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2 UNITED STATES COURT OF APPEALS  
3  
4 FOR THE SECOND CIRCUIT  
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7  
8 August Term, 2011  
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10 (Submitted: February 8, 2012 Decided: February 17, 2012)

11  
12 Docket No. 11-1088-cr  
13

14  
15 UNITED STATES OF AMERICA,  
16

17 *Appellee,*

18  
19 -v.-

20  
21 TROY GILLIARD, AKA T ROY,  
22

23 *Defendant-Appellant.*  
24

25  
26  
27 Before:

28 WESLEY, LOHIER, *Circuit Judges*, and ROSENTHAL, *District Judge*.<sup>\*</sup>  
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30 Appeal from a judgment of the United States District  
31 Court for the Southern District of New York (Sullivan, J.),  
32 following Defendant's guilty plea to conspiring to  
33 distribute and possess with the intent to distribute heroin.  
34 The district court sentenced Defendant principally to a term  
35 of 96 months' imprisonment. Defendant contends that the  
36 above-Guidelines sentence was procedurally unreasonable  
37 because the district court impermissibly based the sentence  
38 on his rehabilitative needs. Defendant also challenges the  
39 sentence as substantively unreasonable. We hold that the  
40 district court did not impose the prison term to promote

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\* The Honorable Lee H. Rosenthal, of the United States  
District Court for the Southern District of Texas, sitting by  
designation.

1 Defendant's rehabilitative needs and that the court's  
2 discussion of rehabilitation during the sentencing  
3 proceeding was permissible. We conclude that the sentence  
4 was neither procedurally nor substantively unreasonable.  
5

6 **AFFIRMED.**  
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10 Steven M. Statsinger, Federal Defenders of New  
11 York, Inc., Appeals Bureau, New York, NY, *for*  
12 *Defendant-Appellant.*  
13

14 Niketh Velamoor, Iris Lan, Assistant United States  
15 Attorneys, for Preet Bharara, United States  
16 Attorney for the Southern District of New  
17 York, New York, NY, *for Appellee.*  
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21 WESLEY, *Circuit Judge:*

22 Defendant-Appellant Troy Gilliard appeals from a March  
23 9, 2011 judgment of the United States District Court for the  
24 Southern District of New York (Sullivan, J.), following his  
25 guilty plea to conspiring to distribute and possess with the  
26 intent to distribute heroin, in violation of 21 U.S.C.  
27 §§ 841(b)(1)(C) and 846. The district court sentenced  
28 Gilliard principally to a term of 96 months' imprisonment.  
29 Gilliard contends that the above-Guidelines sentence was  
30 procedurally unreasonable in light of *Tapia v. United*  
31 *States*, 131 S. Ct. 2382 (2011), because the district court  
32 impermissibly based the sentence, at least in part, on his

1 rehabilitative needs. We disagree and conclude, based on  
2 our review of the record, that the district court did not  
3 impose the prison term to promote Gilliard's rehabilitative  
4 needs and that the court's discussion of rehabilitation  
5 during the sentencing proceeding was permissible. We also  
6 disagree with Gilliard's contention that the sentence was  
7 substantively unreasonable. Accordingly, we affirm the  
8 sentence imposed by the district court.

9 In July 2010, Gilliard was arrested after a series of  
10 authorized communication intercepts confirmed that he was  
11 involved in heroin trafficking. On November 12, 2010,  
12 Gilliard pled guilty to conspiring to distribute and possess  
13 with the intent to distribute heroin, in violation of 21  
14 U.S.C. §§ 841(b)(1)(C) and 846. Under the plea agreement,  
15 the parties stipulated that the calculated Sentencing  
16 Guidelines range was 57 to 71 months' imprisonment.

17 In Gilliard's Presentence Report ("PSR"), the Probation  
18 Office made the same calculation. In arriving at that  
19 calculation, the PSR set forth Gilliard's troubled past. He  
20 had New York state convictions for grand larceny and bail  
21 jumping, and a federal conviction for money laundering  
22 (related to his involvement in distributing prescription

1 drugs), for which he was sentenced to 100 months'  
2 imprisonment. Gilliard also had additional prior  
3 convictions for escape, assault, and possession of a  
4 controlled substance, each resulting in either a prison  
5 sentence or fine. Moreover, Gilliard violated the terms of  
6 his supervised release on multiple occasions. Most notably,  
7 Gilliard committed the instant offense while on supervised  
8 release. The Probation Office ultimately recommended a  
9 sentence of 65 months' imprisonment.

10 Gilliard argued in his sentencing submission that 57  
11 months would be sufficient, asserting principally that his  
12 involvement in narcotics trafficking stemmed from  
13 debilitating medical issues that led him to self-medicate  
14 and to sell narcotics. The government responded that a  
15 sentence within the advisory Guidelines range of 57 to 71  
16 months was appropriate, given that the instant offense  
17 represented Gilliard's eighth criminal conviction and second  
18 narcotics-related federal conviction.

19 At the sentencing proceeding, the district court also  
20 calculated the applicable Guidelines range to be 57 to 71  
21 months and confirmed that neither party had any objections  
22 to the calculation. In response to defense counsel's

1 confirmation that Gilliard was asking for a Guidelines  
2 sentence, the district court explained that it could not  
3 reconcile Gilliard's health struggles stemming from a car  
4 accident and his ensuing efforts to self-medicate with his  
5 prior crimes which preceded and continued after the  
6 accident.

7 After providing Gilliard an opportunity to address the  
8 court, the district court focused on several sentencing  
9 factors in turn. With respect to Gilliard's "extensive  
10 criminal history," the district court took into account the  
11 federal conviction for money laundering—which related to  
12 drug dealing—and Gilliard's failed attempts to comply with  
13 the terms of supervised release. The district court again  
14 was skeptical of the connection between Gilliard's efforts  
15 to self-medicate and the crime at issue, noting that many  
16 people with pain do not resort to selling heroin. Turning  
17 to "the facts and circumstances of the crime," the district  
18 court described the seriousness of the crime of conspiring  
19 to sell heroin and suggested that the amount of drugs  
20 attributed to Gilliard was relatively small compared to the  
21 amount of drugs actually involved. The district court then  
22 addressed the goal of specific deterrence, stating that it

1 sought to impose an appropriate sentence to prevent Gilliard  
2 from committing similar crimes in the future.

3 Finally, the district court addressed Gilliard's own  
4 needs while in custody by noting:

5 I think you obviously had a substance abuse problem.  
6 You obviously also have medical issues that need to  
7 be dealt with. You also have psychiatric issues  
8 that need to be dealt with and have been dealt with  
9 sort of sporadically over a number of years. But  
10 those are important things. And it's important, as  
11 [defense counsel] has requested, that you be  
12 sentenced in such a way that you are able to address  
13 those problems; that you have access to facilities  
14 and care that will enable you to deal with these  
15 problems. So that's something, obviously, I take  
16 very, very seriously, and will, in fashioning my  
17 sentence.

18  
19 A 124.

20 Before imposing the sentence, the district court  
21 explained that all the arguments made by defense counsel in  
22 support of a lower sentence were "outweighed by what [the  
23 court] consider[ed] to be the high, high likelihood of  
24 recidivism and the serious nature of the crime committed and  
25 the crimes committed in the past." A 125. The district  
26 court concluded that an above-Guidelines sentence was  
27 warranted. Although it had contemplated a 10-year sentence,  
28 the district court ultimately decided that an 8-year  
29 sentence was appropriate "in light of everything [the court

1 had] talked about." A 125-26. After imposing a term of 96  
2 months' imprisonment, the district court stated its intent  
3 to recommend to the Bureau of Prisons ("BOP") that Gilliard  
4 be placed close to family and in a facility with effective  
5 drug treatment programs.

6 We review a district court's sentence for  
7 reasonableness. *See, e.g., United States v. Booker*, 543  
8 U.S. 220, 261-62 (2005). Under this "deferential abuse-of-  
9 discretion standard," we first consider whether the district  
10 court committed procedural error. *United States v. Cavera*,  
11 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*) (internal  
12 quotation marks omitted). A district court "errs  
13 procedurally if it does not consider the § 3553(a) factors,  
14 or rests its sentence on a clearly erroneous finding of  
15 fact." *Id.* at 190.

16 Gilliard argues that the sentence was procedurally  
17 unreasonable because the district court violated 18 U.S.C.  
18 § 3582(a) by imposing a term of imprisonment to promote his  
19 rehabilitative needs. As a preliminary matter, we note that  
20 Gilliard did not raise this argument before the district  
21 court, and thus it would normally be subject to plain error  
22 review. *See United States v. Villafuerte*, 502 F.3d 204, 208

1 (2d Cir. 2007). In cases such as this one, however, where  
2 the claim is based on an intervening Supreme Court decision,  
3 this Circuit has previously applied a "modified" plain error  
4 review, which requires the government to prove that the  
5 error was harmless. *United States v. Needham*, 604 F.3d 673,  
6 678 (2d Cir. 2010). Although it is unclear whether this  
7 standard continues to apply, see *id.*, we need not decide  
8 between the two standards because under either, we conclude  
9 that the district court committed no error in light of the  
10 Supreme Court's decision in *Tapia*.

11 In *Tapia*, the Supreme Court held that 18 U.S.C.  
12 § 3582(a) "precludes sentencing courts from imposing or  
13 lengthening a prison term to promote an offender's  
14 rehabilitation," but allows the court to discuss  
15 "opportunities for rehabilitation within prison or the  
16 benefits of specific treatment or training programs." 131  
17 S. Ct. at 2391-92. The Court relied on the text of  
18 § 3582(a), which provides:

19 The court, in determining whether to impose a term  
20 of imprisonment, and, if a term of imprisonment is  
21 to be imposed, in determining the length of the  
22 term, shall consider the factors set forth in [18  
23 U.S.C. § 3553(a)] to the extent that they are  
24 applicable, *recognizing that imprisonment is not an*  
25 *appropriate means of promoting correction and*  
26 *rehabilitation.* In determining whether to make a

1 recommendation concerning the type of prison  
2 facility appropriate for the defendant, the court  
3 shall consider any pertinent policy statements  
4 issued by the Sentencing Commission pursuant to 28  
5 U.S.C. 994(a)(2).  
6

7 18 U.S.C. § 3582(a) (emphasis added). In light of the plain  
8 language of the statute, the Court explained, "when  
9 sentencing an offender to prison, the court shall consider  
10 all the purposes of punishment except rehabilitation—because  
11 imprisonment is not an appropriate means of pursuing that  
12 goal." *Tapia*, 131 S. Ct. at 2389. The Court also reasoned  
13 that because § 3582(a) allows a court to make  
14 recommendations concerning rehabilitation, the district  
15 court "did nothing wrong . . . in trying to get [the  
16 defendant] into an effective drug treatment program." *Id.*  
17 at 2392.

18 But the Court concluded, based on excerpts from the  
19 sentencing transcript, that the district court may have  
20 selected the *length* of the sentence to ensure that the  
21 defendant could complete a 500-hour drug treatment program.  
22 *Id.* at 2392-93. Most notably, the district court explained  
23 that "[t]he sentence has to be sufficient to provide needed  
24 correctional treatment," and that the defendant should be  
25 "in long enough to get the 500 Hour Drug Program." *Id.* at

1 2385. These statements, according to the Court, suggested  
2 that the district court did more than what was permissible  
3 under § 3582(a).<sup>1</sup> *Id.* at 2393.

4 Gilliard contends that the district court erred in  
5 considering Gilliard's "own needs while in custody" in  
6 imposing the sentence. Gilliard focuses on two statements  
7 made by the district court to argue that the sentence was  
8 unlawfully imposed in light of *Tapia*. First, the district  
9 court explained that it was "important, as [defense counsel]  
10 has requested, that [Gilliard] be sentenced in such a way  
11 that [he is] able to address those [substance abuse,  
12 medical, and psychiatric] problems." A 124. Second, the  
13 district court concluded that eight years "is the  
14 appropriate sentence in light of everything [the judge had]  
15 talked about." A 125-26.

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<sup>1</sup> Justice Sotomayor, joined by Justice Alito, concurred to express her skepticism that the district court imposed or lengthened the defendant's sentence to promote rehabilitation. *Tapia*, 131 S. Ct. at 2393-94 (Sotomayor, J., concurring). She noted that the district court carefully reviewed the sentencing factors set forth in § 3553(a) and offered two reasons for choosing the sentence: the need for drug treatment and deterrence. *Id.* at 2393. With respect to the latter reason, the district court highlighted the defendant's criminal history and criminal conduct while released on bail. *Id.* at 2393-94. Notwithstanding her skepticism, Justice Sotomayor concluded that she could not be certain that the district court did not lengthen the defendant's sentence to promote rehabilitation in violation of § 3582(a), and thus agreed with the Court's disposition of the case. *Id.* at 2394.

1           Unlike in *Tapia*, the record here does not suggest that  
2 the *length* of Gilliard's sentence was based on the district  
3 court's consideration of his rehabilitative needs.  
4 Instead, the district court permissibly applied the  
5 applicable sentencing factors under § 3553(a), addressing  
6 (1) Gilliard's extensive criminal history and failures to  
7 comply with the terms of his supervised release; (2) the  
8 facts and circumstances of Gilliard's drug-related crime;  
9 and (3) the goal of deterrence and Gilliard's high  
10 likelihood of recidivism.

11           The sentencing in *Tapia* was improper because the  
12 district court explicitly stated that the defendant needed a  
13 sentence long enough so that she could participate in the  
14 500-hour drug treatment program. Here, there is no  
15 indication that the district court tied the length of the  
16 sentence to any treatment Gilliard would receive. To the  
17 contrary, whenever the district court discussed Gilliard's  
18 rehabilitative needs, it did so in the context of  
19 recommending to the BOP appropriate treatment programs he  
20 should receive while in custody—not with regard to whether  
21 he should spend more time in prison for treatment purposes.  
22 The district court's recommendations—including that Gilliard

1 have access to facilities and care that would enable him to  
2 deal with his problems—were well within what the Supreme  
3 Court deemed permissible in *Tapia*. See *Tapia* 131 S. Ct. at  
4 2392.

5 Our conclusion is consistent with our recent  
6 application of *Tapia*, as well as the decisions of several  
7 other circuits finding that, notwithstanding discussion of  
8 rehabilitation in the record, there was no error where the  
9 sentence length was based on permissible considerations,  
10 such as criminal history, deterrence, and public protection.  
11 See *United States v. Magner*, No. 11-0751-cr, 2012 WL 206013,  
12 at \*2 (2d Cir. Jan. 25, 2012); see also *United States v.*  
13 *Tolbert*, ---F.3d---, 2012 WL 413806, at \*5 (6th Cir. 2012);  
14 *United States v. Blackmon*, 662 F.3d 981, 987 (8th Cir.  
15 2011); *United States v. Cardenas-Mireles*, No. 11-2138, 2011  
16 WL 6394280, at \*3 (10th Cir. Dec. 21, 2011); *United States*  
17 *v. Gregg*, No. 11-12144, 2011 WL 5248165, at \*1 (11th Cir.  
18 Nov. 3, 2011).

19 To be sure, our sister circuits in several other recent  
20 cases have found error where the record revealed that the  
21 defendant's rehabilitative needs influenced the *length* of  
22 imprisonment. In *United States v. Cordery*, 656 F.3d 1103

1 (10th Cir. 2011), the Tenth Circuit found error in the  
2 sentence when the district court commented that, after  
3 taking into account the time that the defendant had already  
4 served, the defendant "need[ed] a sentence of at least 56  
5 months to be able to successfully complete that [treatment]  
6 program together with mental health counseling." *Id.* at  
7 1105. In *United States v. Himes*, 439 F. App'x 272 (4th Cir.  
8 2011), the Fourth Circuit held that the district court  
9 impermissibly considered the defendant's need for  
10 rehabilitation when the district court noted that an  
11 increased sentence of 34 months would "provide enough time  
12 for [the defendant] to be admitted to the [500-hour  
13 residential drug] program and complete that program." *Id.*  
14 at 274-75. Finally, in *United States v. Kubeczko*, 660 F.3d  
15 260 (7th Cir. 2011), the Seventh Circuit held that the  
16 defendant was entitled to resentencing after the district  
17 court explained that "[a] stay in the Bureau of Prisons of a  
18 significant length [was] necessary in order for [the  
19 defendant] to get the Bureau of Prisons' inpatient treatment  
20 program." *Id.* at 261.

21 A common theme exists between *Tapia* and those cases in  
22 which our sister circuits found error—in all four cases, the

1 sentencing judge explicitly tied the need to impose a  
2 sentence of particular length to the defendant's ability to  
3 participate in a drug treatment program. That connection is  
4 missing here. Rather, the record indicates that Gilliard's  
5 sentence was based on, among other permissible reasons, his  
6 extensive criminal history. The district court discussed  
7 Gilliard's rehabilitation only in the context of making its  
8 recommendations to the BOP, and in so doing, did no more  
9 than what was deemed permissible in *Tapia*. Accordingly,  
10 Gilliard's claim of procedural unreasonableness fails.

11 Gilliard also challenges the substantive  
12 reasonableness of his sentence. In reviewing that claim, we  
13 "take into account the totality of the circumstances, giving  
14 due deference to the sentencing judge's exercise of  
15 discretion, and bearing in mind the institutional advantages  
16 of district courts." *Cavera*, 550 F.3d at 190. "[W]e will  
17 not substitute our own judgment for the district court's on  
18 the question of what is sufficient to meet the § 3553(a)  
19 considerations in any particular case." *Id.* at 189.

20 Rather, we will "set aside a district court's *substantive*  
21 determination only in exceptional cases where the trial  
22 court's decision 'cannot be located within the range of

1 permissible decisions.'" *Id.* (quoting *United States v.*  
2 *Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)).

3 Gilliard contends that his sentence was substantively  
4 unreasonable because the district court gave too much weight  
5 to his criminal history and the offense conduct itself.  
6 Gilliard also argues that the district court undervalued his  
7 poor mental and physical health and the relationship between  
8 his substance abuse problem and his criminal conduct. We  
9 disagree.

10 The district court properly considered, and was well  
11 within its discretion to give great weight to, (1)  
12 Gilliard's extensive criminal history and failed attempts to  
13 comply with terms of his supervised release; (2) the facts  
14 and circumstances of his crime; and (3) his high likelihood  
15 of recidivism and the need to deter him from committing  
16 future crimes. Moreover, the district court thoroughly  
17 considered Gilliard's personal circumstances and adequately  
18 explained why it could not reconcile them with his prior  
19 crimes and the instant offense. We find no reason to second  
20 guess the weight (or lack thereof) that the district court  
21 accorded to these factors. *See United States v. Fernandez*,  
22 443 F.3d 19, 34 (2d Cir. 2006); *see also Cavera*, 550 F.3d at

1 191. The district court did not err in determining that  
2 Gilliard's personal circumstances were outweighed by the  
3 high likelihood of recidivism and the serious nature of his  
4 crimes.

5 Taking into account the totality of the circumstances,  
6 the 96-month term of imprisonment was not "shockingly high  
7 . . . or otherwise unsupportable as a matter of law."  
8 *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).  
9 Thus, the sentence was substantively reasonable.

10 For the foregoing reasons, the judgment of the district  
11 court is hereby **AFFIRMED**.