No. 18-6319

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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REPLY BRIEF OF PETITIONER

ELIZABETH B. FORD
Federal Community Defender

Jennifer Niles Coffin
Assistant Federal Defender
Counsel of Record
Federal Defender Services of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

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The government appears at first to embrace the Sixth Circuit's approach. BIO at 8-11. It agrees with *Bowers* that 18 U.S.C. § 3742(a) provides the exclusive jurisdiction to review the denial—on whatever ground—of a motion for a reduced sentence under § 3582(c)(2). BIO at 8. At the same time, the government cannot deny that every other circuit to have considered the question has held, contrary to *Bowers*, that jurisdiction to review the denial of a § 3582(c)(2) motion—on whatever ground—lies in § 1291. Given this clear conflict, and with the government planted firmly on the side of the minority view, review would seem amply warranted.

But the government says no. To get there, it is forced to pretend that the Sixth Circuit's approach is not what the Sixth Circuit holds, and to mischaracterize Mr. Reid's claims. It correspondingly amputates the question presented, lopping off the question about procedural unreasonableness and tossing some (but not all) of the question about substantive unreasonableness. BIO at I. It then dismisses the surviving remnants as reflecting only a "limited conflict" with insignificant effect. *Id.* at 7, 16-20.

If anything, the government's tortured analysis shows that review is warranted.

A. The government invents a non-existent version of *Bowers* to fit its narrative.

As it turns out, the government does not really embrace *Bowers*. It embraces its own reading of *Bowers* as applied to the carved-up question it says is presented. According to the government, *Bowers* precludes review only of a small category of

claims: "pure" challenges to the substantive unreasonableness of the sentence "retained or reduced," and only when that sentence is within or below the amended guideline range. BIO at 7, 10-11. By these lights, the "practical significance" of *Bowers* is limited, leading to the denial of appellate review for just a few claims that the government says are unlikely to succeed on the merits anyway, even in circuits that would review them under § 1291. BIO at 16-17, 19. As a result, it concludes, review is not warranted.

The problem is that *Bowers* is not so limited. The court itself stated that the question there was "whether . . . allegations of *procedural* or substantive unreasonableness" are reviewable under § 3742(a), and held that they are not. 615 F.3d 715, 725, 728 (6th Cir. 2010) (emphasis added). Further, one of Bowers' claims, dismissed as a consequence of that holding, was that the denial of his § 3582(c)(2) motion was based on a clearly erroneous finding of fact. *Id.* at 728. This is a claim of procedural unreasonableness after *Booker*. *See Gall v. United States*, 552 U.S. 38, 51 (2007) (claim that the district court "select[ed] a sentence based on clearly erroneous facts" is a claim that the sentence is procedurally unreasonable).

And in reaffirming *Bowers* here, the Sixth Circuit held that § 3742(a) provides no jurisdiction to hear "challenges to the *procedural* and substantive reasonableness of the outcome" under *Booker*. 888 F.3d 256, 258 (6th Cir. 2018) (emphasis added). The court said nothing to limit its holding in the manner the government claims.

The government apparently presses its novel reading of *Bowers* because, as explained next, it is the only way to reconcile *Bowers* with *Chavez-Meza*'s treatment

of the claim of inadequate explanation presented there. Even so, the government does not really believe that *all* claims of inadequate explanation are reviewable in the Sixth Circuit. Only those claims that are "properly" presented as claims of procedural unreasonableness may pass through the jurisdictional gate. BIO at 10. Mr. Reid's claims, the government asserts, do not pass the test. Instead, it says, his claims are "more properly viewed" as claims of substantive unreasonableness and, for that reason, are unreviewable under *Bowers*. *Id.* at 14. The government cites nothing to support this assertion, nor could it.

Mr. Reid claimed in the court of appeals that the district court's decision, lacked "a reasoned basis" because it was based on an unsupported assumption and appeared arbitrary given other decisions in similar cases. Pet. at 5-6. A claim that a sentence lacks a "reasoned basis" is a claim that it is inadequately explained. The Sixth Circuit dismissed his claims for lack of jurisdiction under *Bowers*, classifying them as challenges to the procedural and substantive reasonableness of his sentence. Yet, under the government's reading of *Bowers*, Mr. Reid's claim should be reviewable.

In any event, the sharp distinction the government urges does not exist. In the Sixth Circuit, the border between the procedural and substantive components of its reasonableness review can be "blurry, if not porous," and the analysis often overlaps. *United States v. Herrera-Zuniga*, 571 F.3d 568, 579 (6th Cir. 2009). Jurisdiction under § 1291 would permit review of either component alone or both together, so that reclassification by the government or a court would not lead to denial of review.

B. The government's imagined version of *Bowers* creates conflict of its own and lacks a principled basis.

The government's arguments in support of its novel reading of *Bowers* are themselves untenable. It says that to permit review of claims of substantive unreasonableness would create "deep tension" with this Court's holding in *Dillon*. BIO at 13-14 (quoting *United States v. Dunn*, 728 F.3d 1151, 1162 (9th Cir. 2013) (O'Scannlain, J., specially concurring)). This is so, it says, because *Dillon* "declined to apply *Booker*'s remedy to Section 3582(c)(2) proceedings." BIO at 18; *id.* at 13.

Under this theory, *Chavez-Meza* is likewise in deep tension with *Dillon*. In *Chavez-Meza*, the government argued that a district court has no duty to provide an explanation for its decision in § 3582(c)(2) proceedings because, it said, *Booker* substantive-reasonableness review does not apply. 138 S. Ct. 1959, 1965 (2018); Gov't Br. at 31-32 & n.2, *Chavez-Meza,* 138 S. Ct. 1959 (2018) (citing *Bowers*). In rejecting the government's position, this Court looked to *Rita v. United States*, 551 U.S. 338 (2007), as providing relevant guidance for both describing the district court's duty to explain its selected sentence and for reviewing that explanation. *Chavez-Meza*, 138 U.S. at 1966-68. *Rita* describes the district court's duty of explanation under the abuse-of-discretion standard adopted by *Booker*'s remedial holding. *Rita*, 552 U.S. at 356-57. That explanation, in turn, provides the measure for meaningful review of the sentence for *Booker* substantive reasonableness. *Id.* at 359-60; *Gall*, 552 U.S. at 50 (district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing"). While the extent of the explanation may differ in § 3582(c) proceedings, *Chavez-Meza*, 138 S. Ct. at

1965, the duty to explain is inextricably bound with substantive-reasonableness review. The government ignores this necessary interdependence when it contends that *Chavez-Meza*, because it involved a claim of inadequate explanation, "does not imply" jurisdiction over a claim of *Booker* substantive unreasonableness. BIO at 14, 15.

The government also ignores that if *Dillon* really means that *Booker* substantive-unreasonableness does not apply in § 3582(c)(2) proceedings, then every application of substantive-reasonableness review of an *above*-guideline sentence in § 3582(c)(2) proceedings in those circuits that routinely permit such review under § 1291 is also in deep tension with *Dillon*. Pet. at 12-16.

In any event, the government overstates the effect of *Dillon*. In *Dillon*, the Court held that because § 3582(c)(2) proceedings are limited in scope and do not result in the "impos[ition] of a new sentence in the usual sense," they "do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." *Dillon v. United States*, 560 U.S. 817, 828 (2010). For this reason, Percy Dillon's Sixth Amendment rights were not violated (and thus no *Booker* remedy was required) when the district court was prohibited by the policy statement at § 1B1.10 from selecting a reduced sentence below the amended guideline range. *Id.* at 828-29; U.S.S.G. § 1B1.10(b)(2)(A) & cmt. (n.1(B)) (2008) (policy statement).

It is the policy statement—not the Court or anything intrinsic to § 3582(c) proceedings—that renders the guidelines mandatory in this "one limited nook." *Dillon*, 560 U.S. at 833, 848 (Stevens, J., dissenting). Though *Booker*'s remedy is not

required in this nook, *Dillon* said nothing to suggest that the Court meant to render entirely unreviewable the district courts' discretionary decisions within the bounds of the policy statement. To the contrary, the Court recognized that the district court's factfinding "affects [] the judge's exercise of discretion within [the guideline] range." *Id.* at 829. This discretionary decision is governed by the same § 3553(a) factors that govern the initial sentencing. To hold that *Booker*'s abuse-of-discretion standard applies to this decision is not to apply *Booker*'s remedy, but simply to apply the familiar abuse-of-discretion standard that applies whenever a district court considers multifarious factors when reaching a discretionary decision. *See United States v. Taylor*, 487 U.S. 326, 336-37 (1988), *applied in Rita*, 551 U.S. at 356; *see also Rita*, 551 U.S. at 362-65 (Stevens, J., concurring) (explaining that the principles underlying *Booker*'s abuse-of-discretion standard, and the standard itself, "have not changed" in the post-*Booker* world); *Gall*, 552 U.S. at 46 ("Our explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions."); *id.* at 72 (Alito, J., dissenting) ("[A]buse-of-discretion review is not toothless; and it is entirely proper for a reviewing court to find an abuse of discretion when important factors . . . are 'slighted.'" (quoting *Taylor*, 487 U.S. at 337)). *Dillon* thus presents no obstacle to applying the same abuse-of-discretion review adopted by *Booker* for the similar discretionary decision made at the initial sentencing.

In its campaign to show review is unnecessary, the government assures that due process claims are reviewable in the Sixth Circuit under § 3742(a)(1). BIO at 16.

But this case proves just the opposite. Mr. Reid in his appellate brief specifically raised a due process claim, Appellant's Br. at 17-18, and did so again in his petition for rehearing, Pet. Rh'g at 13-14, 15, yet the Sixth Circuit dismissed his claim under *Bowers* and denied rehearing en banc.

In the end, the government offers no principled reason why review of Mr. Reid's within-guideline sentence should be denied, while review of an above-guideline guideline sentence on the same ground is permitted. Pointing to § 3742(a)(3), which permits the defendant's appeal when the sentence is "greater than" the guideline range, BIO at 19, merely presupposes that § 3742(a) is the exclusive jurisdictional avenue. If § 1291 provides jurisdiction, as six other circuits hold, these claims would be treated the same.

The lack of reason for the differing treatment is all the more glaring when, unlike in Dillon's case, the policy statement at § 1B1.10 authorizes a reduction to a sentence below the bottom of Mr. Reid's range based on his substantial assistance to the government. U.S.S.G. § 1B1.10(b)(2)(B), (c) (2018) (policy statement). The sentence Mr. Reid is serving is now 20 months *above* the lowest legally allowable point and no longer reflects his substantial assistance in relation to the applicable guideline range—though the policy statement encourages a comparable departure from the bottom of the amended range. *Id.* If he were in any other circuit, he could appeal the sentence as both procedurally and substantively unreasonable.

C. The Sixth Circuit, after *Bautista*, cemented the actual circuit split and eliminated the alternative avenue for review.

Finally, this petition is not "almost identical" to the petition denied in *Bautista v. United States*, 138 S. Ct. 979 (2018). BIO at 8. The petition in *Bautista* was denied in February 2018. At that time, a published decision in the Sixth Circuit plainly permitted review of the claims Mr. Reid presented. *United States v. Howard*, 644 F.3d 455 (6th Cir. 2011); *see* Pet. at 6-7, 16-17. Two month later, the Sixth Circuit characterized Mr. Reid's claims as claims of procedural and substantive unreasonableness, and overruled *Howard* because it is "not faithful to *Bowers*." 888 F.3d at 258. Then, after *Chavez-Meza* was decided, the Sixth Circuit declined to rehear the matter. Thus, unlike the state of affairs when *Bautista* was denied, the Sixth Circuit has now signaled an unwavering intent to adhere to *Bowers* and to deny jurisdiction to review all "challenges to the procedural and substantive reasonableness of the outcome" of a § 3582(c)(2) proceeding, no matter how framed.

* * *

To support its position, the government must change beyond recognition the question presented, Mr. Reid's claims on appeal, and the minority approach it purports to embrace. Meanwhile, the courts of appeals are cleanly divided on the actual question Mr. Reid presents. This Court's review of that important and recurring question is warranted.

CONCLUSION

For the reasons set forth here and in his petition, William Shane Reid requests that the petition for certiorari be granted.

Respectfully submitted,

ELIZABETH B. FORD
Federal Community Defender

Jennifer Niles Coffin
Assistant Federal Defender
Counsel of Record
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

Counsel for William Shane Reid

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