

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 SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR CERTIORARI

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court’s Rule 15.8, Petitioner Barry Cashin submits this supplemental brief to call the Court’s attention to a case decided after the petition for certiorari and reply brief were filed.

Mr. Cashin petitions this Court to grant a writ of certiorari to review whether 18 U.S.C. § 3742(a) limits the power of a court of appeals to review an appeal from the denial of a motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). Mr. Cashin’s petition has been distributed for conference on May 27, 2021.

On May 18, 2021, the D.C. Circuit decided *United States v. Long*, __ F.3d __ 2021 WL 1972245, at *4–5 (D.C. Cir. May 18, 2021) (No. 20-3064). The court addressed whether § 3742(a) restricts appellate review of the denial of a motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A), colloquially known as “compassionate release,” and whose structure “closely parallels” that of § 3582(c)(2). *Long*, 2021 WL 1972245, at *4 n.1. In the decision, the D.C. Circuit explains why § 3742(a) is inapplicable for sentence-modification proceedings, and shows why this Court’s intervention to resolve the question presented is critical.

To address whether § 3742(a) restricted appellate review of the denial of a § 3582(c)(1)(A) motion, the D.C. Circuit first examined *United States v. Jones*, 846 F.3d 366, 369 (D.C. 2017), where the court expressed “serious doubt” about whether Section 3742 applies at all in the analogous context of appeals from the denial of a motion to reduce a sentence under the compassionate release provision’s immediate neighbor, 18 U.S.C. § 3582(c)(2).” *Long*, 2021 WL 1972245, at *4 (quoting *Jones*, 846

F.3d at 370). The court explained that, in *Dillon v. United States*, 560 U.S. 817 (2010), this Court “distinguish[ed] between proceedings for the initial imposition of sentence and sentence-modification proceedings,” and “concluded that a sentence-reduction proceeding under Section 3582(c)(2) ‘does not impose a new sentence in the usual sense.’” *Long*, 2021 WL 1972245, at *4 (quoting *Dillon* 560 U.S. at 827).

The D.C. Circuit next examined the text of § 3742(a) and noted that it “says nothing about the ‘sentence modification’ procedures set out in Section 3582(c)(2) or in any other type of post-imposition adjustment in sentences.” *Id.* at *5. It also noted that Rule 43 of the Federal Rules of Criminal Procedure similarly differentiates between sentencing and sentence-modification proceedings. Specifically, the court noted that Rule 43(b) does not require the defendant’s presence for a “proceeding involv[ing] the correction or reduction of sentence under . . . 18 U.S.C. § 3582(c), whereas Rule 43(a)(3) requires the defendant’s presence ‘at . . . sentencing.’” *Long*, 2021 WL 1972245, at *5. This textual distinction is an additional clue that § 3742(a), which speaks of the imposition of sentences, does not apply to appeals from sentence-modification decisions. “That is because, ‘[b]y definition, a sentence must already have been imposed’ before a sentence-modification rule may be invoked ‘and a sentence reduction contemplated.’” *Id.* (quoting *United States v. McAndrews*, 12 F.3d 273, 277 (1st Cir. 1993)).

Ultimately, the D.C. Circuit concluded that “[t]he same textual and logical reasons explicated in *Dillon* and *Jones* apply with equal force to (c)(1)(A) as they do to (c)(2).” *Id.* The court reiterated that “an order *denying* a requested sentence

modification leaves the preexisting sentence untouched, and so cannot sensibly be said to impose a final sentence.” *Id.* The court thus held “that Section 3742 is no obstacle to our exercise of jurisdiction under 28 U.S.C. § 1291 over this appeal of a denial of compassionate release.” *Id.*

Because of the lingering doubts about the applicability of § 3742(a) to sentence-modification appeals, the D.C. Circuit stated that, even if § 3742(a) applied, it could reach the merits of the appeal because Long argued the district court’s interpretation of § 3582(c)(1)(A) resulted in “an incorrect application of the sentencing guidelines.” 18 U.S.C. § 3742(a)(2). But that does not mean the court believed § 3742(a)(2) was the actual source of jurisdiction at all or could limit the types of claims available to a person appealing the denial of a motion for a sentence reduction.

The D.C. Circuit’s textual analysis illustrates why the Sixth Circuit’s application of § 3742(a) to appeals from the denial of sentence-modification motions is incorrect, highlights the far-reaching implications of the rule, and further illuminates the deep circuit split. Indeed, the Sixth Circuit has intimated that § 3742(a) might restrict appellate review of decisions to deny a § 3582(c)(1)(A) motion. See *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.”); *United States v. Keefer*, 832 F. App’x 359, 362 (6th Cir. 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. Allen*, 819 F. App’x 418, 419 n.1 (6th Cir. 2020) (“[W]e have not yet addressed whether 18 U.S.C. § 3742(a) limits our authority to review a district court’s weighing of the [18 U.S.C.] § 3553(a) factors on appeal from the denial of § 3582(c)(1)(A) motion, but any such limit is not jurisdictional and has not been invoked as a bar to our review here, so we proceed to the merits.”). If the Sixth Circuit adopts this view, then the disagreement between the circuits will deepen.

CONCLUSION

In light of the deepening circuit split and the important nature of the question presented, the petition for a writ of certiorari should be granted.

May 25, 2021

Respectfully submitted,

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