No. 21-460

In the Supreme Court of the United States

APRIL DIANE MYRES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were violated by allowing an eyewitness to testify that petitioner seemed agitated and uncooperative when speaking to law-enforcement officials about a burglary that petitioner had reported to the police.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not published in the Federal Reporter but is reprinted at 844 Fed. Appx. 987.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2021. A petition for rehearing was denied on April 26, 2021 (Pet. App. 20). The petition for a writ of certiorari was filed on September 23, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341, and wire fraud, in violation of 18 U.S.C. 1343.

Judgment 1. She was sentenced to 14 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed in part, vacated, and remanded in part. Pet. App. 1-7.

1. Petitioner was a deputy sheriff and a guard at a jail in San Francisco. C.A. E.R. 51, 1323. One morning in March 2016, petitioner called 911 to report a burglary at her home. *Id.* at 1141-1142. She told the operator that she had left her home the previous evening, slept at her sister's house, and just returned that morning to discover that her home had been burglarized overnight. Gov't C.A. Br. 6-7. The police opened an investigation, and petitioner filed a claim with her insurance company seeking reimbursement for items that she claimed had been stolen during the burglary. C.A. E.R. 165-170, 1147.

Petitioner's statements and actions, however, led investigators to determine that her claim was made up. Petitioner told the police that she lived alone, that her son and a friend had come over on the day of the alleged burglary but had left before she did, and that no one else was at her home that day. C.A. E.R. 1152, 1157-1160. She also stated, during two recorded interviews with the insurance company, that no one else was at her house around the time of the alleged burglary. *Id.* at 776-780; Gov't C.A. Br. 12-13. But surveillance footage from a house across the street showed that, while petitioner was at home the evening of the alleged burglary, "numerous people [were] coming and going, peering out the window, climbing over the gate, [and] exiting the garage." C.A. E.R. 1221. The footage also showed that, when petitioner left her house that evening, at least three men were still inside. *Id.* at 1171.

Consistent with the video footage, the police found no sign of forced entry, despite checking every outside door and window to determine how a burglar would have entered. C.A. E.R. 1150-1151, 1421-1422. When a police officer called petitioner to ask her about the surveillance video, petitioner recanted portions of her story, hung up, and later blocked the officer's number from her phone. *Id.* at 1224-1230, 1228-1230. Petitioner later stated, during one of her interviews with the insurance company, that she did not have a boyfriend or ex-boyfriend who could have taken the items from her home. *Id.* at 826. In fact, petitioner had been in a romantic relationship with a former inmate in her facility, Antoine Fowler. *Id.* at 635, 648.

Furthermore, petitioner's claim to the insurance company, in sworn statements, that she had lost 45 items worth more than $67,000, C.A. E.R. 1678-1680, contained a number of falsehoods. For example, petitioner claimed that the burglar had taken a pair of luxury rain boots ($315), a luxury vest ($649), and a luxury purse ($2200), but police officers, acting pursuant to a search warrant, later found each of those items still in petitioner's home. *Id.* at 627-629, 869-873. Petitioner also claimed that the burglar had taken her firearm, but police found the firearm in Fowler's car. *Id.* at 619. Petitioner additionally claimed that the burglar had taken her San Francisco Sheriff's Department equipment—including her hand radio, bulletproof vest, handcuffs, and pepper spray. *Id.* at 1015-1017, 1678-1680. Petitioner stated that she was entitled to reimbursement because the equipment belonged to her rather than to her department. *Id.* at 1031-1032. But in reality, petitioner never bought, owned, or paid to replace that equipment. Gov't C.A. Br. 17-18.

2. Based on the falsehoods in the statements to the insurance company, a grand jury indicted petitioner for wire fraud, in violation of 18 U.S.C. 1341, and mail fraud, in violation of 18 U.S.C. 1343. C.A. E.R. 1666-1670. The grand jury also indicted petitioner for misprision of a felony, in violation of 18 U.S.C. 4, based on her concealment of Fowler's unlawful possession of her firearm. C.A. E.R. 1668-1669.

Before trial, the government proposed elicting testimony from a claims adjuster who had witnessed an interaction between petitioner and officials investigating the burglary. Gov't C.A. Br. 23. A few days after the burglary, the adjuster had arrived at petitioner's home to conduct an inspection on behalf of the insurance company. C.A. E.R. 960. Upon arriving, he had found petitioner talking to two agents from the Federal Bureau of Investigation (FBI). *Id.* at 962. In the adjuster's presence, the agents had asked petitioner whether they could dust her home for fingerprints while she worked with the adjuster upstairs. *Id.* at 1661. Petitioner had replied that she would not allow the agents to take fingerprints "without her there" and that she "didn't have time for this." *Id.* at 963, 1661.

The district court granted petitioner's motion in limine to limit the government's use of that evidence. C.A. E.R. 1632. The court observed that, under applicable circuit precedent, "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." *Ibid.* (quoting *United States* v. *Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978)). Applying that precedent, the court concluded that petitioner's "refusal to allow the FBI to fingerprint her home is protected by the Fourth Amendment and cannot give rise to an inference of

wrongdoing." *Ibid.* As later clarified during trial, the court allowed the adjuster to testify only about his more general observations and impressions about petitioner's interaction with the FBI agents, not that petitioner "refused to allow the fingerprinting." *Id.* at 93.

At trial, the government asked the claims adjuster whether, during his visit to petitioner's home, he had noticed "anything about the tone in which [petitioner] was talking with the FBI." C.A. E.R. 963. The adjuster answered that petitioner was "agitated and defensive" and that "[t]he FBI was asking her certain things and it didn't seem to be going too well." *Ibid.* The government then asked the adjuster whether he "remember[ed] any statements that she made at that time to the FBI." *Ibid.* The adjuster responded: "The only thing I recall is that—something to the effect that she didn't really—that when the FBI, the male agent, was asking her to do something, I don't remember what it was, but she basically said she didn't have time for this and she had to work with me." *Ibid.* The adjuster explained that the interaction was "unusual" because theft victims tend to be "cooperative" with the police, but "that didn't seem to be the case at this particular time." *Id.* at 964.

Petitioner objected later that day that the adjuster had "undermine[d]" the district court's rulings by "testifying that the FBI asked [petitioner] to do something." C.A. E.R. 975. The court overruled the objection, observing that the adjuster had not mentioned petitioner's refusal to permit fingerprinting and that his testimony was "completely consistent with [the court's] order." *Id.* at 976.

The jury found petitioner guilty of mail fraud and wire fraud, but not guilty of misprison of felony. C.A. E.R. 351. Petitioner moved for a new trial, contending

that the claims adjuster's testimony about her interaction with the FBI agents had violated her Fourth Amendment rights. C.A. S.E.R. 7. The district court denied the motion, explaining that "the jury could not be assumed to infer that [petitioner] had invoked her Fourth Amendment rights from the testimony that they heard, as the attempted fingerprinting was never mentioned by the witness." *Ibid.* The court observed that "what the witness commented on was not [petitioner's] invocation of her rights"; "it was her tone of voice and general uncooperativeness." *Id.* at 7 n.4. The court sentenced petitioner to 14 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. In an unpublished memorandum opinion, the court of appeals affirmed petitioner's convictions, vacated her sentence, and remanded the case. Pet. App. 1-7.

As relevant here, the court of appeals determined that the Fourth Amendment was not violated by allowing the claims adjuster's testimony. Pet. App. 2-3. The court found that the testimony did not suggest that petitioner "refused a warrantless search," but was instead "so vague that the jury could not reasonably connect it to constitutionally protected conduct." *Id.* at 3. The court alternatively reasoned that even if the testimony "were considered a comment on the exercise of [petitioner's] Fourth Amendment rights," it "was admitted for a proper purpose: to undermine [petitioner's] theme that she was the victim of a burglary." *Ibid.*

ARGUMENT

Petitioner renews her contention (Pet. 8-16) that her Fourth Amendment rights were violated by allowing the claims adjuster to testify about her interaction with

FBI agents. The petition for a writ of certiorari arises in an interlocutory posture, which in itself provides a sufficient reason to deny it. In any event, the court of appeals correctly rejected petitioner's contention, and its factbound decision does not conflict with any decision of this Court or any other court of appeals. In addition, this case would be a poor vehicle for reviewing the question that petitioner presents. No further review is warranted.

1. As a threshold matter, the decision below is interlocutory; the court of appeals vacated the sentence and remanded the case for further proceedings. Pet. App. 6-7. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari). This Court routinely denies interlocutory petitions, including in criminal cases. See Stephen M. Shapiro et al., *Supreme Court Practice* 4-55 n.72 (11th ed. 2019).

That practice promotes judicial efficiency, because the proceedings on remand may affect the consideration of the issues presented in a petition. It also enables issues raised at different stages of lower-court proceedings to be consolidated in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). This case does not warrant a departure from the Court's usual practice.

2. In any event, the court of appeals' decision was correct. Although this Court has never resolved the question, some courts of appeals have concluded that the Constitution forbids the prosecution from relying on the defendant's denial of consent to a warrantless search as evidence of guilt. See *United States* v. *Thame*, 846 F.2d 200, 208 (3d Cir.), cert. denied, 488 U.S. 928 (1988); *United States* v. *Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978). Assuming for the sake of argument that those decisions are correct, the claims adjuster's testimony did not violate that principle.

As the district court observed, the claims adjuster testified about petitioner's "tone of voice and general uncooperativeness." C.A. S.E.R. 7 n.4. In particular, he testified that petitioner's tone seemed "agitated and defensive." C.A. E.R. 963. He further testified that one of the FBI agents "was asking [petitioner] to do something, I don't remember what it was," and that petitioner "basically said she didn't have time for this and she had to work with me." *Ibid.* The claims adjuster explained that such behavior was "unusual" because theft victims tend to be "cooperative" with the police. *Id.* at 964.

As both the district court and court of appeals recognized, the claims adjuster did not specifically mention, let alone comment on, petitioner's refusal to allow the FBI agents to search her home. The district court observed that "the attempted fingerprinting was never mentioned by the witness" and that "what the witness commented on was not [petitioner's] invocation of her rights." C.A. S.E.R. 7 & n.4. And the court of appeals found that the jury "could not reasonably connect" the claims adjuster's testimony "to constitutionally protected conduct." Pet. App. 3.

Petitioner contends (Pet. 10) that, even if the claims adjuster did not expressly mention her refusal to consent to a search, his testimony was "based only on" that refusal. But the record does not establish that the claims adjuster's impression that petitioner was "agitated and defensive," C.A. E.R. 963, was based—much less based "only," Pet. 10—on petitioner's refusal to consent to the search. To the contrary, the adjuster testified that, in recounting petitioner's statement that she "didn't have time for this," he "d[idn't] remember" what it was that the FBI agent had asked petitioner to do but that she refused to do. C.A. E.R. 963.

Petitioner's assertion of constitutional error primarily relies (Pet. 1-2, 8-11) on the principle that the right to be free from unreasonable searches of the home lies at the core of the Fourth Amendment. But the court of appeals did not hold that the government was entitled to conduct a warrantless search of petitioner's home, or that the claims adjuster was permitted to testify about petitioner's refusal to permit such a search. The court instead relied on circuit precedent that would generally preclude such testimony, see Pet. App. 3 (citing *Prescott*, 581 F.2d at 1352), and found no ground for such exclusion here.

In doing so, the court of appeals applied the legal rule that petitioner advocates. Compare Pet. 1 ("[A] criminal defendant's exercise of her constitutional rights cannot be used as evidence of guilt."), with Pet. App. 3 ("[P]assive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing.") (citation omitted). The court's factbound determination that the rule was not violated here does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of

certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

That is particularly so given that both the court of appeals and the district court agreed that the claims adjuster's testimony could not be construed as a comment on petitioner's exercise of her Fourth Amendment rights. See *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949)). And petitioner identifies no court of appeals that would have found constitutional error in the circumstances of this case.

3. In all events, this case would be a poor vehicle for reviewing the question presented. To begin with, this Court has not yet decided the threshold question whether the Constitution prohibits the prosecutor from commenting on a defendant's exercise of his rights under the Fourth Amendment. Cf. *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime."). But the circumstances of this case obviate any need to address that threshold question; as explained above, the court of appeals accepted that the Constitution does impose such a restriction, but concluded that the prosecution had not violated it in this case. See pp. 8-9, *supra*. And it would

make little sense for this Court to address the downstream question whether the testimony in this case violated that rule without having resolved the upstream question whether the Constitution imposes such a rule in the first place. Petitioner, moreover, failed to preserve any argument that would allow the Court to address a claim that the admission of testimony like this could be considered a violation of the Due Process Clause. Cf. *Doyle* v. *Ohio*, 426 U.S. 610, 611 (1976) (holding that the use of a defendant's post-arrest silence for impeachment purposes violated the Due Process Clause).

Finally, any error in admitting the claims adjuster's testimony was harmless beyond a reasonable doubt. At trial, the government introduced overwhelming evidence that petitioner's sworn statement to the insurance company included false statements—most notably, that petitioner sought reimbursement for luxury items worth thousands of dollars, but that those items were later recovered from petitioner's home nearly a year after the purported burglary. C.A. E.R. 627-629, 869-873. And contrary to petitioner's assertions (Pet. 14), the evidence was equally overwhelming that petitioner made those misrepresentations knowingly, not merely negligently. The evidence showed that petitioner made many other deceitful representations about the alleged burglary—including, among other statements, false claims about who was at her home when she left the evening before the burglary, whether she had a boyfriend or ex-boyfriend who could have been involved, and whether she owned the Sheriff's Department equipment for which she claimed reimbursement. See pp. 3-4, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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