

No. 17-6415

IN THE SUPREME COURT OF THE UNITED STATES

ZACHARY CHANDLER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

NINA GOODMAN
Attorney

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

QUESTIONS PRESENTED

1. Whether robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), qualifies as a "crime of violence" under 18 U.S.C. 924(c) (3) .

2. Whether the district court abused its discretion in determining that petitioner had not established a "fair and just reason," Fed. R. Crim. P. 11(d) (2) (B), to withdraw his guilty plea.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted at 699 Fed. Appx. 863.¹

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2017. A petition for rehearing was denied on August 1, 2017 (Pet. App. 9). The petition for a writ of certiorari was filed on

¹ The pages of the petition appendix are not numbered. This brief cites the appendix as if it was numbered consecutively.

October 16, 2017. 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 Southern District of Florida, petitioner was convicted on eight counts of obstructing or attempting to obstruct interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (iii); and one count of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (ii). The district court sentenced petitioner to 480 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-6.

1. In October and November 2015, petitioner committed seven armed robberies of gas stations near Fort Lauderdale, Florida. Presentence Investigation Report (PSR) ¶¶ 8-14. Petitioner's modus operandi was the same in each case: he would enter the station with a black cloth covering his face, brandish a revolver, and order the station employees to give him money. Ibid.

Two of petitioner's robberies are particularly relevant here. On November 17, 2015, petitioner robbed a Sunoco gas station. PSR ¶ 12. During that robbery, petitioner struck a station employee in the head with his revolver, causing the revolver to discharge. Ibid. On November 19, 2015, petitioner robbed a BP gas station.

PSR ¶ 13. During that robbery, he threatened to shoot a station employee who tried to hide behind the counter. Ibid.

On December 1, 2015, petitioner was arrested after attempting to rob a Mobil gas station. PSR ¶ 15. Police recovered the black cloth petitioner had used to cover his face during the earlier robberies, and a loaded .38 caliber revolver, from petitioner's car. PSR ¶¶ 9, 15. A Mobil employee identified petitioner as having robbed the same station a few weeks earlier. PSR ¶¶ 11, 15. Various articles of clothing that petitioner wore during the robberies were recovered during a search of petitioner's home. PSR ¶¶ 8-10, 16. And petitioner's stepmother and his roommate viewed surveillance videos of the robberies and identified petitioner as the robber. PSR ¶ 16.

2. A federal grand jury charged petitioner with eight counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of discharging a firearm during and in relation to a crime of violence (the Hobbs Act robbery of the Sunoco station on November 17, 2015), in violation of 18 U.S.C. 924(c)(1)(A)(iii); seven counts of brandishing a firearm during and in relation to crimes of violence (the other Hobbs Act robberies), in violation of 18 U.S.C. 924(c)(1)(A)(ii); and one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). C.A. App. 18-26.

Petitioner moved to dismiss the Section 924(c) counts, asserting that Hobbs Act robbery is not a "crime of violence" as

defined in 18 U.S.C. 924(c)(3). C.A. App. 30-43. The Hobbs Act defines robbery to require the "taking or obtaining" of personal property from another "by means of actual or threatened force, or violence, or fear of injury." 18 U.S.C. 1951(b)(1). Section 924(c)(3) defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B). Petitioner argued that Hobbs Act robbery does not qualify as a "crime of violence" under Section 924(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness. C.A. App. 30-43.

The district court denied petitioner's motion. C.A. App. 73. The court determined that "Hobbs Act robbery certainly qualifies as a crime of violence" under Section 924(c), notwithstanding Johnson. Ibid.

3. On the day petitioner's trial was due to begin, petitioner's counsel informed the district court that petitioner intended to plead guilty to two of the Hobbs Act robbery counts and one of the Section 924(c) brandishing counts, but would proceed

to trial on the remaining counts. C.A. App. 66-70. After a brief recess, petitioner's counsel informed the court that petitioner had changed his mind and wanted to "go to trial on everything." Id. at 75. Petitioner's counsel explained that neither he nor petitioner had realized that, by pleading guilty to brandishing a firearm under Section 924(c), petitioner would be admitting facts that would likely lead to his conviction at trial on the felon-in-possession count, which carried a 15-year mandatory-minimum sentence under the ACCA in light of petitioner's criminal history. Id. at 74-75.

After a further recess, petitioner and the government informed the district court that they had reached an agreement under which petitioner would plead guilty to all of the Hobbs Act robbery counts; the Section 924(c) count charging petitioner with discharging a firearm during the November 17, 2015 Sunoco robbery; and the Section 924(c) count charging petitioner with brandishing a firearm during the November 19, 2015 BP robbery. C.A. App. 84-86. Petitioner's counsel expressly acknowledged that petitioner's conviction on the two Section 924(c) counts would result in a combined mandatory minimum sentence of 35 years of imprisonment (ten years for the discharge count and a consecutive 25 years for the brandishing count), in addition to whatever sentence he received on the Hobbs Act robbery counts. Id. at 84; see 18 U.S.C. 924(c) (1) (A) (iii) (imposing a ten-year consecutive mandatory minimum sentence "if the firearm is discharged"); 18 U.S.C.

924(c)(1)(C)(i) (imposing a 25-year consecutive mandatory minimum sentence for a "second or subsequent conviction" under Section 924(c)). The government and petitioner's counsel made clear that, because petitioner was not pleading guilty to the felon-in-possession count, he would not also be subject to a 15-year mandatory minimum sentence under the ACCA. C.A. App. 85.

The parties executed a formal plea agreement and factual proffer. C.A. App. 45-53. The district court then engaged in an extensive colloquy with petitioner to ensure that his plea was knowing, intelligent, and voluntary. See id. at 87-128. During the course of that colloquy, petitioner's counsel confirmed that he had informed petitioner of the mandatory minimum sentences for the offenses to which he was pleading guilty and that petitioner "underst[ood] he's going to get a certain amount of time for the robberies, plus 10 years, plus 25 years." Id. at 91-92; see id. at 87-91 (discussing mandatory minimum sentences). The court then asked petitioner whether, in light of those sentences, he still wanted to "enter pleas of guilty to these charges." Id. at 92. Petitioner said, "Yes." Ibid.

Petitioner also assured the district court during the plea colloquy that he had reviewed the plea agreement and discussed it with his counsel, that he understood the agreement, and that he was fully satisfied with the advice and representation he had

received from his attorney. C.A. App. 95-97.² And for each of the ten counts to which petitioner pleaded guilty, he stated that no one had forced or threatened him to enter a guilty plea, that his plea was a product of his own free will, and that he was pleading guilty because he had, in fact, committed the charged offense. Id. at 97-110.

Before accepting the plea, the district court verified that petitioner was aware of the mandatory minimum and statutory maximum sentences to which he would be subject. C.A. App. 107-110. The court described those sentences in detail, ibid., and petitioner repeatedly said that he had no questions "with regard to the minimum mandatory penalties or the maximum penalties" he faced, id. at 111; see id. at 127-128. Petitioner's counsel reiterated that he had informed petitioner of "the minimum and maximum possible sentences per the statutes, and * * * concurrent and consecutive time and how that works under the statutes." Id. at 116; see id. at 118 (confirming that petitioner and his counsel "went over the minimum and maximum possible statutory penalties and the fact that under the statute" the sentences had to run consecutively). Petitioner agreed with his counsel's description of what they had discussed and stated that he had no questions about his plea agreement. Id. at 117, 119, 127-128.

² Although petitioner stated that he suffered from bipolar disorder and schizophrenia, he confirmed that neither of those conditions affected his ability to comprehend the proceedings, to read and understand the plea agreement, or to consult with counsel. C.A. App. 93-94.

Based on its colloquy with petitioner, the district court accepted petitioner's guilty plea. C.A. App. 128. The court expressly found that petitioner's plea was "knowing and voluntary" and that he was "aware of the nature of each charge and the consequence of each plea." Ibid.

4. Before sentencing, petitioner moved to withdraw his guilty plea. C.A. App. 54-56. Petitioner contended that he had been prepared to go to trial but had "changed his mind at the last minute" due to the "pressure" he felt after learning on the day of trial that he faced a 15-year mandatory minimum sentence on the felon-in-possession count. Id. at 55. At a hearing on that motion, petitioner acknowledged that, in light of the mandatory minimum sentences that applied to his various offenses, he would have received "over a hundred years" in prison if he was found guilty at trial and that he decided to plead guilty based on his counsel's advice that he would have a "better chance of * * * seeing freedom" by taking the plea. Id. at 154-155.

The district court denied petitioner's motion. C.A. App. 156-157. The court noted that it had thoroughly explained the "minimum and maximum penalties to be imposed" at the plea hearing and that petitioner had acknowledged that he understood them. Id. at 156. The court found that petitioner was "properly advised" and "fully understood the consequences of [his] plea," and that his plea was "knowing and voluntary." Id. at 156-157.

The district court sentenced petitioner to 480 months of imprisonment, including concurrent 60-month terms on the Hobbs Act robbery counts, a mandatory minimum 120-month term on the Section 924(c) discharge count, and a mandatory minimum 300-month term on the Section 924(c) brandishing count. C.A. App. 59, 195.

5. The court of appeals affirmed. Pet. App. 1-6.

a. As relevant here, petitioner first contended that the district court abused its discretion by denying his motion to withdraw his guilty plea. Pet. App. 2. Petitioner asserted, specifically, that his attorney had incorrectly advised him about the sentence that could be imposed and that he had felt pressured to plead guilty because his trial was about to begin. Ibid. The court of appeals rejected that contention, noting that the district court had conducted a "lengthy and thorough" inquiry about each of the charges before accepting petitioner's plea. Id. at 3. The court of appeals observed that the district court had expressly found that petitioner was properly advised by his counsel, that the district court itself had explained the potential penalties in detail, and that petitioner had confirmed that he understood the penalties and the consequences of his plea. Id. at 3-4. Citing petitioner's statements during the plea colloquy that he was satisfied with his counsel's representation and was pleading guilty of his own free will, which the court of appeals "strongly presumed to be true," the court of appeals determined that the

district court had not abused its discretion by declining to allow petitioner to withdraw his plea. Id. at 4.

b. Petitioner also contended that the district court erred by denying his motion to dismiss the Section 924(c) counts because Hobbs Act robbery does not qualify as a “crime of violence” under that section. Pet. App. 4. The court of appeals did not address the merits of that argument, instead concluding that petitioner relinquished the claim by entering a “voluntary, unconditional guilty plea” to two of the Section 924(c) counts. Ibid.

ARGUMENT

The court of appeals correctly rejected petitioner’s challenges to his convictions under 18 U.S.C. 924(c) and to the denial of his motion to withdraw his guilty plea. Its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 22-34) that robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), does not qualify as a “crime of violence” within the meaning of 18 U.S.C. 924(c)(3). Even setting aside the court of appeals’ determination that petitioner had relinquished that argument by pleading guilty (Pet. App. 4-5),³ it does not warrant review by this Court.

³ In Class v. United States, No. 16-424 (argued Oct. 4, 2017), this Court is considering whether an unconditional guilty plea precludes a defendant from challenging the constitutionality of the statute of conviction on appeal. Even if the decision in Class might bear on a claim like the one at issue here, involving whether a criminal offense satisfies a statutory definition, no reason exists to hold this petition for Class because petitioner’s

For the reasons stated in the government's brief in opposition to the similar petition for a writ of certiorari filed in Garcia v. United States, cert. denied, No. 17-5704 (Jan. 8, 2017), Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. 924(c) (3) (A) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Ibid.; see Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).⁴ Every court of appeals to consider the issue, including the Eleventh Circuit, has so held. Br. in Opp. at 8, Garcia, supra (No. 17-5704). And this Court has repeatedly denied review in other cases raising that issue, id. at 5 & n.1, including in Garcia, supra.

Petitioner asserts (Pet. 28-30) that the Hobbs Act's "'fear of injury' element" is equivalent to the element of "intimidation" under the federal bank robbery statute, see 18 U.S.C. 2113(a) (defining bank robbery to require the use of "force and violence, or * * * intimidation"), and that neither statute requires the intentional use or threat of violent force. But, as with Hobbs Act robbery, every court of appeals to have addressed whether bank robbery under Section 2113(a) qualifies as a "crime of violence" within the meaning of Section 924(c) (3) (A) and similar provisions

claim would have correctly been rejected on the merits had the court of appeals entertained it.

⁴ We have served petitioner with a copy of the government's brief in opposition in Garcia.

has held that it does.⁵ And this Court has repeatedly, and recently, denied petitions for writs of certiorari raising that issue.⁶

Because Hobbs Act robbery qualifies as a “crime of violence” under 18 U.S.C. 924(c)(3)(A), no reason exists to consider petitioner’s argument (Pet. 30-34) that 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. Nor does any reason exist to hold this petition for the decision in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017). Dimaya concerns the constitutionality of 18 U.S.C. 16(b), the language of which is similar to Section 924(c)(3)(B). But Dimaya presents no issue concerning a provision similar to Section 924(c)(3)(A), and thus the Court’s holding in Dimaya will not resolve any question that will affect the outcome of this case.

⁵ See, e.g., United States v. Ellison, 866 F.3d 32, 35-39 (1st Cir. 2017); United States v. Williams, 864 F.3d 826, 829-830 (7th Cir.), cert. denied, 138 S. Ct. 272 (2017); In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016); United States v. McNeal, 818 F.3d 141, 153 (4th Cir.), cert. denied, 137 S. Ct. 164 (2016); Johnson v. United States, 779 F.3d 125, 128-129 (2d Cir.), cert. denied, 136 S. Ct. 209 (2015); Royal v. Tombone, 141 F.3d 596, 602 (5th Cir. 1998); see also Holder v. United States, 836 F.3d 891, 892 (8th Cir. 2016) (per curiam) (armed bank robbery); United States v. Wright, 215 F.3d 1020, 1028 (9th Cir.) (same), cert. denied, 531 U.S. 969 (2000).

⁶ See, e.g., Schneider v. United States, No. 17-5477 (Jan. 8, 2018); Castillo v. United States, No. 17-5471 (Jan. 8, 2018); Williams v. United States, 138 S. Ct. 272 (2017) (No. 17-5551); Bruce v. United States, 137 S. Ct. 1580 (2017) (No. 16-7084); Fox v. United States, 137 S. Ct. 1224 (2017) (No. 16-6989); McBride v. United States, 137 S. Ct. 830 (2017) (No. 16-6475); Wingate v. United States, 136 S. Ct. 1364 (2016) (No. 15-5979).

2. Petitioner separately contends (Pet. 34-38) that the court of appeals erred in determining that the district court did not abuse its discretion by denying his motion to withdraw his guilty plea. That factbound contention does not warrant review.

The court of appeals correctly determined that the district court did not abuse its discretion by denying petitioner's motion to withdraw his plea. Pet. App. 3-4. 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). 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."). 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).

Petitioner asserts (Pet. 37-38) that his attorney incorrectly advised him about the “length of the sentence to be imposed” and that the allegedly incorrect advice “vitiate[d]” petitioner’s statements during the plea colloquy. Pet. 38. The district court found to the contrary, however, stating that petitioner was “properly advised” and “understood the minimum mandatory penalties and the maximum penalties that could be imposed.” C.A. App. 156-157. That finding is amply supported by the record, which shows that petitioner was repeatedly advised of the mandatory minimum and maximum sentences he faced and consistently stated that he wished to plead guilty notwithstanding those penalties. See, e.g., id. at 84-85, 87-92, 107-111, 116, 118, 127-128. The court of appeals relied on that finding in determining that the district court did not abuse its discretion in denying petitioner’s motion. Pet. App. 3-4. This Court generally does not grant review to revisit the concurrent factual findings of two courts below, see Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 841 (1996), and no reason exists to do so here. Cf. United States v. Johnston, 268 U.S. 220, 227 (1925) (“We do not grant * * * certiorari to review evidence and discuss specific facts.”).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

NINA GOODMAN
Attorney

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