

No. 23-46

IN THE
SUPREME COURT OF THE UNITED STATES

United States of America,

Petitioner,

v.

Cassity Danielle Jones,

Respondent.

On Petition of a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The safety-valve statute, 18 U.S.C. § 3553(f), sets forth five criteria for safety-valve eligibility. The first criterion addresses criminal history and provides that a defendant is eligible if she “does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, ...; (B) a prior 3-point offense ...; and (C) a prior 2-point violent offense” 18 U.S.C. § 3553(f)(1) (emphasis added).

The question presented is whether a defendant is excluded from safety-valve consideration if she has (A), (B), or (C), or whether this list, joined by “and,” is a conjunctive list requiring the defendant to have (A), (B), and (C) before she is excluded.

The Court granted certiorari on this question in *Pulsifer v. United States*, No. 22-340.

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INTRODUCTION

The petition for certiorari should be denied. Although the government requests a hold for the decision in *Pulsifer v. United States*, No. 22-340, the decision in that case will no longer have any impact on the ultimate outcome in this case. Even if the Court adopts the government's interpretation of the safety-valve statute, Cassity Jones will remain safety-valve eligible due to the Sentencing Commission's recent amendments to the criminal-history provisions of the Sentencing Guidelines. Because *Pulsifer* will not impact the outcome of this case, we ask the Court to reject the requested hold and to deny the petition for certiorari.

STATEMENT OF THE CASE

In June 2020, a federal grand jury indicted Cassity Jones on a single charge of possessing with intent to distribute methamphetamine in violation of 21 U.S.C. § 841. *See* Indictment 1. Because the indictment alleged that the offense involved 50 or more grams of methamphetamine, the charge carried an enhanced statutory-minimum sentence of 10 years (or 120 months) in prison. *See* Indictment 1; 21 U.S.C. § 841(b)(1)(A).

Following her guilty plea, Jones argued that she was eligible for consideration under the statutory safety valve in 18 U.S.C. § 3553(f). If a defendant satisfies the requirements for safety-valve consideration, the district court is permitted—but not required—to impose a sentence below the otherwise applicable statutory minimum. *See* 18 U.S.C. § 3553(f). The safety

valve applies in a specified set of drug cases if the defendant satisfies five criteria:

(1) the defendant does not have--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan

18 U.S.C. § 3553(f).

The government did not dispute that Jones satisfied the four requirements in §§ 3553(f)(2), (f)(3), (f)(4), and (f)(5). Accordingly, the sole question below involved the application of § 3553(f)(1). On that issue, the

parties agreed that Jones did not have either “a prior 3-point offense” under subsection (B) or “a prior 2-point violent offense” under subsection (C). The parties likewise agreed that, under subsection (A), Jones had “more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense.” Specifically, as detailed in the presentence report, Jones’s criminal-history calculation included three separate two-point offenses, one for a 2016 conviction (citing U.S.S.G. § 4A1.1(b)), one for a 2019 conviction (citing U.S.S.G. § 4A1.1(b), and the third for having committed the instant offense while on probation for a prior offense (citing U.S.S.G. § 4A1.1(d)). *See* Presentence Report 12-13.

As a result, the safety valve’s application turned on a statutory-interpretation question. If the three conditions in subsections A, B, and C form a conjunctive as Jones contends, meaning that a defendant is eligible unless all three conditions are present, then Jones would be eligible for safety-valve consideration. On the other hand, if the conditions are disjunctive as the government contends, meaning that the presence of any one condition disqualifies a defendant, then Jones would be ineligible. After receiving briefing and hearing argument, the district court ruled for Jones, deeming “her eligible for safety valve.” Sent. Tr. 30.

Based on that eligibility ruling, Jones argued that the § 3553(a) factors supported a sentence of 100 months, equal to 20 months below the 10-year minimum applicable to a defendant ineligible for the safety valve. Sent. Tr.

33. The government “join[ed] the defendant in the request for 100 months” as the appropriate sentence under the § 3553(a) factors. Sent. Tr. 33-34. The district court accepted the parties’ recommendation and imposed a 100-month sentence. Sent. Tr. 37; Judgment 90.

The Fourth Circuit affirmed. In doing so, the court held that, as a matter of statutory interpretation, a defendant is excluded from safety-valve consideration only if she possesses all three of the criminal-history characteristics identified in § 3553(f)(1). *See* Pet. App. 1a-18a.

REASONS FOR DENYING THE WRIT

The question presented no longer impacts Jones’s safety-valve eligibility.

The government is correct that the legal question resolved by the Fourth Circuit in this case is identical to the one pending in *Pulsifer v. United States*, No. 22-340. Accordingly, the government’s request for a hold would ordinarily make sense. *See, e.g., United States v. Garcon*, No. 22-851 (Aug. 2, 2023) (defendant conceding, in response to a government petition, that a hold for *Pulsifer* is appropriate).

But this case is unusual, and the request for a hold should be rejected for one specific reason: Based on the Sentencing Commission’s retroactive amendments to the criminal history guidelines, *Pulsifer*’s resolution of the statutory question will no longer affect Jones’s safety-valve eligibility. In other words, even if the government ultimately prevails in *Pulsifer*, Jones will remain safety-valve eligible, meaning that her sentence will not change.

Let's explain why. At sentencing in September 2021, Jones's criminal-history calculation included three separate two-point offenses. *See* Presentence Report 12-13. The parties agreed, based on those three offenses, that Jones would be excluded from the safety valve under the government's preferred interpretation because she had "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense." *See* 18 U.S.C. § 3553(f)(1)(A).

The parties also agreed that one of Jones's three two-point offenses arose under § 4A1.1(d). That provision assigned two points because Jones committed the instant offense while serving a probationary term from a prior offense. Without § 4A1.1(d)'s two-point offense, Jones would have had *exactly* four criminal history points under § 3553(f)(1)(A), not *more than* four criminal history points. And, in that scenario, she would have been eligible for safety-valve consideration even under the government's preferred interpretation of the statutory language.

Enter the Sentencing Commission. After the Fourth Circuit issued its decision in this case, the Commission amended the Guidelines by eliminating the two-point offense under § 4A1.1(d)—i.e., the precise offense that, in the government's view, had rendered Jones ineligible for the safety valve. Under this Amendment (referred to as Amendment 821), a defendant no longer receives a two-point increase for committing an offense while serving a criminal justice sentence, such as the probationary term in Jones's case. *See*

Amendments to the Sentencing Guidelines (April 27, 2023; effective date, Nov. 1, 2023), at 77-78, 82.¹ Instead, the Amendment provides that if such a defendant has fewer than seven criminal history points, she receives no additional increase; if she has seven or more criminal history points, the Amendment provides for a one-point increase. *Id.* The Commission recently decided that Amendment 821 will apply retroactively. *See* Amendments to the Sentencing Guidelines (Aug. 31, 2023; effective date, Nov. 1, 2023), at 1.²

Regardless of the outcome in *Pulsifer*, application of Amendment 821 will make Jones eligible for the statutory safety valve. Under Amendment 821, Jones has only two prior two-point offenses, for a total of exactly four criminal history points, not including one-point offenses. In other words, she no longer has “more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense.” *See* 18 U.S.C. § 3553(f)(1)(A). Thus, even if the government prevails in *Pulsifer*, Jones will remain safety-valve eligible thanks to the retroactive application of Amendment 821. Because *Pulsifer* will not affect the outcome in this case, this Court should deny the government’s request for a *Pulsifer* hold.

The Amendment’s impact means that any further review of this case—including a hold for *Pulsifer*—would be a waste of judicial resources. If the

¹ The amendments are available here: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.

² The retroactivity amendment is available here: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202308_RF-retro.pdf.

government prevails in *Pulsifer*, the outcome in Jones’s case would be a resentencing. But, at such a resentencing, Jones would remain safety-valve eligible. And the government has already agreed that, if safety-valve eligible, the appropriate sentence for Jones is 100 months. Sent. Tr. 33-34 (“join[ing] the defendant in the request for 100 months”).

CONCLUSION

For this reason, the petition for a writ of certiorari should be denied.

Dated: September 27, 2023

Respectfully submitted,

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