner faced a three-year mandatory-minimum sentence on Count 1, see 8 U.S.C. 1324(a)(2)(B)(ii), and her Sentencing Guidelines range was 41-51 months, Sent. Tr. 18. The district court sentenced petitioner to 51 months of imprisonment -- concurrent 46-month terms of imprisonment on Counts 1 and 2, and a consecutive five-month term of imprisonment on Count 3 -- plus three years of supervised release. Id. at 20-21.

The district court justified the sentence under the general sentencing criteria of 18 U.S.C. 3553(a). See, e.g., Sent. Tr. 20. The district court acknowledged, as a mitigating factor, that petitioner had a history of sexual and physical abuse. Id. at 16-17. But it observed that she had failed to get help when it was available; that she had smuggled aliens in a manner that created a substantial risk of death or serious injury; that she had jumped bail; that she had gotten involved with even more serious criminal

conduct while she was a fugitive; and that she had a prior felony conviction for possessing with intent to sell 66 pounds of marijuana. Id. at 16-18. The district court said that it was imposing the sentence to "deter [petitioner] from committing other criminal offenses," to "deter criminal conduct by others," and to "protect the public from further crimes." Id. at 18. 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" -- namely, that petitioner be imprisoned "long enough to get the 500 Hour Drug Program" administered by the Bureau of Prisons. Id. at 18-19.

The district court asked petitioner whether she had any objections to the sentence. Sent. Tr. 23. She had none. Id. at 23-24.

3. The court of appeals affirmed the sentence in an unpublished memorandum opinion. Pet. App. A1-A2. On appeal, petitioner argued 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." Id. at A2. Citing circuit precedent that had construed 18 U.S.C. 3582(a) to permit a sentencing court to consider a defendant's rehabilitative needs in determining the length of a term of imprisonment, the court of appeals found "[n]o

reversible error." Pet. App. A2 (citing, inter alia, United States v. Duran, 37 F.3d 557 (9th Cir. 1994)).

ARGUMENT

Petitioner contends (Pet. 6-11) that 18 U.S.C. 3582(a) precludes a district court at initial sentencing from considering rehabilitative goals in determining the length of a term of imprisonment. Although the government agrees with petitioner's interpretation of the statute, further review of this case is unwarranted. Petitioner failed to preserve her claim in the district court and cannot prevail under a plain-error standard of review. Furthermore, because the government is in the process of informing the Ninth Circuit and other courts of appeals of the government's interpretation of Section 3582(a), the conflict among the circuits on that issue may well resolve on its own.

1. Section 3582(a) directs that 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, 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." Because the provision's final clause -- which requires a court to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation" -- applies both "in determining whether to impose a term of

imprisonment" and "in determining the length of the term," the plain language of the statute prohibits considering a defendant's rehabilitative needs as a factor in setting the duration of her prison sentence. See In re Sealed Case, 573 F.3d 844, 849 (D.C. Cir. 2009).

Rehabilitative needs may instead be considered only in imposing other, non-imprisonment, components of a defendant's sentence, such as supervised release, fines, and restitution.¹ The general sentence-determination provision, 18 U.S.C. 3553(a), includes "the need * * * to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" among the "[f]actors to be considered in imposing a sentence." 18 U.S.C. 3553(a)(2)(D). Sections 3553(a) and 3582(a) accordingly function in tandem to provide that "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))." United States v. Manzella,

¹ Rehabilitative needs may also be considered in revoking a previously imposed term of supervised release, because a court in such a proceeding is not imposing "a term of imprisonment" (18 U.S.C. 3582(a)), but merely requiring a defendant to "serve in prison all or part of the term of of supervised release" (18 U.S.C. 3583(e)(3) (emphasis added)). See United States v. Tsosie, 376 F.3d 1210, 1213-1217 (10th Cir. 2004), cert. denied, 543 U.S. 1155 (2005); see also United States v. Doe, No. 09-2615, 2010 WL 3211128 at *5 (3d Cir. Aug. 16, 2010) (noting agreement among the circuits on this issue).

475 F.3d 152, 158 (3d Cir. 2007); see id. at 157 ("Sections 3553(a)(2)(D) and 3582(a) were enacted as part of the Sentencing Reform Act of 1984. * * * It is widely recognized that this legislation rejected rehabilitation as the primary goal of our criminal justice system, though it did not abandon it entirely.") (citing, inter alia, Mistretta v. United States, 488 U.S. 361, 366-367 (1989)); see also In re Sealed Case, 573 F.3d at 851.

2. As petitioner observes (Pet. 7-10), there is a conflict among the circuits regarding whether Section 3582(a) precludes a district court at an initial sentencing from considering rehabilitative needs in determining the length of a term of imprisonment. The Third and D.C. Circuits have held that it does. See Manzella, 475 F.3d at 156-161; In re Sealed Case, 573 F.3d at 848-851; see also United States v. Anderson, 15 F.3d 278, 280-281 (2d Cir. 1994) (stating this rule in a case that did not involve an initial sentencing).² The Sixth, Eighth, and Ninth Circuits have held that Section 3582(a) merely precludes a court from considering rehabilitative needs in deciding whether to impose a term of

² Contrary to petitioner's suggestion (Pet. 7), neither United States v. Harris, 990 F.2d 594 (11th Cir. 1993), nor United States v. Maier, 975 F.2d 944 (2d Cir. 1992), interprets Section 3582(a). Instead, these decisions -- which were issued during the period when the courts of appeals deemed the Sentencing Guidelines to be mandatory -- address a similar, but distinct, statutory provision directing the Sentencing Commission to ensure that the Sentencing Guidelines "reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." 28 U.S.C. 994(k); see Harris, 990 F.2d at 596-597; Maier, 975 F.2d at 946-947.

imprisonment in the first instance, but does not preclude considering them in determining the length of such a term. See United States v. Duran, 37 F.3d 557, 561 (9th Cir. 1994); United States v. Hawk Wing, 433 F.3d 622, 629-30 (8th Cir. 2006); United States v. Jimenez, 605 F.3d 415, 424 (6th Cir. 2010); see also United States v. Giddings, 37 F.3d 1091, 1094 (5th Cir. 1994) (stating this rule in a case that did not involve an initial sentencing).

Any review of this circuit conflict would be premature, because the courts of appeals may resolve it on their own. Though the government has on some previous occasions defended an interpretation of Section 3582(a) that would allow district courts to consider rehabilitative needs in determining the length of a term of imprisonment at an initial sentencing, it is in the process of informing the courts of appeals that, upon further consideration, it no longer will do so. In a case currently pending before the Ninth Circuit, for example, the defendant has requested initial en banc rehearing on this issue, and the court has called for a response; the government has informed the court of appeals that it will support the defendant's interpretation of the statute if en banc consideration is granted. See Gov't Br. 20-26, United States v. Tagatac, No. 10-10074. The government will take similar positions in other appropriate cases in the Ninth Circuit and other courts of appeals. If the circuits are allowed time to

reconsider their precedent in light of the government's position, they may well reach agreement without the need for this Court's intervention.

3. Even if the question presented warranted review at this time, this case is not a suitable vehicle for deciding that question. Because petitioner failed to object to the district court's consideration of her rehabilitative needs in determining her sentence, her claim is subject to plain-error review. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731 (1993). To prevail on plain-error review, petitioner would have to show (1) an "error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] 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). The conflict among the circuits on the question presented, particularly in combination with Ninth Circuit precedent resolving the question adversely to petitioner, prevents the district court's error from being considered "obvious."³ See Olano, 507 U.S. at 734 ("At a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear

³ The D.C. Circuit has found plain error in a district court's consideration of rehabilitative needs in setting the length of a term of imprisonment. See In Re Sealed Case, 573 F.3d at 851-852. Unlike in this case, however, there was not controlling circuit precedent on the issue at the time.

under current law."). It is also unlikely that petitioner could demonstrate that the error "affected her substantial rights," in light of the other factors that the district court relied upon to justify the within-Guidelines sentence of 51 months.

4. Finally, petitioner's suggestion (Pet. 11) that this case be held for Pepper v. United States, cert. granted, No. 09-6822 (oral argument scheduled for Dec. 6, 2010), lacks merit. Pepper presents two questions: first, whether a district court resentencing a defendant following a successful government appeal must apply the same percentage departure from the Guidelines range for substantial assistance as was applied in the initial sentencing; and second, whether a district court at such a resentencing may consider the defendant's post-sentencing rehabilitation in deciding whether to vary downward from the advisory Guidelines range. Gov't Br. i, Pepper, supra. Neither issue is presented in this case. This was an initial sentencing, not a resentencing. And the issue here was not, as in Pepper, whether a defendant's actual past rehabilitation could be a factor in reducing a prison term (because, for example, the defendant no longer presents as much danger to the community), but instead whether the possibility of future rehabilitation could be a factor in lengthening a prison term. However the Court resolves the issue in Pepper concerning consideration of post-sentencing

rehabilitation at resentencing, the decision in Pepper will have no bearing on petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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