No. __-_____

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM

WILLIAM SHANE REID,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals has jurisdiction to review a district court's discretionary denial of a sentence reduction under 18 U.S.C. § 3582(c)(2) when the claim on appeal is that the decision is procedurally or substantively unreasonable.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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Petitioner William Shane Reid respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion in this matter is reported at 888 F.3d 256 (6th Cir. 2018), and appears at pages 1a to 2a of the appendix to this petition. The publicly available portion of the district court's unpublished order denying Petitioner's request

for a sentence reduction is at page 4a of the appendix. The district court's non-public statement of reasons is at page 5a in the sealed portion of the appendix.

JURISDICTION

The Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of an opinion and judgment of the United States Court of Appeals for the Sixth Circuit, by which it dismissed for lack of jurisdiction Petitioner's direct appeal of the district court's order denying a sentence reduction for which he is eligible pursuant to 18 U.S.C. § 3582(c)(2). The Sixth Circuit's order denying panel rehearing and rehearing *en banc* was issued on July 11, 2018. This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

18 U.S.C. § 3582(c) provides:

> The court may not modify a term of imprisonment once it has been imposed except that . . . (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3742 provides:

> (a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range . . . ; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

28 U.S.C. § 1291 provides (in relevant part): "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.]"

STATEMENT OF THE CASE

Overview. This case raises the important question whether a court of appeals has jurisdiction to review a district court's discretionary denial of a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). Every court of appeals to have considered the question, except the Sixth Circuit, has held that jurisdiction to hear such claims lies under 28 U.S.C. § 1291. The Sixth Circuit reaffirmed in this case its outlier position, further deepening an entrenched circuit split. As it stands, an offender sentenced in the Sixth Circuit, but nowhere else, may not appeal a district court's discretionary denial of a § 3582(c)(2) motion on the ground that the court failed to provide an adequately reasoned basis for its decision. This is so even if that denial is based on unfounded assumptions, factual inaccuracies, speculation—or is outright arbitrary.

Factual background

In 2013, William Shane Reid was sentenced to a term of 170 months' imprisonment for conspiring to manufacture and distribute methamphetamine—the middle of the applicable guideline range of 151 to 188 months. Judgment at 2 (Doc. 90). That sentence was later reduced to 145 months pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure, which reflected a 4% downward departure from the bottom of the guideline range. Order Amending Judgment at 1 (Doc. 114).

On December 13, 2016, Mr. Reid filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2), relying on Amendments 782 and 788 to the U.S. Sentencing Guidelines, which together reduced the guideline ranges for certain drug offenses and made that change retroactive. Mot. for Resentencing (Doc. 135). As amended, Mr. Reid's applicable guideline range was reduced to 130 to 162 months, and the parties agreed that he is eligible for a reduced sentence of 125 months, *id.* at 2-3; Gov't Response at 1, 3 (Doc. 136), which represents a comparable 4% downward departure from the bottom of the new range, as authorized by U.S.S.G. § 1B1.10(b)(2)(B). In his motion, Mr. Reid emphasized that while incarcerated, he has taken a craft training program in electrical work, obtained his GED, and taken drug education, anger management, and parenting classes. Mot. for Resentencing at 3. The government took no position on whether Mr. Reid's sentence should be reduced, noting only that Mr. Reid had incurred a disciplinary sanction in 2015 for possessing tobacco, and another in 2016 for "possessing drugs/alcohol." Gov't Response at 1, 3-4.

On March 28, 2017, the district court denied Mr. Reid's motion. App. 1a. In its Statement of Reasons, the district court indicated that it agreed with the parties' calculation of the amended guideline range. Sealed App. 5a. In the section for "additional comments," the district court acknowledged that Mr. Reid is eligible for a reduction and that it must consider the factors set forth at 18 U.S.C. § 3553(a) when deciding whether and to what extent a reduction is warranted. Noting the commentary to the Guidelines policy statement at U.S.S.G. § 1B1.10, which states that the district court "may consider post-sentencing conduct of the defendant" in making its decision, see U.S.S.G. § 1B1.10 cmt. (n.1(B)(ii)), the district court pointed to the two prison disciplinary sanctions and concluded as follows:

> The Court finds that Defendant's disciplinary infractions while incarcerated indicate that he has not gained respect for the law. These infractions are all-the-more troubling given that Defendant was on federal supervised release when he committed the instant offense. Accordingly, Defendant's Motion for Sentence Reduction is hereby DENIED, in order to promote respect for the law. See 18 U.S.C. § 3553(a)(2)(A).

Id. The court did not mention Mr. Reid's rehabilitation or accomplishments while incarcerated.

In his appeal to the Sixth Circuit, Mr. Reid argued that the district court's stated reason for denying the reduction was insufficient because it lacked a reasoned basis in light of the statutory sentencing purposes. He pointed out that the district court ignored the evidence of Mr. Reid's rehabilitation, which bears directly on three of the sentencing purposes and the parsimony principle, *Pepper v. United States*, 562 U.S. 476, 491, 493 (2011); 18 U.S.C. § 3553(a)(2)(B)-(D), and instead considered only

the two non-violent infractions for which he has already been punished by prison officials, and did so in support of a single reason, to "promote respect for the law." Appellant's Br. at 17-18; Reply Br. at 4-12. Mr. Reid cited widely available empirical information showing that the district court's apparent theory that a longer period of incarceration will promote respect and reduce Mr. Reid's likelihood of reoffending—a belief commonly held by courts and the public—is not borne out by empirical data. Mr. Reid argued that the district court thus based its decision on an unfounded assumption, implicating his due process right to a sentence based on reliable and accurate information. Appellant's Br. at 17-18.

Mr. Reid also noted that the same district court has granted reductions in other cases in which the defendant has been sanctioned by BOP for disciplinary infractions, in one case even when the defendant had more than once possessed a weapon and even when the government took a stronger position against a reduction. *Id.* at 16-17. He argued that it was not possible to discern a rational basis for denying Mr. Reid's motion but granting the others' motions, raising the specter of arbitrariness. *Id.* at 17; Reply Br. at 12-13. Finally, he argued that the district court misapplied the governing § 3553(a) criteria—pointing once more to its unsubstantiated assumptions. *Id.* at 16-17.

In support of review and reversal on these grounds, Mr. Reid relied on Sixth Circuit cases both supporting reversal, *see United States v. Howard*, 644 F.3d 455, 460 (6th Cir. 2011) (reversing district court's order denying § 3582(c)(2) reduction due to inadequate explanation in light of case-specific facts and circumstances), and

supporting review, *see United States v. Domenech*, 675 F. App'x 519, 524, 535-26 (6th Cir. 2017) (reviewing claim that district court "misapplied the law when it failed to consider all of the § 3553(a) factors, and when it specifically misapplied the public-safety factor"). He further invoked this Court's established approach to abuse of discretion review in *United States v. Taylor*, 487 U.S. 326 (1988), applied when a district court's discretionary decision is guided by specified statutory factors, as here. Appellant's Br. at 11, 13, 21-22; Reply at 2-3.

The Sixth Circuit dismissed the appeal for lack of jurisdiction. It characterized all of Mr. Reid's claims as "challenges to the procedural and substantive reasonableness of the outcome" under *United States v. Booker*, 543 U.S. 220 (2005). As such, it said, the court's jurisdiction is controlled by its binding decision in *United States v. Bowers*, in which it held (1) that § 3742 is the sole jurisdictional avenue for review of a district court's decision regarding a § 3582(c)(2) motion (whether a grant or denial); and (2) that a claim of "*Booker* unreasonableness" is not cognizable as a "violation of law" appealable under § 3742(a). 615 F.3d 715, 728 (6th Cir. 2010). The panel rejected Mr. Reid's reliance on *Howard* and *Domenech* because they "are not faithful to *Bowers*," and the court was "obliged to follow the explicit holding of *Bowers*." 888 F.3d at 258.

Mr. Reid petitioned for rehearing en banc. He argued that *Bowers* was wrongly decided, and asked the full court to overrule it. He noted that several other courts of appeals reject *Bowers*, holding instead that 28 U.S.C. § 1291, the general appellate-jurisdiction statute, provides jurisdiction to review orders denying § 3582(c)(2)

motions unhindered by § 3742. Pet. Reh'g at 14. He further noted that *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1965 (2018, was then pending in this Court and would address the extent of a judge's obligation to provide reasons for its decision to grant a partial reduction for an eligible offender. Mr. Reid suggested that the Sixth Circuit await the decision in *Chavez-Meza*, given that the government there invoked *Bowers* in its merits brief and that at oral argument, Justice Ginsburg asked how a claim of inadequate explanation meets the standard of review at § 3742(a)(1)—indicating that the Court was aware of *Bowers* and its jurisdictional analysis. *Id.* at 3-4. The government, too, acknowledged at oral argument that a court of appeals may review a claim that the district court relied on unfounded or erroneous factual information, as a claim of *Booker* unreasonableness. *See id.* at 3 (quoting transcript).

On June 18, 2018, this Court decided *Chavez-Meza*. The Court assumed "for argument's sake" that the district court's duties of explanation in a § 3582(c)(2) proceeding are equivalent to those when initially sentencing a defendant after *Booker*, as outlined in *Rita v. United States*, 551 U.S. 338 (2007), and *Gall v. United States*, 552 U.S. 38 (2007), and held that the district court provided sufficient explanation for granting a partial reduction of 21 months rather than the full 27 months for which Chavez-Meza was eligible. 138 S. Ct. at 1965-67. The Court reasoned that the sentencing judge's consideration of the § 3553(a) factors, indicated by checking a box on a form order, combined with the record of the initial sentencing and Chavez-Meza's disciplinary record while in custody, "as a whole" supported the

district court's decision. *Id.* at 1967. The Court did not question the Tenth Circuit's jurisdiction to hear the appeal.

Thereafter, on July 11, the Sixth Circuit denied Mr. Reid's petition for rehearing. App. 3a.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are sharply divided on the question whether a court of appeals has jurisdiction, and from what source, to review a district court's discretionary denial of a sentence reduction under § 3582(c)(2).

When, as here, a defendant is eligible for a sentence reduction, "the court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] § 3553(a) to the extent that they are applicable, if such a reduction is consistent with [U.S.S.G. § 1B1.10]." 18 U.S.C. § 3582(c)(2). The decision whether and by how much to reduce the term of imprisonment of an eligible defendant is discretionary, guided by the same statutory factors that guide initial sentencings and by the Sentencing Commission's policy statement at § 1B1.10. *See Dillon v. United* States, 560 U.S. 817, 826-27 (2010) (explaining the framework). Since 1989, the Sentencing Commission has made twenty-seven amendments retroactive, *see* U.S.S.G. § 1B1.10(d), and courts of appeals—including the Sixth Circuit—have decided on the merits thousands of appeals of district court orders disposing of motions for sentence reductions brought pursuant § 3582(c)(2).

A. The Sixth Circuit holds that jurisdiction to review a decision to grant or deny a sentence reduction must arise from § 3742, but that § 3742 provides no jurisdiction to hear a claim that the district court's discretionary denial was unreasonable.

After twenty-one years of unobstructed appellate review, the Sixth Circuit in *United States v. Bowers*, 615 F.3d 715, 716-17 (6th Cir. 2010), considered *sua sponte* the impact of *United States v. Booker*, 543 U.S. 220 (2005), on its jurisdiction "to hear an appeal from a district court's decision to reduce (or decline to reduce) a final sentence" under § 3582(c)(2). In *Booker*, this Court rendered the guidelines advisory and instituted "reasonableness" review of all federal sentences, the latter by excising the *de novo* standard of review at § 3742(e). *Booker* "reasonableness" review requires courts of appeals to apply the familiar abuse-of-discretion standard that has long been used when multifarious factors must be considered in reaching a discretionary decision. *Id.* at 260-62 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403-05 (1990); *Pierce v Underwood*, 487 U.S. 552, 558-60 (1988)); *Rita*, 551 U.S. at 356 ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.") (citing *Taylor*, 487 U.S. at 336-37)); *id.* at 362-65 (2007) (Stevens, J., concurring) (explaining that the principles underlying the applicable abuse-of-discretion standard, and the standard itself, "have not changed" in the post-*Booker* world).

In *Bowers*, the defendant moved for a sentence reduction under § 3582(c)(2); the district court declined to grant the defendant any reduction at all, though he was eligible; and he appealed. 615 F.3d at 718. He argued that the district court erred in

making a certain finding of fact regarding his conduct while in custody, and otherwise acted "unreasonably" in denying the motion. Before reaching the merits of these arguments, the Sixth Circuit examined two possible jurisdictional bases for review. The first possibility, 28 U.S.C. § 1291, is the general statute conferring in the courts of appeals jurisdiction over "appeals from all final decisions of the district courts." The second possibility, 18 U.S.C. § 3742, was enacted at the same time as § 3582(c)(2) as part of the Sentencing Reform Act of 1984. Pub. L. No. 98-473, Title II, § 213, 98 Stat. 1987, 2011 (1984). Section 3742(a) authorizes a defendant to file a notice of appeal "for review of an otherwise final sentence" if the sentence

> (1) was imposed in violation of law;
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
> (3) is greater than the sentence specified in the applicable guideline range . . . ; or
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3742(a).

The Sixth Circuit held that an appeal in a § 3582(c)(2) proceeding is an appeal of "the sentence" imposed, so that jurisdiction to review a district court's discretionary decision to grant or deny a reduction in "the sentence" imposed, if it exists, must come from § 3742. *Bowers*, 615 F.3d at 722. Because Bowers did not claim an "incorrect application of the sentencing guidelines," or that the sentence is greater than the applicable guideline range or one for which there is no guideline, his only possible avenue for jurisdiction under § 3742(a), was that the sentence was "imposed in violation of law." *Id.* at 723. Characterizing Bowers' arguments as a *Booker* challenge

to the procedural and substantive reasonableness of the sentence, the Sixth Circuit held that "a defendant's allegation of *Booker* unreasonableness in a § 3582(c)(2) proceeding does not state a cognizable 'violation of law' that § 3742(a)(1) would authorize us to address on appeal." *Id.* at 725, 727.

The court reasoned that while an appeal from an "initial, plenary sentencing proceeding" raising a claim of *Booker* unreasonableness is reviewable as "imposed in violation of law" under § 3742(a)(1), this Court held in *Dillon* that *Booker*'s "remedial opinion has no force in § 3582(c)(2) proceedings." *Id.* at 725-27. As a result, *Booker*'s "promulgation of unreasonableness review in lieu of [the Sentencing Reform Act's] more circumscribed standard" also does not apply under § 3582(c). The court dismissed Bowers' appeal for lack of jurisdiction.

B. Six other circuits hold that jurisdiction to review a discretionary denial exists under 28 U.S.C. § 1291, unhindered by 18 U.S.C. § 3742.

No other Circuit follows the Sixth Circuit's fruitless path. Every Circuit to consider the question after *Bowers* has instead held (or reaffirmed) after full analysis that jurisdiction to hear the appeal of a district court's denial of a sentence-reduction motion—including discretionary denials—exists under 28 U.S.C. § 1291, the general appellate jurisdiction statute. *See United States v. Calton,* __ F.3d __, 2018 WL 3976941, at *3–4 (5th Cir. Aug. 20, 2018); *United States v. Rodriguez*, 855 F.3d 526, 530 (3d Cir. 2017); *United States v. Jones*, 846 F.3d 366, 369-70 (D.C. Cir. 2017); *United States v. Washington,* 759 F.3d 1175, 1180-81 (10th Cir. 2014); *United States v. Dunn*, 728 F.3d 1151, 1156-58 (9th Cir. 2013).

In concluding that jurisdiction arises in § 1291, the Third Circuit noted that "three other Circuits have also concluded after a full analysis that jurisdiction lies under Section 1291," *Rodriguez*, 855 F.3d at 530, and that "[a]t least two more Circuits have, in recent decisions, asserted jurisdiction under Section 1291, without explanation," *id.* (citing *United States v. Hernandez-Marfil*, 825 F.3d 410, 411 (8th Cir. 2016) (per curiam), and *United States v. Purnell*, 701 F.3d 1186, 1188 (7th Cir. 2012) (exercising jurisdiction under § 1291 and § 3742)). It recognized that "[t]he only Circuit to reach a contrary holding is the Sixth Circuit," and "[n]o Circuit has followed this 2010 decision." *Id.* at 530. Engaging in its own independent analysis, the Third Circuit reasoned that "'[f]inal judgment in a criminal case means sentence.'" *Id.* (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)). Because "[t]he sentence is the judgment," and "[a] judgment of sentence is a final order," the court has both "the [p]ower" and "the [d]uty to review it as a final order" under the plain text of § 1291. *Id.* (internal quotation marks omitted; alterations in original). As such, "this Court regularly exercises jurisdiction over sentencing appeals under Section 1291 (in addition to 18 U.S.C. § 3742)." *Id.* (collecting cases). "Like sentencing judgments," discretionary denials of § 3582(c)(2) motions "are unquestionably 'final decisions of a district court' because they close the criminal cases once again" and § 3742 presents no obstacle to jurisdiction. *Id.* (quoting § 1291).

The D.C. Circuit likewise reasoned that when "the district court's denials of appellants' sentence-reduction motions resulted only in final orders—not new

sentences by any definition—it appears that at least the most obvious reading of § 3742 renders it inapplicable." *Jones*, 846 F.3d at 370. In any event, it said, the limitations of § 3742 were undone by *Booker*'s excision of § 3742(e), so that the court reviews all sentences for reasonableness under § 3742. *Id.* at 370-71. As such, § 3742 "presents no problem for review under § 1291." *Id.* at 371.

The Second Circuit has stated without analysis that § 1291 is the source of its jurisdiction, at least in cases involving denial of a § 3582(c)(2) motion due to ineligibility. *See. e.g.*, *United States v. McGee*, 553 F.3d 225, 226 (2d Cir. 2009) (per curiam) ("We have jurisdiction under 28 U.S.C. § 1291."). Otherwise, the Second Circuit has frequently exercised jurisdiction (without identifying its source) to review the adequacy of a district court's explanation for a discretionary denial. *United States v. Christie*, 736 F.3d 191, 196 (2d Cir. 2013). "Like the initial sentencing decision," the court explained, "resolution of a sentence reduction motion is a discretionary decision regarding the defendant's fundamental liberty interests, which is subject to appellate review." *Id.*

In a recent Second Circuit case, the government argued that a denial due to ineligibility is reviewable under § 1291, whereas a discretionary denial for an eligible offender may only be reviewed, if at all, under § 3742(a). *United States v. Nugent*, 685 F. App'x 17, 20 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 698 (2018). The court rejected the argument. It "recognize[d] that there is a circuit split on precisely this question," but seeing "no basis for drawing such a distinction," it declined to "upend the approach to appellate review in § 3582(c)(2) cases we laid out" in *Christie*. *Id.*

It further noted that even if "jurisdiction is more properly framed under 18 U.S.C. § 3742, *Christie* would likely require us to construe § 3742 to permit review of whether the district court's exercise of discretion under § 3582(c)(2) was reasonable." *Id.* at 20 n.2.

Most recently, the Fifth Circuit surveyed the state of the law, noted the conflict in the circuits, and joined these other circuits to hold that "§ 1291 provides the proper jurisdictional basis for reviewing appeals from denials of § 3582(c)(2) sentence-reduction motions." *United States v. Calton*, __ F.3d __, 2018 WL 3976941, at *3-4 (5th Cir. Aug. 20, 2018) (No. 15-10874) ("Only the Sixth Circuit has held that § 3742, rather than § 1291, provides jurisdiction over appeals from § 3582(c)(2) determinations."). While the Fifth Circuit in *Calton* reviewed a district court's denial due to a finding of ineligibility, the court did not distinguish between that and review of a discretionary denial for an eligible defendant. Rather, like the other circuits, it takes the view that when a district court denies a § 3582(c)(2) motion, it does not impose a new "sentence," *Dillon*, 560 U.S. at 827, but a "final order." *Calton*, 2018 WL 3976941 at *4. As such, it is reviewable under § 1291.

The government, too, has taken the position that a court of appeals has jurisdiction to hear a claim of inadequate explanation under the rubric of *Booker* unreasonableness. At oral argument in *Chavez-Meza*, Justice Sotomayor asked the government how a reviewing court could know, if the government were correct that no specific explanation is required, whether the district court based its decision on an "impermissible factual or legal basis," such as a mistake about the seriousness of

the defendant's infraction in prison. Tr. of Oral Argument at 45-46, *Chavez-Meza v. United States*, 138 S. Ct. 1959 (2018) (No. 17-5639). The government responded that "the defendant would be permitted on appeal to argue procedural unreasonableness, just as this Court contemplated in *Gall*." *Id.* at 46.

C. The Sixth Circuit has now deepened and cemented the conflict.

Until the decision in this case, the impact of *Bowers* was not fully felt even in the Sixth Circuit. In the eight years between *Bowers* and this case, the court heard and decided on the merits appeals challenging a district court's explanation as inadequate. The court either avoided *Bowers* by invoking § 3742(a), but not in terms of *Booker* "unreasonableness," *see*, *e.g., United States v. Howard*, 644 F.3d 455, 459-61 (6th Cir. 2011) (holding that district court abused its discretion and imposed sentence "in violation of law" under § 3742(a) because it did not adequately explain its ruling), or did not mention *Bowers* at all, *see, e.g.*, *United States v. Domenech*, 675 F. App'x 519, 524, 525-26 (6th Cir. 2017) (reviewing claim that district court "misapplied the law when it failed to consider all of the § 3553(a) factors, and when it specifically misapplied the public-safety factor"). Mr. Reid, too, attempted to avoid *Bowers* by invoking those cases as well as this Court's established approach to review for abuse of discretion when the district court must consider multifarious factors, as applied in *Taylor*.

With its decision here, the Sixth Circuit has now expressly repudiated the path laid by *Howard* and *Domenech* as "not faithful to *Bowers*." 888 F.3d at 258. It showed that no matter how one frames a claim of inadequate explanation or lack of reasoned

basis, it will be deemed a request for "reasonableness" review and dismissed for lack of jurisdiction. In so doing, the Sixth Circuit has both deepened and cemented the conflict with other circuits. Its decision will result in the total (or near-total) absence of appellate review for claims that the district court provided inadequate explanation in denying a § 3582(c)(2) motion—including claims sounding in due process, which are treated in the Sixth Circuit as claims of "procedural unreasonableness." *See, e.g.*, *United States v. Adams*, 873 F.3d 512, 519-20 (6th Cir. 2017) (holding that district court violates defendant's right to due process when it "incorporate[s] . . . unreliable information in its sentencing decision," rendering the sentence "procedurally unreasonable") (citing *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948), and *United States v. Tucker*, 404 U.S. 443, 447 (1972)); *United States v. Souders*, __ F. App'x __, 2018 WL 3737983 at *2 n.1 (6th Cir. Aug. 6, 2018) (clarifying that defendant's claim that district court relied on an "erroneous assumption" about life expectancy is a due process claim reviewed as challenge for "procedural unreasonable[ness]").

Not only does the Sixth Circuit deny appellate review when other circuits do not, its jurisdictional limit is in tension with this Court's decision in *Chavez-Meza*. There, the government argued that while "original sentencing decisions are subject to appellate review for substantive reasonableness, [] discretionary decisions whether to reduce a sentence under Section 3582(c)(2) are not." U.S. Br. at 31-32, *Chavez-Meza*, 138 S. Ct. 1959 (2018) (citing *Bowers*). It contended that § 3742, being the more "specific provision" governing appellate courts' "[r]eview of a sentence," must be "'the exclusive avenue'" for an appeal challenging a district court's decision

to retain or reduce a sentence under Section 3582(c)(2)." *Id.* (quoting *Bowers*, 615 F.3d at 719).

At oral argument, Justice Ginsburg appeared to accept that the standard of review comes from § 3742 when she asked counsel how it could be a "violation of law" for a district court to inadequately explain a sentence within the amended guideline range. Tr. of Oral Argument 5-6, *Chavez-Meza*, 138 S. Ct. 1959 (2018). Counsel for Chavez-Meza responded that review for *Booker* "unreasonableness" means review for abuse of discretion, so that a district court abuses its discretion contrary to its obligation as stated in *Gall* when it fails to adequately explain the sentence, even when it is within the amended guideline range. *Id.* at 6. The government, too, later acknowledged that a claim that a district court relied on erroneous information is reviewable for "procedural unreasonableness, just as this Court contemplated in *Gall*." *Id.* at 46. And the Court, in ultimately deciding the case, assumed for the sake of argument that the standard of review articulated in *Gall* applies.

Thus, even if the Court assumed that jurisdiction comes only from § 3742, as the government urged, jurisdiction nevertheless existed to review Chavez-Meza's claim. Yet, bound by *Bowers*, the Sixth Circuit would dismiss the same claim for lack of jurisdiction.

D. The jurisdictional question is vital and recurring.

The Sixth Circuit's limit on its jurisdiction will affect the appeal rights of untold numbers of individuals sentenced in the Sixth Circuit who either are currently eligible for a sentence reduction under Amendment 782, or will be eligible in the

future due to later guideline amendments made retroactive. In addition to the approximately 300 individuals who may still seek a reduction under Amendment 782,[1] many whose motions were previously denied will likely file a new motion in light of *Hughes v. United States*, 138 S. Ct. 1765 (2018). For them, it is crucial that the Court grant this petition and ensure that the court of appeals will hear any potential claim that the district court abused its discretion in deciding a sentence-reduction motion, whether framed as review for "unreasonableness" or as review for abuse of discretion.

II. This case presents an ideal vehicle for addressing this question.

This case squarely presents the jurisdictional question. The Sixth Circuit both reaffirmed and expanded the reach of *Bowers*, so that a claim of inadequate explanation, however framed, will be treated as a claim of *Booker* unreasonableness that can never be heard. The full court then declined to revisit *Bowers* despite knowing that several circuits expressly refuse to follow it, and that this Court in *Chavez-Meza* reviewed a claim of inadequate justification under the reasonableness standard. As it stands for Mr. Reid and others like him in the Sixth Circuit, there is no avenue for appellate review of the denial of a motion on reasonableness grounds or any claim of abuse of discretion that the court of appeals might characterize as

[1] The Sentencing Commission estimated that 4,599 individuals sentenced in the Sixth Circuit were eligible for a reduction under Amendment 782, U.S. Sent'g Commission, Office of Data and Research, *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive* tbl.8 (2014), and recently reported that 4,218 motions have so far been decided, *see* U.S. Sent'g Comm'n, *2014 Drug Guidelines Amendment Retroactivity Report* tbl.1 (Aug. 2018).

such. In Mr. Reid's case, it means he has no chance of getting the reduced sentence for which he is eligible, and he will not be released until the end of 2021. The Sixth Circuit's singular approach—and the possible deprivation of liberty at stake—is embodied in this case.

No more is needed to makes this case an excellent vehicle for review of the jurisdictional question. But there is also good reason to believe that Mr. Reid would prevail on his claims should the court of appeals hear them. In the Sixth Circuit, it is a due process violation, thus "procedurally unreasonable" to base a discretionary decision an unfounded assumption or "unreliable" information. *Adams*, 873 F.3d at 517-18, 519-20 (reversing where district court based decision on unfounded and unreliable assertions about the time needed to "reset" the brain of a drug-addicted person). Mr. Reid showed how the district court's factual assumption that a longer term of incarceration will promote respect for the law, though understandable, is without support and is in fact contrary to readily available empirical evidence.

In addition, discretionary authority does not permit its arbitrary exercise. *See* Harry T. Edwards *et al.*, *Federal Standards of Review: Review of District Court Decisions and Agency Actions*, Ch. V, Pt. 1 (2013) ("[A] patently arbitrary application of the controlling law to the relevant facts [] amounts to an abuse of discretion."). Mr. Reid provided strong evidence that the district court's decision is arbitrary, given the same judge's favorable decisions in other cases with offenders with arguably worse prison disciplinary histories, some in which the government took a stronger position against a reduction. *See* Order, *United States v. Mayberry*, No. 4:11-cr-13-07 (E.D.

Tenn. Jan. 13, 2016) (Doc. 290) (granting full reduction where government advocated for "little or no reduction" because of defendant's multiple prison infractions, including possessing a dangerous weapon); Order, *United States v. Steele*, No. 1:10-cr-103-02 (E.D. Tenn. Jan. 24, 2017) (Doc. 53) (granting full reduction where government noted that defendant had nine disciplinary infractions, some recent, including highly disruptive conduct, possessing non-hazardous tool and other unauthorized items); Order, *United States v. Stewart*, No. 1:09-cr-80 (E.D. Tenn. May 1, 2015) (Doc. 30) (granting partial reduction where defendant had been sanctioned for using controlled substances and fighting).

As this Court reiterated in *Chavez-Meza*, the duty of explanation depends on the circumstances of each case. 138 S. Ct. at 1965. So while the Court deemed sufficient the district court's explanation there, in part by looking to the record of the original sentencing, Mr. Reid's case is different. Unlike Chavez-Meza, whose sentence was reduced by nearly two years, Mr. Reid is eligible for a 20-month reduction but was *denied any reduction at all*. While the sentence he is serving (145 months) happens to fall within his amended guideline range, it no longer reflects any downward departure for his substantial assistance—which was granted *after* his initial sentencing and could not have been based on the § 3553(a) factors. *United States v. Grant*, 636 F.3d 803, 815 (6th Cir. 2011) (en banc) (holding that the § 3553(a) factors have "no role" in Rule 35(b) proceedings). It is thus impossible to divine from the record of the initial sentencing any reason why the district court has effectively nullified Mr. Reid's post-sentencing substantial assistance departure. Worse, what

the court did say reveals that the decision is based on an unfounded factual assumption about the effect of incarceration on the risk of reoffending, or is at the very least arbitrary when viewed in light of its decisions in similar cases.

The circumstances of this case, and the arguments made, raise meritorious questions regarding the district court's explanation. The court of appeals was wrong not to hear them.

CONCLUSION

For the reasons set forth above, William Shane Reid requests that the petition for certiorari be granted.

Respectfully submitted,

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