

IN THE SUPREME COURT OF THE UNITED STATES

BARRY CASHIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 3742(a) precluded the court of appeals from reviewing petitioner's challenge to the district court's denial of his sentence-reduction motion under 18 U.S.C. 3582(c)(2).

ADDITIONAL RELATED PROCEEDINGS

U.S. District Court (E.D. Mich.):

United States v. Cashin, No. 90-cr-20029 (Nov. 8, 2019)

United States v. Cashin, No. 90-cr-20081 (Nov. 8, 2019)

U.S. Court of Appeals (6th Cir.):

United States v. Cashin, Nos. 91-2303, 91-2329 (Apr. 9, 1993)

United States v. Cashin, No. 92-2555 (Feb. 15, 1994)

United States v. Cashin, No. 19-2325 (Aug. 4, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted at 822 Fed. Appx. 378. The order of the district court (Pet. App. 6-11) is unreported but is available at 2019 WL 5853538.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2020. The petition for a writ of certiorari was filed on January 4, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846. Pet. App. 6. Following a jury trial based on a separate indictment, petitioner was convicted of conspiring to tamper with a witness, in violation of 18 U.S.C. 371 and 1512(b), and witness tampering, in violation of 18 U.S.C. 1512(b). Pet. App. 7. For the drug offense, petitioner was sentenced to 372 months of imprisonment. Id. at 6. For the witness-tampering offenses, he was sentenced to 170 months of imprisonment, to run consecutively with the drug sentence. Id. at 7. He subsequently moved to modify his sentences under 18 U.S.C. 3582(c)(2). Pet. App. 1, 6-7. The district court denied his motion, id. at 5, and the court of appeals affirmed, id. at 11.

1. In late 1989 and early 1990, petitioner led a large drug-distribution conspiracy in Midland, Michigan, that involved more than 4000 pounds of marijuana. C.A. Sealed Appx. 21-22. In April 1990, officers executed a search warrant at petitioner's home, where they found drugs, a handgun, and more than \$300,000 in cash. Ibid. Petitioner subsequently pleaded guilty to conspiring to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846. Pet. App. 6. His then-mandatory Sentencing Guidelines range for that offense was 360 months to life imprisonment, based on an offense level of 40 and a criminal

history category of III. Id. at 2, 7. The district court imposed a 372-month sentence. Id. at 6.

Separately, the government learned that, while petitioner was in pretrial detention for the drug offense, he and his brother tried to enlist his cellmate to intimidate government witnesses and kill the Federal Bureau of Investigation (FBI) Special Agent investigating him. Pet. App. 7. Petitioner's cellmate informed the FBI of the plot, and petitioner was charged in a separate indictment with conspiring to tamper with a witness, in violation of 18 U.S.C. 371 and 1512(b); witness tampering, in violation of 18 U.S.C. 1512(b); and solicitation to commit a crime of violence, in violation of 18 U.S.C. 373. Pet. App. 7. Petitioner proceeded to trial and was convicted on the first two charges. Ibid. The district court sentenced petitioner to 170 months of imprisonment, to run consecutively to the sentence for the drug offense. Ibid.

2. In 2014, the Sentencing Commission adopted an amendment to the Sentencing Guidelines reducing the offense levels corresponding to particular drug quantities, and made its amendment retroactive. Pet. App. 7. Under that amendment, the guidelines range for petitioner's drug offense would be 292 to 365 months. Ibid. Petitioner accordingly moved to reduce his sentence under 18 U.S.C. 3582(c)(2). Pet. App. 1. The district court found, and petitioner did not dispute, that the amendment provided no basis to reduce his witness-tampering sentence. Id. at 7-8. And although the court recognized its authority to reduce

petitioner's drug sentence under Section 3582(c)(2), it declined to do so after reviewing the factors listed in 18 U.S.C. 3553(a). Pet. App. 11. The court explained that petitioner's "serious and deeply threatening behavior, combined with his proven skills at organizing complex criminal activities," led the court to determine "that his original sentence was an appropriate measure of punishment for his actions and that he poses a continued risk to the public." Ibid.

3. On appeal, petitioner argued that the district court abused its discretion in denying his Section 3582(c)(2) motion by failing to consider his consecutive sentence for witness tampering, as well as his declining health, as reasons to reduce the sentence for the drug conspiracy. Pet. App. 3. The court of appeals viewed petitioner's argument as a procedural reasonableness argument under United States v. Booker, 543 U.S. 220 (2005). Pet. App. 4. The court concluded that, under 18 U.S.C. 3742(a), it lacked authority to review petitioner's contentions. Pet. App. 5. Applying circuit precedent, the court reasoned that Section 3742(a) constrains the scope of merits review of the denial of a Section 3582(c)(2) sentence-reduction motion. See id. at 4-5 (citing, inter alia, United States v. Bowers, 615 F.3d 715, 727-728 (6th Cir. 2010)). And the court concluded that Section 3742(a)(1), which provides for review of claims that a sentence was "imposed in violation of law," did not cover a claim like petitioner's. Id. at 4 (citation omitted).

Notwithstanding petitioner's citation (Pet. C.A. Br. 1) of Section 3742(a)(3), which provides for review of sentences above the applicable guidelines range, the court of appeals did not address whether that provision might provide an alternative basis for its review.

ARGUMENT

Petitioner contends (Pet. 15-30) that Section 3742(a) places no restrictions on a court of appeals' authority to review denials of Section 3582(c)(2) motions. This Court has recently and repeatedly declined to review the Sixth Circuit's position on that question, see, e.g., Reid v. United States, 139 S. Ct. 1320 (2019) (No. 18-6319); Bautista v. United States, 138 S. Ct. 979 (2018) (No. 17-6509), and review on that issue is unwarranted here as well. Even under the court of appeals' approach, however, it did have authority to consider petitioner's arguments based on 18 U.S.C. 3742(a)(3), because his sentence was above the amended guidelines range. Given that the court failed to consider its authority under that provision, this Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand for the court of appeals to consider petitioner's appeal under Section 3742(a)(3).

The Sixth Circuit has held that Section 3742 restricts its authority to review for procedural reasonableness the denial of a Section 3582(c)(2) motion. Pet. App. 4-5; see United States v. Marshall, 954 F.3d 823, 825-829 (6th Cir. 2020); see also United

States v. Reid, 888 F.3d 256, 257-258 (6th Cir. 2018), cert. denied, 139 S. Ct. 1320 (2019); United States v. Bautista, 699 Fed. Appx. 449, 450 (6th Cir. 2017), cert. denied, 138 S. Ct. 979 (2018); United States v. Bowers, 615 F.3d 715, 727 (6th Cir. 2010). This Court's review on that question is unwarranted.

Section 3742, enacted as part of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987, is titled "Review of a sentence." It authorizes a criminal defendant to appeal "an otherwise final sentence if the sentence" meets one of four conditions: the sentence "(1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; * * * (3) is greater than the sentence specified in the applicable guideline range[;] * * * or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." 18 U.S.C. 3742(a).

Under the "commonplace of statutory construction that the specific governs the general," NLRB v. SW Gen., Inc., 137 S. Ct. 929, 941 (2017) (citation omitted), "the federal courts are in agreement that" Section 3742 displaced 28 U.S.C. 1291 as "'the exclusive avenue through which a party can appeal'" criminal sentence, Bowers, 615 F.3d at 719 (citation omitted). In other words, "a criminal defendant may not invoke" the general grant of appellate jurisdiction in Section 1291 to "circumvent the conditions imposed by" Section 3742. United States v. Hartwell, 448 F.3d 707, 712 (4th Cir.), cert. denied, 549 U.S. 938 (2006).

The Sixth Circuit has further held that Section 3742 is "the exclusive avenue" not only for an appeal challenging a defendant's initial sentence, but also for an appeal challenging a district court's decision to retain or reduce that sentence under Section 3582(c)(2). Bowers, 615 F.3d at 719 (citation omitted). The court of appeals has reasoned that when a defendant challenges the district court's resolution of a sentence-reduction motion, the defendant is challenging his resulting "sentence" -- in either retained or reduced form. Id. at 722. In Bowers, the Sixth Circuit held that Section 3742(a) restricted the court's "jurisdiction." Id. at 718. In Marshall, the court clarified that Bowers had used the term "jurisdiction" less "careful[ly]" than some of this Court's recent decisions have counseled. 954 F.3d at 826. The court of appeals emphasized, however, that Section 3742(a) remains a "mandatory claim-processing rule" that must be satisfied (unless it is waived) for the court to exercise its authority over an appeal. Ibid. (citation omitted).

Even under that approach, a court of appeals has authority to consider many appeals contesting Section 3582(c)(2) decisions. For instance, because Section 3742(a)(1) allows a court of appeals to review a sentence that "was imposed in violation of law," it allows courts to review, inter alia, disputes over a defendant's eligibility for a sentence reduction, which necessarily involve an interpretation of "law." See, e.g., Koons v. United States, 138 S. Ct. 1783 (2018); Hughes v. United States, 138 S. Ct. 1765

(2018). But Section 3742(a)(1) will not itself automatically authorize review of a district court's discretionary determination that a sentence is appropriate to remain as originally imposed. See Pet. App. 4-5.

Under 18 U.S.C. 3742(a)(3), however, a court of appeals may review a sentence that "is greater than the sentence specified in the applicable guideline range." And here, petitioner's amended guidelines range was 292 to 365 months, see Pet. App. 7, making his original sentence of 372 months "greater than the sentence specified in the applicable guideline range," 18 U.S.C. 3742(a)(3). Petitioner invoked Section 3742(a)(3) in his opening brief before the court of appeals (Pet. C.A. Br. 1), and the court should have considered that provision and concluded that it had authority to review his appeal. The Sixth Circuit has previously reviewed denials of Section 3582(c)(2) motions pursuant to Section 3742(a)(3) under similar circumstances, and the government has indicated that such decisions are correct. See, e.g., United States v. Greenwood, 521 Fed. Appx. 544, 547 & n.1 (6th Cir. 2013); United States v. Daniel, 414 Fed. Appx. 806, 808 (6th Cir. 2011); see also Br. in Opp. at 19-20, Reid, supra (No. 18-6319); Br. in Opp. at 18-19, Bautista, supra (No. 17-6501).

In the government's view, petitioner's appeal is unlikely to result in success on the merits. Under Section 3742(a)(3), the court of appeals would review the reasonableness of the district court's decision to deny his Section 3582(c)(2) motion for abuse

of discretion. See United States v. Curry, 606 F.3d 323, 327 (6th Cir. 2010). No basis exists to conclude that the district court abused its discretion here. The court acknowledged its obligation to evaluate petitioner's request for a sentence reduction in light of the factors listed in 18 U.S.C. 3553(a) and considered both his consecutive sentence for the witness-tampering crimes and his health. See Pet. App. 7. The court nevertheless determined not to reduce petitioner's sentence because he "helped organize a major drug trafficking operation, threatened key witnesses, and conspired to kill a federal agent assigned to his case." Id. at 11. That decision was reasonable and not an abuse of discretion.

Although petitioner's appeal is unlikely to succeed, the court of appeals' threshold error warrants a grant of the petition for a writ of certiorari, vacatur of the decision below, and remand for reconsideration. See, e.g., Franklin v. United States, 139 S. Ct. 1254 (2019); Lloyd v. United States, 138 S. Ct. 925 (2018); White v. United States, 138 S. Ct. 641 (2018); Close v. United States, 138 S. Ct. 137 (2017). Petitioner does not suggest any conflict among the courts of appeals on the application of Section 3742(a)(3) in a case like this one. See, e.g., United States v. Jones, 846 F.3d 366, 368 (D.C. Cir. 2017) (indicating that Section 3742(a)(3) provides authority to review an above-Guidelines sentence); United States v. Dunn, 728 F.3d 1151, 1154 (9th Cir. 2013) (same); Greenwood, 521 Fed. Appx. at 547 & n.1 (same). Plenary review on the question would accordingly be unwarranted.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

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