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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVE ELLIS WILSON,

Defendant - Appellant.

No. 19-7048

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:18-CR-00021-RAW-1)

J. Lance Hopkins, Tahlequah, Oklahoma, for Defendant-Appellant.

Linda A. Epperley, Assistant United States Attorney (Brian J. Kuester, United States Attorney; Gregory Dean Burris, Assistant United States Attorney, with her on the brief), Muskogee, Oklahoma, for Plaintiff-Appellee.

Before **McHUGH**, **EBEL**, and **EID**, Circuit Judges.

EBEL, Circuit Judge.

Dave Ellis Wilson pled guilty to selling 1.54 grams of methamphetamine to a police confidential informant. Along the way, however, he confessed to purchasing four ounces of meth (113 grams). Deeming that entire quantity "relevant conduct,"

the district court sentenced Wilson based on the 113 grams he admitted to possessing, rather than the 1.54 grams he was caught selling.

Wilson appeals his sentence, claiming he personally consumed most of the 113 grams and only sold some of it to support his habit. Wilson argues that any personal-use quantity was not relevant for sentencing, and that the government failed to prove how much of the 113 grams Wilson personally consumed versus how much he sold. Although we agree that any personal-use quantity should be excludable in this context, we hold that Wilson has the burden of coming forward with evidence to establish a personal-use quantity and no such evidence is currently reflected in the record. Nevertheless, because Wilson's burden to come forward with evidence of personal use was unclear before this opinion, we vacate the sentence and remand so that Wilson has the opportunity to put on evidence of personal use pertaining to the quantities of meth charged. Of course, the government should also be given the opportunity to put on opposing evidence. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we therefore vacate Wilson's sentence and remand for resentencing.

I. BACKGROUND

On two occasions a week apart, Wilson sold one gram of methamphetamine for $80 to a confidential informant working with the Cherokee County Sheriff's Office. Laboratory analysis of the two purchases revealed .86 grams and .68 grams of methamphetamine (1.54 grams total). Based on these controlled buys and additional information from the confidential informant, a federal search warrant was

issued for Wilson's residence. During the execution, investigators located in Wilson's bedroom four cell phones, a plastic bag containing methamphetamine residue, eight Oxycodone pills, a marijuana cigarette, an electronic tablet, and two digital scales.

After the search warrant execution, Bureau of Alcohol, Tobacco, Firearms, and Explosives Special Agent Ashley Stephens interviewed Wilson. Wilson admitted to buying an ounce of methamphetamine on four occasions (in total, 113.4 grams) since his release from prison nine months earlier. Wilson asserts that he also told Special Agent Stephens that he personally consumed most of that amount and sold the rest to supply his own habit.[1]

On the same day, Special Agent Stephens interviewed Lori Walker, who described purchasing methamphetamine from Wilson on multiple occasions. Walker stated that she had purchased methamphetamine from Wilson in one-gram or "eight ball" (an eighth of an ounce, or 3.5 grams) quantities on ten to fifteen occasions over the past eight months. R., vol. 3 at 4. She also reported buying eight-ball quantities from Wilson on approximately five additional dates.

[1] The record does not reflect Wilson's daily consumption rate, but other courts have found that most meth users use between 1 and 2 grams a day. United States v. Tennison, No. 17-20038-14-DDC, 2020 WL 430741, at *4 (D. Kan. Jan. 28, 2020) (unreported), appeal filed, (10th Cir. Feb. 19, 2020) (No. 20-3033). So over the course of nine months, the relevant time period here, a meth user might use between 270 and 540 grams. Wilson admitted to buying only 113 grams in that time, so it is at least plausible that he consumed most of it.

Wilson was indicted by a federal grand jury for two counts of Distribution of Methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C). He pled guilty to one count and the other was dismissed at sentencing.

In preparation for sentencing, the probation office issued a presentence investigation report. Relevant here, the report calculated Wilson's base offense level in light of the amount of methamphetamine deemed "relevant conduct" under the Sentencing Guidelines. In determining that amount, the report addressed the relevance of the 1.54 grams actually sold by Wilson during the controlled buys, the 113 grams he admitted to purchasing, and an estimate of the amount Walker purchased from Wilson (an additional 27.5 grams):

> Pursuant to U.S.S.G. § 1B1.3(a), the defendant is held accountable for all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant that were part of the same course of conduct or common scheme or plan as the offense of conviction. As the amounts of methamphetamine from the controlled buys on November 7 and 15, 2017, in addition to the 27.5 grams of methamphetamine purchased by Walker could reasonably be included in the 4 ounces or 113.4 grams of methamphetamine the defendant claimed he had during the same time period, the defendant will only be held accountable for the 113.4 grams of methamphetamine.

R., vol. 3 at 5. Based on that conclusion, the report found a base offense level of 24, with a recommended guideline range of 57 to 71 months.[2] Wilson objected to the

[2] Wilson was initially sentenced as a career offender, resulting in a recommended guideline range of 151 to 188 months. Wilson appealed application of that enhancement and this Court reversed and remanded for resentencing. United States v. Wilson, No. 18-7045 (10th Cir. Mar. 29, 2019). Wilson did not object to (continued)

inclusion of the 113 grams, arguing that the court should sentence based only on the 1.54 grams directly associated with the offense of conviction. Using that quantity would have resulted in a base offense level of 12 and a final sentencing range of 15 to 21 months.

At the sentencing hearing, Wilson did not testify, call any witnesses, or submit any evidence in support of his objection. Instead, defense counsel merely argued that there was no evidentiary basis to hold Wilson accountable for the 113 grams because "there's just no way to measure it," blaming Special Agent Stephens for failing to ask Wilson how much of the 113 grams was for personal use. R., vol. 2 at 16. The government argued that it had met its burden of proof by proving the total amount of meth possessed by Wilson and that he had distributed some portion of it.

The district court found that Wilson was accountable for the 113 grams he had admitted purchasing at least in part for further distribution. The court had previously concluded that Wilson's assertion of personal consumption did "not mitigate his purchase of four ounces of methamphetamine for distribution." R., vol. 1 at 107. That conclusion was based on the rationale that the four one-ounce purchases (totaling 113 grams) constituted "distributable amounts." R., vol. 2 at 16. The court sentenced Wilson to 57 months in prison, the bottom of the recommended guidelines range. Wilson appeals that sentence.

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the drug quantity calculation until the resentencing hearing. The government dwells on the original sentencing hearing and Wilson's delay in raising the drug-quantity objection but does not say why it is relevant and does not make any claim of waiver.

II. STANDARD OF REVIEW

This court reviews a defendant's sentence for reasonableness, with deference to the district court absent an abuse of discretion. United States v. Hamilton, 587 F.3d 1199, 1219 (10th Cir. 2009). A challenge to the drug quantities included by the district court in its relevant-conduct finding constitutes a challenge to the procedural reasonableness of the sentence. United States v. Sells, 541 F.3d 1227, 1234 (10th Cir. 2008). We review de novo the district court's legal conclusion regarding the scope of relevant conduct for sentencing and its factual drug-quantity determination for clear error. United States v. Dalton, 409 F.3d 1247, 1251 (10th Cir. 2005). This Court will reverse for clear error only if the district court's finding was without factual support in the record or if we are left with a definite and firm conviction that a mistake has been made. Id.

III. DISCUSSION

This case presents an issue of first impression for this Court: whether a personal-use drug quantity constitutes "relevant conduct" under Sentencing Guidelines § 1B1.3(a) for a defendant convicted of simple[3] distribution.[4] We conclude that this is a case-by-case factual determination under § 1B1.3(a)(1)(A),

[3] We use the "simple" designation to distinguish from a charge of "conspiracy" to distribute.

[4] Wilson was convicted of distribution. Several cases in this context involve defendants convicted of possession with intent to distribute. Both parties cite those cases and apply them to the simple distribution context. We follow the same approach, considering the legal principles we announce as equally applicable to either context.

requiring an assessment of any evidence of a nexus between the drugs possessed for personal use and drugs possessed for distribution. Applying that standard to the facts before us, we conclude that any drugs shown to be possessed by Wilson for personal use would not constitute relevant conduct for his sentencing for distribution.

Having reached that conclusion, we must then determine which party bears the burden of proving a personal-use quantity. We hold that although the government bears the ultimate burden of proving the quantity of drugs for sentencing, the defendant bears the burden of production regarding any excludable personal-use quantity. To satisfy that burden, the defendant must come forward with some evidence that a specific quantity was intended for personal use. Applying this framework to Wilson's case, we conclude that Wilson has not met his burden.

A. Any personal-use drug quantity in this case would not constitute "relevant conduct" under U.S.S.G. § 1B1.3(a).

Despite Wilson's admitted possession of 113 grams of methamphetamine, a drug quantity is only relevant for sentencing if it possesses "the proper relation to the offense of conviction." United States v. Asch, 207 F.3d 1238, 1243 (10th Cir. 2000). We conclude that a personal-use quantity here would not possess the necessary relationship to Wilson's distribution conviction.

A defendant convicted of simple distribution or possession with intent to distribute, see 21 U.S.C. § 841(a)(1), is sentenced based on the underlying drug quantity, see U.S.S.G. § 2D1.1(a)(5). That quantity includes not just the drug quantities specified in the count of conviction, but also those deemed "relevant

conduct" to the offense. U.S.S.G. § 2D1 comment. n.5. "Relevant conduct" is defined in U.S.S.G. § 1B1.3(a).

Under § 1B1.3(a), there are two potentially applicable categories of "relevant conduct." Subdivision (a)(1)(A) encompasses "all acts and omissions committed . . . by the defendant; and . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[5] Alternatively, conduct may be "relevant" under subdivision (a)(2), which provides that, "solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivision[(a)(1)] . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction" would be included.

All drug quantities associated with "relevant conduct" are aggregated to determine the defendant's offense level. United States v. Washington, 11 F.3d 1510, 1516 (10th Cir. 1993). This means that, as occurred here, a defendant convicted of an offense involving 1.5 grams of drugs can be sentenced based on over 100 grams that were never seized or charged, if the additional quantity is deemed "relevant conduct." The government bears the burden of proving the relevant-conduct drug quantities by a preponderance of the evidence. United States v. Fortier, 180 F.3d 1217, 1225 (10th Cir. 1999).

[5] Subdivision (a)(1)(B) applies "in the case of a jointly undertaken criminal activity" and is thus inapplicable in this context.

In light of that sentencing framework, we must determine whether the district court erred by including claimed personal-use drug quantities as "relevant conduct" for a defendant convicted of simple distribution. Although this Court has previously suggested in dicta that personal-use quantities are excludable in this context, United States v. Montgomery, 468 F.3d 715, 720 (10th Cir. 2006) ("Finite quantities of processed narcotics kept for personal use are not a part of the underlying offense of possession with intent to distribute."), we have not yet definitively resolved this issue, United States v. Niles, 708 F. App'x 496, 507 (10th Cir. 2017) (unpublished) ("We have not addressed whether personal-use drug quantities qualify as relevant conduct in possession-with-intent-to-distribute cases.").[6]

We do so now. We first consider whether a personal-use drug quantity constitutes "relevant conduct" under subdivision (a)(2). That subdivision applies "solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts." U.S.S.G. § 1B1.3(a)(2). The "offenses" referred to is the offense of the asserted relevant conduct, not the offense of conviction. United States v. Taylor, 97 F.3d 1360, 1363 (10th Cir. 1996) ("[T]he offense must be the type of offense that, if the defendant had been convicted of both offenses, would

[6] We have, however, addressed closely related issues. In United States v. Wood, 57 F.3d 913 (10th Cir. 1995), we held that personal-use marijuana may be included as relevant conduct for a defendant convicted of manufacturing marijuana. Id. at 920. Similarly, in United States v. Asch, 207 F.3d 1238 (10th Cir. 2000), we concluded that personal-use methamphetamine constituted relevant conduct for a defendant convicted of a drug-trafficking conspiracy. Id. at 1243–44. Due to the differences in the nature of the offenses, neither case dictates the outcome here.

require grouping with the offense of conviction for sentencing purposes under U.S.S.G. § 3D1.2(d).").

Under the grouping rules, possession of drugs with intent to consume them does not group with simple distribution or possession with intent to distribute. The offense of simple possession falls under § 2D2.1 and is specifically excluded from the operation of § 3D1.2 (the grouping provision). Because simple possession is not a groupable offense, subdivision (a)(2) is inapplicable.[7]

Where (a)(2) does not apply, relevant conduct is assessed under subdivision (a)(1)(A), which covers all acts committed by the defendant "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." Whether a personal-use quantity falls within that subdivision will depend on the facts of each case, specifically, on the offense of conviction and the nexus between the personal-use quantity and that offense. Where possessing the drugs for personal use "was not part of or connected to the commission of, preparation for, or concealment of" the distribution offense, the personal-use quantity will not constitute relevant conduct. United States v. Gill, 348 F.3d 147, 153 (6th Cir. 2003).

On the other hand, if there is a sufficient connection between the personal-use quantity and the distribution offense of conviction, a personal-use quantity might

[7] Two of our sister circuits have reached the same conclusion. See United States v. Gill, 348 F.3d 147, 152 (6th Cir. 2003); United States v. Wyss, 147 F.3d 631, 632 (7th Cir. 1998).

satisfy subdivision (a)(1)(A). See United States v. Fraser, 243 F.3d 473, 476–77 (8th Cir. 2001) (Hansen, J., dissenting) (suggesting that a personal-use quantity could constitute "relevant conduct" under subdivision (a)(1)(A) where the personal-use quantity was "inextricably intertwined" with the distribution quantity, constituting "one indivisible act").

Applying the (a)(1)(A) standard to the case at hand, Wilson's personal-use quantities (if proven) would not constitute relevant conduct for his distribution offense. Specifically, any personally consumed portion would not be "part of or connected to the commission of, preparation for, or concealment of" the distribution offense, because it was not possessed with the intent to distribute. See Gill, 348 F.3d at 153.

In contrast, any quantity Wilson distributed or possessed with the intent to distribute would be relevant conduct. That is because both distribution and possession with intent to distribute are groupable offenses, thus implicating subdivision (a)(2). That subdivision would be satisfied, because possession with the intent to distribute would constitute "part of the same course of conduct or common scheme or plan" as the offense of distribution.

Of course, this leaves it to the district court to determine what was possessed with the intent to distribute and what was possessed for personal consumption. We address allocation of the burden of proof in the next section.

Our conclusion is consistent with that of all but one of our sister circuits that have considered this issue, though some circuits have employed different reasoning

in navigating § 1B1.3(a). See United States v. Williams, 247 F.3d 353, 357–58 (2d Cir. 2001); Jansen v. United States, 369 F.3d 237, 249 (3d Cir. 2004); Gill, 348 F.3d at 152 (6th Cir.); Wyss, 147 F.3d at 632 (7th Cir.); Fraser, 243 F.3d at 475 (8th Cir.); United States v. Kipp, 10 F.3d 1463, 1465–66 (9th Cir. 1993). But see United States v. Antonietti, 86 F.3d 206, 210 (11th Cir. 1996).

As have our sister circuits, we note that our result "is in accord with an overall objective of the Sentencing Guidelines"—proportionality in sentencing. Jansen, 369 F.3d at 247. Distribution or possession with intent to distribute is different and more culpable than possession with intent to consume personally, thus meriting a different level of punishment. Id. It would "contravene[] a fundamental principle" of the Guidelines to punish "a drug user who possessed 50 grams for personal use and gave one gram away more harshly than a drug dealer who possessed 49 grams for distribution." Kipp, 10 F.3d at 1466.

In light of this overwhelming support for excluding personal-use quantities in this context, the government makes only a half-hearted argument in response, "opt[ing] not to waste this Court's time discussing these non-binding, out-of-circuit cases." Aple. Br. 19. In the little time it does spend on the merits of this issue, the government urges this Court to follow the Eleventh Circuit's contrary position in United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996). For a variety of reasons, however, that decision is not persuasive.

To start, several other circuits have distinguished Antonietti on the basis that it involved a defendant convicted of conspiracy to distribute in addition to possession

with intent to distribute. See Fraser, 243 F.3d at 475 n.4 (suggesting this as "the real rationale" for Antonietti). The conspiracy context implicates different considerations, and every circuit considering that issue has held that a personal-use quantity constitutes relevant conduct for a defendant convicted of conspiracy to distribute. United States v. Williamson, 953 F.3d 264, 270 (4th Cir. 2020); Asch, 207 F.3d at 1243–44. But in Antonietti, the Eleventh Circuit made no effort to distinguish between (1) conspiracy to distribute and (2) possession with intent to distribute, and instead seemed to consider them as equivalent. 86 F.3d at 209–10. In contrast, every other circuit faced with this question has considered the two offenses to be two separate issues which can be resolved in different ways. Each court that has considered both issues has concluded that personal-use quantities are relevant conduct for a conviction for conspiracy to distribute, but not relevant for a conviction for possession with intent to distribute.

In addition to failing to appreciate that distinction, Antonietti is not persuasive because there is no analysis—instead, the court summarily concluded that it chose "to reject the Ninth Circuit's analysis and instead follow the majority of the circuits that have considered the personal use issue." Id. at 210. This was a mischaracterization of the caselaw when made and each subsequent court to consider the issue has come out the other way. For these reasons, we decline to follow Antonietti.

Beyond pointing to Antonietti and a dissent in Fraser, the government does not raise any new arguments for this Court to consider. Instead, it focuses on whether

Wilson has met his burden of proof such that it is appropriate for this Court to reach the merits of this issue. We next address this burden of proof issue.

In sum, we hold that whether a personal-use drug quantity constitutes relevant conduct for a conviction for simple distribution or possession with intent to distribute is determined under § 1B1.3(a)(1)(A). That provision requires a case-by-case assessment of the connection between the personal-use quantity and the offense of conviction. Because there is no connection here between Wilson's claimed personal-use drug quantities and the offense of his conviction, any such quantities held only for personal use do not constitute relevant conduct and are excludable from the sentencing quantity.

B. The defendant has the burden of coming forward with some evidence that a specific quantity was intended for personal use.

It is well-established that the government bears the burden of proving the relevant-conduct drug quantities by a preponderance of the evidence. Fortier, 180 F.3d at 1225. But that does not mean that the government need bear the sole burden regarding personal-use quantities. In light of competing considerations on both sides, we find it necessary to place some of this burden on the defendant. Accordingly, we hold that although the government retains the ultimate burden of proof, a defendant who wishes to exclude a specific drug quantity as for personal use has the burden of coming forward with some evidence that that quantity was intended for such use or was personally consumed. Once sufficient evidence has come

forward from the defendant to establish personal use, the burden falls back to the government either to rebut or accept the defendant's evidence.

This burden-shifting framework has support in this Court's precedent in a closely related sentencing context. In United States v. Asch, 207 F.3d 1238, this Court considered whether personal-use quantities were relevant for sentencing in conspiracy to distribute cases under either the Sentencing Guidelines or the statutory sentencing ranges imposed by 21 U.S.C. § 841(b). We held that, in conspiracy to distribute cases, although personal-use quantities were relevant conduct under the Guidelines, they could not be considered when determining the statutory sentencing range under § 841(b). Id. at 1240. In describing the exclusion of personal-use quantities under § 841(b), the Asch court addressed the proper allocation of the burden of proof. Id. at 1246. That thoughtful analysis provides a helpful guide for this Court's consideration of the present issue.

The Asch court began by reiterating that the government bears the ultimate burden of proving the quantity of drugs involved by a preponderance of the evidence. Id. Because the court held that personal-use quantities should be excluded, the government must prove by a preponderance of the evidence the quantity that the defendant obtained with the intent to distribute. Id. Recognizing that this "burden might appear unduly onerous," the court held that a district court "is permitted to infer that the entire quantity of drugs the defendant obtained from her co-conspirator during the course of the conspiracy to distribute, as proven by the government by a

preponderance of the evidence, was obtained with the common objective of distribution." Id.

Based on that inference, the court concluded that "a defendant must produce evidence tending to demonstrate that she always intended to personally consume some specific portion of the drugs received from her co-conspirator in order to place at issue the absence of a common objective." Id. This burden reflects the need to avoid handing defendants a get-out-jail-free card:

> [W]hen 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."

Id. (quoting Wyss, 147 F.3d at 633). Asch further noted that "[e]vidence, including personal testimony, of actual consumption of specific quantities would be probative of such an intent." Id.

Thus, Asch's framework provides that the government bears the "ultimate burden of proof on the quantity of drugs involved in the offense," but "the defendant bears the burden of producing evidence of her intent to consume." Id. We think the same framework appropriate here.

We note, however, that Asch's rationale for burden shifting relied at least in part on the inference that the entire quantity of drugs obtained by a defendant from a co-conspirator was obtained with the objective of distribution. Id. That inference does not necessarily apply in the instant context of a simple distribution offense. In a

conspiracy to distribute, it makes sense to infer that a co-conspirator will give the defendant conspirator the drugs for distribution—after all, that is the purpose of the conspiracy. In a simple distribution case, it is less intuitive to infer that every quantity of drugs the defendant possessed was for distribution, as the defendant could be both a user and a distributor, as Wilson claims here. Overall, we think it is a close call whether a conviction for simple distribution alone is sufficient to support the inference for sentencing purposes that every quantity of drugs the defendant possessed during the relevant time period was also intended for distribution.

But we are ultimately convinced that we should apply the same inference in the simple distribution context and thus adopt Asch's shifting of the burden of proof. A person convicted of simple distribution has been found guilty of distributing drugs. It is at least reasonable initially to infer that a convicted drug distributor possesses all his drugs with the intent to distribute. It then becomes the defendant's burden to come forward with evidence to prove any excludable personal-use quantity. This reflects the same balance of fairness as in Asch: personal-use quantities are excludable, but it is the defendant that bears the burden of coming forward with evidence to prove those quantities. We think this framework is further supported by workability concerns in light of the need to avoid putting an "unduly onerous" burden on the government and forcing it to disprove every defendant's personal-use intent. See Asch, 207 F.3d at 1246.

This burden-of-proof allocation is consistent with that applied by the other circuits that have addressed this issue. In fact, two circuits already have applied

Asch in the context of considering whether personal-use quantities constitute relevant conduct under the Guidelines. See Gill, 348 F.3d at 156 (6th Cir.) ("We agree with the Tenth Circuit that the defendant bears the burden of production with respect to his personal use of the drug in question." (citing Asch)); United States v. Rangel, 108 F. App'x 162, 166 (5th Cir. 2004) (unpublished) ("When a defendant claims drug quantities are not relevant conduct because they were intended for personal use, the defendant bears the burden of production with respect to his personal use, although the Government bears the ultimate burden of persuasion with respect to the sentencing amount." (citing Asch and Gill)). The Ninth Circuit has come to the same conclusion. See United States v. Gonzales, 307 F.3d 906, 914 (9th Cir. 2002) ("Although the burden is ultimately on the government to prove that all of the drugs were intended for distribution, a defendant who seeks to have some of the drugs excluded from the sentencing determination has the burden of producing some evidence on this issue.")

Adopting this allocation of the burden of proof, we next consider whether Wilson has met his burden under this framework.

C. Wilson failed to meet his burden of production.

Applying the above principles to this case, we conclude that Wilson failed to meet his burden of coming forward with evidence that not all 113 grams were possessed with the intent to distribute.

Once the government established that Wilson was distributing methamphetamine and possessed at least 113 grams, Wilson had the burden of

coming forward with evidence that some of that amount should be excluded as a personal-use quantity. Wilson did not even attempt to produce such evidence. He did not testify at the sentencing hearing and his defense attorney did not present any evidence regarding personal-use quantities. Instead, defense counsel argued that because Wilson had never admitted how much he sold versus how much be consumed, the government had failed to meet its burden of proof. This does not constitute evidence identifying a specific quantity possessed for personal use, and accordingly, Wilson failed to meet his burden of production.

However, we are announcing the burden-of-proof allocation in this context for the first time. Even though Wilson does not request a remand for the opportunity to present additional evidence to meet his burden of production, we believe the appropriate remedy is to vacate the sentence and order that both sides should be given the opportunity to present evidence on the issue of personal use pertaining to the charged quantities.[8]

Although the presentence report mentions Wilson's admission of purchasing the 113 grams, it says nothing about him saying he personally consumed most of it. The only references in the record to such a statement are in arguments made by

[8] Wilson did argue that even if he had a burden of production to establish personal use, he satisfied that burden based on statements he made when interviewed by Special Agent Stephens. Wilson argues this burden was satisfied because he "indicated to the agents that most of the amount was for personal use and he sold some to support his drug habit." Reply Br. 6. Yet this argument fails because his claimed personal-use-quantity assertion to Special Agent Stephens is nowhere in the present record.

defense counsel. Defense counsel refers to a report describing what Wilson said in the interview, but that report is not in the record, and nor is a transcript of the interview itself. The district court never found that Wilson made those statements, referring only to "the defendant's assertion through his attorney that he sold drugs to provide for his own habit." R., vol. 1 at 107. On appeal, Wilson's briefs merely cite parts of the record containing defense counsel's arguments describing what Wilson allegedly said to Special Agent Stephens. Yet the record itself is devoid of any actual evidence of those statements.

Notwithstanding the state of the current record, because we are announcing a new rule, the appropriate remedy is to vacate the sentence and remand for further proceedings so that both sides will have the opportunity to present (or rebut) evidence of personal use of the drug quantities involved in this case.

IV. CONCLUSION

For the reasons provided above, we reverse Wilson's sentence and remand for further sentencing proceedings in accordance with this opinion.

No. 19-7048, *United States v. Wilson*

EID, J., concurring in part and dissenting in part.

I join the majority opinion with the exception of its decision to remand the case to permit Wilson to produce evidence that a portion of the methamphetamine, which he pled guilty to selling, was actually for personal use. Maj. op. at 19. I dissent from that portion of the opinion for many of the reasons discussed by the majority.

The majority points out, for example, that "Wilson did not even attempt to produce such evidence," instead resting on his position that it was the government's burden to prove that none of the methamphetamine he purchased was for personal use. *Id*. Indeed, again as pointed out by the majority, Wilson's counsel argued before the district court that "there's just no way to measure" a personal-use quantity, and faulted the government for not asking Wilson about personal use during an investigative interview. *Id*. at 5. It is thus not surprising that before this court, as noted by the majority, Wilson "does not request a remand for the opportunity to present additional evidence to meet his burden of production." *Id*. at 19. Under these circumstances, I see no reason for giving him that opportunity.

The majority ultimately orders a remand on the ground that it is "announcing a new rule." *Id.* at 20; *see also id.* at 2 (stating that remand is appropriate "because Wilson's burden to come forward with evidence of personal use was unclear before this opinion"). But this assertion too is belied by the majority's own words. In fact, it adopts the burden-shifting framework of *United States v. Asch*, 707 F.3d 1238 (10th Cir. 2000), which addressed "a closely related sentencing context" under the guidelines for

conspiracy to distribute. *Id*. at 15. In fact, the majority cites to three additional circuit courts that, in dealing with intent to distribute cases, have come to the same conclusion as we do today. *Id*. at 18 (citing *United States v. Gill*, 348 F.3d 147 (6th Cir. 2003); *United States v. Rangel*, 108 F. App'x 162 (5th Cir. 2004); *United States v. Gonzales*, 307 F.3d 906 (9th Cir. 2002)). Our result today—that relies upon three circuit court decisions and a Tenth Circuit decision in a "closely related sentencing context"—is hardly a "new rule" requiring that Wilson be given an additional opportunity to present additional evidence of personal use.[1] Under the majority's approach, one would be hard-pressed to find any decision of this court that would not announce such a "new rule."

For these reasons, I respectfully dissent from the majority's decision to remand the case.

[1] The majority's reference to a "new rule" echoes the standard of *Teague v. Lane*, 489 U.S. 288 (1989). Yet *Teague* retroactivity applies only after a final conviction, defined as one where judgment was rendered, the possibility of appeal exhausted, and the time for petition for certiorari elapsed. *Id*. at 295. The finality requirement has not been satisfied here, so *Teague* is inapplicable. The majority cites no authority for its conclusion that a new rule, however that is defined, would require a remand in this context.