No. 21-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

KIMBERLY JONES,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a drug addict, pleaded guilty to narcotics distribution. The PSR reflected petitioner's uncontradicted assertion that roughly 60% of the methamphetamine she possessed was for personal use by her and her husband. Nevertheless, the district court refused to downwardly adjust petitioner's drug quantity determination based on that personal use finding petitioner had failed to prove the amounts used. The Second Circuit affirmed rejecting the view of the Seventh Circuit that places the burden on the government to disprove the amount personally used.

The Second Circuit also affirmed the district court's criminal history determination finding that petitioner could not establish plain error because of the five appellate courts to consider the issue, one had ruled that the issuance of a citation or summons can be considered an "intervening arrest" for purposes of USSG §4A1.2(a)(2).

This petition raises the following questions concerning which the appellate courts are divided:

1. Who bears the burden of proving or disproving "personal use" quantities when making drug quantity determinations for purposes of the narcotics guidelines?

2. Is the issuance of a citation or summons an "intervening arrest" for purposes of USSG §4A1.2(a)(2)?

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OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit affirming petitioner's judgment of conviction is reported as *United States v. Casey,* 2021 WL 5617739 (2d Cir. 2021), a copy of which is annexed hereto as Appendix A.

The unreported order of the United States Court of Appeals for the Second Circuit, dated February 4, 2022, denying petitioner's petition for rehearing with a suggestion for rehearing *en banc* is annexed hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on December 1, 2021, and the order of that court denying petitioner's petition for rehearing was entered on February 4, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

1. In October 2019, petitioner (Kimberly Jones) and her husband (Shane Casey) were arrested in Massachusetts during a traffic stop of a car in which they were passengers. PSR ¶12. A search of the couple revealed them to be in possession of either drugs or drug paraphernalia. PSR ¶¶12-16. Later that month, petitioner, her husband and their supplier (Sharifshoble) were charged in a multi-count indictment with various offenses surrounding the distribution of methamphetamine primarily in Vermont.

In February 2020, petitioner proffered to the government, and indicated, *inter alia*, that both she and her husband were intravenous methamphetamine users. PSR ¶17(a). Petitioner estimated that she and her husband would purchase half an ounce of methamphetamine for $800 from Sharifshoble every four or five days from the winter of 2019 to October 2019, although at times they would occasionally purchase up to an ounce. PSR ¶17(c). According to petitioner, the methamphetamine purchased was both for personal use and to sell to others. *Id.*; *see also* PSR ¶23 n.5.

As a result of information received from petitioner during her proffer, on February 13, 2020, the government obtained a superseding indictment, this one containing 11-counts charging the same defendants with the addition of a conspiracy count. A5-A15.[1] Count three of the superseding indictment charged petitioner alone with knowingly and intentionally distributed methamphetamine on April 3, 2019, in the District of Vermont, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). A7.

On May 13, 2020, petitioner appeared before United States District Judge Christina Reiss and pursuant to a plea agreement (A16-A22), pled guilty to count three of the superseding indictment. The plea agreement contained no Guideline calculation. It did, however, recommend that Jones be sentenced to a term of imprisonment at the low-end of the Sentencing Guidelines range if the final offense level is 14 or above. A20. The plea agreement also contained a stipulated set of facts that included petitioner's admission that during the relevant time period, petitioner and her co-defendants "knowingly and intentionally communicated

[1] "A__" refers to petitioner's appendix filed in the Second Circuit; "Doc#__" refers to docket entries on the district court docket.

about, arranged, agreed, and participated in many other distributions of methamphetamine in Vermont." A17.

The PSR calculated a base offense level of 34 for petitioner. PSR ¶23. That base offense level was arrived at by adding together three separate amounts. First, using petitioner's statements that she purchased half an ounce of methamphetamine every four or five days during the winter 2019 until October 1, 2019, the PSR calculated half-ounce of methamphetamine once weekly for 39 weeks (between January 1, 2019 and October 1, 2019) yielding a quantity of 552.81 grams; second, petitioner had indicated that Casey made three trips to Massachusetts to purchase methamphetamine which yielded an estimated quantity of 67.82 grams; finally, another individual mailed Casey methamphetamine on two occasions which yielded a quantity of 396.89 grams. *Id.* The resulting total of 1,017.52 grams, produced a base offense level of 34. USSG §2D1.1(c)(3) (prescribing a level 34 for offenses involving at least 500 grams but less than 1.5 kilograms).

The PSR, however, noted petitioner's uncontested assertion "that roughly 60% of the drugs mentioned were for personal use by herself and her husband, Shane Casey. While not disregarding her sale and Casey's

many sales, Jones states that she and Casey were chronic, daily users – often consuming three to four grams per day." PSR ¶23 fn 5. The PSR, however, made no adjustment for the foregoing personal use. PSR ¶23. There were no specific offenses characteristics and with adjustments for acceptance of responsibility and timely entering a plea the total offense level was 31. PSR ¶31.

According to the PSR, petitioner had 13 criminal history points for a host of relatively minor offenses which placed her in the highest criminal history category. PSR ¶¶36-44. Relevant to this petition are petitioner's convictions for two theft offenses involving property taken from her parents. On the first occasion, petitioner stole two checks from her mother's checkbook and cashed one of them for $400. Petitioner was not arrested for that offense but rather issued a citation. PSR ¶39. On the second occasion, petitioner stole jewelry from a safe within her parent's home. PSR ¶40. With respect to both offenses, petitioner was sentenced on the same day (August 7, 2015) to a term of imprisonment of 6 months to 2 years all of which was suspended except for 60 days. After imposition of that sentence petitioner incurred a number of parole violations. PSR ¶¶39, 40. Despite the fact that there was no intervening

arrest between the two offenses and the sentence was imposed on the same day, petitioner received separate criminal history points (2 points) for each of the two offenses. *Id.* Had petitioner received only a total of two points for both offenses she would have been placed in criminal history category V. Defense counsel, however, never objected to this error.

On June 29, 2020, the parties appeared for sentencing. Petitioner raised several challenges to the Guideline calculation. Relevant to this petition is petitioner's argument that the PSR mistakenly calculated the Guideline level since it failed to deduct those amounts of methamphetamine that were used by her and her husband for personal use. Doc#100 at 4-5. At sentencing, the district court was willing to acknowledge that petitioner used some of the drugs for personal use, and indicated that it was a mitigating factor that it would consider in determining the ultimate sentence. The district court, however, refused to adjust petitioner's Guideline calculation (i.e., by crediting her by 60%) since in the view of the district court:

> If the Court applied a discount of 60 percent, it would have to do so on a representation by

> [petitioner], not a representation under oath that I'm aware of, at least it didn't happen in front of me, no calculation except kind of a thumbnail sketch that occurred in the midst of sentencing as to how much each party was consuming, and the Court would also have to factor in the very thing that Mr. Kerest pointed out as the crimes of dishonesty that would impeach her credibility. So the Court is going to factor into its sentence that some of the drugs were consumed by Ms. Jones and her co-conspirators, but it isn't going to discount drug quantity by 60 percent.

A80.

While it rejected petitioner's challenge to the USSG calculation, the district court did grant a downward variance based on, *inter alia*, petitioner's medical condition, the harshness of the methamphetamine guidelines and the fact that certainly some of the drugs were used for personal use. *Id.* The district court then sentenced petitioner to a 45-month term of imprisonment to run concurrent to any sentence ultimately imposed in Vermont and Massachusetts. A87.

2. On appeal petitioner challenged both the district court's drug quantity calculation, as well as the determination that she was in criminal history category VI. With respect to the drug quantity issue, the

Court of Appeals ruled that the exception for personal use only applies where the defendant's conduct amounted to distribution offenses, and not to conspiracy offenses. Even where the defendant, like petitioner, did not actually plead to a conspiracy offense.

As an alternative holding, the Court of Appeals held that "even assuming that [petitioner] were entitled to a personal use discount" she would not be entitled to relief on this appeal. Because the minimum drug quantity for a base offense level of 34 – the level chosen by the district court – requires only 500 grams, petitioner would have to "demonstrate her entitlement to a personal use discount of over 50%" from the 1,017 grams of methamphetamine:

> While the district court agreed to take into consideration the fact that Jones personally used some drugs in her possession, it declined to credit Jones's claim that 60% of the total drug quantity was intended for personal use. Accordingly, we conclude that even if Jones were entitled to a personal use discount of some degree, the district court did not commit clear error in declining to give Jones a personal use discount of over 50%.

Casey, 2021 WL 5617739 at *2.

The Court of Appeals likewise concluded that petitioner could not establish plain error based on the district court's calculation of her criminal history category. In the view of the Court of Appeals, Jones could not demonstrate plain error since the Second Circuit had never decided the meaning of "intervening arrest" and "sister circuits have diverged on the question."

The Court of Appeals denied petitioner's rehearing petition.

REASONS FOR GRANTING THE WRIT

I.

In rejecting petitioner's challenge to the district court's loss calculation, the Panel offered two rationales. First, the Second Circuit questioned whether the personal use exception applies to conspiracy offenses, an issue never determined by the district court. The Court of Appeals rationale was of dubious validity in this case since petitioner did not plead guilty to a conspiracy charge, a fact that the Court of Appeals appeared to recognize since it offered an alternative rationale to justify its decision. Indeed, in this precise scenario, i.e., a defendant charged with conspiracy but who pled guilty to a substantive distribution charge,

the Ninth Circuit found error in not applying the personal use exception. *See United States v. Kipp*, 10 F.3d 1463 (9th Cir. 1993).

In its alternative holding, i.e., even if the personal use exception applies to someone like petitioner who did not plead to a conspiracy offense, the Court of Appeals concluded that the district court did not commit error because, "[i]n order to affect her base offense level . . . *Jones would have to demonstrate* her entitlement to a personal use discount of over 50%. While the district court agreed to take into consideration the fact that Jones personally used some drugs in her possession, it declined to credit Jones's claim that 60% of the total drug quantity was intended for personal use." *Casey*, 2021 WL 5617739 at *2 (emphasis added).[2]

The Court of Appeal's placement of the burden on petitioner to demonstrate her personal use conflicts with the precedent of at least one

[2] According to the district court, it rejected petitioner's calculation because "the math escapes me. It seems to be more of a guesstimate in terms of what should be detracted. For example, *it doesn't say her habit per day was X and this is how much she consumed and this is how much her husband consumed and we can detract that*." A48-A49 (emphasis added). But that is precisely the information that petitioner provided to Probation and was reflected in the PSR. *See* PSR ¶23 fn 5 (noting petitioner's rough calculation of 60% going for personal use was based on the fact "that she and Casey were chronic, daily users – often consuming three to four grams per day").

other appellate court. In *United States v. Wyss*, 147 F.3d 631 (7th Cir. 1998), the Seventh Circuit observed:

> Maybe, when the defendant buys drugs both for his own consumption and for resale, he has some burden of producing evidence concerning the amount that he consumed — he cannot just say to the government, "I'm an addict, so prove how much of the cocaine that I bought I kept for my own use rather than to resell." This we need not decide. *Wyss testified that he consumed at least half of the cocaine that he bought, and there is no contrary evidence.* In these circumstances, we do not think that the district judge on remand should be permitted to determine that more than half the cocaine was relevant to the offense for which he was convicted. The government was entitled to only one opportunity to present evidence on the issue.

147 F.3d at 633 (7th Cir. 1998) (emphasis added). Here, petitioner told probation the basis for her personal use calculation, a fact that was reflected in the PSR. The government made no objection and made no attempt to challenge petitioner's calculation. Under nearly the precise scenario, the Seventh Circuit concluded that the defendant was entitled to the personal use deduction.

The Seventh Circuit's decision is consistent with a long line of authority recognizing that the government always bears the burden of proof in regard to sentencing enhancements. *See, e.g., United States v.*

Kirshner, 995 F.3d 327, 336-37 (9th Cir. 2021) ("the government *always* bears the burden of proving by a preponderance of the evidence that the facts support a sentencing enhancement, and the defendant does not have to prove the negative to avoid the enhanced sentence.") (original emphasis).

A decision placing the burden on petitioner to demonstrate her entitlement to the "personal use" exception, has repercussions with respect to a host of guideline issues. *See, e.g.,* USSG §2B1.1, comment. (n.3(E)) (providing for "credits against loss" as an offset to loss amounts in cases of financial fraud).

This Court should grant certiorari to resolve the split among the Circuits.

II.

Every Court of Appeals to have considered the question save one has concluded that the mere issuance of a citation or summons is not an "arrest" for purposes of USSG §4A1.2(a)(2). ***Compare*** *United States v. Powell*, 798 F.3d 431, 437-40 (6th Cir. 2015); *United States v. Ley*, 876 F.3d 103, 109 (3d Cir. 2017); *United States v. Wright*, 862 F.3d 1265,

1281-83 (11th Cir. 2017); *United States v. Leal-Felix*, 665 F.3d 1037, 1040-44 (9th Cir. 2011) ***with*** *United States v. Morgan*, 354 F.3d 621 (7th Cir. 2003). In *Powell,* the Sixth Circuit reached this conclusion even though, as here, the summons was for felony conduct.

Morgan, the only outlier decision, is based on reasoning that has since been rejected by the Seventh Circuit. Thus, *Morgan* reasoned that the issuance of a traffic citation counts as an intervening arrest under USSG §4A1.2(a)(2) because "[a] traffic stop is an 'arrest' in federal parlance." *Id.* at 624. As the Third Circuit observed in *Ley*, "that statement is incorrect" since this Court made clear in *Knowles v. Iowa,* 525 U.S. 113 (1998), that a traffic stop is not like an arrest, instead it is "a relatively brief encounter and 'is more analogous to a so-called "*Terry* stop" than to a formal arrest.'" *Knowles,* 525 U.S. at 117. A fact that even the Seventh Circuit later came to recognize in the context of a summons, "the close sibling on a citation" (*Ley*, 876 F3.d at 108). *See Bielanski v. County of Kane,* 550 F.3d 632, 642 (7th Cir. 2008) ("No court has held that a summons alone constitutes a seizure, and we conclude that a summons alone does not equal a seizure for Fourth Amendment purposes.").

Nevertheless, the Second Circuit determined that petitioner could not demonstrate plain error since, in view of the divergent view on the issues, any error was not plain. *Casey*, 2021 WL 5617739 at *3.

The Court should grant certiorari to resolve the purported circuit split, and thereby grant petitioner relief.

CONCLUSION

Because the decision of the Second Circuit on at least two separate points of law critical to the outcome of the appeal conflicts with decisions of other appellate courts, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED

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