No. 20-6946

In the Supreme Court of the United States

BARRY CASHIN,

***Petitioner*,**

v.

UNITED STATES of AMERICA,

***Respondent*.**

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

PETITIONER'S REPLY BRIEF TO OPPOSITION

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REPLY BRIEF FOR PETITIONER

Under the government's reading of Sixth Circuit caselaw, 18 U.S.C. §§ 3742(a)(1), (a)(2), and (a)(4) prohibit the courts of appeals from reviewing the reasonableness of the denial of a sentence reduction under 18 U.S.C. § 3582(c)(2). The government believes the Sixth Circuit permits reasonableness review under a narrow exception created by 18 U.S.C. § 3742(a)(3), when an unmodified sentence exceeds the revised Guidelines range. BIO 5–6, 8. The government therefore confesses error below, suggests that the petition should be granted, the judgment of the court of appeals vacated, and the case be remanded for further proceedings. BIO 10. Although the government does not attempt to defend the Sixth Circuit's opinion or its unique approach to appeals from the denial of a § 3582(c)(2) sentence-reduction motion, it also does not agree that the lower court's approach is wrong. *See* BIO 5–7.

Petitioner does not oppose the government's request for summary vacatur and remand of the case for further proceedings in the court below. But this resolution will not solve the deeper problem.

Even if the government is correct that the Sixth Circuit reads § 3742(a)(3) to permit reasonableness review in this narrow circumstance, that approach is inconsistent with the government's view below, every other circuit, and the statutory text. The split between the circuits will remain unresolved. People whose sentences are not above the amended guideline range and cannot avail themselves of § 3742(a)(3) still face the hurdle the Sixth Circuit has erected. Nor is the law in the Sixth Circuit sufficiently clear to be certain that it will review Mr. Cashin's

arguments at all. There are no sound reasons to allow the disagreement between the circuits to fester. The question presented is important and warrants review.

I. The Government Has Changed Positions

The government previously argued that § 3742(a)(3) did *not* authorize appellate review because the argument raised was "a *Booker* reasonableness argument" and, under its reading of the Sixth Circuit's law, "[o]rders denying motions for sentence reduction under § 3582 are not reviewable for reasonableness." (Appellee Br. at 6) The government *now* says the Sixth Circuit has authority to consider a challenge to the district court's decision to deny Mr. Cashin a sentence reduction. BIO 8. Although Petitioner does not oppose the government's suggestion to grant the petition, vacate the judgment, and remand for further proceedings, this approach is unlikely to resolve the persistent problem this petition presents.

II. Remand to the Sixth Circuit for Review Under § 3742(a)(3) Perpetuates a Well-Established Circuit Split

Although the petition does not address whether there is any conflict among the courts of appeals on the application of § 3742(a)(3) to the denial of a § 3582(c)(2) motion, *see* BIO 9, that does not mean none exists. It does. The government's proposal perpetuates an existing conflict between the circuit courts.

Even if the Sixth Circuit concludes that Mr. Cashin's appeal is reviewable under § 3742(a)(3), the application of that statute to appeals from the denial of a § 3582(c)(2) sentence reduction is still out of step with other circuits. Remanding this case to the Sixth Circuit runs the risk of perpetuating and deepening the existing circuit split.

Most courts of appeals hold that § 3742(a) does not apply to appeals from orders denying § 3582(c)(2) modifications *at all*. *See United States v. Calton*, 900 F.3d 706, 712–13 (5th Cir. 2018) ("[A] district court proceeding under § 3582(c)(2) does not impose a new sentence in the usual sense, and holding that 28 U.S.C. § 1291 supplies the jurisdictional basis for reviewing denials of § 3582(c)(2) motions best comports with this principle." (cleaned up)); *United States v. Rodriguez*, 855 F.3d 526, 532 (3d Cir. 2017), *as amended* (May 1, 2017) ("[W]e have jurisdiction over Rodriguez's appeal under Section 1291, notwithstanding Section 3742" when the sentence maintained exceeds the amended applicable guidelines range); *United States v. Jones*, 846 F.3d 366, 370 (D.C. Cir. 2017) ("[W]e have serious doubt as to whether a statute specifically directed at appeals of sentences (§ 3742) also extends to those challenging the denial of a § 3582(c)(2) reduction."); *United States v. Hernandez-Marfil*, 825 F.3d 410, 411 (8th Cir. 2016) (invoking only § 1291 to review the denial of a sentence reduction under § 3582(c)(2)); *United States v. Washington*, 759 F.3d 1175, 1179–81 (10th Cir. 2014) ("§ 3742(a) does not displace § 1291's broad grant of appellate jurisdiction over appeals from final sentencing orders."); *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) (invoking jurisdiction under § 1291, not § 3742(a)(3) where the denial of a § 3582(c)(2) motion maintained a sentence above the applicable guideline range). Remand to the Sixth Circuit could suggest that § 3742(a) applies at all to the denial of a § 3582(c)(2) motion, and could perpetuate the disagreement between the courts of appeals.

Contrary to the government's claim, neither *Jones*, 846 F.3d at 368, nor *United States v. Dunn*, 728 F.3d 1151, 1154 (9th Cir. 2013)), "indicat[e] that Section 3742(a)(3) provides authority to review an above-Guidelines sentence" in the context of an appeal from the denial of a § 3582(c)(2) motion. BIO 9. In *Jones*, the D.C. Circuit suggested the opposite, remarking that "*denials* of appellants' sentence-reduction motions result[] only in final orders—not new sentences by any definition—[thus] it appears that at least the most obvious reading of § 3742 renders it inapplicable." *Jones*, 846 F.3d at 370; *Calton*, 900 F.3d at 713 (same); *Rodriguez*, 855 F.3d at 530 (same). And the Ninth Circuit did not discuss § 3742(a)(3) at all. *See Dunn*, 728 F.3d at 1155–58 & n.5. Instead, the Ninth Circuit considered whether intervening authority undermined the holding in *United States v. Colson*, 573 F.3d 915, 916 (9th Cir. 2009), "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." *See Dunn*, 728 F.3d at 1155–58.

The split the Sixth Circuit has created will not heal itself. The conflict has been noted many times. *See, e.g.*, *United States v. Doe*, 932 F.3d 279, 282 n.2 (5th Cir. 2019) ("[The circuits] disagree on whether § 3742 or § 1291 governs decisions regarding § 3582(c)(2) sentence-reduction motions."); *Rodriguez*, 855 F.3d 530 ("The only Circuit to reach a contrary holding is the Sixth Circuit . . . ."). And the Sixth Circuit's unique approach continues to generate controversy and confusion. The disagreement between the courts on this issue is settled and firm.

Clarification of this issue is crucial because the number of people affected by this decision is potentially infinite. Every time the Sentencing Commission passes a retroactive amendment to the Guidelines, people have a chance to seek a sentence reduction under 18 U.S.C. § 3582(c)(2). Thus, each time there is a retroactive Guidelines change, the federal courts of appeals will have to decide the scope of their appellate authority to review decisions to deny relief. In all but the Sixth Circuit, courts of appeals will entertain challenges to the procedural and substantive reasonableness of a decision to deny relief unencumbered by § 3742(a). People in the Sixth Circuit, however, will have decisions to deny § 3582(c)(2) motions affirmed without consideration.

This petition presents a sound vehicle to resolve this question with far-reaching effects. The opinion below was squarely premised on the court's (erroneous) interpretation of § 3742(a)(1); the split on that issue is settled and firm; and the government's apparent reluctance to defend the Sixth Circuit's approach to these appeals is no obstacle to review, as the Court can appoint an amicus to defend the judgment below should the Solicitor General refuse to defend the judgment following grant of certiorari.

III. Section 3742(a) Is Not Applicable to Appeals from the Denial of a Motion to Reduce a Sentence Under § 3582(c)

The proper solution is to recognize that § 3742(a) is not a mandatory claim-processing rule limiting appellate review or a jurisdictional limitation on appeals from the denial of a § 3582(c)(2) motion for a sentence reduction. In reality, § 3742(a) is wholly inapplicable in this context.

To see how, begin with 18 U.S.C. § 3582, which governs "the imposition of a sentence of imprisonment." Subsection (a) tells the district court what to consider at sentencing when deciding whether to impose a term of imprisonment and for how long. 18 U.S.C. § 3582(a); *Tapia v. United States*, 564 U.S. 319, 326 (2011).

Next door, 18 U.S.C. § 3582(b) identifies three mechanisms by which a sentence of imprisonment may be "modified" or "corrected": (1) modifications under § 3582(c); (2) corrections under Fed. R. Crim. P. 35(a) and 18 U.S.C. § 3742; or (3) appeals and modifications, if outside the guideline range, also under § 3742. 18 U.S.C. § 3582(b)(1)–(3). These provisions delineate between "impositions" of sentences and "modifications" or "corrections" of sentences. Modifications and corrections do not disturb the "judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes." 18 U.S.C. § 3582(b).

Subsection 3582(c) identifies when a district court may "modify a term of imprisonment once it has been imposed":

(1) when "extraordinary and compelling reasons warrant such a reduction," 18 U.S.C. § 3582(c)(1)(A)(i);

(2) when "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," the Director of the Bureau of Prisons has "determin[ed] that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g)," 18 U.S.C § 3582(c)(1)(A)(ii);

(3) when "expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure," 18 U.S.C. § 3582(c)(1)(B); and

(4) when the defendant's sentence is based on a Guidelines range that the Sentencing Commission has "subsequently lowered" and the reduction is

> consistent with 18 U.S.C. § 3553(a) and the Commission's applicable policy statements," 18 U.S.C. § 3582(c)(2).

Not one of § 3582(c)'s provisions refers to 18 U.S.C. § 3742.

Contrast this with § 3582(b)(2) and (3), which describe two additional mechanisms to modify an otherwise final sentence. Both subsections expressly reference § 3742. Congress's choice of differing words is presumed purposeful and intended to convey different meaning. *Russello v. United States*, 464 U.S. 16, 23 (1993). And here the decision not to reference § 3742(a) seems intentional.

Moreover, § 3742(f), which describes the remedy for a defendant who successfully appeals under § 3742(a), highlights the distinction between the imposition and the modification of a sentence. If the sentence "was imposed in violation of law" or "was imposed as a result of an incorrect application of the sentencing guidelines," the remedy is remand to the district court "for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. § 3742(f)(1). Whereas, if "the sentence is outside the applicable guideline range, and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable," the court of appeals must set aside the sentence and remand "for further sentencing proceedings" with instructions. *Id.* § 3742(f)(2).

But § 3742 does not mention appeals of denials of a motion for sentence modification under §§ 3582(b)(2) or (3), and does not describe the procedural next

steps if the court of appeals concludes the district court was wrong to conclude the defendant was ineligible for a sentence modification or whether the decision to deny one was unreasonable. And the provisions of § 3742(f) do not make sense in the context of the denial of a motion for a sentence modification because in denying a reduction the district court does not issue a new judgment and commitment order or consider departures anew. *See* 18 U.S.C. § 3742(f)(2). Nor can it be said that a motion under § 3582(c)(2) based on an amendment lowering the Guideline range could ever fall into the category of offenses for which "there is no sentencing guideline." 18 U.S.C. §§ 3742(a)(4), (f)(2).

Section 3742(a) is an uncomfortable fit, as a matter of text, structure, and purpose, for appeals from the denial of a motion to modify a sentence under 18 U.S.C. § 3582(c)(2).

IV. The Sixth Circuit May Not Review Mr. Cashin's Sentence Even Under § 3742(a)(3)

The Sixth Circuit's decision in *United States v. Turner*, 797 F. App'x 226 (6th Cir. 2019), *vacated and remanded,* No. 17-2104, 2020 WL 4578575 (6th Cir. Apr. 22, 2020),[1] provides an indication about how the court will treat Mr. Cashin's claims under a maximalist reading of *United States v. Bowers*, 615 F.3d 715 (6th Cir. 2010). The majority in *Turner* read *Bowers* to preclude appellate review of a § 3582(c)(2) motion unless the claims "meet one of the four statutory criteria

[1] Alvin Turner died of COVID-19 while his petition for rehearing en banc was pending. The Sixth Circuit accordingly vacated the opinion, and his motion for a sentence reduction was dismissed as moot. *United States v. Turner*, No. 17-2104, 2020 WL 4578575, at *1 (6th Cir. Apr. 22, 2020).

above *and* [does] *not* challenge procedural or substantive reasonableness." *Turner*, 797 F. App'x at 227. Turner appealed the denial, arguing that the district court did not recalculate the Guidelines before denying the request, ignored recent mitigating evidence, and relied on clearly erroneous facts. *Id.* at 228–29. The majority characterized each of Turner's challenges as claims of procedural unreasonableness. *See id.* at 228–29.[2]

The majority primarily relied on a published, binding opinion, holding that what *Bowers* forecloses "are challenges to the procedural and substantive reasonableness of the outcome of his § 3582(c)(2) sentence-reduction proceeding under the "reasonableness" review that the Supreme Court instituted in *United States v. Booker*, 543 U.S. 220, 261–62 (2005)." *United States v. Reid*, 888 F.3d 256, 258 (6th Cir. 2018). The Sixth Circuit had dismissed Reid's appeal because his claims that the district court failed to provide a reasoned basis for denying the motion and misapplied the 18 U.S.C. § 3553(a) factors were "at their core" challenges to the substantive and procedural reasonableness of the decision. *Id.*

Here, the Sixth Circuit concluded that Mr. Cashin's appeal was a challenge "on reasonableness grounds," *United States v. Cashin*, 822 F. App'x 378, 381 (6th Cir. 2020), and under the *Turner* majority's approach, review would be foreclosed as well.

[2] Judge Moore dissented in *Turner*, criticizing the majority's "recasting the § 3742(a) jurisdictional grounds as questions of 'substantive unreasonableness' or 'procedural unreasonableness,'" and "stretch[ing] *Bowers* past its already questionable bounds." *Turner*, 797 F. App'x at 230–31 (Moore, J., dissenting). She noted that "[i]f *Bowers*'s logic were carried out to its maximum extent, [courts of appeals] would have no jurisdiction under any circumstances to review sentence-reduction proceedings." *Id.*

Although the *Turner* majority examined § 3742(a)(3) as a potential source of "jurisdiction," it concluded that § 3742(c)(1) barred review because Turner had entered into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement, and the district court imposed a within-Guidelines sentence. *See Turner*, 797 F. App'x at 229–30. Thus, even though the applicable Guidelines had been amended, the Sixth Circuit believed it was without authority to consider an appeal from the denial of a sentence reduction. *See id.*

The government is correct that the Sixth Circuit has reviewed for an abuse of discretion challenges to the denial of a sentence-reduction motion under § 3742(a)(3). *See United States v. Griffin*, 520 F. App'x 417, 419 (6th Cir. 2013); *United States v. Chambliss*, 398 F. App'x 142, 143 (6th Cir. 2010). But the *Turner* majority's description of the *Bowers* rule raises questions about whether those cases "were faithful to *Bowers*." *Reid*, 888 F.3d at 258 (criticizing two unpublished cases where the court exercised jurisdiction to review claims of procedural reasonableness) (citing *United States v. Domenech*, 675 F. App'x 519, 524 (6th Cir. 2017); *United States v. Howard*, 644 F.3d 455, 459–61 (6th Cir. 2011)). In short, the Sixth Circuit has tangled itself up, and the government's claim that § 3742(a)(3) provides an exception to the bar on reasonableness review of sentence-reduction denials complicates the knot more.

CONCLUSION

The petition for certiorari should be granted. In this alternative, the petition should be granted, the judgment vacated, and the matter remanded to the U.S. Court of Appeals for the Sixth Circuit.

May 12, 2021

Respectfully submitted,

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