No. _____

In the Supreme Court of the United States

BARRY CASHIN,

***Petitioner*,**

v.

UNITED STATES of AMERICA,

***Respondent*.**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does 18 U.S.C. § 3742(a) restrict appellate courts' authority to review the procedural and substantive reasonableness of a denial of a motion for a sentence reduction or modification under 18 U.S.C. § 3582(c)(2)?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR WRIT OF CERTIORARI 1
PARTIES TO THE PROCEEDINGS 6
JURISDICTION 6
OPINIONS BELOW 6
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 7
STATEMENT OF THE CASE 11
A. The Marijuana-Conspiracy Case 11
B. The Witness-Tampering Case 11
C. Mr. Cashin Moves for Sentence Reduction 12
D. Mr. Cashin Appeals the Sentence-Reduction Denial 13

REASONS TO GRANT CERTIORARI 15
A. There is a Circuit Split About Whether 18 U.S.C. § 3742(a) Prevents Appellate Courts from Reviewing the Reasonableness of a Denial of a 18 U.S.C. § 3582(c)(2) Motion for a Sentence Reduction 15
1. The Sixth Circuit is the only court that reads § 3742(a) as a limit on an appellate court's authority to review challenges to the reasonableness of a sentence-reduction denial. 15
2. Most circuit courts hold that § 1291 is the only source of appellate jurisdiction to review sentence-reduction denials and review claims without § 3742(a)'s limitations. 17
3. The Third and Seventh Circuits find jurisdiction in both § 1291 and § 3742(a), but still review the reasonableness of a sentence-reduction denial. 19
2. This Court's precedent demands appellate review of procedural and substantive errors made in denying a sentence reduction 24
C. The Question Presented is Important Because the Answer Could Resolve Confusion About § 3742(a)'s Application in Other Contexts 26
CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Supreme Court Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 24

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 24, 25

Dillon v. United States, 560 U.S. 817 (2010) 2, 18, 23

Gall v. United States, 552 U.S. 38 (2007) 26

Pierce v. Underwood, 487 U.S. 552 (1988) 25

Rita v. United States, 551 U.S. 338 (2007) 25

Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018) 25, 26

United States v. Booker, 543 U.S. 220 (2005) 2, 20, 25

United States v. Taylor, 487 U.S. 326 (1988) 25

1st Circuit Cases

United States v. Dewire, 271 F.3d 333 (1st Cir. 2001) 20

2d Circuit Cases

United States v. McGee, 553 F.3d 225, (2d Cir. 2009) 17, 18, 24

United States v. Montanez, 717 F.3d 287 (2d Cir. 2013) 17

3d Circuit Cases

United States v. Devlin, 800 F. App'x 88 (3d Cir. 2020) 27

United States v. Easter, 975 F.3d 318 (3d Cir. 2020) 19

United States v. Minutoli, 374 F.3d 236 (3d Cir. 2004) 20

United States v. Pawlowski, 967 F.3d 327 (3d Cir. 2020) 28

United States v. Rodriguez, 855 F.3d 526 (3d Cir. 2017) 4, 19, 24

5th Circuit Cases

United States v. Calton, 900 F.3d 706 (5th Cir. 2018) ..... passim

United States v. Chambliss, 948 F.3d 691 (5th Cir. 2020) 28

6th Circuit Cases

United States v. Bowers, 615 F.3d 715 (6th Cir. 2010)..... passim
United States v. Cashin, 822 F. App'x 378 (6th Cir. 2020) 3, 22
United States v. Clark, 385 F.3d 609 (6th Cir. 2004) 20
United States v. Foreman, 958 F.3d 506 (6th Cir. 2020)..... 16, 28
United States v. Hunnicutt, 807 F. App'x 551 (6th Cir. 2020) 3, 5, 29
United States v. Jones, 980 F.3d 1098 (6th Cir. 2020) 5, 28
United States v. Keefer, No. 19-4148, 2020 WL 6112795 (6th Cir. Oct. 16, 2020) 28
United States v. Marshall, 954 F.3d 823 (6th Cir. 2020) ..... passim
United States v. Moore, 582 F.3d 641 (6th Cir. 2009) 24
United States v. Moran, 325 F.3d 790 (6th Cir. 2003) 21
United States v. Reid, 888 F.3d 256 (6th Cir. 2018)..... 2
United States v. Richardson, 960 F.3d 761 (6th Cir. 2020) 16, 22, 23, 29
United States v. Ruffin, 978 F.3d 1000 (6th Cir. 2020)..... 28
United States v. Smith, 959 F.3d 701 (6th Cir. 2020) 29
United States v. Smithers, 960 F.3d 339 (6th Cir. 2020) 5, 29
United States v. Turner, 797 F. App'x 226 (6th Cir. 2019)..... 2
United States v. Wilson, 827 F. App'x 473 (6th Cir. 2020)..... 5, 30

7th Circuit Cases

United States v. Purnell, 701 F.3d 1186 (7th Cir. 2012) 17, 19

8th Circuit Cases

United States v. Hernandez-Marfil, 825 F.3d 410 (8th Cir. 2016)..... 17

9th Circuit Cases

United States v. Colson, 573 F.3d 915 (9th Cir. 2009) 18, 24
United States v. Dunn, 728 F.3d 1151 (9th Cir. 2013) 17, 18
United States v. Uribe, 735 F. App'x 338 (9th Cir. 2018)..... 27

10th Circuit Cases

United States v. Lowe, 498 F. App'x 782 (10th Cir. 2012)..... 27
United States v. Washington, 759 F.3d 1175 (10th Cir. 2014)..... 17, 18

11th Circuit Cases

United States v. Reagan, 162 F. App'x 912 (11th Cir. 2006) 22, 27

Statutes

18 U.S.C. § 3553(a) 24, 26
18 U.S.C. § 3553(a)(1) 13
18 U.S.C. § 3553(a)(2)(A) 14
18 U.S.C. § 3553(a)(2)(C) 14
18 U.S.C. § 3582(c)(1) 16
18 U.S.C. § 3582(c)(1)(A) 5, 27
18 U.S.C. § 3582(c)(1)(B) 21
18 U.S.C. § 3582(c)(2) ..... passim
18 U.S.C. § 3583(e) 2, 27
18 U.S.C. § 3742(a) ..... passim
18 U.S.C. § 3742(a)(1) ..... passim
18 U.S.C. § 3742(d) 23
18 U.S.C. § 3742(e) 20, 23
18 U.S.C. § 3742(f) 23
18 U.S.C. § 3742(g) 23
28 U.S.C. § 1254(1) 6
28 U.S.C. § 1291 ..... passim
First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 ..... 5, 27, 29

Rules

Fed. R. Crim. P. 35(b) 21

PETITION FOR WRIT OF CERTIORARI

Barry Cashin was sentenced to consecutive sentences totaling 45 years in prison in two separate but related cases. After the Sentencing Commission lowered the applicable guidelines for one of the offenses, Mr. Cashin sought a sentence reduction under 18 U.S.C. § 3582(c)(2). The district court denied the motion without considering the aggregate term of imprisonment or Mr. Cashin's rehabilitative efforts and declining health. Had Mr. Cashin appealed the denial to any other Circuit Court of Appeals, the reasonableness of the denial would be reviewed for an abuse of discretion. Because Mr. Cashin had to appeal to the Sixth Circuit, the court never reviewed the reasonableness of the district court's denial. That was so because the Sixth Circuit is the only court that believes 18 U.S.C. § 3742(a) restricts appellate courts' authority to consider the reasonableness of a denial of a § 3582(c)(2) motion.

Appellate courts have jurisdiction to review any final order under 28 U.S.C. § 1291. "Denials of sentence reductions are unquestionably 'final decisions of [a] district court[ ]' because they close the criminal cases once again." *United States v. Jones*, 846 F.3d 366, 369 (D.C. Cir. 2017) (quoting § 1291, alterations in original).

In the context of appeals from the denial of a § 3582(c)(2) motion, however, courts disagree on whether § 3742(a), which governs appellate "[r]eview of a sentence," circumscribes § 1291's broad grant of jurisdiction. Section 3742(a) allows defendants to "file a notice of appeal in the district court for review of an otherwise final sentence" in only four circumstances: (1) if the sentence "was imposed in violation of law"; (2) if the sentence "was imposed as a result of an incorrect

application of the sentencing guidelines"; (3) if the sentence is greater than recommended by the applicable guidelines; and (4) if the sentence "was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." Proceedings under § 3582(c)(2) are not considered "sentencing or resentencing proceeding[s]." *Dillon v. United States*, 560 U.S. 817, 825 (2010).

Nevertheless, the Sixth Circuit has decided defendants appealing the § 3782(c) denials must "pass[] through one of § 3742(a)'s four gateways." *United States v. Marshall*, 954 F.3d 823, 827(6th Cir. 2020). In the wake of this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Sixth Circuit crafted a rule that treated § 3742(a) as the sole source of appellate jurisdiction for appeals from denials of § 3582(c)(2) motions, which precluded any reasonableness review of those denials. *United States v. Bowers*, 615 F.3d 715, 725–28 (6th Cir. 2010). For a decade, the Sixth Circuit relied on this rule to dismiss not only claims of substantive unreasonableness, but also claims of procedural error in the form of guideline-calculation errors and lack of rational basis. *United States v. Turner*, 797 F. App'x 226, 226 (6th Cir. 2019) (procedural error); *United States v. Reid*, 888 F.3d 256, 258 (6th Cir. 2018) (lack of rational basis).

In 2020, the Sixth Circuit put new gloss on *Bowers*, adopting a novel reading of § 3742(a). After originally dismissing *for lack of subject-matter jurisdiction* an appeal from the denial of a motion for early termination of supervised release under 18 U.S.C. § 3583(e), the panel held that there *is* appellate jurisdiction from such denials under § 1291. *Marshall*, 954 F.3d at 824. The panel stated that "*Bowers* is

best read as confining our power to grant certain types of relief in 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." *Id.* Now, rather than dismissing appeals seeking review of the denial of a motion for a sentence reduction for lack of subject-matter jurisdiction, the Sixth Circuit affirms those denial orders because it lacks authority to conduct appellate review, as in this case. (A-1, APP_005); *United States v. Cashin*, 822 F. App'x 378, 381 (6th Cir. 2020); *United States v. Hunnicutt*, 807 F. App'x 551, 553 (6th Cir. 2020), *cert. denied,* No. 20-5561, 2020 WL 6037332 (U.S. Oct. 13, 2020) (finding the claim on appeal non-justiciable because it "does not fit within the narrow class of sentencing appeals for which we may order relief").

The Sixth Circuit is the only circuit court to hold that 18 U.S.C. § 3742(a) strips appellate courts of authority to review challenges to the reasonableness of the denial of a motion for a sentence reduction or modification under 18 U.S.C. § 3582(c)(2). There are three reasons to grant certiorari.

One. There is an entrenched circuit split about whether § 3742(a) restricts appellate courts' authority to review denials of a sentence reduction under § 3582(c)(2). Before *Marshall*, the Sixth Circuit was the only circuit court to hold that § 3742(a) was the sole source of appellate courts' subject-matter jurisdiction to review discretionary decisions in § 3582(c)(2) proceedings. *United States v. Calton*, 900 F.3d 706, 712 (5th Cir. 2018) (collecting cases). All other circuits to consider this issue

found jurisdiction to review § 3582(c)(2) denials in § 1291, and did so without § 3742(a)'s limitations. *See id.*

Although the Sixth Circuit now agrees that denials of motions for sentence reductions are final decisions appealable under § 1291, it adheres to the view that § 3742(a) controls appellate review of denials of § 3582(c)(2) motions for a sentence reduction or modification. The Sixth Circuit is the only circuit to apply § 3742(a) to § 3582(c)(2) sentence-reduction denials in a manner that precludes review for procedural and substantive reasonableness. This Court must grant review to resolve this acknowledged, entrenched circuit split.

Two. Review is required because the Sixth Circuit's approach is an incorrect reading of § 3742(a)'s text. Section 3742(a) speaks only of sentences "imposed," and the denial of a motion for a sentence reduction does not result in the imposition of a sentence. Moreover, even if § 3742(a) plays a role in appellate review of sentence-reduction denials, "it does *not* bar review for reasonableness." *United States v. Rodriguez*, 855 F.3d 526, 531 (3d Cir. 2017), *as amended* (May 1, 2017). Rather, 18 U.S.C. § 3742(a)(1) allows review for reasonableness because, under the reading of § 3742(a) adopted by other circuits, "an unreasonable sentence is 'imposed in violation of law.'" *Id.*; a*ccord Jones*, 846 F.3d at 370 (agreeing § 3742(a) does not limit § 1291's grant of jurisdiction to review challenges to sentence-reduction denials); *Calton*, 900 F.3d at 712–13 (same).

Three. This question is exceptionally important. The Sixth Circuit's unique approach to appellate review affects not only defendants seeking a modification or

reduction of their sentences, but also those who seek early termination of supervised release. *Marshall*, 954 F.3d at 830. The Sixth Circuit may even restrict appellate review of the denial of a sentence reduction under § 404(b) of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 and 18 U.S.C. § 3582(c)(1)(A), otherwise known as compassionate release. *See Hunnicutt*, 807 F. App'x at 553 n.1 (holding that § 3742(a) does not authorize appellate courts to review the reasonableness of a denial of a motion for a sentence reduction under § 404(b) of the First Step Act); *United States v. Smithers*, 960 F.3d 339, 344 (6th Cir. 2020) (describing § 3742(a) as a non-jurisdictional limit on an appellate court's authority to review the denial of a § 3582(c)(1) motion); *but see United States v. Wilson*, 827 F. App'x 473, 478 (6th Cir. 2020) ("[O]ur binding precedent now tips the scale towards the interpretation that denials of motions to reduce sentence under the First Step Act be reviewed for abuse of discretion."); *United States v. Jones*, 980 F.3d 1098, 1112 n.22 (6th Cir. 2020) (reviewing the denial of a § 3582(c)(1) motion for an abuse of discretion consistent with two other circuits). Resolving the question presented may clarify whether § 3742(a) limits appellate authority to review the denial of other types of sentence-reduction motions, as well.

This case presents a clean vehicle. The time is now to address whether § 3742(a) limits appellate authority to review sentence-reduction denials.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Sixth Circuit Court of Appeals affirmed the denial of Barry Cashin's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2) on August 4, 2020. Therefore, under the Court's March 19, 2020 Order, this petition is timely because it was filed on the first business day 150 days after the date of the lower court judgment.

OPINIONS BELOW

The Sixth Circuit's unpublished opinion holding that it was "without authority to consider Cashin's arguments," but "affirm[ing] the district court's judgment," is included at A-1 and is available at *United States v. Cashin*, 822 F. App'x 378 (6th Cir. 2020). The District Court's opinion and order denying Mr. Cashin's motion for modification or reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) is included at A-2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves questions of statutory interpretation and appellate court jurisdiction. The relevant statutes provide, in pertinent part:

18 U.S.C. § 3553(a):

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

* * *

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3582(c):

(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(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(a):

(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) 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.

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.

STATEMENT OF THE CASE

A. The Marijuana-Conspiracy Case

In 1990, Barry Cashin pled guilty to conspiracy to possess with intent to deliver marijuana. In March 1991, the district court sentenced Mr. Cashin to serve a 31-year (372-month) sentence for the marijuana conspiracy. The district court found that his then-mandatory Guidelines range was 360 months to life based on a Criminal History Category of III and an offense level of 40. The drug quantity and three enhancements drove the offense level, including an enhancement for obstruction of justice based on Mr. Cashin's alleged witness tampering for which he was also separately charged. At the sentencing hearing, the district court explained that the obstructive conduct deserved a higher sentence than the two-level increase called for by the Guidelines.

B. The Witness-Tampering Case

Two days after Mr. Cashin pled guilty to the drug charge, a grand jury indicted him in a separate case, alleging that he participated in a conspiracy to tamper with a witness and witness tampering. Later, a superseding indictment added a count for solicitation to commit a crime of violence. At trial, a jury convicted Mr. Cashin of the witness-tampering charges, but could not reach a verdict on the solicitation charge.

In November 1991, the district court sentenced Mr. Cashin to approximately 14 years' imprisonment (170 months) for the witness-tampering convictions. The Guidelines recommended a sentence between 151 and 180 months. The district court ordered this sentence to run consecutively with the sentence imposed for Mr. Cashin's participation in the marijuana conspiracy even though that sentence already

incorporated an enhancement for the alleged witness tampering. This resulted in a total prison sentence of just over 45 years.

C. Mr. Cashin Moves for Sentence Reduction

Nearly 15 years after Mr. Cashin's sentencing hearings, the Sentencing Commission passed Amendment 782, which lowered the base offense levels for drug offenses. This change lowered the applicable offense level for the marijuana conspiracy to 38, resulting in a new Guidelines range of 292–365 months. Consequently, Mr. Cashin's 372-month sentence was above the top of the applicable Guidelines range. The Guideline calculation for the witness-intimidation convictions did not change. But, even if the district court decided to impose a sentence 12-months above the bottom of the new Guidelines range (304 months), Mr. Cashin's current sentence is still 68 months (five years and eight months) higher.

In November 2015, Mr. Cashin filed a pro se motion asking the district court to modify or reduce his sentence under 18 U.S.C. § 3582(c)(2). He filed an identical motion in the witness-tampering case.

Two years later, in November 2017, the district court appointed counsel to help Mr. Cashin present his arguments. The government argued that Mr. Cashin's 372-month sentence was not based on the Guidelines, and therefore he was not eligible for a sentence reduction under Amendment 782. The government claimed that the district court's sentence was based instead on the aggregate sentence in both cases. With the assistance of counsel, Mr. Cashin replied that the record did not support the government's argument. He also provided evidence of his significant rehabilitative

efforts in prison, like earning a GED and involvement in programs. In addition, Mr. Cashin pointed out that during his entire time in the Federal Bureau of Prisons, he had been sanctioned only once in 2004 for disobeying an order. Subsequently, counsel notified the district court that Mr. Cashin was transferred to a medical facility and designated to a Care Level 3 because he was diagnosed with atrial fibrillation. Incarcerated people in Care Level 3 are fragile and require frequent clinical contacts.

Two years later, in November 2019, the district court filed opinions in both cases finding that Mr. Cashin was eligible for a sentence reduction under § 3582(c)(2) because the sentence selected was "the mid-point of the guideline range" and the court referenced the Guidelines during the hearings. (A-2, APP_008–09; A-3, APP_014–15) Yet the court declined to reduce the sentence. The district court explained that, despite the change to his applicable Guideline range, the original 31-year sentence was "an appropriate measure of punishment for his actions and that he poses a continued risk to the public." (A-2, APP_011; A-3, at APP_017) The district court did not mention Mr. Cashin's health, rehabilitative efforts, or nearly spotless disciplinary record.

D. Mr. Cashin Appeals the Sentence-Reduction Denial

Mr. Cashin filed a timely appeal. He argued that the district court made a legal error by failing to consider numerous factors the policy statement governing sentence reductions, U.S.S.G. § 1B.10, the up-to-date information about Mr. Cashin's "history and characteristics," 18 U.S.C. § 3553(a)(1), or the 170-month consecutive sentence

from the witness-tampering case, which accounts for "the seriousness of the offense," *id.* § 3553(a)(2)(A), and the need "to protect the public," *id.* § 3553(a)(2)(C).

The Sixth Circuit concluded that Mr. Cashin's appeal involved a challenge to "the denial of a motion seeking a sentence reduction on reasonableness grounds." (A-1, at APP_005) Citing *Bowers*, 615 F.3d at 725–28, and *Marshall*, 954 F.3d at 829, the panel concluded that it did "not have statutory authority to consider this argument" under 18 U.S.C. § 3742(a) and affirmed the district court without considering the merits of Mr. Cashin's arguments. (A-1, at APP_004–05)

REASONS TO GRANT CERTIORARI

A. There is a Circuit Split About Whether 18 U.S.C. § 3742(a) Prevents Appellate Courts from Reviewing the Reasonableness of a Denial of a 18 U.S.C. § 3582(c)(2) Motion for a Sentence Reduction

Section 3582(c)(2) of title 18 permits a reduction or modification of an otherwise final sentence when the Sentencing Commission lowers the recommended Guidelines range for the offense of conviction. The circuit courts have identified three possible sources of their authority to review the denial of a § 3582(c)(2) motion for a sentence modification or reduction: 28 U.S.C. § 1291, 18 U.S.C. § 3742(a), or both. Resolving which statute governs appeals has consequences in the Sixth Circuit, which views as out of bounds challenges to the procedural and substantive reasonableness of a sentence. It is the only court to do so, and the majority of circuit courts have expressly rejected the Sixth Circuit's application of § 3742(a) to sentence-reduction denials under § 3582(c)(2). This Court should grant this petition for certiorari to resolve the split.

1. The Sixth Circuit is the only court that reads § 3742(a) as a limit on an appellate court's authority to review challenges to the reasonableness of a sentence-reduction denial.

The Sixth Circuit stands alone in the view that § 3742(a) prohibits appellate review of the reasonableness of sentence-reduction denials under § 3582(c)(2). In *Bowers,* the Sixth Circuit held that 18 U.S.C. § 3742(a) is the sole source of appellate jurisdiction to review the denial of a § 3582(c)(2) motion. 615 F.3d at 722. It also concluded that challenges to the reasonableness of a sentence are not "violation[s] of law" under § 3742(a)(1) when districts court deny motions under § 3582(c)(2). *Id.* at

728. Now, the Sixth Circuit treats § 3742(a) as a "mandatory claim-processing rule," which if not followed, deprives an appellate court of the authority to grant relief in sentencing appeals. *Marshall*, 954 F.3d at 827.

The Sixth Circuit has tried to harmonize holdings of *Bowers* and *Marshall* by explaining that "§ 1291 gives us jurisdiction over appeals from sentence-reduction orders, while § 3742(a) limits the sorts of claims that a defendant may bring on appeal." *United States v. Richardson*, 960 F.3d 761, 764 (6th Cir. 2020) (per curiam). Still, as more thoroughly discussed below, the court has been inconsistent in its treatment of appeals of the denials of various types of sentence-reduction motions.

The Sixth Circuit itself has acknowledged that its reading of § 3742(a) is out of step with the majority of courts. For example, when discussing the changes the First Step Act made to another section of this same statute, 18 U.S.C. § 3582(c)(1), the Sixth Circuit concluded that Congress did not intend to limit appellate review of § 3582(c)(1) sentence modifications because it passed the Act "against this otherwise uniform backdrop" where all other courts reviewed denial of sentencing reductions for reasonableness. *United States v. Foreman*, 958 F.3d 506, 514 (6th Cir. 2020). And at least one member of the Sixth Circuit believes "§ 3742(a) by its terms is completely inapposite in a case where the district court *denies* a defendant's motion to modify his sentence." *Richardson*, 960 F.3d at 765–66 (Kethledge, J., concurring) (emphasis in original).

No matter whether the Sixth Circuit's rule is "jurisdictional" or a "claim-processing rule," however, it is *the only* court to hold that § 3742(a) hinders appellate

courts' ability to review the reasonableness of a denial of any type of motion for a sentence modification under § 3582(c)(2). *See, e.g.*, *Calton*, 900 F.3d at 712 ("Only the Sixth Circuit has held that § 3742, rather than § 1291, provides jurisdiction over appeals from § 3582(c)(2) determinations."); *Jones*, 846 F.3d at 370 ("[T]he 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.").

2. Most circuit courts hold that § 1291 is the only source of appellate jurisdiction to review sentence-reduction denials and review claims without § 3742(a)'s limitations.

The majority of circuit courts have concluded that 28 U.S.C. § 1291 is the sole source of jurisdiction and appellate review of the denial of a sentence-reduction motion. *See Calton*, 900 F.3d at 712–13; *Jones*, 846 F.3d at 369–70; *United States v. Hernandez-Marfil*, 825 F.3d 410, 411 (8th Cir. 2016); *United States v. Washington*, 759 F.3d 1175, 1179–81 (10th Cir. 2014); *United States v. Dunn*, 728 F.3d 1151, 1157 (9th Cir. 2013); *United States v. Purnell*, 701 F.3d 1186, 1188 (7th Cir. 2012); *United States v. McGee*, 553 F.3d 225, 226 (2d Cir. 2009), *superseded on other grounds as recognized in United States v. Montanez*, 717 F.3d 287, 294 (2d Cir. 2013). All of these courts review the reasonableness of a district court's decision to deny a sentence reduction for an abuse of discretion without any of § 3742(a)'s limitations.

These courts have expressly held that § 3742(a) is inapplicable to appeals of sentence-reduction denials under § 3582(c)(2). The Fifth and D.C. Circuits reasoned that "'a district court proceeding under § 3582(c)(2) does not impose a new sentence

in the usual sense,'" and so "holding that § 1291 supplies the jurisdictional basis for reviewing denials of § 3582(c)(2) motions best comports with this principle." *Calton*, 900 F.3d at 713 (quoting *Dillon*, 560 U.S. at 827); *see also Jones*, 846 F.3d at 370.

The Tenth Circuit concluded that "§ 3742(a)(1) does not displace § 1291's broad grant of appellate jurisdiction over appeals from final sentencing orders" even for ordinary sentencing appeals. *Washington*, 759 F.3d at 1180. Instead, the Tenth Circuit treats § 1291 as the statutory source of jurisdiction to review sentence-reduction denials "without regard to whether the arguments . . . advance[d] fall within one of the four categories set out in § 3742(a)(1)." *Id.* at 1181. And so the same is true in appeals from the denial of a motion for a sentence reduction under § 3582(c)(2). *See id.*

The Second and Ninth Circuits relied on § 1291 to review the denial of sentence-reduction motions, but they did not provide much discussion. *See McGee*, 553 F.3d at 226; *United States v. Colson*, 573 F.3d 915, 916 (9th Cir. 2009) ("We conclude that 18 U.S.C. § 3582(c)(2) sentence reduction decisions are reviewable in their entirety for abuse of discretion under 28 U.S.C. § 1291."). When presented with the opportunity to change course, the Ninth Circuit stuck to this holding over one judge's arguments in favor of adopting the rule that § 3742(a) limits appellate courts' subject-matter jurisdiction to review § 3582(c)(2) decisions. *See Dunn*, 728 F.3d at 1155–588 (concluding that intervening case law did not undermine the holding of *Colson*); *id.* at 1160–63 (explaining why "[t]he Sixth Circuit's opinion in [*Bowers*]

rightly concluded that jurisdiction over re-sentencing appeals does not include review for reasonableness.") (O'Scannlain, J., concurring).

3. The Third and Seventh Circuits find jurisdiction in both § 1291 and § 3742(a), but still review the reasonableness of a sentence-reduction denial.

Two courts hold that both 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) provide jurisdiction to review the denial of a motion for a sentence reduction.

The Third Circuit reviews the denial of a motion of a sentence reduction "for a 'violation of the law,' 18 U.S.C. § 3742(a)(1), which includes both (i) matters of statutory interpretation over which [it exercises] plenary review, as well as (ii) questions about reasonableness, which [it] review[s] for abuse of discretion." *United States v. Easter*, 975 F.3d 318, 322 (3d Cir. 2020) (some internal quotation marks and citations omitted). The Third Circuit expressly held that § "3742 is not an 'obstacle' to [§] 1291 jurisdiction" to review the reasonableness of a reduction denial the unreasonable denial results in a sentence 'imposed in violation of law' under 18 U.S.C. § 3742(a)(1)." *Rodriguez*, 855 F.3d at 531.

The Seventh Circuit also reviews for an abuse of discretion the denial of a § 3582(c)(2) motion for a sentence reduction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. *Purnell*, 701 F.3d at 1188. The court did not offer much analysis to support this conclusion. *Id.* Nonetheless, § 3742(a) did not interfere with the Seventh Circuit's review of the procedural and substantive reasonableness of the district court's decision. *See id.* at 1189–92.

* * *

Without this Court's intervention, confusion will persist about whether § 3742(a) restricts appellate courts' authority to review the denial of a sentence reduction under § 3582(c)(2). The petition for certiorari should be granted.

B. Section § 3742(a) Does Not Apply to Appeals from the Denial of a § 3582(c)(2) Sentence-Reduction Motion

The Sixth Circuit's conclusion that § 3742(a) governs appeals from the denial of a § 3582(c)(2) motion was the result of its attempt to reconcile the remedial opinion of *United States v. Booker*, 543 U.S. 220 (2005), with pre-*Booker* precedents. After *Booker*, the Sixth Circuit considered whether § 3742(a) authorizes challenges to the reasonableness of the § 3582(c)(2) denial, and specifically whether an unreasonable denial is a "violation of law" under § 3742(a)(1). *Bowers*, 615 F.3d at 723. There was a need to reconsider the question because, before *Booker*, challenges to sentence adjustments based on clearly erroneous findings of fact were not cognizable on appeal. *Id.* at 723–24 (citing, *inter alia*, *United States v. Clark*, 385 F.3d 609, 623 (6th Cir. 2004); *United States v. Minutoli*, 374 F.3d 236, 240 (3d Cir. 2004); *United States v. Dewire*, 271 F.3d 333, 337–39 (1st Cir. 2001)). In *Booker*, to remedy the Sixth Amendment violation created by the mandatory Guidelines regime, this Court excised from the Sentencing Reform Act 18 U.S.C. § 3742(e), which governed the standard of review on direct appeal from imposition of a sentence. 543 U.S. at 259 (Breyer, J.). In its place, this Court held that sentences could be reviewed for "unreasonableness." *Id.* at 261.

After *Booker*, the Sixth Circuit held that the pre-*Booker* law still applied because this Court "left § 3742(a), the Act's jurisdictional standard, untouched," and

so "the *Booker* remedial opinion has no force in § 3582(c)(2) proceedings." *Bowers*, 615 F.3d at 726–27. Relying on opinions concluding that appellate courts lacked jurisdiction to review Fed. R. Crim. P. 35(b) determinations (governed by 18 U.S.C. § 3582(c)(1)(B)), the Sixth Circuit concluded that "[d]efendants appealing § 3582(c)(2) determinations are 'appealing [their] sentence[s]' every bit as much as defendants appealing the outcome of proceedings under Rule 35(b)." *Bowers*, 615 F.3d at 722 (quoting *United States v. Moran*, 325 F.3d 790, 793 (6th Cir. 2003)). Accordingly, the court subjected the appeal from the denial of a § 3582(c)(2) motion to § 3742(a)'s limitations. *See id.* The court ultimately concluded 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.*

The Sixth Circuit's reasoning is unpersuasive and incorrectly applies the text of § 3742(a) the *denial* of a motion for a sentence reduction under § 3582(c)(2) and ignores this Court's precedents. It also erred in holding that a challenge to the reasonableness of the sentence-reduction denial is not a "violation of law" under § 3742(a)(1).

1. Section 3742(a) does not apply when an order does not "impose" a sentence

In *Marshall*, the Sixth Circuit correctly held that a district court does not "impose a sentence" when it declines to reduce or modify an otherwise final sentence. 954 F.3d at 830. But the Sixth Circuit also staked out the textually unsupported position that appellate courts do not have "a license to ignore § 3742's limitations" when a defendant appeals the denial of a sentence modification. *Id.* at 831. So, the

Sixth Circuit still applies § 3742(a)'s requirements as a limitation on appellate courts' authority to review the denial of a sentence reduction, as evidenced here. *Cashin*, 822 F. App'x at 381.

The confusion created by the Sixth Circuit's approach stems from the court's failure to differentiate between decisions to reduce a sentence and those denying a sentence reduction. Section 3742 says nothing about sentencing-modification denials. *United States v. Reagan*, 162 F. App'x 912, 914 (11th Cir. 2006); *see also Calton*, 900 F.3d at 712 (The "'most obvious reading of § 3742 renders it inapplicable' to denial of a § 3582 (c)(2) motion[s]." (quoting *Jones*, 846 F.3d at 370)). It speaks only of sentences "imposed" and review of "an otherwise final sentence." *See* 18 U.S.C. § 3742(a). By its plain terms, § 3742(a) therefore applies only where a defendant seeks '*review of an otherwise final sentence*'—rather than where . . . a party seeks review of some other decision by a district court." *Richardson*, 960 F.3d at 766 (Kethledge, J., concurring).

The decision to deny a motion for a sentencing reduction is not the imposition of a sentence. In fact, a denial does not change the status quo at all. Accordingly, an order denying a sentence modification or reduction does not comfortably fit within the definition of a "sentence" under § 3742(a). Thus, even if § 3742(a) is a "claim-processing rule," that does not mean it restricts appellate review in the context of appeals from sentence-reduction denials. Nor does it mean that defendants must "pass[] through one of § 3742(a)'s four gateways" to obtain review in this context. *Marshall*, 954 F.3d at 827.

The remainder of § 3742(a) confirms that "an otherwise final sentence" does not include a denial of a sentence reduction. Section 3742(d) directs the district court clerk to "certify to the court of appeals" the record of "the sentencing proceeding" after a defendant files a notice of appeal. "Section 3742(e) provides in turn that, '[u]pon review of the record, the court of appeals shall determine whether the sentence' was, among other things, 'imposed in violation of law' or 'imposed as a result of an incorrect application of the sentencing guidelines[.]'" *Richardson*, 960 F.3d at 766 (Kethledge, J., concurring). Subsection (f) tells the courts of appeals how to decide and dispose of the appeal: either "affirm the sentence" or "remand the case for further sentencing proceedings" if, among other things, "the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines." Finally, § 3742(g) instructs the district court to "resentence [the] defendant" in the event the court of appeals remands the case.

All of these provisions speak of sentencing hearings with all of their procedural trappings, not sentence modifications or reductions under § 3582(c)(2), which "does not authorize a sentencing or resentencing proceeding." *Dillon*, 560 U.S. at 825. "Thus, when a defendant seeks review of a district court's denial of a sentence-reduction motion, § 3742 neither limits [appellate] 'jurisdiction' over the appeal, nor confines our power to grant certain types of relief." *Richardson*, 960 F.3d at 766 (Kethledge, J., concurring).

In addition, nothing in the text of 3742(a) limits § 1291's broad grant of jurisdiction or the types of claims available for appeal because "an unreasonable

sentence is 'imposed in violation of law' under 18 U.S.C. § 3742(a)(1)." *Rodriguez*, 855 F.3d at 530; *see also Calton*, 900 F.3d at 712; *Jones*, 846 F.3d at 370; *Washington*, 759 F.3d at 1180; *Colson*, 573 F.3d at 916; *McGee*, 553 F.3d at 226. Indeed, "'the most obvious reading of § 3742 renders it inapplicable' to the denial of a § 3582 (c)(2) motion[s]." *Calton*, 900 F.3d at 712 (quoting *Jones*, 846 F.3d at 370). Consequently, § 1291 is the only source of appellate jurisdiction to review the denial of a § 3582(c)(2) motion without § 3742(a)'s limitations. *Calton*, 900 F.3d at 713.

2. This Court's precedent demands appellate review of procedural and substantive errors made in denying a sentence reduction

Even discretionary decisions cannot be "unfettered by meaningful standards or shielded from thorough appellate review." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). Appellate courts must still ask whether district courts applied the wrong legal standard, or relied on clearly erroneous facts. *United States v. Moore*, 582 F.3d 641, 644 (6th Cir. 2009); *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

The district court's decision about whether to grant or deny a motion for a sentence reduction under § 3582(c)(2) is governed by factors set forth in 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3582(c)(2) (allowing a sentence reduction when, "after considering the factors set forth in section 3553(a) to the extent that they are applicable, . . . such a reduction is consistent with applicable policy statements issued by the Sentencing Commission"). When "Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully

consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review." *United States v. Taylor*, 487 U.S. 326, 336 (1988). "Only then can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy, thereby failing to act within the limits prescribed by Congress." *Id.* at 337. Abuse-of-discretion review asks whether the district court had a reasoned basis for that decision, guided by the relevant criteria and record evidence. *Id.* at 336.

The explanations offered for the Sixth Circuit's unique approach to appeals of denials of § 3582(c)(2) motions are not persuasive. *Booker* did not invent a wholly new species of review called "reasonableness" review; the Court adopted the abuse-of-discretion standard commonly applied when multifarious factors must be considered in reaching a discretionary decision. *Booker*, 543 U.S. at 260–62 (citing *Cooter & Gell*, 496 U.S. at 403–05; *Pierce v. Underwood*, 487 U.S. 552, 558–60 (1988)); *Rita v. United States*, 551 U.S. 338, 356 (2007) (holding sentencing judges should explain their decisions enough that appellate courts appropriately review the judges' exercise of discretion) (citing *Taylor*, 487 U.S. at 336–37); *Booker*, 543 U.S. at 362–65 (Stevens, J., concurring) (explaining that the abuse-of-discretion standard, and its underlying principles, "have not changed" post-*Booker*).

This Court recently emphasized the importance of appellate review of discretionary sentencing-related decisions. In *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), this Court explained, "*[b]efore* a court of appeals can consider the

substantive reasonableness of a sentence, '[i]t must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.'" *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)) (emphasis added)). To ensure procedurally sound decisions, appellate courts must make sure the district courts calculated the guidelines range, considered the § 3553 (a) factors, did not rely on clearly erroneous facts, and adequately explained the decision. *Gall*, 552 U.S. at 51.

This Court's endorsement of careful appellate review of the procedural components of discretionary sentencing-related decisions underscores why § 3742(a) should not preclude review of the denial of a § 3582(c)(2) motion. Congress explicitly permits people to seek sentence reductions, and Congress prescribed certain procedural steps to follow. Therefore, there must be a mechanism to review denials of those motions and ensure district courts do not engage in illegal decision-making.

C. The Question Presented is Important Because the Answer Could Resolve Confusion About § 3742(a)'s Application in Other Contexts

The Sixth Circuit's attempt to correct or clarify the scope of appellate authority to review the denial of a sentence reduction or modification under § 3582(c)(2) has created a whole new set of interpretation problems. The reasoning in *Bowers* and *Marshall* has already creeped into other contexts and generated confusion in the Sixth Circuit. This Court should clarify whether § 3742(a) applies to the denial of a § 3582(c)(2) motion before the uncertainty metastasizes in other circuits or other contexts.

The Sixth Circuit has expanded application of the *Bowers* rule to appeals from the denial of different types of sentence-reductions motions. *Marshall* did not involve § 3582(c)(2) at all; it was an appeal from the denial of a motion for early termination of supervised release under 18 U.S.C. § 3583(e). *Marshall*, 954 F.3d at 829. Yet the Sixth Circuit read § 3742(a) as a restriction on appellate courts' authority to review the reasonableness of a district court's denial of a motion for early termination of supervised release even when the claim is that the district court relied on clearly erroneous facts. *See id.* at 829–30. This approach conflicts with other circuit courts, which review such denials for an abuse of discretion unencumbered by § 3742(a). *See, e.g., United States v. Devlin*, 800 F. App'x 88, 90 n.1 (3d Cir. 2020) (reviewing the merits of § 3583(e)(1) denial under § 1291 without limiting that review based on § 3742; *United States v. Uribe*, 735 F. App'x 338, 338 (9th Cir. 2018) (same); *United States v. Lowe*, 498 F. App'x 782, 784 (10th Cir. 2012) (same); *Reagan*, 162 F. App'x at 914 n.1 (same).

The Sixth Circuit's recent difficulties applying the *Bowers/Marshall* rule to two other sentence-modification proceedings further illustrates why this Court should resolve the circuit split to avoid further confusion. In 2018, Congress passed the First Step Act, which modified 18 U.S.C. § 3582(c)(1)(A) (the so-called "compassionate release" statute), and made retroactive the Fair Sentencing Act's changes to mandatory statutory penalties for certain drug offenses. Section 404(b) of the First Step Act created the vehicle for people to seek this sentence reduction. Since 2018, people have filed numerous motions for a sentence reduction under both

provisions. In particular, the COVID-19 pandemic sparked a wave of compassionate-release litigation.

The Sixth Circuit has been inconsistent about whether § 3742(a) prohibits reasonableness review of the denial of compassionate release. In most cases, the Sixth Circuit has reviewed the denials of compassionate-release motions for an abuse of discretion, as other circuit courts do. *See, e.g., Jones*, 980 F.3d at 1112; *United States v. Pawlowski*, 967 F.3d 327, 330 (3d Cir. 2020); *United States v. Chambliss*, 948 F.3d 691, 693 (5th Cir. 2020). But the court has hinted that this approach may be at odds with *Marshall*. Rather than address the question, different panels note that the government forfeited § 3742(a)'s mandatory "claim-processing rule," which they suggest might limit the scope of appellate review. *United States v. Keefer*, No. 19-4148, 2020 WL 6112795, at *3 (6th Cir. Oct. 16, 2020) ("The government makes no argument that appellate review should be even more restricted under 18 U.S.C. § 3742(a), so we need not consider the point."); *United States v. Ruffin*, 978 F.3d 1000, 1005 (6th Cir. 2020) ("[B]ecause the government does not argue for more restrictive appellate review, we may assume in this case that a district court might abuse its discretion if it engaged in a substantively unreasonable balancing of the § 3553(a) factors.") This lack of certainty—especially in the midst of this unprecedented pandemic—has caused widespread confusion among criminal-defense practitioners attempting to advise clients about appeals.

The Sixth Circuit's explanation of when § 3742(a) applies in appeals from § 404(b) motions is even more incoherent. In *Foreman*, 958 F.3d at 513, the court

explicitly rejected the government's contention that § 3742(a)'s restrictions limit appellate review of decisions to modify sentences under § 404 of the First Step Act. Shortly thereafter, a different panel reviewed the substantive reasonableness of the denial of a motion for a sentence reduction under § 404 without any references to § 3742(a) and found the denial substantively unreasonable. *See United States v. Smith*, 959 F.3d 701, 704 (6th Cir. 2020).

Subsequently, another panel highlighted the distinction between the denial of a sentence-reduction motion and review of the extent of the sentence modification. *See Smithers*, 960 F.3d at 344. The court stated that even though § 3742(a) was inapplicable in an appeal challenging the reasonableness of the district court's *modification* of a sentence, the court suggested that § 3742(a) "sets forth a non-jurisdictional limit on [appellate courts'] review authority, not a jurisdictional exception to [their otherwise broad appellate jurisdiction under § 1291." *Id.*

Further adding to the confusion, three days after *Smithers*, another Sixth Circuit panel held that § 3742(a) actually *does* preclude review of the *denial* of a sentence reduction under the First Step Act, rendering such appeals "non-justiciable." *Hunnicutt*, 807 F. App'x at 553. And the same day, yet another panel assumed without deciding that § 3742(a) *did not* restrict its authority to review the substantive reasonableness of the denial of a § 404 motion for a sentence reduction. *Richardson*, 960 F.3d at 764–65.

Now, it seems the Sixth Circuit reviews the denial of a § 404 motion for a sentence reduction without § 3742(a)'s limitations, but the conflicting teachings in

published opinions remain. *See Wilson*, 827 F. App'x at 478 ("[O]ur binding precedent now tips the scale towards the interpretation that denials of motions to reduce sentence under the First Step Act be reviewed for abuse of discretion.").

These varied holdings make no sense. The confusion on display in the Sixth Circuit showcases why clarity is needed about whether § 3742(a) applies in appeals from the denial of a § 3582(c)(2) motion. The *Bowers/Marshall* rule may creep into the appeals from other sentence-modification proceedings and cause more disarray.

* * *

This Court's intervention is sorely needed. Without it, the circuit split will persist. Defendants in most circuit courts will get the benefit of appellate review of the denial of their § 3582(c)(2) motions. But those in the Sixth Circuit, like Mr. Cashin, will not. The Sixth Circuit's application of § 3742(a) to appeals from the denial of a § 3582(c)(2) motions will also continue to generate inconsistent and incoherent results in other contexts and potentially other circuit courts.

CONCLUSION

The petition for certiorari should be granted.

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Respectfully submitted,

s/Colleen P. Fitzharris

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