No. 18-6319

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM SHANE REID, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review the substantive reasonableness of the district court's discretionary decision to retain petitioner's below-Guidelines sentence rather than grant a sentence reduction pursuant to 18 U.S.C. 3582(c)(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 888 F.3d 256. The order of the district court (Pet. App. 4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2018. A petition for rehearing was denied on July 11, 2018 (Pet. App. 3a). The petition for a writ of certiorari was filed on September 17, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. 841(b)(1)(B) and 846. Pet. App. 1a. He was sentenced to 170 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. His sentence was later reduced to 145 months of imprisonment to reflect his substantial assistance to law enforcement. Pet. App. 1a; see Fed. R. Crim. P. 35(b). Following a retroactive amendment to the Sentencing Guidelines, petitioner sought a further sentence reduction under 18 U.S.C. 3582(c)(2). The district court denied his motion. Pet. App. 4a. The court of appeals dismissed petitioner's appeal for lack for jurisdiction. Id. at 1a-2a.

1. In 2011, petitioner participated in a conspiracy to manufacture and distribute methamphetamine. Plea Agreement 2. Petitioner's "role in the conspiracy was to manufacture, or 'cook' methamphetamine for others and to purchase pseudoephedrine and other chemicals, equipment and supplies and give those items to others who used them to manufacture methamphetamine." Ibid.; see id. at 3 (noting that records from Tennessee pharmacies showed that petitioner had purchased 62 grams of pseudoephedrine). Petitioner "also distributed methamphetamine to others, some[]times trading methamphetamine for pseudoephedrine." Id. at 2.

In furtherance of the conspiracy, petitioner engaged in at least two controlled transactions with confidential informants, in which he distributed methamphetamine in exchange for pseudoephedrine. Plea Agreement 2-3. Police officers later went to petitioner's residence, where they saw petitioner "come out of an out-building with a glass jar" and "noticed a strong chemical odor associated with meth labs." Id. at 3. They made contact with petitioner and "saw several items associated with a meth lab inside the shed." Ibid. Petitioner initially "said that there was no meth in the shed, but after a small baggie of a white powder and two coffee filters with white residue were found in [his] pocket, he gave consent to search the shed." Ibid. In the shed, officers "found a glass jar with camping fuel inside, muriatic acid in a plastic water bottle and lithium strips," all of which are associated with methamphetamine production. Ibid.

2. A grand jury indicted petitioner for conspiracy to manufacture 50 grams of more of pure methamphetamine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A) and 846; conspiracy to possess pseudoephedrine to manufacture methamphetamine, in violation of 21 U.S.C. 841(c)(2) and 846; three counts of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing equipment and chemicals to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6). Indictment 1-3. Pursuant to a plea agreement, petitioner pleaded guilty to

conspiracy to distribute five grams or more of methamphetamine, in violation of 21 U.S.C. 841 (b)(1)(B) and 846. Plea Agreement 1.

At sentencing, the district court calculated petitioner's advisory Sentencing Guidelines range as 151 to 188 months and imposed a sentence of 170 months of imprisonment. Judgment 2-3. The government subsequently filed a motion under Federal Rule of Criminal Procedure 35(b) seeking a sentence reduction to reflect petitioner's substantial assistance to law enforcement. Pet. App. 1a. The district court granted the motion and reduced petitioner's sentence to 145 months, a 4% downward departure from the bottom of the Guidelines range. Ibid.; see Amended Judgment 1.

3. a. In 2014, the Sentencing Commission promulgated Amendment 782 to the Sentencing Guidelines, which retroactively reduced the base offense level corresponding to most drug quantities. Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014); see id. Amend. 788 (Nov. 1, 2014). Under the retroactively amended Guidelines, petitioner's advisory sentencing range was 130 to 162 months of imprisonment. Pet. App. 1a.

b. After the amendments to the Guidelines took effect, petitioner sought a sentence reduction under 18 U.S.C. 3582(c)(2), which provides that

> 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 * * * the [district] 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.

Petitioner sought a reduced sentence of 125 months -- a 4% reduction from the low end of his amended Guidelines range. Mot. to Reduce Sentence 3. The parties agreed that petitioner was eligible for that reduction. Pet. App. 1a. The government took no position on his motion but noted two disciplinary infractions that petitioner had incurred in prison and deferred to the district court's discretion whether a reduction was warranted. See ibid.

c. The district court denied petitioner's motion, explaining that petitioner's "disciplinary infractions while incarcerated indicate that he has not gained respect for the law." Pet. App. 1a. The court added that "[t]hese infractions are all-the-more troubling given that [petitioner] was on federal supervised release when he committed the instant offense." Id. at 1a-2a.

4. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-2a. In his court of appeals briefing, petitioner acknowledged that the district court "gave a reason for denying [his] request for a sentence reduction" -- i.e., his disciplinary history while incarcerated -- and "that reason was based on an undisputed fact and tied to a sentencing purpose set forth" in 18 U.S.C. 3553(a). Pet. C.A. Br. 13. Petitioner argued, however, that the district court's reasoning was "without * * * foundation" because petitioner had been "sanctioned" for

his infractions "through the prison disciplinary process." Id. at 13-14. Petitioner also complained that the same district court had granted sentencing reductions despite "disciplinary infractions" in other cases and disagreed with the court's "assum[ption] that a longer term of incarceration * * * will help [petitioner] adjust to societal norms." Id. at 16-17. Finally, petitioner faulted the court for "ignor[ing]" his "successful efforts at rehabilitation," which consisted mostly of participating in educational classes. Id. at 19. Petitioner reiterated the same contentions as an argument that his sentence was substantively unreasonable. Id. at 20-22.

Relying on its decision in United States v. Bowers, 615 F.3d 715 (6th Cir. 2010), the court of appeals explained that appellate jurisdiction to review a district court's decision on a Section 3582(c)(2) motion arises from 18 U.S.C. 3742(a), which confers appellate jurisdiction only where a sentence "(1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; * * * (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); see Pet. App. 2a. The court observed that petitioner's claims were "[a]t their core * * * challenges to the procedural and substantive reasonableness of the outcome of his § 3582(c)(2) sentence-reduction proceeding under the 'reasonableness'

review * * * instituted in" United States v. Booker, 543 U.S. 220, 261-262 (2005). Pet. App. 2a. The court determined that petitioner's claim did not fall within any of the categories for which appellate jurisdiction is authorized by Section 3742, and it accordingly dismissed petitioner's claim for lack of jurisdiction. Ibid.

ARGUMENT

Petitioner contends (Pet. 9-22) that the court of appeals had jurisdiction to review his unreasonableness claim under 28 U.S.C. 1291, 18 U.S.C. 3742, or both. Section 3742(a) provides the exclusive jurisdictional basis for appellate review of a district court's denial of a motion to reduce a sentence under 18 U.S.C. 3582(c)(2), and petitioner's claims -- which at their core challenge the substantive reasonableness of the court's discretionary denial of his request for a sentence reduction -- do not state a "violation of law" appealable under 18 U.S.C. 3742(a)(1). Petitioner observes (Pet. 12-18) that other courts of appeals have exercised jurisdiction over such claims, but that conflict has very little practical importance, because it affects only defendants whose sentences already fall within or below a retroactively amended Guidelines range, and because review is available under Section 3742(a)(1) for any alleged "violation of law." This Court recently denied a petition for a writ of certiorari seeking review of a Sixth Circuit decision on the same

question, see Bautista v. United States, 138 S. Ct. 979 (2018) (No. 17-6509), and the same course is appropriate here.

1. The court of appeals correctly determined that its jurisdiction to review the grant or denial of a Section 3582(c)(2) motion arises only under 18 U.S.C. 3742, not 28 U.S.C. 1291. Pet. App. 2a; see United States v. Bowers, 615 F.3d 715, 718-723 (6th Cir. 2010); see also United States v. Bautista, 699 Fed. Appx. 449, 450 (6th Cir. 2017), cert. denied, 138 S. Ct. 979 (2018).

a. "[T]here is no constitutional right to an appeal" in a criminal case. Abney v. United States, 431 U.S. 651, 656 (1977). A criminal defendant must instead show that his appeal falls "within the terms of [an] applicable statute." Ibid. For many years, federal courts of appeals reviewed criminal sentences under the general appellate jurisdiction statute, 28 U.S.C. 1291, which provides jurisdiction over "appeals from all final decisions of the district courts of the United States." Ibid.; see Berman v. United States, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."). The scope of appellate review under Section 1291 was limited: "once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." Dorszynski v. United States, 418 U.S. 424, 431 (1974).

In 1984, Congress enacted the Sentencing Reform Act of 1984 (SRA or Act), Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987.

The Act included a provision, now codified at 18 U.S.C. 3742, entitled "Review of a sentence." Section 3742 authorizes a criminal defendant to appeal "an otherwise final sentence if the sentence" meets one of four conditions: the sentence "(1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; * * * (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).

As that detailed enumeration indicates, Congress enacted Section 3742 to establish "a limited practice of appellate review of sentences in the Federal criminal justice system." S. Rep. No. 225, 98th Cong., 1st Sess. 149 (1983). Under the "commonplace of statutory construction that the specific governs the general," NLRB v. SW Gen., Inc., 137 S. Ct. 929, 941 (2017) (citation omitted), "the federal courts are in agreement that" Section 3742 displaced Section 1291 as "'the exclusive avenue through which a party can appeal'" a criminal sentence, Bowers, 615 F.3d at 719 (citation omitted). In other words, "a criminal defendant may not invoke" the general grant of appellate jurisdiction in Section 1291 to "circumvent the conditions imposed by" Section 3742. United States v. Hartwell, 448 F.3d 707, 712 (4th Cir.), cert. denied, 549 U.S. 938 (2006).

b. Section 3742 is "the exclusive avenue" not only for an appeal challenging a defendant's initial sentence, but also for an appeal challenging a district court's decision to retain or reduce that sentence under Section 3582(c)(2). Bowers, 615 F.3d at 719 (citation omitted). When a defendant challenges the district court's resolution of a sentence-reduction motion, the defendant is challenging his resulting "sentence" -- in either retained or reduced form -- not a separate final order reviewable under Section 1291. Id. at 722. Just as a defendant may not circumvent Section 3742's specific grant of jurisdiction by invoking Section 1291 to appeal an initial sentence, a defendant may not invoke Section 1291 to appeal a sentence that has been reduced or retained under Section 3582(c)(2). Ibid.; accord United States v. Dunn, 728 F.3d 1151, 1161-1162 (9th Cir. 2013) (O'Scannlain, J., specially concurring) (endorsing Bowers).

Section 3742's exclusivity in this context is underscored by Congress's enactment of Section 3582(c)(2) and Section 3742 in the same statute. SRA § 212, 98 Stat. 1987. Section 3582(c)(2) expressly incorporates many of the same features of the federal sentencing system incorporated in Section 3472's appellate-review provisions, such as the Sentencing Guidelines and the factors a court must consider under 18 U.S.C. 3553(a) when the sentence is initially imposed. Given the provisions' common source of enactment and close textual interconnection, it would be anomalous to infer that Congress intended appeals of Section 3582(c)(2)

decisions to proceed under the general appellate jurisdiction statute rather than the "narrow" jurisdictional provisions of Section 3742. Dunn, 728 F.3d at 1161 (O'Scannlain, J., specially concurring).

2. The court of appeals correctly recognized that Section 3742(a) does not supply jurisdiction to review petitioner's challenges to the district court's discretionary decision to retain its original sentence. Pet. App. 2a; see Bowers, 615 F.3d at 723-728. Under Section 3742(a), a court of appeals may review a sentence that the defendant claims "(1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; * * * (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 statute thus provides jurisdiction over many appeals contesting Section 3582(c)(2) decisions, including disputes over a defendant's eligibility for a sentence reduction, see, e.g., Koons v. United States, 138 S. Ct. 1783 (2018); Hughes v. United States, 138 S. Ct. 1765 (2018); Freeman v. United States, 564 U.S. 522 (2011), which necessarily involve an interpretation of "law" and are therefore reviewable under Section 3472(a)(1). Section 3742(a) does not, however, authorize review of a district court's purely discretionary determination that a sentence within or below the Guidelines range is appropriate and should be retained.

a. "It is beyond dispute" that petitioner's objection to the discretionary denial of a sentence reduction "would not have qualified as" a "violation of law" appealable under Section 3472(a)(1) before this Court's decision in Booker. Bowers, 615 F.3d at 723. As this Court explained shortly before Booker, "[e]very Circuit ha[d] held that [Section 3742] does not authorize a defendant to appeal a sentence where the ground for appeal consists of a claim that the district court abused its discretion in refusing to depart." United States v. Ruiz, 536 U.S. 622, 627 (2002) (emphasis omitted). The same principle would necessarily apply to an alleged abuse of discretion in the denial of a sentence reduction under Section 3582(c)(2). See Bowers, 615 F.3d at 724 & n.8.

In Booker, this Court found a Sixth Amendment violation arising from the mandatory application of the Sentencing Guidelines (at an initial sentencing) to increase defendants' sentencing exposure based on facts (other than the fact of a prior conviction) not found by a jury. 543 U.S. at 245. To remedy that violation, the Court excised two statutory provisions: 18 U.S.C. 3553(b)(1), which mandated application of the Guidelines, and 18 U.S.C. 3742(e), which imposed standards of appellate review for sentences that presupposed mandatory application of the Guidelines. See Booker, 543 U.S. at 259. In place of the latter, Booker established a standard of appellate review for

"unreasonableness." Id. at 261 (brackets and citation omitted); see Gall v. United States, 552 U.S. 38, 51 (2007).

b. Booker made clear, however, that its remedy was focused on the particular Sixth Amendment concerns identified in that case. See 543 U.S. at 259-260. As the Court subsequently explained in Dillon v. United States, 560 U.S. 817, 827 (2010), sentence-reduction proceedings under Section 3582(c)(2) do not raise the concerns that prompted the remedy in Booker, because sentence-reduction proceedings "do not serve to increase the prescribed range of punishment." Dillon, 560 U.S. at 828. Sentence-reduction proceedings therefore do not implicate Booker's holding that a jury rather than a judge must find "[a]ny fact (other than a prior conviction) which is necessary" to increase a defendant's punishment range. Booker, 543 U.S. at 244.

As Dillon illustrates, the determination that Section 3582(c)(2) proceedings do not implicate Booker's constitutional holding means that no reason exists to apply Booker's remedial holding to such proceedings. Dillon, 560 U.S. at 828-829. Specifically, Dillon declined to apply to Section 3582(c)(2) proceedings Booker's remedial holding that the Guidelines are advisory. See ibid. The Sixth Circuit's approach, in turn, follows Dillon by declining to apply to Section 3582(c)(2) proceedings Booker's remedial holding that initial sentences are reviewable for reasonableness. See Bowers, 615 F.3d at 727; Pet. App. 2a (applying Bowers). And because Booker's remedial holding

creating substantive-reasonableness review does not apply to Section 3582(c)(2) proceedings, an assertion of substantive unreasonableness in a Section 3582(c)(2) decision cannot be construed to state a "violation of law" appealable under Section 3742(a)(1). Bowers, 615 F.3d at 727. Any other conclusion would create "deep tension" with this Court's holding in Dillon. Dunn, 728 F.3d at 1162 (O'Scannlain, J., specially concurring).

3. Petitioner's contrary arguments lack merit. Petitioner errs in contending (Pet. 17-18) that the jurisdictional limitation recognized by the Sixth Circuit in Bowers, supra, is "in tension" with this Court's recent decision in Chavez-Meza v. United States, 138 S. Ct. 1959 (2018). Unlike this case and Bowers, the claim in Chavez-Meza was that the district court failed to comply with an asserted procedural requirement to "adequately explain why" it had not reduced the defendant's sentence as much as the defendant had requested. Id. at 1963. Contrary to petitioner's suggestion (Pet. 9), this Court in Chavez-Meza addressed (and rejected) that claim without discussing or deciding any question of appellate jurisdiction. And appellate jurisdiction over the procedural claim in Chavez-Meza would not imply appellate jurisdiction over petitioner's substantive claim here.

Although petitioner couched his claims to the court of appeals in partly procedural terms, Pet. C.A. Br. 13-20, a characterization the court seemingly accepted, Pet. App. 2a, they are properly viewed as substantive. Unlike the claims at issue in Chavez-Meza,

petitioner's claims did not at their core call into question the adequacy of the district court's explanation for denying a sentence reduction, but instead the substance of the denial itself. Petitioner claimed, in particular, that the district court (1) sanctioned petitioner twice for the same infractions; (2) failed to treat similarly situated defendants similarly; (3) overestimated the rehabilitative benefits of additional incarceration; and (4) failed to credit petitioner's completion of educational courses. Pet. C.A. Br. 13-19. Appellate jurisdiction over inadequate-explanation claims like those in Chavez-Meza would therefore not suggest that petitioner's claims, which ultimately challenge a discretionary determination about the proper length of his sentence, is likewise subject to appellate review. To the extent that the panel's opinion in this case could be read to indicate that it would view claims like the one at issue in Chavez-Meza as claims seeking Booker-specific "reasonableness" review that Section 3742 does not allow, see Pet. App. 2a, rather than as asserting that a sentence "was imposed in violation of law," 18 U.S.C. 3742(a)(1), that issue was not before the court and its view would not be binding on future Sixth Circuit panels.

Petitioner thus errs in suggesting (Pet. 17-18) that Bowers will result in the "near-total[] absence" of appellate review for claims "sounding in due process" because such claims will be "treated in the Sixth Circuit as claims of 'procedural unreasonableness.'" Whenever a sentence is imposed in violation

of due process, it is imposed "in violation of law." 18 U.S.C. 3472(a)(1). Due process claims are therefore appealable under Section 3742(a)(1), regardless of whether they can also be presented as "reasonableness" Booker claims in a direct appeal from an initial sentencing decision.

4. As petitioner observes (Pet. 12-18), several courts of appeals have exercised jurisdiction over challenges to the substantive reasonableness of a district court's discretionary denial of a Section 3582(c)(2) motion under Section 1291, Section 3742(a)(1), or both. See United States v. Rodriguez, 855 F.3d 526, 530 (3d Cir. 2017); United States v. Jones, 846 F.3d 366, 370 (D.C. Cir. 2017); United States v. Washington, 759 F.3d 1175, 1180-1181 (10th Cir. 2014); Dunn, 728 F.3d at 1156-1158. But he identifies no conflict of practical significance that would warrant this Court's review.[1]

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[1] Petitioner also cites (Pet. 14) United States v. McGee, 553 F.3d 225, 226 (2d Cir. 2009), and United States v. Christie, 736 F.3d 191, 196 (2d Cir. 2013), but he acknowledges (Pet. 12) that those courts exercised jurisdiction without analysis. This Court has "often" cautioned, even with respect to its own decisions, that such "drive-by jurisdictional rulings * * * have no precedential effect." Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 91 (1998). The court below had similarly unconsidered decisions on its books, but did not view them as binding when the question here was squarely presented for its consideration. See Bowers, 615 F.3d at 721-722; Pet. App. 2a. Any reliance on United States v. Hernandez-Marfil, 825 F.3d 410, 411 (8th Cir. 2016), and United States v. Purnell, 701 F.3d 1186, 1188 (7th Cir. 2012) (per curiam), which petitioner cites only indirectly (Pet. 13), is misplaced for the same reason: they did not analyze the jurisdictional question presented here. Finally, the Second Circuit's unpublished summary order in United States v. Nugent, 685 Fed. Appx. 17 (2017) (per curiam), cert. denied, 138

a. Petitioner describes the relevant decisions as presenting an entrenched division of authority (Pet. 12-16), but the differences in reasoning and result are narrower than petitioner suggests. The rationale for reviewing a district court's pure exercise of discretion under Section 3582(c)(2) has not been fully examined, and petitioner identifies no decision that actually disturbs such an exercise of discretion. All but one of the decisions cited by petitioner that addressed the court of appeals' jurisdiction reach the same outcome: an affirmance of the district court's judgment. See Rodriguez, 855 F.3d at 533; Jones, 846 F.3d at 373; Washington, 759 F.3d at 1185; Dunn, 728 F.3d at 1160.[2] The sole decision cited by petitioner that vacated a denial of a sentence-reduction motion after analyzing the court of appeals' appellate jurisdiction involved a finding of threshold ineligibility, not a discretionary denial of relief. See United States v. Calton, 900 F.3d 706, 709 (5th Cir. 2018). As noted above, see p. 11, supra, a legal question about eligibility for a sentence reduction is appealable under Section 3742(a). And the Sixth Circuit would itself exercise jurisdiction over such a claim. See, e.g., Bautista, 699 Fed. Appx. at 450 ("[W]e have jurisdiction

S. Ct. 698 (2018), which petitioner also cites (Pet. 12), is nonprecedential.

[2] Likewise, the nonprecedential decisions cited by petitioner resulted in affirmances of the district court. See Hernandez-Marfil, 825 F.3d at 413; Purnell, 701 F.3d at 1192; Nugent, 685 Fed. Appx. at 21.

to consider * * * claims that the district court violated the law.").

The recent decisions by the D.C., Third, and Fifth Circuits, moreover, agreed with the Sixth Circuit's decision in Bowers that review of a substantive reasonableness challenge to a district court's resolution of a Section 3582(c)(2) motion could not proceed under the general grant of appellate jurisdiction in Section 1291 if the more specific grant of jurisdiction in Section 3742 "barred review for reasonableness." Jones, 846 F.3d at 369 (citing Bowers, 615 F.3d at 723-728). Those courts thus recognize that "a would-be appellant cannot use [Section 1291's] broad grant of jurisdiction to circumvent statutory restrictions on sentencing appeals in [Section] 3742." Ibid.; see Rodriguez, 855 F.3d at 531 (same); Calton, 900 F.3d at 709 (same). Those opinions disagreed with the Sixth Circuit primarily about Booker's effect on Section 3742 jurisdiction. In their view, Booker made district court decisions on Section 3582(c)(2) motions reviewable for reasonableness because Booker directed courts to "review all criminal sentences for reasonableness." Rodriguez, 855 F.3d at 531 (citation and emphasis omitted); accord Jones, 846 F.3d at 370; Calton, 900 F.3d at 709. None of those decisions attempted to square that reasoning with Dillon, which declined to apply Booker's remedy to Section 3582(c)(2) proceedings because those proceedings do not implicate the constitutional flaws that prompted Booker's remedy.

Neither of the other two courts of appeals in the asserted conflict -- the Ninth and the Tenth Circuits -- expressly disagreed with Bowers' analysis. See Washington, 759 F.3d at 1180; Dunn, 728 F.3d at 1156. The Ninth Circuit instead relied on a pre-Bowers decision, United States v. Colson, 573 F.3d 915, 916 (2009), that provided "little in the way of reasoning," Jones, 846 F.3d at 370, and that one panel member expressly called on the court "to reconsider," so that it could "follow Bowers's lead," Dunn, 728 F.3d at 1161 (O'Scannlain, J., specially concurring). The Tenth Circuit relied on a circuit precedent that predates both Bowers and Booker, see United States v. Hahn, 359 F.3d 1315 (2004) (en banc) (per curiam), which it applied to an unusual case in which the government and the defendant agreed that a sentence-reduction motion should be denied so that the defendant could obtain review of a different issue, see Washington, 759 F.3d at 1180. The conflict between such decisions and Bowers is limited.

b. As the results of the cited cases illustrate, the limited conflict identified by petitioner does not warrant this Court's intervention, because it has very little practical effect.

The Sixth Circuit's approach precludes appellate review only for defendants whose sentences are within or below the retroactively amended Guidelines ranges and only of pure reasonableness challenges under Booker that present no questions of law. Section 3742(a)(3) provides a separate jurisdictional basis for challenges to a sentence "greater than" the Guidelines

range. The Sixth Circuit has relied upon Section 3742(a)(3) to review reasonableness challenges raised by defendants whose initial sentences are above a retroactively amended range and seek a reduction under Section 3582(c)(2). See, e.g., United States v. Greenwood, 521 Fed. Appx. 544, 547 & n.1 (6th Cir. 2013); United States v. Daniel, 414 Fed. Appx. 806, 808 (6th Cir. 2011). And at least two of the cases that petitioner cites as evidence of a circuit conflict involved defendants whose sentences exceeded the retroactively amended Guidelines range, see Jones, 846 F.3d at 368; Dunn, 728 F.3d at 1154, and who therefore would have been entitled to appellate review of their substantive reasonableness claims under Section 3742(a)(3) in the Sixth Circuit.

In addition, defendants in the Sixth Circuit sentenced within or below the retroactively amended Guidelines range are not precluded from appealing on the ground that the district court violated any legal requirements, including determining the defendant's eligibility for a sentence reduction and computing the applicable Guidelines. See, e.g., Bautista, 699 Fed. Appx. at 449. To the extent defendants' abuse-of-discretion claims turn on legal claims, therefore, they are reviewable under Section 3742(a)(1). And as the Sixth Circuit's recent decision in Bautista, supra, illustrates, the difference between claims framed in that manner and Booker "reasonableness" claims is narrow. This Court recently denied an almost identical petition for a writ of certiorari in that case seeking review of the Sixth Circuit rule

announced in Bowers, see Bautista, supra, and review is similarly unwarranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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