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ALEJANDRA TAPIA, :

Petitioner :

v. : No. 10-5400

UNITED STATES :

Washington, D.C.

Monday, April 18, 2011

APPEARANCES:

STEPHANOS BIBAS, ESQ., Philadelphia, Pennsylvania; for
amicus curiae, appointed by this Court.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 10-5400, Tapia v.
5 United States.

6 Mr. Cahn.

7 ORAL ARGUMENT OF REUBEN C. CAHN

8 ON BEHALF OF THE PETITIONER

9 MR. CAHN: Mr. Chief Justice, and may it
10 please the Court:

11 When it instructed courts to recognize that
12 imprisonment is not an appropriate means of promoting
13 correction and rehabilitation, Congress intended to end
14 the practice of sending defendants to prison so that
15 they might get treatment. The commands of 3582 are
16 clear on this point: Do not imprison and do not
17 lengthen prison sentences for the purposes of
18 rehabilitation. This plain meaning is confirmed by the
19 structure of the statute.

20 Under the statute, judges have the power to
21 sentence defendants to prison but not to prison
22 programs. Judges once had that power under the Youth
23 Corrections Act and under the Narcotic Addicts
24 Rehabilitation Act. With the Sentencing Reform Act
25 Congress took that power away. That structure makes

1 sense only because Congress intended that defendants
2 should no longer be sent to prison for purposes of
3 rehabilitation.

4 JUSTICE KENNEDY: You have, in effect, a
5 one-way ratchet. If the judge really thinks
6 rehabilitation is a -- a -- a primary or an important
7 component of the sentence, then it reduces the prison
8 term. It could never increase it. So you have a
9 one-way ratchet.

10 MR. CAHN: Yes, Your Honor. I believe that
11 that's correct, that the -- that the way in which the
12 statute is set up, the logic of 3582 is that a need for
13 rehabilitation can push the judge, the sentencing judge,
14 into moving the individual either out of an
15 incarceration sentence into probation or lower the
16 sentence to get that individual into supervisory release
17 where rehabilitation current -- concerns are properly
18 addressed under the statute.

19 JUSTICE ALITO: Do you think that's -- do
20 you think that's consistent with what Congress thought
21 about rehabilitation when it adopted the Sentencing
22 Reform Act? And you discuss their thinking, and I think
23 accurately, in your brief, but was their thinking simply
24 that rehabilitation is very feasible and it's reasonably
25 predictable whether somebody can be rehabilitated or has

1 been rehabilitated so long as it's done outside of
2 prison, but it just doesn't work in prison? Was that
3 their thinking?

4 MR. CAHN: Well, there's relatively little
5 evidence of what Congress thought about the possibility
6 of rehabilitating individuals outside of prison. What's
7 clear is that they doubted that rehabilitation could be
8 reliably induced in the prison setting. There is at
9 least one comment that indicates that they doubt that we
10 know enough about human behavior to rehabilitate
11 individuals on a regular basis in any case, but they
12 certainly --

13 JUSTICE GINSBURG: But it is strange, isn't
14 it, that they can take rehabilitation into account for
15 the supervised release. I mean, that -- that's a
16 provision, isn't it? As far as supervised release is
17 concerned, the judge can take account of rehabilitation
18 in setting the length of the term, but can't do that for
19 the prison time.

20 MR. CAHN: Well, certainly with regard to
21 supervised release, we think, as far as setting the term
22 of supervised release, the judge is required to take
23 rehabilitation concerns into account, and that's because
24 supervised release is intended to smooth the transition
25 from prison to true liberty and is specifically a

1 rehabilitative vehicle.

2 Now, with regard to revocation, to the
3 extent that that's -- that's at issue, we concur with
4 the Solicitor General that 3582, by its terms, simply
5 doesn't govern a revocation of supervised release
6 because it's not the imposition of a term of
7 imprisonment but, rather, requiring the individual to
8 serve a portion of the supervised release term in
9 prison. So, by its plain terms, it simply isn't
10 applicable.

11 JUSTICE SOTOMAYOR: Counsel, aren't -- isn't
12 punishment and rehabilitation often flip sides of each
13 other? If you read what the judge said here, his
14 comment was this man -- or this woman, I'm sorry, has
15 been involved in a series -- escalating series of
16 serious offenses. Logically, she has to be put away for
17 a long time unless she gets rehabilitation because
18 there's going to be no deterrence otherwise.

19 And so, what the judge was basically saying,
20 in my judgment -- and I don't know why it's not just the
21 flip, which is without -- without drug treatment, we
22 can't deter her. And so, this crime, given her
23 background, deserves this kind of sentence. One of its
24 by-products is a drug treatment program.

25 How different is that, or do you really

1 think that a judge who knows that someone is going to
2 get a rehab program if they serve 50 months and the
3 sentencing range is between 45 and 55, do you think that
4 they're going to take 50 -- they're not going to choose
5 50 if they understand that there's no chance for this
6 person to be deterred without drug treatment?

7 MR. CAHN: The problem is the judge has no
8 ability to ensure that the individual gets that
9 treatment if they're sent to prison.

10 JUSTICE SCALIA: Your client --

11 JUSTICE SOTOMAYOR: That's a --

12 JUSTICE SCALIA: -- didn't get, did she?

13 MR. CAHN: She did not get that treatment,
14 in fact. And then, she's past the --

15 JUSTICE SCALIA: So, if he gave her extra
16 years in order to get that treatment, he just gave her
17 extra years without the treatment, as it turned out?

18 MR. CAHN: Yes, and I don't think that was
19 that --

20 JUSTICE SOTOMAYOR: Well, wait a minute.
21 That's the whole point, because what the judge said was
22 if she doesn't get treatment, she needs to be in jail a
23 long time because her crime was serious, because she's
24 just going to continue committing crimes. There's a
25 chance if she gets it that she won't, but without it,

1 for sure, she's not, and this is the just punishment she
2 deserves, this amount of years. That's how I read the
3 transcript.

4 MR. CAHN: Well, Judge -- I mean, Justice, I
5 would disagree with that characterization of Judge
6 Moskowitz's comments, and I'd point specifically to the
7 Joint Appendix, really, at pages 25 through 38, and
8 particularly to pages 27 through 29, where he very
9 specifically says not that he's imposing this time for
10 punishment purposes, but really to get her into the drug
11 program. He says: I'm going to impose a 51-month
12 sentence, 46 months plus 5 months for the bail jump, and
13 one of the factors that affects this is the need to
14 provide treatment. In other words, so she is in long
15 enough to get the 500-hour drug program.

16 And then, again, when he actually imposes
17 sentence, he says -- the judge says: I think a
18 sentence -- I'm sorry. Well, he says: The court
19 recommends, strongly recommends, that she participate in
20 the 500-hour drug program.

21 JUSTICE SOTOMAYOR: But you're ignoring his
22 lengthy discussion talking about she was really going
23 down the wrong road here. I understand her troubled
24 past. She gets involved in alien smuggling, which is
25 very serious. He is talking at length about the

1 seriousness of the crime.

2 So what I'm asking you is, if what we see is
3 a judge who's talking about a flip situation, i.e., you
4 need to punish strongly because the crimes are serious,
5 and an added benefit is rehabilitation, why does that
6 violate 3582? What about 3582, in using the word
7 "recognizing," stops a judge from saying without
8 something there's going to be no deterrence?

9 MR. CAHN: There's nothing that stops a
10 sentencing judge from saying I think that
11 incapacitation, retribution, deterrence justify a
12 sentence of X, and in addition you'll receive
13 rehabilitative resources while you're inside; make --
14 you know, make best use of them. There's nothing that
15 stops a judge from urging a defendant to, in fact, make
16 better of herself while she's in prison or outside.

17 JUSTICE SOTOMAYOR: So you're talking only
18 about when rehabilitation is the primary purpose? So
19 the issue here is what was the judge's primary purpose?

20 MR. CAHN: No. No. Whenever the judge
21 lengthens a sentence or imposes a sentence of
22 imprisonment that that judge otherwise would not have
23 imposed, that is a violation of 3582. You could --

24 JUSTICE SOTOMAYOR: So now we want some
25 talismanic words where the judge says what I said? This

1 crime is so serious that the sentence should be X
2 amount, and now talismanically I'll say rehab is just a
3 side effect, really the sentence is motivated by --
4 completely by punishment?

5 MR. CAHN: I think a fair reading of Judge
6 Moskowitz's statements at the sentencing was that, in
7 fact, he was lengthening the sentence for purposes of
8 rehabilitation --

9 JUSTICE GINSBURG: Well, how do we --

10 MR. CAHN: -- to make sure that she got into
11 the --

12 JUSTICE GINSBURG: -- can we know that when
13 the government -- didn't the government ask for 63
14 months?

15 MR. CAHN: The government did ask for 63
16 months. We requested 36 months. There's -- we don't
17 know with certainty --

18 JUSTICE GINSBURG: And the judge came up
19 with something in between those two?

20 MR. CAHN: He did, indeed. I believe that
21 -- that these particular issues are appropriately -- I'm
22 sorry -- addressed on plain error review in the circuit
23 court first. I don't think they're essential to the
24 legal question that's before this Court.

25 JUSTICE SCALIA: The judge did say, didn't

1 he -- this is on page 27 of the Joint Appendix -- "the
2 sentence has to be sufficient to provide needed
3 correctional treatment, and here I think the needed
4 correctional treatment is the 500-hour drug program."
5 It couldn't be clearer that he's computing the length of
6 the sentence on the basis of what correctional treatment
7 will be received. It "has to be sufficient to provide
8 needed correctional treatment."

9 MR. CAHN: Indeed, he did, and I believe
10 that he was taking into account his own knowledge of the
11 prison system and what it would require to allow Ms.
12 Tapia to participate in the 500-hour program.

13 CHIEF JUSTICE ROBERTS: What if -- putting
14 aside the particular statement here, what if a judge
15 says: I appreciate that one purpose of punishment is
16 deterrence; that's what -- and that's what's going to
17 guide me, and I think you will not be deterred if I only
18 sentence you for 2 years, but I think if you have to go
19 away for 3 years, you will appreciate that what you've
20 done is wrong and you won't do it again.

21 Is that for rehabilitation, that extra year,
22 or is it for punishment?

23 MR. CAHN: I believe that's for punishment
24 and deterrence, and I don't believe that's an improper
25 purpose.

1 CHIEF JUSTICE ROBERTS: Well, maybe -- what
2 is the difference between deterrence and rehabilitation?
3 The person doesn't commit any crimes anymore but wishes
4 -- wishes she could? Or -- and, well, if she's
5 rehabilitated, she doesn't want to? It seems to me it's
6 a very artificial distinction.

7 MR. CAHN: Well, I don't think it is,
8 because I think we can look at the purposes Congress had
9 in mind when it enacted the statute and, in particular,
10 the system it had in mind, the system it intended to
11 overturn when it enacted the statute. As I mentioned
12 before, one of the statements, a prominent statement, in
13 the Senate report that comes up again and again is
14 Congress doubted that rehabilitation could be reliably
15 induced in the prison setting. The system that was
16 being overturned was one of coercive rehabilitation in
17 which individuals were sent to prison and prison
18 sentences were tied to their completion of these
19 programs.

20 And so for that reason, I think when you
21 look at a sentence that's employed specifically to get
22 somebody into treatment, it is exactly within the
23 proscription Congress intended.

24 If there are no questions at this time, I'd
25 ask to reserve the rest of my time, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cahn.
2 Mr. Roberts.

3 ORAL ARGUMENT OF MATTHEW D. ROBERTS
4 ON BEHALF OF THE RESPONDENT IN SUPPORT OF VACATUR

5 MR. ROBERTS: Mr. Chief Justice, and may it
6 please the Court:

7 Section 3582(a) prohibits courts from
8 imposing or lengthening a term of imprisonment to
9 promote a defendant's rehabilitation, including by
10 facilitating her access to a prison drug treatment
11 program.

12 JUSTICE KAGAN: Mr. Roberts, could I take
13 you back to Justice Kennedy's question at the start
14 about the one-way ratchet? What's the government's
15 theory about what Congress might have been thinking when
16 it said you can't think about rehabilitation to sentence
17 or to lengthen a sentence, but you can think about
18 rehabilitation to make a decision not to sentence or to
19 shorten a sentence? What would -- what would have been
20 in Congress's mind?

21 MR. ROBERTS: Well, Congress was intending
22 to reject the prevailing rehabilitation model of
23 sentencing, and under that model, defendants were kept
24 in prison until they were declared rehabilitated based
25 on their participation in treatment programs. And what

1 Congress determined was that -- that coercing
2 participation in prison programs that way wasn't -- had
3 failed and that rehabilitation couldn't be accomplished
4 reliably in a prison setting. So --

5 JUSTICE ALITO: That's only one-half of what
6 the thinking was at the time about rehabilitation. The
7 thinking was that -- that some people were being
8 sentenced to coercive rehabilitation, but also that
9 other people were being paroled before they should be on
10 the theory that they had been rehabilitated. It was a
11 general skepticism about rehabilitation, and that is
12 inconsistent with the idea that you can take
13 rehabilitation into account in going down, but you can't
14 take rehabilitation into account in going up.

15 MR. ROBERTS: Well, Congress expressly
16 determined to retain -- there were people that said
17 rehabilitation never works; it can't be a legitimate
18 purpose of sentencing. And Congress decided not to go
19 that far. It expressly retained rehabilitation as a
20 purpose of sentencing. That's reflected in section
21 3553(a)(2)(D).

22 But what Congress determined was that it --
23 that because you couldn't reliably induce it in prison,
24 it wasn't appropriate to deprive defendants of their
25 liberty, expend the resources on keeping them in prison

1 for that purpose, but that -- that rehabilitation
2 remained a possibility, that other forms of sentencing
3 were appropriate ways to attempt to achieve
4 rehabilitation, and that's why Congress expressly
5 provided that, in imposing a sentence of probation, the
6 court can require a defendant to participate in
7 particular treatment programs --

8 JUSTICE ALITO: Yes, but that's different
9 from saying that a lower sentence can be imposed on the
10 theory that with rehabilitation outside of prison, a
11 lengthier sentence isn't needed.

12 Would you agree that when the guidelines
13 were mandatory a judge could not sentence to -- to
14 additional time, certainly not additional time outside
15 the guideline range for the purpose of rehabilitation,
16 but the judge also generally could not depart below the
17 guideline range on the theory that this defendant had
18 led a life of crime because the defendant lacked
19 vocational skills or the defendant was dependent on
20 drugs or alcohol, and with treatment outside of
21 incarceration, those problems which had led to the
22 criminality could be alleviated?

23 MR. ROBERTS: I think it would depend
24 whether that was an aggravating or, you know, mitigating
25 circumstance that the guidelines hadn't adequately taken

1 into account, but I don't think that Congress was trying
2 to prevent a court from selecting another sentencing
3 option, such as probation, in lieu of imprisonment
4 because the court determined that the primary purpose of
5 the sentence should be rehabilitation, or to shorten the
6 sentence to speed the defendant from imprisonment to
7 supervised release, where the court could guarantee the
8 defendant would participate in programs.

9 On the other hand, if the -- it was very
10 important, if there were important purposes of
11 protecting the public, deterring the defendant from
12 committing other crimes, deterring generally, then the
13 court was supposed to sentence the defendant to prison
14 in accordance with that, even if the defendant also
15 needed rehabilitation.

16 JUSTICE KENNEDY: Suppose -- suppose the
17 case in which the judge is going to sentence to 2 years
18 no matter, but there is a 2-year rehabilitation program,
19 and the defendant is -- the prisoner is receiving that.
20 Would you say that, at that point, the prisoner is
21 receiving an imprisonment term and rehabilitation?

22 MR. ROBERTS: Well, the prisoner is
23 receiving an imprisonment term --

24 JUSTICE KENNEDY: Hypothetical. The term
25 isn't affected by the program, but the judge recommends

1 the program, and the prisoner is receiving it.

2 MR. ROBERTS: I --

3 JUSTICE KENNEDY: Would you agree the
4 prisoner is then receiving both an imprisonment term and
5 rehabilitation?

6 MR. ROBERTS: I think the prisoner is
7 receiving rehabilitative services, yes, in prison -- in
8 prison, yes.

9 JUSTICE KENNEDY: I -- so then, we can use
10 those two goals of sentencing in -- in the
11 conjunctive --

12 MR. ROBERTS: Well --

13 JUSTICE KENNEDY: -- and you can have
14 imprisonment and rehabilitation at the same time?

15 MR. ROBERTS: Congress intended that, even
16 if a defendant needed rehabilitation, if the other goals
17 of sentencing such as deterrence and protecting the
18 public justified a term of imprisonment, that the court
19 should impose a term of imprisonment. So Congress --

20 JUSTICE KENNEDY: I'm just talking about a
21 matter of diction. You would agree there are instances,
22 in a hypothetical --

23 MR. ROBERTS: Yes.

24 JUSTICE KENNEDY: -- case, where you can
25 receive imprisonment and rehabilitation at same time?

1 MR. ROBERTS: Yes, yes, but what Congress
2 wanted courts to -- required courts to recognize was
3 that imprisonment is not an appropriate means of
4 promoting rehabilitation.

5 JUSTICE KENNEDY: We're -- we're talking
6 about what the statute says, and the question indicates,
7 the hypothetical indicates, that those are not mutually
8 exclusive. You can have imprisonment and rehabilitation
9 at same time. Now, this case is a little different
10 because she didn't get it, but let's just talk about the
11 hypothetical.

12 MR. ROBERTS: I agree that you can -- there
13 can be rehabilitative programs in prison. But what
14 Congress was trying to preclude was imposing
15 imprisonment for the purpose of providing those programs
16 or lengthening the imprisonment term for that purpose.

17 JUSTICE KAGAN: Counsel, assume --

18 JUSTICE GINSBURG: Prisons have multiple
19 treatment programs.

20 MR. ROBERTS: Yes.

21 JUSTICE GINSBURG: And they have vocational
22 treatment. Do you -- are you relying at all on the fact
23 that in the supervised release term, the judge can say
24 this man or this woman needs rehabilitation, and I want
25 this program for her, but in the prison setting, the

1 judge, this judge -- as the colloquy with Justice Scalia
2 showed, this judge wanted her to be in the program, but
3 she never got into it because the judge has no control?

4 MR. ROBERTS: Exactly, Your Honor. The --
5 under the SRA, judges have no authority to place
6 prisoners in -- place defendants in prison treatment
7 programs or to require their participation in those
8 programs. And Petitioner, in fact, did not participate
9 in the drug treatment program on which the sentencing
10 court relied in setting her prison term.

11 CHIEF JUSTICE ROBERTS: What if -- what if
12 the judge sentences people who commit robbery with
13 assault typically to 1 year; he can do it 1 to 2 years,
14 he gives them 1 year; except whenever the presentencing
15 report says the person has a drug problem and there's a
16 one-and-a-half-year drug program in the prison, he
17 sentences those people to one and a half years?
18 Regularly. But each time he says I recognize
19 rehabilitation is not a permitted factor; I can send
20 sentence this person to one to two, I'm going to pick
21 one and a half.

22 MR. ROBERTS: Right.

23 CHIEF JUSTICE ROBERTS: Is that a problem,
24 or does it always just depend on what the judge says?

25 MR. ROBERTS: I think generally you take the

1 district court at the court's word for what the purposes
2 of the sentence are, and the sentence has to be
3 justified by the reasons that the district court gives
4 in sentencing the defendant.

5 JUSTICE SCALIA: I think you'd say it was
6 wrong for the district court to do that.

7 MR. ROBERTS: If the -- if the judge --

8 JUSTICE SCALIA: But whether it can be
9 established on appeal that it was wrong is another
10 matter.

11 MR. ROBERTS: Yes. I mean, I don't know if
12 we -- I mean if we -- if the question is we know --

13 CHIEF JUSTICE ROBERTS: It's wrong -- wrong
14 to do what?

15 MR. ROBERTS: -- we're inside the district
16 court's head, and the district court is actually not
17 recognizing that rehabilitation is an appropriate means
18 of promoting -- that imprisonment is an appropriate
19 means of promoting rehabilitation but is in fact doing
20 that, but not -- but being disingenuous about the
21 court's reason, then the court is violating the statute,
22 but we're not going to know that.

23 CHIEF JUSTICE ROBERTS: Does the defendant
24 have the right to raise arguments and inquire into that
25 in -- in every case? Say that, well, he did say this

1 was just to -- just to punish me, but here is a list of
2 10 cases where I think it's like my case and those
3 people got less.

4 MR. ROBERTS: I think that -- that it's
5 going to be hard for the defendant to obtain reversal of
6 a conviction under those circumstances.

7 CHIEF JUSTICE ROBERTS: Well, I think it's
8 going to be hard for the government to defend a sentence
9 under those circumstances.

10 MR. ROBERTS: Well, I think, as I said, that
11 the words that you -- that the court is required to give
12 its reasons for imposing sentence. We presume that
13 district courts honestly give their reasons for imposing
14 the sentence and that if the court is indeed lengthening
15 the term of imprisonment because the court wants the
16 defendant to be in a program, that the court will say
17 that's what they're doing, just as Judge Moskowitz did
18 here. And once this Court makes clear that imprisonment
19 is not an appropriate means of promoting rehabilitation,
20 therefore, courts cannot impose or lengthen a term of
21 imprisonment to serve that purpose, sentencing courts
22 will follow that --

23 JUSTICE SOTOMAYOR: Counsel --

24 MR. ROBERTS: -- map.

25 JUSTICE KENNEDY: Suppose the judge said:

1 I'm going to sentence you to 12 months. Now, there is a
2 particular facility where there is a drug treatment
3 program that you can really benefit from, and you'd be a
4 safer citizen, but I'm not going to mix up imprisonment
5 and rehabilitation. I'm not even going to make that --
6 I'm not going to consider it. All I'm interested in is
7 imprisonment.

8 Is that an abuse of discretion? The failure
9 to consider the factors that Congress set forth,
10 including rehabilitation?

11 MR. ROBERTS: No. I think that the -- that
12 the -- what the court has to do is consider all of the
13 factors, including rehabilitative purposes.

14 JUSTICE KENNEDY: No, he said I -- no, he
15 said I'm not going to consider that.

16 MR. ROBERTS: He's not going to consider
17 rehabilitation at all in imposing sentence?

18 JUSTICE KENNEDY: Right.

19 MR. ROBERTS: Then, yes, that would -- that
20 would be a procedural error --

21 JUSTICE KENNEDY: All right.

22 MR. ROBERTS: -- to fail to consider it at
23 all.

24 JUSTICE KENNEDY: So -- so then he must
25 consider rehabilitation in the context of imprisonment?

1 MR. ROBERTS: Yes. We don't think that it
2 precludes -- the statute precludes considering
3 rehabilitation in the context of imprisonment. What it
4 precludes is imposing or lengthening the term.

5 JUSTICE SCALIA: I don't understand what
6 you're saying. It -- it seems to me what the statute
7 requires is that he consider rehabilitation in imposing
8 the sentence. Right?

9 MR. ROBERTS: Yes.

10 JUSTICE SCALIA: Not in imposing
11 imprisonment.

12 MR. ROBERTS: It does require --

13 JUSTICE SCALIA: So he can consider
14 rehabilitation in deciding what this person will be
15 required to do in -- in a probated term, but not in how
16 long he's going to stay in prison before he gets
17 probation.

18 MR. ROBERTS: Yes, but the court can also
19 consider rehabilitation to choose a sentence of
20 probation rather than a sentence of imprisonment.

21 JUSTICE ALITO: Suppose the judge thinks
22 that a -- a defendant would benefit from a type of a
23 vocational or educational training that may be available
24 in prison but that is not available in -- on the outside
25 in the particular community where this defendant

1 resides? What would the judge do then?

2 MR. ROBERTS: I think the court can still
3 require the availability -- require that as a condition
4 of supervised release if the judge thinks that that's --
5 or as probation; if the judge thinks that that's a
6 really critical provision to have, and the judge can
7 require the defendant --

8 JUSTICE ALITO: No, what if that's not --

9 MR. ROBERTS: -- to reside in the
10 appropriate place.

11 JUSTICE ALITO: What if it's not available
12 in the community on the outside?

13 MR. ROBERTS: Well, then the judge would
14 have to decide whether moving from -- whether having the
15 defendant in a different location than the defendant
16 ordinarily would be is worth providing that program. I
17 don't know that -- that there are such specialized
18 programs that those things can't be accommodated as a
19 general matter in -- in most communities --

20 JUSTICE SCALIA: Well, that wouldn't affect
21 the length of the sentence. Are you talking about, say,
22 can the judge prescribe that he be incarcerated in a
23 particular facility?

24 MR. ROBERTS: The judge cannot prescribe
25 that he be incarcerated in a particular facility. The

1 judge can make a recommendation for a particular
2 facility, but the judge can require participation in a
3 particular program on supervised release and residing in
4 a particular area on supervised release or on probation.
5 So a judge can, if the judge thinks it's important
6 enough, address that situation if it would arise. I'm
7 not --

8 JUSTICE SOTOMAYOR: Counsel, can a judge who
9 believes a defendant is dangerous to the public and
10 thinks that that danger can't be abated without a drug
11 treatment program, could the judge nevertheless under
12 3553(a)(2)(C) say, because of the danger to the public,
13 I'm going to lengthen the sentence?

14 MR. ROBERTS: Yes.

15 JUSTICE SOTOMAYOR: And in the hopes that a
16 drug rehabilitation program will be available? I don't
17 care if it is or it's not; this person's dangerous to
18 the community otherwise?

19 MR. ROBERTS: I think the judge can say that
20 -- that this person needs to be in prison for this
21 amount of time to protect the public.

22 JUSTICE SOTOMAYOR: So what's different than
23 what the judge did here, where he talked about,
24 explicitly, on page 26, "it has to deter" -- the
25 sentence has to deter criminal conduct by others, and it

1 has to protect the public from further crimes of the
2 defendant, and the sentence -- that's a big factor here,
3 given her failure to appear and what she did out on
4 bail.

5 So, if the sentence has a dual motive, is
6 that okay?

7 MR. ROBERTS: That is --

8 JUSTICE SOTOMAYOR: Now, I know that you're
9 -- there's -- there's an issue about whether this
10 transcript can be read as a dual motive or not.

11 MR. ROBERTS: Right.

12 JUSTICE SOTOMAYOR: But my question is, is a
13 dual-motive sentence permissible?

14 MR. ROBERTS: No, a dual-motive sentence --
15 if one reason that the judge is selecting the term is to
16 impose a sentence of imprisonment, that violates the
17 prohibition. However, if the sentence would have been
18 the same otherwise, then that would be harmless error.

19 JUSTICE SOTOMAYOR: Isn't that what "dual
20 motive" means? Unless --

21 MR. ROBERTS: I think -- yes. We --

22 JUSTICE SOTOMAYOR: You want talismatic
23 words. I would have picked the sentence anyway.

24 MR. ROBERTS: We -- we think that -- that in
25 this case the Petitioner won't be able to show plain

1 error, won't be able to show an effect on her
2 substantial rights on remand.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Bibas.

5 ORAL ARGUMENT OF STEPHANOS BIBAS
6 ON BEHALF OF THE AMICUS CURIAE

7 MR. BIBAS: Thank you. Mr. Chief Justice,
8 and may it please the Court:

9 Sentencing judges may consider needed
10 correctional treatments in deciding both whether to
11 imprison and for how long. The Sentencing Reform Act
12 rejected the rehabilitation model's unstructured
13 sentencing procedures designed to confine every inmate
14 indefinitely until a parole board found he had reformed
15 himself.

16 It did not, however, forbid treatment
17 programs targeting specific defendants' pathologies,
18 such as the drug treatment at issue here. The Act
19 rejected one means of promoting rehabilitation that was
20 bound up with indeterminate sentencing, not
21 rehabilitation itself.

22 JUSTICE GINSBURG: I could follow your
23 argument much better if the judge could say that this
24 specialized program -- as I am making that a term of
25 your incarceration. The disturbing factor about your

1 argument is the judge can only recommend; the judge has
2 no way of making sure that this person will be in prison
3 longer and get the treatment the -- the judge wants,
4 because the judge can't control where the person will
5 serve her sentence and what treatment will be available
6 for her.

7 MR. BIBAS: Your Honor, I don't believe
8 that's a large concern for several reasons. The first
9 is this Residential Drug Abuse Program, RDAP, is given
10 to 93 percent of eligible defendants. The only reason
11 Petitioner did not get it is because she affirmatively
12 refused, said she was not interested.

13 The second point I would make is that if we
14 look at the legislative history, the Petitioner and the
15 government's reply brief say, well, this Act stripped
16 judges of the power to do this. The Senate report makes
17 clear this was a simple administrative simplification
18 designed to make it clear that the Bureau of Prisons
19 ultimately controlled all of these things but that at
20 the same time it was supposed to listen seriously to
21 judges' recommendations. It was not --

22 JUSTICE GINSBURG: Wasn't there something --
23 you responded that she didn't -- she said I'd rather
24 not. But wasn't there something about placing her
25 with -- in the same facility as another inmate? Wasn't

1 that involved?

2 MR. BIBAS: There were two distinct issues
3 here. One was putting her in the particular prison that
4 was named was not possible because she needed to be
5 separated from another inmate. The other is whether she
6 could be put in a facility that had one of these
7 programs. About half of prisons -- Federal prisons do,
8 and the reason she didn't get that was because she
9 refused, she said she wasn't interested.

10 JUSTICE SCALIA: I don't know why you
11 consider that that solves your case, that that makes
12 everything okay. She refused it. She would not have
13 been able to refuse it had it been made a condition of
14 her supervised release. You either take the program or
15 you go back to jail. I mean, that's -- why is that an
16 insignificant difference?

17 The fact is the judge has no control over
18 whether this person gets the rehabilitation that was
19 supposedly the purpose of the -- of the extended prison
20 term.

21 MR. BIBAS: A couple of --

22 JUSTICE SCALIA: It makes no sense.

23 MR. BIBAS: I just note, Your Honor, first
24 of all, the statute requires judges to make predictions
25 about deterrence. That is a forward-looking matter.

1 The fact that a judge must predict the future calls for
2 appropriate skepticism and a statement of reasons in
3 appellate review. It does not mean that a judge may not
4 consider deterrence because it's a speculative
5 possibility.

6 JUSTICE SCALIA: You're -- you're not
7 responding to my point. You're -- you're -- you're
8 making a different point. I'm saying that it's -- it --
9 it -- it does not help your case that the reason she did
10 not get the rehabilitative treatment that this judge
11 wanted her to get was that she simply refused it. Why
12 does that help your case? She couldn't have refused it
13 if, as the other side says, had to be the case, he had
14 imposed this rehabilitative measure as a portion of
15 supervised release. Then she would have had to take it.

16 MR. BIBAS: Your Honor is correct that there
17 is a contingency involved here, but the contingency
18 involved is no greater than the contingency involved in
19 other sentencing decisions judges must make and that is
20 a reason for skepticism. It doesn't imply that the Act
21 meant to disable judges from doing this.

22 JUSTICE KAGAN: Mr. Bibas, I -- I -- I have
23 to say I don't really understand the whole premise of
24 your argument. You're basically saying the judge cannot
25 consider rehabilitation, but the judge can consider

1 educational programs, vocational programs, treatment
2 programs, and so forth.

3 I think most people would think that all of
4 those things are rehabilitation, that there's nothing
5 left over when you say that the judge can consider all
6 of those things.

7 MR. BIBAS: Your Honor, I don't believe you
8 phrased correctly. Our point is not that judges can't
9 consider rehabilitation. It is that judges may not use
10 imprisonment as the means of promoting rehabilitation.

11 JUSTICE KAGAN: Yes. Well, I'll ask the
12 same question.

13 MR. BIBAS: Yes.

14 JUSTICE KAGAN: You're saying they can
15 consider rehabilitation in imposing a sentence, they
16 cannot consider rehabilitation in imposing a sentence,
17 but they can consider all these programs in imposing a
18 sentence. And I'm saying what's the difference between
19 all these programs and rehabilitation? Once you say
20 they -- they can consider all these programs, what's
21 left over that they can't consider?

22 MR. BIBAS: Your Honor, I think the answer
23 is clear if we look at the statutory text. It's in
24 Petitioner's brief, the blue brief at Appendix 2 and
25 Appendix 3. The contrast becomes clear if we look at

1 3553(a)(2)(D). There were four simple purposes of
2 punishment the judge must consider. And (D) is not
3 everything that was ever considered rehabilitation. It
4 is a specifically limited subset of rehabilitation.

5 It must be needed, must be educational or
6 vocational training, medical care or other correctional
7 treatment, and it must be in the most effective manner.

8 So, judges may no longer rest on what Judge
9 Frankel and the -- the Senate decried as the eerie
10 nonsense that everyone can be rehabilitated simply by
11 throwing them in prison or simply by having everybody
12 going to social workers or classes, but because
13 criminality is not a pathology that needs treatment.
14 But he and the Senate report contrasted that with drug
15 treatment, which is very different, because there's a
16 diagnosed pathology, there is a criterion for success
17 that's measurable, and there's a fixed limited time.

18 And that third point is crucial here,
19 because both Petitioner and the government in their
20 argument said that you can't keep someone in jail tied
21 to completion of programs or keep them in until he has
22 been rehabilitated through treatment. The indeterminant
23 aspect here was a crucial part of what Congress was
24 targeting that's very different from --

25 JUSTICE SCALIA: You haven't read the -- the

1 crucial provision of the statute. Yes, you read the --
2 the section entitled imposition of a sentence, but there
3 is another provision in the statute which says
4 imposition of a sentence of imprisonment. You can
5 indeed consider those factors in imposing the sentence,
6 which includes probation, supervised release and any
7 other matters. But what -- what 3582(a) says is that
8 the court in determining whether to impose a -- whether
9 to impose a term of imprisonment as opposed to just
10 parole or -- or supervised release, and if a term of
11 imprisonment is to be imposed and determining the length
12 of term shall consider the factors set forth in, that
13 you mentioned in 3553(a) to the extent they are
14 recognizing that imprisonment is not an appropriate
15 means of promoting correction and rehabilitation.

16 You have to reconcile the two sections. And
17 the way to reconcile them is to say that the former
18 applies to sentencing in general but when you're dealing
19 with the length of a sentence of imprisonment or whether
20 there should be any imprisonment at all, you cannot
21 consider rehabilitation.

22 MR. BIBAS: No, Your Honor.

23 JUSTICE SCALIA: I don't know any other way
24 to read it.

25 MR. BIBAS: No, Your Honor. The main clause

1 of 3582(a) says shall consider the factors set forth in
2 3553(a). It does not say (a)(2) -- (a), (a)(2)(B) and
3 (a)(2)(C). As the very next section of the sentencing
4 format goes, 3583 says consider only these purposes, but
5 3582 says consider all of these factors to the extent
6 they apply in a particular case.

7 Now, the way Your Honor reads the
8 recognizing clause is as if it said, except the court
9 shall not consider in imposing or lengthening a sentence
10 (a)(2)(D) or if it tracked the language of (a)(2)(D).

11 JUSTICE SCALIA: I -- I don't know what else
12 recognizing that factor would consist of, except you
13 won't use that factor in deciding imprisonment or length
14 of term of imprisonment.

15 MR. BIBAS: Your Honor, we've looked through
16 the entire United States Code. We have not found a
17 single instance in which a recognizing clause is used to
18 mean an exception --

19 JUSTICE SCALIA: Well, you tell me what it
20 means here, then. What, he -- he should say, you know,
21 I recognize that rehabilitation is not a -- an
22 appropriate factor to take into account in determining
23 the length of your sentence or the -- or whether you
24 should go to jail at all. That said, I'm going to send
25 you to jail in order to rehabilitate you.

1 (Laughter.)

2 JUSTICE SCALIA: Is that all it means?

3 MR. BIBAS: Your Honor, a recognize -- we

4 found dozens of instances in the U.S. Code where

5 recognizing introduces a statement of principle or

6 policy or rationale. Petitioner or the government cite

7 no instances in which it's used to impose a flat ban.

8 What we point out is -- Justice Kennedy made

9 the point that logically there is a distinction between

10 the imprisonment and the treatment that occurs during

11 the imprisonment. And if it's recognizing that the

12 imprisonment is not an appropriate means of promoting

13 correction rehabilitation, that itself bans a

14 penological policy that was known in our history and had

15 been known into the 1970s.

16 JUSTICE SCALIA: But the judge only has the

17 power to impose imprisonment. He does not have the

18 empower to impose anything else during the imprisonment.

19 I mean, what you're saying might make sense if indeed he

20 could prescribe some treatment during imprisonment, but

21 he can't. There are prisons -- and why can't he, by the

22 way? Why has he been prevented from doing that,

23 although he's allowed to do it during supervised

24 release? Does that make any sense, if indeed, as you

25 say, he can take that into account in imprisonment?

1 MR. BIBAS: Your Honor, judges in supervised
2 release, it -- it -- it's hard to understand why in
3 3583(e)(3) judges may consider rehabilitation in
4 deciding whether to impose a term of imprisonment on
5 resentencing, and we've been offered no logical
6 explanation as to why that same logic Congress would
7 have meant a flat ban here that it didn't spell out in
8 an initial sentencing.

9 JUSTICE KENNEDY: It -- it does seem to me
10 that the principal trouble I have with your argument is
11 that, as Justice Scalia mentioned, the judge can't be
12 certain that the treatment will -- will be provided.
13 And in an answer to an earlier question you said, well,
14 90 percent of the time the judge's recommendation is
15 followed, the program is -- is offered.

16 Suppose we're only 10 percent of the time?
17 Suppose only 10 percent of the time could or did the
18 Bureau of Prisons follow the judge's recommendation,
19 wouldn't your interpretation of the statute then be very
20 difficult to sustain?

21 MR. BIBAS: Justice Kennedy, while I agree
22 that the reliability of the prediction is an important
23 factor, I think this is dealt with through the ordinary
24 appellate review that this Court has fleshed out in
25 Rita, Gall, and Kimbrough. If there's 93 percent

1 likelihood, predictability, here, then the judge can
2 give it a fair amount of weight as the judge can give a
3 fair amount of weight to deterrence calculations. If
4 it's highly unpredictable, then the judge shouldn't be
5 putting very much weight on that at all.

6 And I would point out particularly that if
7 we look at those appellate review cases, it's very
8 relevant that the judge here imposed a sentence within
9 the range. As Justice Sotomayor pointed out, there are
10 multiple explanations going on here; the judge arrives
11 at a sentence within the range. It's hard to tell here
12 that it's even a but-for cause versus just a hope.

13 The -- the thicket of issues that
14 Petitioner's and the government's reading forces
15 appellate courts into in disentangling sentences that
16 are otherwise reasonable, that are within the range that
17 could have been justified any number of ways, counsels
18 against requiring us to say one factor is categorically
19 forbidden in the sentencing format.

20 JUSTICE KAGAN: Mr. Bibas, just practically
21 speaking what does this clause instruct a court not to
22 do in your view?

23 MR. BIBAS: It instructs a court to bear in
24 mind that simply locking someone in a cell away from his
25 criminal associates, away from his pattern of life, is

1 not itself going to reform him. We've been down that
2 road.

3 JUSTICE KAGAN: Well, really who thought
4 that? This was 1984. When people talked about
5 rehabilitation, they were talking about drug programs,
6 they were talking about education programs, they were
7 talking about vocation programs. They were not talking
8 about some idea that had passed away long since, that
9 just locking you in a cell was going to rehabilitate
10 you.

11 MR. BIBAS: A couple of responses that I
12 think show that to be incorrect. The first of these is
13 most of the references in the Senate report are to just
14 generic open-ended education, vocation, and counseling.
15 We see maybe one reference to alcohol and drug treatment
16 in there.

17 The second of these is that idea of
18 isolation, though it had diminished, was still alive in
19 the 1970s. There was a widely cited manual for judges,
20 the "Guides for Sentencing" in 1974, that said that
21 confinement, quote, "may be necessary to break criminal
22 associations and in time to modify antisocial attitudes
23 and tendencies."

24 My third point is this is not just about the
25 substantive idea of rehabilitating. The government and

1 Petitioner point out that there was a rehabilitation
2 model, a procedural approach here that was bound up with
3 that history of the penitentiary, and the approach was
4 that, in the Senate report, the rehabilitation model
5 ties prison release dates to successful completion of
6 programs.

7 We don't have open-ended, unpredictable
8 sentences any more. The Sentencing Reform Act in
9 multiple ways gets rid of that unpredictability --

10 JUSTICE GINSBURG: But wouldn't your
11 proposal lead to unevenness in sentencing? If you -- if
12 you're right, then this choice of extending a term to
13 accommodate a drug program, that could be -- the judge
14 would have the option. I think nearly half of the
15 people who are incarcerated have a drug addiction. So
16 one judge might say: I'm not going to let that person
17 out until they -- they should at least have a chance to
18 get into this program. And another will say: I can't
19 control that; I'm not going to subject -- you would be
20 introducing that, just what the framers of the Reform
21 Act were trying to get away from, that this swings from
22 one judge to another, and you're dealing with almost
23 half the prison population.

24 MR. BIBAS: A couple of points. One is,
25 statistically I think the number is lower than you say.

1 The RDAP program here requires 12 months before
2 admission having a provable addiction or abuse, so it's
3 about 30, 35 percent of inmates.

4 But granted that issue, that's why the
5 Sentencing Reform Act requires statements of reasons,
6 subject to appellate review. If judges are varying
7 widely, this Court's case law in Rita, Gall, and
8 Kimbrough allows appellate courts to harmonize what
9 they're doing. If this judge had added 5 years to her
10 sentence, this would be a different case. Judge
11 Franklin and others were concerned about sentences
12 exceeding 5 years, open-ended, airy hopes that everyone
13 will be cured of criminality.

14 We're talking about a sentence within the
15 range, sentence that, if a few lines of the transcript
16 had been whited out we wouldn't be here. A judge could
17 have reached the same sentence on a lot of different
18 grounds. And are we going to tell judges you can
19 consider other things, but if you muse about this ground
20 you can't offer a thoughtful, reasoned justification --
21 per se automatic reversal.

22 There are only a couple of places in the
23 Sentencing Reform Act that have categorical bans and
24 they don't read the way this one does. The very next
25 section in the Act, 3583(c) says: "In considering a

1 supervised release sentence, a judge shall consider the
2 factors in 3553(a)(1), (a)(2)(B), (a)(2)(C), and
3 (a)(2)(D).

4 It skips over retribution explicitly where
5 Congress meant to omit it.

6 The other place in the Act where Congress
7 explicitly banned the factor was in 28 U.S.C. 994(d).
8 The commission, the sentencing commission, not a judge,
9 shall ensure that the guidelines are entirely neutral
10 with respect to race, sex, creed, national origin, and
11 socioeconomic status. When Congress meant to ban
12 something, even within the range, it spoke much more
13 clearly. What it did usually was it gave some guidance
14 to the sentencing commission. And section 994 has a
15 number of places where the commission shall do this, the
16 commission shall ensure that this is generally an
17 appropriate or inappropriate.

18 But it left a range, and it simultaneously
19 said judges should individualize sentences within that
20 range. 991(b)(1)(B) says there are factors not
21 adequately taken into account in the guidelines that can
22 lead to aggravating or mitigating, and judges can also
23 adjust sentences to individualize them within the range.

24 JUSTICE SOTOMAYOR: Can you articulate an
25 interpretation of this provision that would guide

1 appellate review? If rehabilitation can always be a
2 factor, then when and how does a court of appeals
3 determine whether a judge has abused his or her
4 discretion? You said 5 years, if the guideline range
5 presumably is 24 months and the judge adds 5 years. But
6 how do you define that?

7 The simple answer is if the judge is
8 imposing the sentence because of rehabilitation, they
9 can't do that. Is that what you're arguing or are you
10 arguing they can do it except within a range? I'm not
11 quite sure I understand how far you're going.

12 MR. BIBAS: I understand, Justice Sotomayor.
13 Our primary argument is that 3582's recognizing clause
14 isn't about this at all. This is dealt with by
15 3553(a)(3)(D), what is it that's needed correctional
16 treatment, and if it fits within (a)(2)(D), ordinary
17 appellate review.

18 If the Court is not comfortable with that
19 and thinks that there ought to be more discouragement,
20 we do have a fallback argument that says that the Senate
21 report talks about discouraging using this as the sole
22 basis, right, but that if it's one of several factors,
23 if it appears to be given a proper balanced weight, then
24 there's no need to be so suspicious of it. And indeed,
25 when we look at the case law in the circuits -- and

1 we've surveyed the most recent 150 or so cases on
2 rehabilitation in the courts -- we see very rarely --
3 first of all, we haven't found any cases where judges
4 are putting someone into prison versus out based solely
5 on this.

6 We find only a couple of cases where judges
7 appear to be lengthening a sentence solely because of a
8 desire to put someone into drug treatment. Usually,
9 what's happening is something like what happened here.
10 The judge is balancing three or four factors; it's in
11 the mix; the judge might well have gotten the same
12 result anyway.

13 Are we going to forbid courts to have that
14 kind of reasoned, open review, subject to appellate
15 review, in order to ban something that isn't banned in
16 the way that 994 bans race and sex or 3583 bans
17 retribution? It's simply not the way the statute words
18 things elsewhere and it's not the wording Congress chose
19 here, especially since this -- it's a subordinate
20 clause, it's hidden, it's not at all clear in
21 undercutting the main clause of 3582 in saying shall
22 consider all the factors of punishment here to the
23 extent they apply in an individual case.

24 JUSTICE KENNEDY: But I still find it hard,
25 if I were going to write the opinion, to rule for your

1 position to ignore the 90 percent-10 percent
2 hypothetical problem I have, to say, well now, 90
3 percent of the time the judge's rules are going to be
4 followed or the judge's recommendations are going to be
5 followed. That's an odd way to support the
6 interpretation of the statute that we have to -- that we
7 have to adopt in order to rule in your favor because, as
8 I say, suppose his position, his recommendation, were
9 followed only 10 percent of the time?

10 MR. BIBAS: Justice Kennedy, first of all,
11 there are programs out there for which the judge's
12 recommendation is a prerequisite and 100 percent of the
13 people who get into the program are ones whom the judge
14 recommended. There are some drug education programs, I
15 believe a mental health or sex offender program, where
16 there's a link between those two. It's just this
17 particular program that we're talking about.

18 The second point is, as I said, one of the
19 explicit purposes of sentencing is deterrence. A judge
20 can never guarantee that he's going to deter a
21 particular offender from committing a crime in the
22 future. The judge has to make an educated prediction
23 with the help of the probation or pretrial services
24 officer's report, and that's subject to appellate
25 review. But the fact of the prediction, the fact of

1 uncertainty about whether someone will be deterred or
2 not doesn't disable the judge from weighing that
3 prediction.

4 JUSTICE SCALIA: If -- if it is as you say,
5 why -- why did Congress leave it up to the Bureau of
6 Prisons to decide whether this person can enter into a
7 rehabilitation program, and not allow the judge to
8 prescribe that the person will enter into it?

9 Why? What -- what possible sense could that
10 make?

11 MR. BIBAS: Your Honor, if you will bear
12 with me for your colleagues who like legislative
13 history, and I quote from the Senate report, that this
14 change is designed only to simplify the administration
15 of the prison system, at page 141 of the Senate report.
16 It was not designed to introduce any substantive change
17 in the role of judges or the Attorney General.

18 JUSTICE SCALIA: Judges can prescribe it?

19 MR. BIBAS: No, the change was made --

20 JUSTICE SCALIA: Well, that's a substantive
21 change, they can't prescribe, right?

22 MR. BIBAS: But it was not intended to
23 affect the authority of the Bureau of Prisons or the
24 judge in their -- in their roles and input. It's just
25 that the --

1 JUSTICE SCALIA: I don't understand what
2 you're saying. Was it not a change that the judge could
3 not prescribe a certain program for the prisoner?

4 MR. BIBAS: It -- it was --

5 JUSTICE SCALIA: It was a change?

6 MR. BIBAS: Yes, it was, actually.

7 JUSTICE SCALIA: Why? Why would they have
8 that change if the statute reads the way you say? What
9 sense does it make to still allow the judge to take this
10 into account, but affirmatively deprive him of the power
11 to do what he wanted to do?

12 MR. BIBAS: Your Honor, I believe that there
13 were some legal issues that were coming up in litigation
14 over prison conditions and sentencing in the years
15 leading up to this Act, where there was unclarity as to
16 whether the Attorney General or the judge or the Bureau
17 of Prisons -- whose decision ultimately was being
18 challenged in this litigation. And the Act made that
19 change, but it was designed only to simplify the
20 administration. It was not meant to say that judges
21 therefore are cut out of the process, and unfortunately
22 that's all that we know about that provision.

23 JUSTICE BREYER: Well, the Senate report
24 says that the provisions we've been talking about make
25 clear a defendant should not be sent to prison only

1 because the prison has a program that might be good for
2 him. Drug dependence in the committee's view generally
3 should not play a role in the decision whether or not to
4 incarcerate the offender. Is there something that
5 conflicts with that?

6 Because that was pretty clear indication of
7 the committee's view.

8 MR. BIBAS: Your Honor, the committee in
9 dealing with drug dependence said the commission shall
10 decide whether drug dependence, etcetera, is relevant,
11 shall take it into account only to the extent that it is
12 relevant; and the commission decided as with most of
13 these other factors that drug dependence shall not be
14 used ordinarily in sentencing outside the range, but
15 left it to the judge to decide within the range.

16 As to your -- so judges have some
17 flexibility in using drug dependence for
18 within-guideline sentencing.

19 And then on your point about a person should
20 not be sent to prison only because the prison has a --

21 JUSTICE BREYER: You put a great deal of
22 weight on the word only. I guess if it's a dual motive
23 we don't really know what would have happened in the
24 absence of one of the motives. So should we send the
25 whole thing back for resentencing?

1 MR. BIBAS: No, I think this goes to Justice
2 Sotomayor's question. That very often these things are
3 bound up and judge ought to be able to consider it in
4 the mix, especially when it's not just a program that
5 quote, "might" be good for him this -- this airy hope
6 that everybody who has criminality can be cured -- but
7 specifically there's a specific targeted program.

8 Particularly where, as here, Congress made a
9 point of approving of in-prison drug treatment as
10 effective to reduce recidivism where we have a fixed
11 term and a specific diagnosis that Congress has funded
12 and encouraged with a 12-month sentence reduction.

13 If this Court has no further questions, the
14 statute allows judges to consider needed correctional
15 treatment programs in prison sentencing. The judgment
16 of the court of appeals should therefore be affirmed.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 Mr. Cahn, you have 3 minutes remaining.

19 REBUTTAL ARGUMENT OF REUBEN C. CAHN

20 ON BEHALF OF THE PETITIONER

21 MR. CAHN: Thank you, Your Honor.

22 Let me begin with a couple points about the
23 plain language of this statute. When a defendant is
24 sent to prison so that he can gain access to
25 rehabilitative programs, imprisonment is used as a means

1 to promote rehabilitation. Counsel stresses only the
2 imprisonment portion of that sentence, but it is
3 strictly speaking within the very prohibition that
4 Congress has articulated.

5 Beyond that I would point to 3553(a)(2)(D),
6 and counsel has left off the last few words in
7 discussing that purpose of sentencing that's set out
8 there. Congress required that these rehabilitative
9 resources be provided in the most effective manner. As
10 is discussed in the brief, Congress had determined with
11 regard to in-prison rehabilitation programs that they
12 simply were not the most effective manner.

13 JUSTICE SOTOMAYOR: Counsel, this makes a
14 lot of sense when we're talking about huge disparities
15 in a guideline sentence, versus one where the judge goes
16 outside the guidelines or imposes a greater sentence
17 than otherwise the guidelines would determine for
18 rehabilitation purposes.

19 But not infrequently guideline ranges are
20 within very narrow scopes, and in fact there are some
21 prison advantages that you get from being sentenced to a
22 year and a day that you don't get if you're sentenced to
23 12 months; and district courts routinely will choose
24 between a year and a day or 12 months based on knowledge
25 about what might be available if you're there for over a

1 year. Why is that wrong?

2 What would be the difference? You see, I'm
3 having a hard time in this case, because if a judge
4 comes in and says guideline range is 50 to 60, I think
5 in the middle is perfectly fine, I just don't know
6 whether I should give him 54 or 55 months, but I know
7 that at 55 months there's this kind of program
8 available. I'm going to do -- I'm going to -- you know,
9 it is -- judging is not so precise that you know exactly
10 where to go within the small ranges, and so there are
11 many factors that influence that decision. Why should
12 we announce a rule that says to a judge in those
13 situations, don't give him that extra month?

14 MR. CAHN: Because Congress has prescribed
15 it. Because Congress made the choice that it shouldn't
16 be allowed; and it may seem unreasonable to all of us,
17 but Congress made a determination that it wasn't
18 appropriate to lengthen these sentences or impose them
19 for purposes of rehabilitation.

20 JUSTICE ALITO: Are you arguing for
21 something like a plain statement rule, if the judge says
22 plainly, I'm increasing your sentence so you can get
23 rehabilitation, then there's a problem? Or would there
24 possibly be situations in which one could infer that the
25 desire to provide for rehabilitation in prison had

1 influenced the sentence? For example, choosing a
2 sentence that is just long enough to allow somebody to
3 take advantage of a particular rehabilitation program in
4 a -- in a prison, or where the judge goes on and on and
5 on about the need for rehabilitation for this --
6 vocational training for this prisoner?

7 MR. CAHN: It's possible, but I think that
8 this Court entrusts sentencing judges to follow its
9 mandate, and if this Court says you're not to increase
10 sentences for the purposes of getting people into
11 rehabilitative programs, then you should state why
12 you're putting people in prison, that we can count on
13 those reasons to be honestly and truthfully given.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Bibas, you were appointed by this Court
16 to brief and argue this case. You have ably carried out
17 that responsibility, for which the Court is grateful.

18 The case is submitted.

19 (Whereupon, at 11:02 a.m., the case in the
20 above-entitled matter was submitted.)
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