No. _____

IN THE
Supreme Court of the United States

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CRAIG EDWARD HUNNICUTT, JR.
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

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

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# Petition for a Writ of Certiorari

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Anna R. Rapa
Counsel of Record
PO Box 140
Mears, MI 49436
231-873-4852
Annarapa@arapalaw.com
Counsel for Petitioner
CJA Appointment

## QUESTIONS PRESENTED

1. A First Step Act (FSA) sentence reduction denial should come only after a "complete review on the merits." Yet the Sixth Circuit held that it had no authority to review the denial of Mr. Hunnicutt's FSA motion under 18 U.S.C. § 3742 where Mr. Hunnicutt complained that the trial court failed to understand its full discretion and review his motion completely. Did the Sixth Circuit err by refusing to review the denial of his FSA motion?

2. A Court's discretion to reduce a sentence under the First Step Act (FSA) is not tied to the Guidelines or its policy statements the way that reductions based on retroactive Guideline changes are. Yet the trial court followed the same process and used exactly the same reasons to deny Mr. Hunnicutt's FSA motion that it had in previous requests for reduction after Guideline amendments. Did the trial court abuse its discretion by failing to recognize and exercise its full authority under the FSA?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Craig Hunnicutt, Jr. respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Sixth Circuit.

## OPINION BELOW

The Sixth Circuit panel opinion is unpublished, and it is included as *United States v. Hunnicutt*, 807 Fed. Appx. 551 (W.D. Mich. 2020) Appendix A. . The unpublished district court order denying the requested sentence reduction under the First Step Act and its accompanying memorandum are included as Appendix B.

## JURISDICTION

The United States District Court for the Western District of Michigan originally had jurisdiction under 18 U.S.C. § 3231, which provides the federal district court with exclusive jurisdiction over offenses against the United States. The district court had authority to reduce Mr. Hunnicutt's sentence under the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

Mr. Hunnicutt timely appealed the district court's denial of First Step Act relief to the Sixth Circuit Court of Appeals under 28 U.S.C. § 1291. Notice of Appeal, R. 98, Page ID #386. The Sixth Circuit affirmed the district court order in an unpublished opinion on May 29, 2020.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

First Step Act of 2018, Pub. L. No. 115-319, § 404; 132 Stat. 5194 (2018), which provides in relevant part:

> SEC. 404. APPLICATION OF FAIR SENTENCING ACT
>
> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

28 U.S.C. § 1291

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited

to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

18 U.S.C. § 3742

(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 to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [1] than the maximum established in the guideline range; or
(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

## STATEMENT OF THE CASE

Mr. Hunnciutt's case is a case that fell through the cracks as the trial and appellate courts have attempted to apply the First Step Act and this Court's decision in *Fort Bend County v. Davis*, ___ U.S. ___, 139 S. Ct. 1843, 1849-50 (2019), to sentencing reduction motions. Although the appellate decision, if not the trial court's approach, would likely be different now, after some consensus has been reached, Mr. Hunnicutt's case was decided early enough in the process that he was not able to benefit from this growing consensus. Instead, his case was decided in opposition to the growing consensus in both trial and appellate arenas. This is the Court of last resort for Mr. Hunnicutt, and others in his position, and he is requesting a remand so that his appellate and trial court decisions can be reconsidered in light of how the First Step Act has ultimately been interpreted and how the appellate courts have determined *Fort Bend* affects its precedent related to jurisdiction for reviewing sentence reduction motions.

### A. Legal Background

#### 1. Appellate Jurisdiction vs. Authority to Review

In *Fort Bend County v. Davis*, ___ U.S. ___, 139 S. Ct. 1843, 1849-50 (2019), this Court stated that only "[i]f the Legislature clearly indicates that a prescription counts as jurisdictional," can the lower courts treat a statute as jurisdictional rather than as a claims processing rule or a limitation on authority to review an issue.

As a result, the Sixth Circuit has recently had to reconsider its case law

regarding jurisdiction for appeals, particularly appealing motions for sentence reductions under 18 U.S.C. § 3582. For almost a decade, defendants in the Sixth Circuit who were looking for appellate review of motions under 18 U.S.C. § 3582(c)(2) based on retroactive Guideline changes were forced to frame their jurisdictional claims as those that fit under 28 U.S.C. § 3742(a)(1). *United States v. Bowers*, 615 F.3d 715, 717-19 (6th Cir. 2010). Under § 3742(a)(1), a person can only appeal his sentence if it (1) was imposed in violation of law; (2) was imposed as an incorrect application of sentencing guidelines; (3) is an above-Guideline sentence; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable. After *Fort Bend*, the Sixth Circuit clarified that "*Bowers* is best read as confining our power to grant certain types of relief from sentencing appeals, not as confining our subject-matter jurisdiction over them. Section 1291 thus remains the main source of our subject matter-jurisdiction in these appeals." *United States v. Marshall*, 954 F.3d 823, 829 (6th Cir. 2020).

This recalibration of jurisdiction vs. authority to review led to a period of uncertainty in the Sixth Circuit appellate review for FSA sentencing reduction cases that were denied versus those that are granted: For FSA reduction cases that are granted in the district court, the Sixth Circuit reviews for reasonableness, and the process must include an accurate calculation of the Sentencing Guidelines. *See United States v. Foreman*, 958 F.3d 506 (6th Cir. 2020) (reviewing FSA grant of relief for reasonableness); *United States v. Boulding*, 960 F.3d 774, 776 (6th 2020)

(reversing because the process used to grant FSA relief was not adequate). But the Sixth Circuit was, at least for a time, internally conflicted about whether 28 U.S.C. § 3742(a)(1) restricts the review of an FSA denial. *Compare, e.g., United States v. Hunnicutt*, 807 Fed. Appx. 551, 553 (6th Cir. 2020) (holding that 28 U.S.C. § 3742(a)(1) precludes review of an FSA denial), *with United States v. Ware*, 964 F.3d 482 (6th Cir. 2020) (holding that § 3742(a)(1) "does not apply–and therefore does not preclude relief–where a district court denied a defendant's request for a sentence reduction under the First Step Act") and *United States v. Richardson*, 960 F.3d 761 (6th Cir. 2020) (assuming without deciding that they had the authority to review an FSA denial).

**2. First Step Act**

In 2010, the Fair Sentencing Act was passed to reduce the sentencing disparity between crack and powder cocaine offenses by increasing the amount of crack cocaine needed to trigger the mandatory minimums established in the Anti-Drug Abuse Act of 1986. *United States v. Blewett*, 746 F.3d 647, 649 (6th Cir. 2013) (en banc); *see also Dorsey v. United States*, 567 U.S. 260 (2012); Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). For example, the Fair Sentencing Act raised the penalty threshold from 5 grams to 28 grams of crack cocaine to trigger a mandatory 5-year minimum sentence. The changes made by the Fair Sentencing Act in 2010, however, were not made retroactive at the time. *See Blewett*, 746 F.3d at 650.

But in 2018, the First Step Act was signed into law. First Step Act of 2018, Pb. L. No. 115-391, 132 Stat. 5194. Section 404 of that Act made the statutory changes for crack cocaine offenses found in the Fair Sentencing Act retroactive to defendants sentenced before August 3, 2010. Put another way, defendants sentenced for a "covered offense," i.e., a crack cocaine offense for which the Fair Sentencing Act reduced statutory penalties, before August 3, 2010 are now eligible for consideration of a reduced sentence.

Very little information is given in the statute regarding how to review a case for whether a defendant is eligible for a reduction and if so, how to exercise discretion to grant or deny the motion. Congress does indicate that review should be a complete review on the merits because it prohibits granting a motion where a previous motion was filed only if it was "denied after a complete review of the motion on the merits." This expectation of a complete review is different from the review of a motion under 18 U.S.C. § 3582(c)(2) after a Guideline change is made retroactive, where courts are limited to reducing a sentence only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

### B. District Court Proceedings

On August 17, 2006, a Grand Jury for the Western District of Michigan returned a three-count indictment against Mr. Hunnicutt. Presentence Investigation Report (PSR), ¶ 1, R. 62, Page ID #198, 200. Mr. Hunnicutt was charged with possessing with intent to distribute five or more grams of cocaine

base, possessing a gun in furtherance of that crime, and possessing that gun as a felon. PSR, ¶¶ 1-3, Page ID #200.

Mr. Hunnicutt pleaded guilty to Counts 1 and 2 on November 16, 2006. *Id.* at ¶ 5. District Court Judge Quist accepted this plea on December 6, 2006. *Id.* at ¶ 6.

Mr. Hunnicutt's sentencing guidelines were calculated with a Total Offense Level 29 and Criminal History Category VI. *Id.* at ¶¶ 38-48, 68, 107. The resulting guideline range was 151 to 188 months' imprisonment. *Id.* Mr. Hunnicutt was subject to both a five-year mandatory minimum on Count 1 and a mandatory five-year consecutive sentence on Count 2. *Id.* at ¶¶ 105-106.

At sentencing, Mr. Hunnicutt was granted a downward departure because his criminal history points, which were based in part on several driving with a suspended license charges, overstated the seriousness of his crimes. Sentencing Transcript, R. 72, Page ID #259, 273-74. The court used Criminal History Category V to lead to a guideline range of 140-175 months' imprisonment on Count 1. *Id.* at Page ID #274.

Mr. Hunnicutt was sentenced to 204 months' imprisonment (consisting of 144 months on Count 1 and 60 months on Count 2, to be served consecutively) followed by four years of supervised release. Judgment, R. 25, Page ID #92, 93.

Mr. Hunnicutt subsequently filed three motions for modification of his sentence based on guideline amendments applied retroactively. Each of these was

denied. See Order Denying Modification, R. 42, Page ID #135-136; Order Denying Modification, R. 52, Page ID #183; and Order Denying Modification, R. 68, Page ID #253. For the final request under Guideline Amendment 782, the district court probation department prepared a Sentence Modification Report (SMR), finding that Mr. Hunnicutt was eligible for a reduction based on adjusted guidelines of 140 to 175 months' imprisonment on Count 1 and a consecutive 60 months on Count 2. SMR, R. 64, Page ID #228, 230. The probation department recommended a reduction from 204 to 144 months' imprisonment, which would consist of 84 months on Count 1 and a consecutive 60 months on Count 2, to no avail. SMR, R. 64, Page ID #228, 232. Mr. Hunnicutt appealed the last denial through this Court, but certiorari was denied. *Hunnicutt v. United States*, 137 S. Ct. 2265 (2017).

On March 22, 2019, Mr. Hunnicutt filed a Request for Reduction of Sentence Under Section 404 of First Step Act. R. 88, Page ID #344. Undersigned counsel was appointed to represent him, and briefing followed. The court held that Mr. Hunnicutt was eligible for relief under the First Step Act, but denied this reduction too, stating

> Judge Jonker and the undersigned have denied Defendant's requests for sentence reductions three times (ECF Nos. 42, 52, 67, and 68), each time citing Defendant's history and propensity for violent and threatening behavior. Upon consideration of Defendant's and his counsel's arguments, the Court finds nothing in their submissions that persuades the Court to depart from its prior determinations. In addition, the Court notes that Defendant remains incarcerated at a Bureau of Prisons facility that houses inmates that are extremely dangerous and violent.

Order Denying First Step Act Motion, R. 97, Page ID #385.

### C. Sixth Circuit Proceedings

Mr. Hunnicutt timely filed a notice of appeal of the First Step Act denial through undersigned counsel. Notice of Appeal, R. 98, Page ID #386. In his appeal, he argued that the trial court misunderstood its broad discretion under the First Step Act to review a case for eligibility and discretionary reduction of sentence, and relied too heavily on the previous processes and reasoning from motions to reduce his sentence under 18 U.S.C. § 3582(c)(2) after retroactive changes to the Sentencing Guidelines. For these reasons, he argued that the process the district court used to decide the FSA motion was an abuse of discretion.

Instead of reviewing the trial court's process, the Sixth Circuit rejected Mr. Hunnicutt's appeal, categorizing the First Step Act decision as a "sentencing decision," and finding that the FSA denial did not fit within the narrow authority of 28 U.S.C. § 3742(a) for the Sixth Circuit to review.

## REASONS FOR GRANTING THE WRIT

### A. A denial of FSA relief is not restricted by 28 U.S.C. § 3742(a)(1)'s claim processing restrictions.

Generally, appellate review of a criminal conviction is protected as related to a defendant's right to meaningfully access the courts. *See, e.g. Burns v. Ohio*, 360 U.S. 252, 257 (1959) (allowing prisoners to file appeals without payment of filing fees because of the constitutional right to access the courts); *Johnson v. Avery*, 393 U.S. 483 (1969) (allowing prisoners the help of jailhouse lawyers to file habeas corpus petitions). And appeals protect a number of important rights and values, including "correcting legal and factual errors; encouraging the development and refinement of legal principles; increasing uniformity and standardization of the application of legal rules, and promoting respect for the rule of law." Robertson, Cassandra Burke, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1225 (2013). These values are so important that forty-seven states and the federal courts provide for appeals as of right in criminal cases. *Id.* at 1222.

Federal law has granted the right to appeal "all final decisions of the district court of the United States . . . ." 28 U.S.C. § 1291. This means that the Sixth Circuit had the jurisdiction to review Mr. Hunnicutt's claim of error.

But instead of reviewing Mr. Hunnicutt's case, the Sixth Circuit stated that the "claims processing" rule of 28 U.S.C. § 3742(a), which limits the types of "review of an otherwise final sentence," prohibited it from reviewing his case. The Sixth Circuit explained that "a court does not 'impose' a sentence by denying a motion for

discretionary sentence review," and therefore § 3742(a)(1) "does not authorize us to order the relief defendant seeks." *Hunnicutt*, 807 Fed. Appx. at 552.

But if the trial court does not impose a final sentence when it denies a motion for sentence reduction, then § 3742(a)(1) does not apply because it is only a claims processing rule when the court is reviewing "an otherwise final sentence." The Sixth Circuit later affirmed this reality in a published decision, after Mr. Hunnicutt's time for requesting rehearing had expired. *United States v. Ware*, 964 F.3d 482 (6th Cir. 2020) (publishing the case on June 30, 2020).

As a result, Mr. Hunnicutt's case has fallen into the cracks as the Sixth Circuit worked out how this Court's decision in *Fort Bend* applies to its previous holdings related to sentence reduction motions and the new First Step Act situation, which is not exactly like the sentence reduction motions under 18 U.S.C. § 3528(c)(2). Though it appears that the Sixth Circuit has ultimately resolved the question in favor of defendants in Mr. Hunnicutt's position, this Court is his last chance to have their error along the way to that resolution corrected. Mr. Hunnicutt is seeking recognition by this Court that the Sixth Circuit's resolution in his case was the Sixth Circuit holding on to the vestiges of a limitation on appellate jurisdiction that was comfortable to the Sixth Circuit, but that was not intended by the legislature to be that type of restriction and so was unfairly applied to Mr. Hunnicutt, and likely others.

### B. The parameters of First Step Act review at the trial and appellate levels are still being ironed out among the federal courts, and this Court's guidance will help to preserve the balance of defendant's constitutional rights with the other priorities the courts have.

Mr. Hunnicutt's situation on both the appellate and trial court levels is indicative of the struggle courts have when new laws are created or clarified. With the advent of the First Step Act, the trial courts have been working out what eligibility for sentence reduction looks like and what kind of process is necessary to exercise a court's discretion. Consensus between courts seems to be appearing, after a long, drawn out fight, but there are people in Mr. Hunnicutt's position whose cases were unfairly or improperly decided along the way.

The error Mr. Hunnicutt alleges with regard to the trial court is that the trial court did not review his request for FSA reduction of sentence any differently than it did his motions under 18 U.S.C. § 3582(c)(2) after a retroactive Sentencing Guidelines change. But the two processes are not the same. The 3582(c)(2) reductions expressly limit a court's discretion to decisions that comply with policy statements of the Sentencing Guidelines, while the FSA has no such limitation. In addition, the FSA implies that a full review on the merits is required. This has led to appellate review of FSA cases for reasonableness more similar to requirements for sentencing review in *United States v. Booker,* 543 U.S. 220 (2005), than the review limitations found in *Dillon* v. United States, 560 U.S. 817 (2010), that were applied in § 3582(c)(2) situations. *Compare United States v. Foreman*, 958 F.3d 506 (6th Cir. 2020) (reviewing FSA grant of relief for reasonableness), *with United*

*States v. Bowers*, 615 F.3d 715, 717-19 (6th Cir. 2010) (restricting appellate jurisdiction for 18 U.S.C. § 3582(c)(2) motions to situations found in 28 U.S.C. § 3742(a)(1)).

But Mr. Hunnicutt's court used the same reasoning for its denial of his FSA motion as it had in his § 3582(c)(2) motins, and simply stated that nothing Mr. Hunnicutt advanced changed its mind about a sentence reduction. In offering this reasoning, the trial court displayed its lack of understanding about the additional discretion it had in reviewing Mr. Hunnicutt's case under the FSA. This Court's clarification would go a long way toward assisting lower courts in understanding the parameters of discretion and review and how it differs from the 18 U.S.C. § 3582(c)(2) cases and confirming the growing consensus, as well as correcting the errors that have been made along the way.

**CERTIFICATE OF COMPLIANCE UNDER SUPREME COURT RULE 33(g)**

I hereby certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 4,141 words composed with 12 point Century Schoolbook font as calculated by WordPerfect software.

Dated: August 25, 2020

Anna R. Rapa (P71266)
Attorney for Petitioner

## CERTIFICATE OF SERVICE

It is hereby certified that on August 25, 2020, service of the Defendant-Appellant's Brief on Appeal was made upon the following by electronic filing:

U.S. Attorney for the Western District of Michigan
P. O. Box 208
Grand Rapids, MI 49501-0208

Office of the Solicitor General
Room 5616, Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

Dated: August 25, 2020

Anna R. Rapa (P71266)
Attorney for Petitioner
PO Box 140
Mears, MI 49436
231-873-4852

# Appendix A

# Sixth Circuit Unpublished Opinion

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRAIG EDWARD HUNNICUTT, JR.,

Defendant.
_____/

Case No. 1:06:CR:194

HON. GORDON J. QUIST

**ORDER DENYING FIRST STEP ACT MOTION**

Pursuant to the Court's May 10, 2019, Order (ECF No. 93), Defendant, through his appointed counsel, has filed a supplemental brief in support of his motion for modification or reduction of his sentence pursuant to Section 404 of the First Step Act (FSA). (ECF No. 94.) The Government has filed a response to Defendant's supplemental brief (ECF No. 95), and Defendant has submitted a letter to the Court (ECF No. 96). The Court has read and considered all of the foregoing submissions in deciding whether to grant Defendant a sentence reduction.

Pursuant to Section 404(b) of the FSA, "[a] court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed." A "'covered offense' means a violation of a Federal Criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010." This Court has previously indicated that it agrees with Judge Jonker's analysis of the FSA in *United States v. Boulding*, 379

F. Supp. 646 (W.D. Mich. 2019)—and that of "[n]early every district court considering the issue," *United States v. Cole*, No. 1:09 CR 118, 2019 WL 3406872, at *3 (N.D. Ind. July 29, 2019)—that it is the statute of conviction, and not actual conduct, that controls whether a defendant is eligible for relief under the FSA.

Based on the foregoing, Defendant is eligible for relief under the FSA. But eligibility is only the threshold issue, as courts retain discretion to determine whether a Defendant's sentence should be reduced. *Id.* at *2. As Defendant and the Government note, Judge Jonker and the undersigned have denied Defendant's requests for sentence reductions three times (ECF Nos. 42, 52, 67, and 68), each time citing Defendant's history and propensity for violent and threatening behavior. Upon consideration of Defendant's and his counsel's arguments, the Court finds nothing in their submissions that persuades the Court to depart from its prior determinations. In addition, the Court notes that Defendant remains incarcerated at a Bureau of Prisons facility that houses inmates that are extremely dangerous or violent.

Accordingly, Defendant's Motions for Modification or Reduction of Sentence Under the First Step Act (ECF Nos. 85 and 88) are **DENIED**.

**IT IS SO ORDERED**.

Dated: August 28, 2019

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

# Appendix B

# District Court Denying First Step Act Sentence Reduction

**NOT RECOMMENDED FOR PUBLICATION**
**File Name: 20a0310n.06**

**No. 19-2044**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | ON APPEAL FROM THE |
| | ) | UNITED STATES DISTRICT |
| CRAIG EDWARD HUNNICUTT, JR., | ) | COURT FOR THE WESTERN |
| | ) | DISTRICT OF MICHIGAN |
| Defendant-Appellant. | ) | |
| | ) | |

BEFORE: BOGGS, GRIFFIN, and LARSEN, Circuit Judges.

GRIFFIN, Circuit Judge.

Defendant Craig Hunnicutt appeals the district court's denial of his motion for a sentence reduction pursuant to the First Step Act of 2018. *See* Pub. L. No. 115-391, 132 Stat. 5194. We dismiss the appeal because it does not fall within the narrow class of cases for which we may order relief under 18 U.S.C. § 3742.

I.

In 2006, Hunnicutt pleaded guilty to possessing with intent to distribute five or more grams of cocaine base and to possessing a gun in furtherance of that crime. The district court sentenced defendant to 204 months' imprisonment.

Hunnicutt did not appeal his conviction or sentence, but in the years to come, he moved the district court several times for modification of his sentence pursuant to 18 U.S.C. § 3582(c)(2).

The first time, the district court found him eligible for a reduction, but declined to modify his sentence based in part on defendant's conduct in prison, which included disciplinary sanctions for carrying an 8-inch metal shank, possession of intoxicants, and lying to staff. It was much the same two years later, when the district court denied Hunnicutt's second motion for a sentence reduction, as the court expressed a continued belief that defendant was "a threat to society." After defendant filed his third motion, the court's probation officer recommended that Hunnicutt's sentence be reduced from 204 months' imprisonment to 144 months' imprisonment. The district court was not swayed, however:

> After considering Defendant's request, his criminal conduct, his continuing breaking of the rules, his danger to the community, the nature of his original offenses, and the facts and circumstances set forth in his original Presentence Investigation Report, this Court has decided that it will not reduce Defendant's sentence.

After Congress passed the First Step Act, Hunnicutt moved to reduce his sentence a fourth time. Once again, the court recognized that defendant was eligible for a sentence reduction but denied relief:

> As Defendant and the Government note, Judge Jonker and the undersigned have denied Defendant's requests for sentence reductions three times, each time citing Defendant's history and propensity for violent and threatening behavior. Upon consideration of Defendant's and his counsel's arguments, the Court finds nothing in their submissions that persuades the Court to depart from its prior determinations. In addition, the Court notes that Defendant remains incarcerated at a Bureau of Prisons facility that houses inmates that are extremely dangerous or violent.
>
> Accordingly, Defendant's Motions for Modification or Reduction of Sentence Under the First Step Act are **DENIED**.

Record citations omitted. Hunnicutt timely appealed the district court's order.

II.

A.

As a threshold issue, we must determine whether we have jurisdiction over this appeal.

In *United States v. Bowers*, we held that 18 U.S.C. § 3742 limited our ability to review appeals of an "otherwise final sentence." 615 F.3d 715, 718 (6th Cir. 2010). In so deciding, we conceptualized § 3742 as a *jurisdictional* limit on appellate review. In other words, because § 3742 was intended to be "the exclusive avenue through which a party can appeal a sentence," we reasoned that a criminal defendant could not invoke 28 U.S.C. § 1291 "to circumvent the conditions imposed by 18 U.S.C. § 3742." *Id.* at 719 (citations omitted). Thus, the government contends that our jurisdiction is limited to the extent provided by § 3742(a), and that like *Bowers*, defendant's appeal does not fit within any of the four categories delineated therein.

However, we recently clarified in *United States v. Marshall* that § 3742(a) does not limit our subject-matter jurisdiction, but rather, it "confin[es] our power to grant certain types of relief in sentencing appeals." 954 F.3d 823, 829 (6th Cir. 2020). To put it differently, § 3742 imposes "a mandatory limit on our power, not a subject-matter jurisdiction limit on our power." *Id.* at 827. Given this understanding, we concluded that "Section 1291 . . . remains the main source of our subject-matter jurisdiction in these appeals." *Id.* at 831. In closing, we noted that we were not deciding whether appellate courts have authority to review First Step Act appeals. *Id.* Whether we have authority to review such appeals or not, we explained that the issue "is not one that turns on the subject-matter jurisdiction of the federal courts." *Id.* Consistent with *Marshall*, we hold that 28 U.S.C. § 1291 provides subject-matter jurisdiction over Hunnicutt's appeal.

B.

"While we have subject matter jurisdiction over the appeal under § 1291, it does not follow that we necessarily have authority to grant relief." *Id.* at 829. In other words, even if § 3742 does not circumscribe our jurisdiction, it may still limit our authority to order relief. *See id.* We must thus determine whether Hunnicutt's appeal fits within any of the four scenarios identified by § 3742(a).

Hunnicutt argues that the district court erred by "fail[ing] to recognize the full extent of its discretion." This, he says, is because the district court incorporated its prior orders resolving his motions brought under 18 U.S.C. § 3582(c)(2). Extrapolating from this observation, Hunnicutt speculates that the district court did not understand that it was free to consider other, unspecified factors that it could not have considered in resolving his prior motions.

However, Hunnicutt's appeal cannot be considered to challenge a sentence "imposed in violation of law," as permitted by 18 U.S.C. § 3742(a)(1). As explained in *Marshall*, a district court does not "impose" a sentence by denying a motion for a discretionary sentence reduction. *See* 954 F.3d at 830 ("[I]t makes no sense to say *declining* to modify a sentence 'imposes' a sentence."). For this simple reason, § 3742(a)(1) does not authorize us to order the relief defendant seeks; no sentence was "imposed" upon him as a result of the district court's denial of his motion.[1] Nor does any other provision of § 3742(a) even plausibly provide us with authority under the

[1]This distinguishes the case from *United States v. Foreman*, where the district court granted in part a motion brought under the First Step Act, imposed a reduced sentence, and defendant appealed. No. 19-1827, — F.3d —, 2020 WL 2204261 (6th Cir. May 7, 2020). A panel of our court held that it could review the "corrected sentence" because a district court's abuse of the statutory grant of discretion flowing from the First Step Act "amounts to a 'violation of law' giving rise to appellate review under § 3742(a)(1)." *Id.* at *5–7. In a footnote, *Foreman* suggests that the same may be true of *denials* of First Step Act motions, *id.* at *5 n.2, but that statement is dicta, and it appears to be contrary to *Marshall*.

circumstances presented here. Therefore, Hunnicutt's appeal does not fit within the narrow class of sentencing appeals for which we may order relief. This conclusion renders Hunnicutt's appeal non-justiciable and precludes further review of his arguments.[2]

III.

For these reasons, we dismiss the appeal.

[2]Even if we assumed authority to order relief under § 3742(a)(1), it would not benefit Hunnicutt because the district court did not abuse its discretion by adhering to the original sentence imposed upon defendant. *See United States v. Woods*, 949 F.3d 934, 937–38 (6th Cir. 2020). The district court stated that it had considered Hunnicutt's arguments for a reduced sentence but determined that Hunnicutt was not entitled to relief because of his history of and propensity for violent behavior (as explained in its previous orders denying Hunnicutt's motions for modification of his sentence). This, coupled with the fact that defendant was housed at a Bureau of Prisons facility designated for extremely dangerous or violent offenders, led the district court to exercise its discretion and deny the motion. Thus, the district court gave a legitimate reason to deny Hunnicutt's request for a reduced sentence, and we discern no abuse of discretion. *See Marshall*, 954 F.3d at 831; *Woods*, 949 F.3d at 938 (6th Cir. 2020).

LARSEN, Circuit Judge, concurring. As the opinion of the court explains, in *United States v. Marshall*, this court held that 18 U.S.C. § 3742 is not jurisdictional; instead, 28 U.S.C. § 1291 grants us jurisdiction over this appeal. 954 F.3d 823, 829 (6th Cir. 2020). And as the majority opinion also explains, Hunnicutt is not entitled to relief on the merits. I therefore would not reach the question addressed in part II.B. of the majority opinion. I otherwise concur.