No. 20-8415

IN THE SUPREME COURT OF THE UNITED STATES

DEMARIO DESHAWN SIMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

DANIEL J. KANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was entitled to appellate relief on the theory that the district court lacked discretion to deny petitioner's request to plead guilty to one of three intertwined offenses while proceeding to trial on the other two.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mich.):

United States v. Simpson, No. 19-cr-137 (Feb. 19, 2020)

United States Court of Appeals (6th Cir.):

United States v. Simpson, No. 20-1162 (Feb. 17, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is not published in the Federal Reporter but is reprinted at 845 Fed. Appx. 403.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2021. A petition for rehearing was denied on March 25, 2021. The petition for a writ of certiorari was filed on June 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 Western District of Michigan, petitioner was convicted of possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a) and (b)(1)(C); possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1. The district court sentenced petitioner to 84 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A18.

1. In response to citizen complaints of drug dealing involving weapons in Kalamazoo, Michigan, police officers followed petitioner and several known gang members, including one whom they had just observed openly displaying a large handgun, to a vacant lot and wooded area. Presentence Investigation Report (PSR) ¶¶ 21-23. Petitioner fled when police approached the group but was caught after a brief chase. PSR ¶¶ 24, 29. Petitioner consented to a search of his person, which revealed that he was carrying 8.52 grams of heroin, and police found a handgun and petitioner's cellphone a few feet away. PSR ¶ 29. Petitioner consented to a search of that phone, which revealed text messages indicating that petitioner had been engaged in drug trafficking. PSR ¶ 31.

A federal grand jury in the Western District of Michigan charged petitioner with possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a) and (b)(1)(C); possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and possessing a firearm in furtherance of a drug-trafficking crime (namely, the charged possession-with-intent-to-distribute offense), in violation of 18 U.S.C. 924(c)(1)(A) (Count 7). Pet. App. A4; Indictment 2, 4, 7.

2. Shortly before the final pretrial conference, petitioner informed the district court that he wished to plead guilty to the drug-trafficking count, but proceed to trial on the count of possessing a firearm in furtherance of that drug-trafficking crime along with the felon-in-possession count. See D. Ct. Doc. 60, at 1 (Sept. 19, 2019). Petitioner asserted that such a plea would "obviate the need [for the government] to present evidence on drug dealing," D. Ct. Doc. 78, at 10 (Sept. 25, 2019), but acknowledged that "[i]f it doesn't have any impact on what evidence is going to be offered" at trial, "then there's probably no benefit" to such a partial plea, Pet. App. A35. The government did not take a position on petitioner's request. See id. at A37.

The district court denied the request. See Pet. App. A45-A51. The court observed that a defendant does not have a constitutional right to plead guilty. See id. at A46. The court acknowledged that a partial guilty plea might be appropriate in some circumstances, such as when it would avoid the introduction

of "potentially inflammatory" evidence at trial. Id. at A47; see id. at A46-A48. The court found, however, that this was not such a case because "the drug-trafficking crime is actually one of the elements that the government ha[d] to prove" for the possession-in-furtherance offense, which charged petitioner with possessing a firearm in furtherance of that specific drug-trafficking crime. Id. at A47-A48. The court accordingly observed that the evidence "regarding drug distribution, drug possession, and the quantities and the place found and all the rest" would be admissible "regardless of whether [the drug-trafficking count] is pled out in advance." Id. at A47; see id. at A48 (explaining that the drug-trafficking charge was "intertwined completely with what's still got to be tried"). The court also noted its reluctance to accept the partial guilty plea on the ground that any statements petitioner made in support of the plea might be admissible against him at trial. See id. at A29.

3. The case proceeded to trial and the jury found petitioner guilty on all three counts. Pet. App. A5. The district court thereafter denied petitioner's motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, rejecting petitioner's argument that it had erred in denying his request to proceed to trial on only two of the three charges. D. Ct. Doc. 107, at 5-7 (Nov. 18, 2019); see Pet. App. A5.

At sentencing, the district court calculated an advisory guidelines range of 37 to 46 months on the drug-trafficking and

felon-in-possession counts, with the possession-in-furtherance count requiring a mandatory consecutive sentence of 60 months. Pet. App. A6 n.2; see Sent. Tr. 3. Petitioner acknowledged that he would have faced the same guidelines range regardless of whether he had proceeded to trial on only the latter two counts, but requested a downward variance based on his attempt to plead guilty to the drug-trafficking offense alone. Pet. App. A5; see Sent. Tr. 5. Giving "some weight" to petitioner's willingness to "take responsibility for what he felt he unequivocally had to take responsibility for," the district court varied downward and sentenced petitioner to "24 months concurrent on Counts 2 and 4 to be followed by 60 months consecutive on Count 7, for a total of 84 months." Sent. Tr. 20.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A18. As relevant here, petitioner argued that the district court had erred in denying his request to proceed to trial on only two of the counts, while pleading guilty to the third, and had thereby permitted the government to present otherwise inadmissible evidence regarding drug trafficking. Id. at A7. The court of appeals rejected that argument, explaining that a defendant has no absolute right to have a partial guilty plea accepted and that the district court did not abuse its discretion in rejecting petitioner's request because it had articulated "not only practical, but sound reasons" to do so. Id. at A6-A7.

ARGUMENT

Petitioner contends (Pet. 8-25) that he is entitled to relief on the theory that the district court lacked discretion to deny his request to proceed to trial on the felon-in-possession charge and the charge of possessing a firearm in furtherance of a drug-trafficking offense, while pleading guilty to the underlying drug-trafficking offense. That contention lacks merit, and the court of appeals' unpublished decision rejecting it does not create any conflict in the courts of appeals warranting this Court's review.

1. In Santobello v. New York, 404 U.S. 257 (1971), this Court made clear that a defendant has "no absolute right to have a guilty plea accepted." Id. at 262. Accordingly, a trial court need not "accept every constitutionally valid guilty plea merely because a defendant wishes so to plead." North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970). Instead, the court "may reject a plea in exercise of sound judicial discretion." Santobello, 404 U.S. at 262.

Petitioner does not dispute that principle, see Pet. 13-14, but nevertheless asserts (Pet. 8-25) that Rule 11 of the Federal Rules of Criminal Procedure divests a district court of discretion to reject any "open" or "straight up" guilty plea to any subset of the charged offenses, even when a defendant goes to trial on other intertwined charges. He does not, however, identify any express statement in the Rule that purports to supersede the discretionary constitutional standard with an absolute rule. He instead attempts

(Pet. 14-23) to infer such a divestment from Rule 11(a)'s statement that "[i]n [g]eneral," a "defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere," Fed. R. Crim. P. 11(a)(1); Rule 11(b)'s checklist of "determin[ations]," that a district court must make before accepting a plea, Fed. R. Crim. P. 11(b)(1); and Rule 11(c)'s procedures regarding plea agreements, which identify circumstances under which such agreements may be rejected.

This Court has, however, repeatedly cited Rule 11 in decisions explaining that a district court has discretion to reject a guilty plea. See Santobello, 404 U.S. at 262; Alford, 400 U.S. at 38 n.11; Lynch v. Overholser, 369 U.S. 705, 719 (1962). Petitioner would dismiss (Pet. 16-17) those references on the theory that the current version of Rule 11 differs from prior versions on this point. Specifically, before 1975, Rule 11 not only stated -- much as it does now -- that a court "may plead not guilty, guilty or, with the consent of court, nolo contendere," but also provided that a "court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first" ensuring through a colloquy that it is voluntary and knowing. Fed. R. Crim. P. 11 (1972); see also ibid. ("If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.") The nearly comprehensive 1975 rewrite took Rule 11 "from general scheme to detailed plan," United States v.

Vonn, 535 U.S. 55, 62 (2002), by turning the former single paragraph into a provision with seven subdivisions containing expanded procedures on accepting guilty pleas and plea agreements, among other topics.

Although the rewritten Rule does not directly refer to the rejection of a guilty plea, it also does not contain any express revocation of a district court's "sound judicial discretion," Santobello, 404 U.S. at 262, to do so. In the absence of such an indication, this Court has itself referred to the amended Rule as allowing the court to "in its discretion, accept a defendant's guilty plea" after conducting a proper Rule 11(b) colloquy, United States v. Hyde, 520 U.S. 670, 674 (1997). And to the extent that the advisory Sentencing Guidelines could bear on this issue, petitioner's reliance (Pet. 24-25) on Sentencing Guidelines § 3E1.1 and its commentary is misplaced. Those provisions simply describe potential implications of a district court's accepting a guilty plea, and do not bear on the right to enter one in the first instance.

2. Petitioner errs in contending (Pet. 8-16) that the decision below creates a conflict that warrants this Court's review. Although the Ninth Circuit stated in In re Vasquez-Ramirez, 443 F.3d 692 (2006), that "a court must accept an unconditional guilty plea, so long as the Rule 11(b) requirements are met," id. at 695-696, that case did not involve a defendant who sought, as petitioner did here, to proceed to trial on some

charges while pleading guilty to another intertwined charge in the same multicount indictment. And although the Tenth Circuit in United States v. Martin, 528 F.3d 746, cert. denied, 555 U.S. 960 (2008), expressed "doubts that [a] district court's desire to avoid confusing the jury or complicating the evidentiary issues was a sufficient basis for rejecting [a] partial plea," id. at 750, that court did not decide the issue or address whether the reasons the district court provided here -- focused on the defendant's interests, not on jury confusion or evidentiary complexity -- would have sufficed.

In any event, the court of appeals' unpublished decision could not have created a circuit conflict warranting this Court's review because it does not establish binding precedent. See United States v. Sanford, 476 F.3d 391, 396 (6th Cir. 2007). And another panel of the Sixth Circuit recently stated that Vasquez-Ramirez and Martin "persuasively suggest that" it would be an abuse of discretion to reject a partial guilty plea "without ever conducting a hearing or colloquy to ascertain whether [the] guilty plea would satisfy Rule 11(b)'s requirements," and suggested (without holding) that "these out-of-circuit cases [might] persuade us to disagree with our unpublished decision in" petitioner's case. United States v. Assfy, No. 20-1630, 2021 WL 2935359, at *4 (July 13, 2021) (unpublished).

The openness of the issue in the Sixth Circuit counsels against further review of this case. See Wisniewski v. United

States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). That is particularly so because it is unclear how often the issue arises, even there. Petitioner himself indicates (Pet. 13-14) that partial pleas are commonplace in the federal system. And he identifies (Pet. 14) the district court's decision here as an outlier within the Sixth Circuit. If and when the issue is presented again, the Sixth Circuit can address it in a published opinion.

3. Further review is particularly unwarranted in this case because any error in rejecting petitioner's proposed partial guilty plea was harmless. Rule 11(h) states that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights." Fed. R. Crim. P. 11(h). That provision, which is "specifically designed to stop automatic vacaturs, calls for across-the-board application of the harmless-error prescription (or, absent prompt objection, the plain-error rule)." United States v. Davila, 569 U.S. 597, 610 (2013); see Vonn, 535 U.S. at 74. Accordingly, even if the district court erred under Rule 11, petitioner is not entitled to relief unless he was prejudiced by that error.

Petitioner was not prejudiced here. He asserts in passing (Pet. 5) that "the government presented [evidence] involv[ing] inflammatory drug-related materials that would have been irrelevant and inadmissible had the court accepted [his] partial

plea," but he does not identify any such evidence. And the district court itself found "no way the case evidence would have been any different" had it agreed to petitioner's proposal because the "drug trafficking crime" he wanted to exclude from the trial "was one of the elements the government had to prove as part of its case" for possession of a firearm in furtherance of a drug-trafficking crime. D. Ct. Doc. 107, at 7; see Pet. App. A7. Furthermore, petitioner does not assert in this Court that the government presented insufficient evidence to sustain the firearms convictions, and he recognized at sentencing that he would have faced the same guidelines range even if he had entered a partial plea. Pet. App. A5; Sent. Tr. 5-6. This case is therefore not an appropriate vehicle in which to review the question presented. Cf. Herb v. Pitcairn, 324 U.S. 117, 126 (1945) ("[I]f the same judgment would be rendered by the [lower] court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

DANIEL J. KANE
Attorney

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