

the instant motion for review of sentence, Petitioner claims this Court misapplied United States Sentencing Guidelines § 4A1.2(d)(1) by miscalculating his criminal history category and seeks reconsideration of his sentence. As we will explain below, this Court lacks jurisdiction to adjudicate an appeal pursuant to 18 U.S.C. § 3742 (2000). Therefore, Petitioners' Motion for Review of Sentence and Motion for Appointment of Counsel is **DENIED**. Additionally, Petitioners' Motion for Proceed In Forma Pauperis is **GRANTED** provided Petitioner complies with procedures set forth in § 1915(a), (b), as discussed below.

I. Motion for Review of Sentence & Appointment of Counsel

Although Petitioner did provide the Court with notice of appeal in accordance to 18 U.S.C. § 3742(a), this Court is without jurisdiction to rule on Petitioner's Motion for Review of Sentence as requested. Petitioner must first seek review by the Third Circuit pursuant to § 3742. The clear language of § 3742(a) permits a defendant to file a notice of appeal in the district court for review of a sentence if the sentence: "(1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of sentencing guidelines; or (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)(1)-(4). Although Petitioner alleges that this Court committed a violation of the sentencing guidelines pursuant to § 3742(a)(2), he has brought this claim to the wrong court. Section 3742 only directs that Petitioner file a notice of appeal in a district court; it does not grant jurisdiction to a district court to review Petitioner's sentence. See § 3742(a); see also United States v. Auman, 8 F.3d 1268, 1271 (8th Cir. 1993) (asserting that § 3742 does not grant jurisdiction to a district court). As such, Section 3742 provides only for appellate review of sentences on a set of limited circumstances. See United States v. Graham, 72 F.3d 352, 359 n.8 (3d Cir. 1995) (explaining that Congress enacted § 3742 to provide for a "limited practice of appellate review")(emphasis added); United States v. Fossett, 881 F.2d 976, 979 (11th Cir. 1989) (contending § 3742 defines the claims the court of appeals may adjudicate) (emphasis added); United States v. Bohn, No. 92-61-02, 1999 U.S. Dist. LEXIS 18522, at *27 (E.D. Pa. Nov. 9, 1999) (stating that the "protocol" under § 3742 directs the court of appeals to decide whether a sentence was in violation of the applicable sentencing guidelines) (emphasis added); United States v. Carillo, No. 90-0316-07, 1993 U.S. Dist. LEXIS 5694, at *7 (E.D. Pa. Apr. 29, 1993) (noting that Rule 35(a) and § 3742 explain the procedure for remands from the court of appeals) (emphasis added). The Third Circuit Court

of Appeals reserves the authority to determine whether this Court has misapplied the sentencing guidelines in violation of § 3742. This Court is without jurisdiction to do so.

Additionally, Petitioner cannot, as the Government anticipates, successfully invoke this Court's jurisdiction by construing his § 3742 claim as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. Although at least one court has viewed a pro se defendant's § 3742 motion as a request for relief pursuant to § 2255, Petitioner has neither introduced newly discovered evidence nor provided a new rule of constitutional law to warrant further review of Petitioner's instant motion for review of sentence as a second § 2255 motion.¹ See 28 U.S.C. § 2255; see also United States v. Smith, No. 00-303, 2001 U.S. Dist. LEXIS 10531, at *2-3 (E.D. Pa. July 13, 2001) (allowing petitioner to resubmit a § 3742 motion as an action under § 2255). Therefore, this Court is unable to grant Petitioner's motion even if construed as a successive § 2255 motion.

As this Court is without jurisdiction to review Petitioner's motions, the Petitioner's Motions for Reconsideration of Sentence and Appointment of Counsel (Doc. No. 748) is **DENIED**.

¹ Moreover, to file a second § 2255 motion, Petitioner must first seek certification from a three-judge panel of the court of appeals. See § 2255 (b).

II. Motion for Proceed In Forma Pauperis

Petitioner also requests this Court to consider a Motion to Proceed In Forma Pauperis in order to pursue this review. According to 28 U.S.C. § 1915(a)(1), a court may authorize a petitioner's appeal to proceed without prepayment of fees or security if the petitioner provides an affidavit stating that he is unable to pay such costs. See 28 U.S.C. § 1915(a)(1) (2000). However, Section 1915 also states that even if the court does allow a petitioner to proceed without prepayment of fees or security, a petitioner must pay the full amount of the filing fee. Specifically, Section 1915(b)(1) provides:

(1) Notwithstanding subsection (a), if a prisoner. . . files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--
(A) the average monthly deposits to the prisoner's account; or
(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

28 U.S.C. § 1915(a)(b)(1)(A)-(B).

In addition, after payment of the initial partial filing fee, Petitioner is required to make monthly payments of 20 percent of the preceding month's income credited to his prisoner's account. See § 1915(b)(2).

Accordingly, Petitioner's Motion for In Forma Pauperis

(Doc. No. 753) is **GRANTED** and Petitioner is ordered to comply with procedures espoused in 28 U.S.C. § 1915(a), as set forth above.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL NO. 95-296-09
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 :
QUINCY TURNER :

O R D E R

AND NOW, this 19th day of September 2002, in consideration of the Motion for Review of Sentence, Motion for Appointment of Counsel, and Motion for In Forma Pauperis filed by Petitioner, Quincy Turner, it is hereby **ORDERED**:

1. The Motion for Review of Sentence pursuant to 18 U.S.C. § 3742 is **DENIED**.
2. The Motion for Appointment of Counsel is **DENIED**.
3. The Motion for In Forma Pauperis is **APPROVED** provided Petitioner abides by the procedures set forth in 28 U.S.C. § 1915.

BY THE COURT:

JAMES MCGIRR KELLY, J.