

In the Supreme Court of the United States

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BARRY CASHIN,

*Petitioner,*

v.

UNITED STATES of AMERICA,

*Respondent.*

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

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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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