No. 21-6685

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER DOMINGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts erred in finding that petitioner had not established a "fair and just reason," Fed. R. Crim. P. 11(d)(2)(B), to withdraw his guilty plea.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.M.):

United States v. Dominguez, No. 16-cr-4697 (Dec. 20, 2018) (transferred to D. Wyo.)

United States District Court (D. Wyo.):

United States v. Dominguez, No. 17-cr-98 (Mar. 4, 2019)

United States v. Dominguez, No. 18-cr-186 (Mar. 4, 2019)

United States Court of Appeals (10th Cir.):

United States v. Dominguez, No. 19-8021 (June 2, 2021)

United States v. Dominguez, No. 19-8022 (June 2, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet App. B, at 1-67) is reported at 998 F.3d 1094. The order of the district court (Pet. App. C, at 1-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2021. A petition for rehearing was denied on September 17, 2021 (Pet. App. A, at 1-4). The petition for a writ of certiorari was filed on December 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Wyoming, petitioner was convicted of carjacking, in violation of 18 U.S.C. 2119 and 2; attempted robbery involving controlled substances, in violation of 18 U.S.C. 2118(a)(1), (a)(3), (c)(1), and 2; discharging, using, or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii); and conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a). 17-cr-98 Judgment 1. The district court sentenced petitioner to 336 months of imprisonment, to be followed by three years of supervised release. Id. at 3-4. The court of appeals affirmed. Pet. App. B, at 1-67.

1. On December 3, 2016, petitioner and two accomplices stole a car and robbed the Medicine Shoppe Pharmacy in Raton, New Mexico. Pet. App. B, at 2. During the robbery, they wore face masks, displayed firearms, and ordered the employees to load "Oxy 30" (a reference to Oxycontin and Oxycodone) into black trash bags. Id. at 2-3. They were arrested later that day. See id. at 3.

After the arrests, the Raton Police Department posted about the robbery on its Facebook page. See Pet. App. B, at 3. The post caught the attention of a pharmacist who had been shot during a robbery of the Medicap Pharmacy in Cheyenne, Wyoming, two months earlier. Ibid. The Wyoming robbery closely resembled the New Mexico robbery, but was even more violent: petitioner and his

accomplices obtained the stolen vehicle used in the Wyoming robbery by carjacking the victim, and while robbing the pharmacy, they engaged in a gun battle with the pharmacist before fleeing the scene. Ibid. DNA and eyewitness evidence established that petitioner's accomplices in the New Mexico robbery were two of the participants in the Wyoming robbery. See id. at 3-4. And a vehicle matching the description of the one that was used during the Wyoming carjacking was found in the driveway of petitioner's girlfriend. Id. at 4.

2. A federal grand jury in the United States District Court for the District of New Mexico returned an indictment charging petitioner with Hobbs Act Robbery, in violation of 18 U.S.C. 1951(a); brandishing a firearm in furtherance of a crime of violence and drug trafficking crime, in violation of 18 U.S.C. 924(c); robbery involving controlled substances, in violation of 18 U.S.C. 2118(a)(1) and (c)(1), and 2; theft of medical products, in violation of 18 U.S.C. 670(a)(1), (b)(2)(A) and (B), and 2; possessing with intent to distribute Oxycodone, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and 18 U.S.C. 2; and possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. B, at 4 n.1; 16-cr-4697 Indictment 1-6.

A federal grand jury in the District of Wyoming returned an indictment charging petitioner with conspiring to commit carjacking, in violation of 18 U.S.C. 371; carjacking, in violation

of 18 U.S.C. 2119 and 2; four counts of using, carrying, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii); attempted robbery involving controlled substances, in violation of 18 U.S.C. 2118(a)(1), (a)(3) and (c)(1), and 2; and Hobbs Act robbery, in violation of 18 U.S.C. 1951(a). Pet. App. B, at 4 n.1; 17-cr-98 Indictment 1-6. Two of the four Section 924(c) counts from the Wyoming indictment were later dismissed. Pet. App. B, at 4 n.1.

Between the two indictments, petitioner faced three Section 924(c) counts. The New Mexico Section 924(c) charge, which involved the brandishing of a firearm, carried a 7-year statutory-minimum term of imprisonment. See 18 U.S.C. 924(c)(1)(A)(ii). The two Wyoming Section 924(c) charges -- one tied to the carjacking and one tied to the robbery -- each included the discharge of a firearm and carried a 10-year statutory minimum. See 18 U.S.C. 924(c)(1)(A)(iii). And because Section 924(c) requires that each term of imprisonment for a violation of the statute run consecutively to each of a defendant's other terms of imprisonment, any sentences on those counts would add to the total length of a prison term. See 18 U.S.C. 924(c)(1)(D)(ii).

At the time petitioner was charged, Section 924(c)(1)(C) further required a minimum consecutive sentence of 25 years of imprisonment in the case of a "second or subsequent conviction" under Section 924(c), 18 U.S.C. 924(c)(1)(C)(i) (2012), including where that second or subsequent conviction was entered in the same

proceeding as the defendant's first conviction under Section 924(c), Deal v. United States, 508 U.S. 129, 132-137 (1993). Accordingly, under that version of Section 924(c), petitioner would face a mandatory minimum sentence of 60 years if convicted of all three Section 924(c) offenses -- a 10-year sentence for the first Wyoming offense and consecutive 25-year sentences for the second Wyoming offense and the New Mexico offense. Pet. App. B, at 6.

3. Petitioner and the government began plea negotiations in November 2018 and reached an agreement by mid-December. Pet. App. B, at 6. Under the agreement, the New Mexico indictment would be transferred to the District of Wyoming and petitioner would plead guilty to a total of four counts: Hobbs Act robbery from the New Mexico indictment, and one Section 924(c) offense, carjacking, and attempted robbery involving controlled substances from the Wyoming indictment. Id. at 7-9 & n.3.

Pursuant to Rule 11(c)(1)(C), the parties agreed that, if the district court accepted the agreement, it would be bound to impose a 28-year term of imprisonment: 10 years for the Section 924(c) offense, 8 years for carjacking, and 10 years for attempted robbery, all to run consecutively; and 18 years for Hobbs Act robbery, to run concurrently with the sentences for the Wyoming offenses. Pet. App. B, at 7-8; 3 C.A. ROA 18. The government also agreed to dismiss the remaining counts in both indictments. Plea Agreement ¶ 9. And the U.S. Attorney's Office in New Mexico

further agreed to forgo any criminal charges against petitioner arising from an armed bank robbery for which petitioner was under investigation. 3 C.A. ROA 19; see 18-cr-186 Am. Presentence Investigation Report (PSR) ¶ 98 (describing facts of bank robbery). That bank robbery also involved the use of a firearm and could have resulted in an additional Section 924(c) charge. 5 C.A. ROA 112.

In the plea agreement, petitioner acknowledged, inter alia, that he understood the nature of the charges to which he was pleading and the sentence for those charges, and that he entered into the agreement knowingly and voluntarily. Pet. App. B, at 8-9. On December 21, 2018, petitioner appeared for a plea colloquy and confirmed that he was satisfied with his attorney, had discussed the plea with the attorney, was pleading guilty voluntarily, and understood the consequences of his plea. Id. at 9. The district court accepted the plea agreement. Ibid.

4. On the day of the plea hearing, the President signed into law the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194. In Section 403(a) of the First Step Act, Congress deleted Section 924(c)(1)(C)'s reference to a "second or subsequent conviction" and replaced it with the phrase a "violation of this subsection that occurs after a prior conviction under this subsection has become final." § 403(a), 132 Stat. 5221-5222. Under the First Step Act, petitioner's conviction on all three charged Section 924(c) offenses, which were committed in the

absence of a prior final Section 924(c) conviction, would have resulted in a 27-year statutory-minimum sentence, rather than a 60-year statutory-minimum sentence: a 7-year statutory-minimum sentence for brandishing a firearm, and two 10-year statutory-minimum sentences for discharging a firearm, all to run consecutively. See Pet. App. B, at 10; 18 U.S.C. 924(c)(1)(A), and (D)(ii); see § 403(b), 132 Stat. 5222 (applying new scheme to all offenses for which a sentence "ha[d] not been imposed as of" the date of enactment).

Petitioner subsequently moved to withdraw his guilty plea. He contended that due to the change in law applicable to his potential sentence for the full set of charged offenses, "a fair and just reason" existed to withdraw his plea to a subset of those offenses. Pet. App. C, at 5 (citation omitted). Specifically, he asserted that the plea had not been knowing or intelligent and that he had not received "close assistance" of counsel in negotiating that plea. Pet. App. B, at 11-12, 17 (citation omitted). The district court denied the motion. Pet. App. C, at 9-10; see Pet. App. B, at 13. The court found no dispute that petitioner's plea was voluntary. Pet. App. C, at 9. And it explained that petitioner's lack of awareness of the First Step Act did not provide a sufficient basis to find that the plea was not knowingly entered, given that the plea colloquy fully covered the minimum and maximum sentences as well as the sentencing range for each charge to which he pleaded guilty. Pet. App. C, at 9-

10. The court also rejected petitioner's claim that he had been denied "close assistance" of counsel when, during several weeks of plea negotiations, defense counsel gave advice based on the law in effect at that time, before passage of the First Step Act became certain. Id. at 8-9.

Consistent with the now-passed First Step Act, the Probation Office calculated a guidelines range of 412 to 485 months for the offenses to which petitioner pleaded guilty. PSR ¶ 137. The Probation Office noted that the plea agreement called for a binding sentence of 336 months, which was 76 months below the low end of the guidelines range. Ibid. The district court sentenced petitioner according to the plea agreement to 336 months of imprisonment, to be followed by three years of supervised release. 17-cr-98 Judgment 3-4.

5. The court of appeals affirmed. Pet. App. B, at 1-67.

After considering the factors set forth in United States v. Yazzie, 407 F.3d 1139, 1142 (10th Cir.), cert. denied, 546 U.S. 921 (2005), the court of appeals determined that the district court did not abuse its discretion in declining to allow petitioner to withdraw his guilty plea. Id. at 17, 20. The court of appeals rejected petitioner's theory that, because he had negotiated his plea under the then-correct understanding that he would be subject to a 60-year statutory-minimum sentence if convicted on all three Section 924(c) counts, his plea had not been made knowingly and intelligently. Id. at 23-26. The court explained that "[t]he

First Step Act's stacking amendment did not impact the charges to which [petitioner] pleaded guilty and as to which the district court undisputedly conducted a thorough Rule 11 colloquy." Id. at 25. And the court further rejected petitioner's argument that his plea was invalid because he did not receive "close assistance" of counsel, emphasizing among other things that the 28-year sentence in the plea agreement was 76 months below the low end of the applicable guidelines range for the offenses to which he pleaded guilty; that his exposure was far greater for the full set of relevant offenses, which even under the First Step Act would have exposed him to a mandatory minimum sentence of twenty-seven years, on the Section 924(c) offenses, a statutory maximum of 165 years on the non-924(c) charges, and decades more on the charges the government agreed not to pursue; that petitioner "d[id] not come close to showing" weakness in the government's evidence that "would have made it rational for him to forgo his very favorable plea agreement"; and that petitioner had not identified evidence that he would have received a more favorable plea offer had his attorney raised a First Step Act issue. Id. at 31-58.

Judge Lucero dissented. Pet. App. B, at 59-67. In his view, the record sufficiently established that "effective assistance of counsel would have affected [petitioner's] choice to accept the plea agreement." Id. at 65.

ARGUMENT

Petitioner renews his contention (Pet. 17-21) that he should have been permitted to withdraw his guilty plea, on the theory that he was misinformed about the mandatory minimum penalty for his Section 924(c) charges. The lower courts' factbound rejection of his withdrawal request is correct and does not conflict with any decision of another court of appeals or of a state court of last resort. Further review is unwarranted.

1. Rule 11 of the Federal Rules of Criminal Procedure provides that "[a] defendant may withdraw a plea of guilty * * * after the court accepts the plea, but before it imposes sentence if * * * the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B); see Fed. R. Crim. P. 11(e) ("After the court imposes sentence, the defendant may not withdraw a plea of guilty * * * , and the plea may be set aside only on direct appeal or collateral attack."). Accordingly, a defendant has no absolute right to withdraw a guilty plea. See, e.g., United States v. Fernández-Santos, 856 F.3d 10, 15 (1st Cir. 2017); United States v. Harrison, 777 F.3d 227, 234 (5th Cir. 2015). Instead, the defendant bears the burden of showing that relief should be granted. See United States v. Rivernider, 828 F.3d 91, 104 (2d Cir.), cert. denied, 137 S. Ct. 456 (2016); United States v. Collins, 796 F.3d 829, 834 (7th Cir. 2015).

"As innumerable cases have said, a ruling on a motion for leave to withdraw a plea of guilty * * * is discretionary with the trial court, and an appellate court will rarely interfere with the exercise of this discretion." 1A Charles Alan Wright & Andrew D. Leipold, Federal Practice and Procedure § 181, at 354 (2008). In United States v. Yazzie, 407 F.3d 1139, cert. denied, 546 U.S. 921 (2005), the Tenth Circuit identified several factors for district courts to consider in determining whether a "fair and just reason" exists to withdraw a plea, including whether the defendant asserts his innocence, whether the plea was knowing and voluntary, and whether the defendant received "close assistance" of counsel. Id. at 1142 (citation omitted); see Pet. App. B, at 17. Other courts of appeals have generally focused on similar factors. See 24 Daniel R. Coquillette et al., Moore's Federal Practice § 611.31[2][b], at 611-110 (3d ed. Mar. 2022) (explaining that, "[a]lthough the courts enumerate these concerns in different ways, they can be easily grouped into" the same factors). And petitioner does not challenge that overall approach.

The district court in this case applied that approach and did not abuse its discretion in denying petitioner's motion to withdraw his plea. As the court of appeals explained, the district court conducted a thorough Rule 11 colloquy where petitioner acknowledged that he was guilty and understood the consequences of his plea, and petitioner was correctly informed of the penalties for the offenses that he admitted to committing. Pet. App. B, at

25. Petitioner received close assistance of counsel, with a highly favorable plea agreement negotiated by his attorney. Id. at 39. And petitioner has never asserted his innocence of the charged offenses. Id. at 17, 19.

Petitioner's sole contention in this Court is the categorical assertion that any mistake regarding the statutory maximum or minimum sentenced attached to a dismissed count automatically renders a plea unknowing. Pet. 19. As the court of appeals observed, however, petitioner cites no authority for that "novel position." Pet. App. B, at 25. Instead, Rule 11 requires a district court to advise a defendant about the potential sentencing exposure for the charges on which he is agreeing to be convicted, not dismissed charges. See Fed. R. Crim. P. 11(b)(1). The district court's role to ensure that the defendant understands the consequences of what he is doing; it is expressly foreclosed from participating in plea discussions. See Fed. R. Crim. P. 11(c)(1). Petitioner no longer disputes that he received close assistance of counsel in those negotiations, see Pet. 17-21, and the Constitution "permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor" -- including legal misapprehensions. United States v. Ruiz, 536 U.S. 622, 630 (2002) (citing, inter alia, Brady v. United States, 397 U.S. 742, 757 (1970)). Accordingly, petitioner's lack of awareness about

the applicability of the First Step Act did not render his plea unknowing and did not support the withdrawal of the plea.

2. The decision below comports with the decisions of other courts of appeals that have rejected a defendant's efforts to withdraw a plea where, contrary to the defendant's understanding during plea negotiation, the defendant would have been subject to the First Step Act's reduced statutory minimums for dismissed charges. See United States v. Hardy, 838 Fed. Appx. 68, 74-77 (5th Cir. 2020) (per curiam); United States v. Marc, 806 Fed. Appx. 820, 821-822 (11th Cir. 2020) (per curiam). And no conflict warranting this Court's review exists between the decision below and the decisions that petitioner cites (Pet. 9-14).

In Morrow v. State, 548 P.2d 727 (1976), decided nearly half a century ago, the Supreme Court of Kansas determined that a defendant was entitled to an evidentiary hearing as to whether his plea was involuntary where he alleged that the State had induced his plea to armed robbery by promising not to seek consecutive sentences on three additional counts that were actually lesser-included offenses that could not result in additional convictions. Id. at 730-731, 734. The court explained that the plea may not have been voluntary because the State's promise "to dismiss the three lesser counts if defendant would plead guilty to aggravated robbery was legally meaningless." Id. at 731. The court also emphasized that the plea colloquy had not addressed potential coercion or included specific questions about the plea's

voluntariness. Id. at 732. Here, in contrast, petitioner does not challenge the voluntariness of his plea, Pet. App. B, at 24 n.6; petitioner received a "thorough plea colloquy," id. at 23, which necessarily included questions absent in Morrow, see Fed. R. Crim. P. 11(b)(2); and no legal error eliminated the benefit of petitioner's plea agreement, which remains quite favorable even under current law, see, e.g., id. at 41.

In United States v. De La Torre, 940 F.3d 938 (2019), the Seventh Circuit vacated the guilty pleas of two defendants who were incorrectly advised that they faced a mandatory minimum of life imprisonment if convicted at trial. Id. at 948-953. For both defendants, the benefit of the plea agreement -- that the government amended the information to allege "only one prior felony drug conviction" -- was illusory because the additional prior convictions did not in fact qualify as predicates under the relevant recidivism statute. Id. at 948. As to the first defendant, the government conceded that vacatur of the plea agreement was warranted, and the court "accept[ed] the government's concession" after determining that the defendant's plea was driven by the belief that "life in prison was his only alternative." Id. at 949. As to the second defendant, the court determined that the record, including the sentencing judge's statements expressing concern about the severity of the agreed-on sentence, established that the accurate information "would have changed the [defendant's] calculus" as to whether to plead guilty.

Id. at 952; see id. at 952-953. Here, in contrast, the court of appeals determined that petitioner's plea agreement was "very favorable" when considered against his actual sentencing exposure and did not find that any misapprehension affected his decision to plead guilty. Pet. App. B, at 41.

Finally, in United States v. Guerra, 94 F.3d 989 (1996), the Fifth Circuit vacated a conviction based on a Rule 11 violation where a defendant pleaded guilty to one of two charged offenses after the district court incorrectly informed him that he was subject to a recidivist enhancement that would expose him to 30 years on each count and sentenced him based on that mistaken understanding of the applicable maximum. Id. at 991-992, 994-995. In this case, however, petitioner has not identified a Rule 11 error and "does not contest the sufficiency of the court's Rule 11 colloquy." Pet. App. B, at 24. And in a recent unpublished decision, the Fifth Circuit upheld a district court's denial of a motion to withdraw a guilty plea based on the enactment of the First Step Act, Hardy, 838 Fed. Appx. at 74-77. Although that decision is nonprecedential and did not address Guerra specifically, it illustrates that the Fifth Circuit does not view its precedent to preclude a result in accord with the decision below in this case. See id. at 75-77 (distinguishing a change in applicable statutory minimums for uncharged offenses from situations in which the Fifth Circuit allowed the withdrawal of a plea).

3. Review of the lower courts' factbound determination here is not warranted for the additional reason that this case involves an unusual situation. Petitioner's only challenge to the negotiated plea agreement is that the plea was rendered not knowing and voluntary based on the idiosyncratic circumstance the penalties for some of the counts that would be dismissed changed on the very day of his plea hearing under a statute that applied to certain prior offenders. That circumstance will arise only rarely. Making the case particularly unrepresentative, petitioner has abandoned any argument that his lawyer performed deficiently in negotiating this agreement for him -- which is extremely favorable even considering the amended stacking provision for Section 924(c) -- and he does not contend that he is innocent of the crimes to which he pleaded guilty. This Court's intervention is not warranted to address this effectively sui generis case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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