No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICO MONTELL REID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Federal Rule of Criminal Procedure 11 prohibits a district court from discussing sentencing options with a defendant at the sentencing hearing, when the plea has been accepted, but the court has not yet accepted the plea agreement and suggests that it will not accept the agreement if the defendant does not yield to the district court's constraints.

In particular, the district court, who had not yet accepted the plea agreement, told Reid at sentencing, that it would impose a sentence much higher than the negotiated agreement of 240-months imprisonment if Reid did not want to comply with the terms of the plea agreement. The sentence the district court warned it would impose (34 years) was the calculation from the presentence report for all the offenses charged in the indictment, including sentence calculations for six counts to which Reid had not pled guilty. The district court failed to inform Reid that he would be allowed to withdraw the guilty plea if the district court declined to accept the plea agreement, which the court indicated it would do if Reid persisted in asking for the guideline range as calculated in the presentence report, which was 106-117 months for the counts to which he pled guilty.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rico Montell Reid, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 18-4334, entered on December 14, 2018.

OPINION BELOW

The Fourth Circuit panel issued its unpublished opinion on December 14, 2018, affirming the decision of the United States District Court for the District of South Carolina. The Fourth Circuit's opinion is attached as App. 1A-3A. The Fourth Circuit issued its judgment affirming in part and dismissing in part the appeal on December 14, 2018. App. 4A. Reid did not file a petition for rehearing and rehearing *en banc*. Reid's appeal challenged the validity of the plea agreement because the district court improperly interfered with the plea when it indicated it would impose a 34-year sentence on Reid, encompassing charges to which Reid had not pled, if Reid did not agree to the 20-year sentence stipulated in the plea agreement. Reid wanted to be sentenced within the guideline range calculated for charges to which he pled, which was less than half the 20-year sentence specified in the plea agreement.

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and entered its judgment on December 14, 2018. App. 1A-4A. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY/ CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 11(c)(3) provides:

> (3) Judicial Consideration of a Plea Agreement.
>
> (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.
>
> (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

Federal Rule of Criminal Procedure 11(c)(5) provides:

> (5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):
>
> (A) inform the parties that the court rejects the plea agreement;
>
> (B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and
>
> (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

STATEMENT OF THE CASE

Reid was charged in a nine-count indictment of various drug charges, being a felon in possession of a firearm and two violations of 18 U.S.C. §924(c). JA 11-14.[1] Petitioner pled guilty to Counts Three, Seven and Eight on January 16, 2018 pursuant to a Rule 11(c)(1)(C) plea agreement. JA 16-22. The counts to which Reid pled were for violations of 18 U.S.C. §924(c), 18 U.S.C. §922(g)(1) and 21 U.S.C. §841(a)(1). *Id.* The plea agreement was based on Rule 11(c)(1)(C), with the parties agreeing to a 240-month sentence. JA 21, ¶10. At the change of plea hearing, the court accepted Reid's plea, but did not indicate it accepted the Rule 11(c)(1)(C) agreement at that time. JA 43-44.

The presentence report ("PSR") calculated Reid's guideline range as 46-57 months, based on a criminal history of III and total offense level of 21, for Counts Seven and Eight. JA 85, ¶100. For Count Three, Reid was subject to a 60-month consecutive sentence. *Id.* Therefore, at most, a guideline sentence for the counts to which Reid pled would be 117 months.

The court adopted the PSR. *Id.* Notwithstanding the Rule 11 agreement, the court indicated it was obligated to put the guidelines range into the record, which was 46 to 57 months, with a consecutive five-year sentence based on a total offense level of 21 and criminal history category III. JA 47. Neither party had an issue with the

[1] Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. *See United States v. Reid*, No. 18-4334, *Joint Appendix* (ECF Nos. 19 and 2) (4th Cir. filed July 27, 2018).

guidelines calculation. *Id.* The court further noted the plea agreement called for a 240-month sentence. *Id.*

The government told the court that it recommended the court adopt the Rule 11 plea agreement. JA 48. Reid's counsel, however, indicated that Reid had a problem with the plea agreement and was confused about the sentence. JA 48-49. Reid's counsel indicated that Reid asked if the guidelines could apply to his sentence, rather than the 240 months. JA 48. Both the government and Reid's counsel referenced that the potential sentence for all the charges absent the plea agreement could have been 34 years. JA 48; JA 85, ¶102.

The court noted that Reid sent the court a letter, asking the court for leniency and consideration for various things in the sentencing, which led the court to believe that Reid might not understand that the plea agreement required a 240-month sentence. JA 49. The court concluded:

> I'm not going to pass sentence until I know that Mr. Reid fully understands it and that he is going along with it, because otherwise I'm going to sentence him according to the guidelines, but if I do that, Mr. Reid, I'm going to tell you that the sentence would be more than what is agreed to between you and the government, but that's your choice, not mine.

JA 49. The court further stated he would allow Reid to consult with his counsel, after which the court expected Mr. Reid to say "on the record he wants to be sentenced by the guidelines, or he does not and he wants to go along with the stipulated time in the agreement." JA 49-50.

After counsel and Reid's off-the-record discussion, counsel indicated that he explained to Reid that, as the PSR showed, Reid could get a 34-year sentence if

convicted of all counts. JA 50. Counsel said he told Reid "that the 25 years would be right back on" as indicated in the PSR. *Id.* Reid's counsel stated on the record that he told Reid: "it's 34 years or 20 years, and he – finally I think he's got a good grasp of it." JA 50.

Counsel indicated he told Reid about the 25 years, and thought Reid now understood. *Id.* When the court directly questioned Reid, Reid responded:

> Yes, sir, I agree. I understand that me going by the guidelines would be more than the agreed sentence.

JA 51. The court then sentenced Reid to 240-months and a three-year term of supervised release. JA 54.

Reid was sentenced on May 10, 2018. Before Reid was sentenced, the United States Senate had introduced a bill that ultimately became The First Step Act of 2018. Shortly after Reid's sentencing, the House of Representatives passed the bill on July 25, 2018. *See First Step Act of 2018*, P.L. 115-391, 132 Stat. 5194 (Dec. 21, 2018) (review of bill drafts). Among other things, the First Step Act clarified that 18 U.S.C. §924(c) does not allow consecutive five-year and twenty-five year sentences for two §924(c) convictions charged in the same indictment, as occurred in Reid's indictment. *First Step Act of 2018*, P.L. 115-391, 132 Stat. 5194, 5221-22. The provisions of the First Step Act related to §924(c) do not apply retroactively if the defendant was sentenced before the bill was enacted, which occurred on December 21, 2018. *Id.* In other words, had Reid been sentenced after the First Step Act, he would not be subject to consecutive five-year and twenty-five-year sentences for the two §924(c) counts charged, a driving factor behind the district court's suggestion it

would impose a 34-year sentence if Reid did not agree to the negotiated plea.

Reid appealed his conviction and sentence, arguing that the district court improperly interfered with plea negotiations and that the district court failed to give Reid the opportunity to withdraw his plea. In affirming the district court, the Fourth Circuit summarily concluded that the district court did not improperly participate in plea negotiations. App. 3A. The appellate court dismissed the remainder of Reid's claims based on the appeal waiver in his plea agreement. *Id.*

Reid's case involves a narrow issue which has not yet been decided by this Court. This Court has recognized both that a defendant has the absolute right to withdraw his plea before the guilty plea is accepted by the district court and that the fair and just reason for withdrawal of a plea applies when the court has accepted a defendant's plea, but not yet accepted the plea agreement. *United States v. Hyde*, 520 U.S. 670 (1997). This Court also recognizes the impropriety of the district court's participation in plea negotiations. *United States v. Davila*, 569 U.S. 597, 605-08 (2013). The issue here involves a convergence of a defendant's right to withdraw his guilty plea when the district court declines to adopt the plea agreement and interference by the district court to convince the defendant to agree to the negotiated sentence of 240 months, when the guideline range as calculated in the presentence report was substantially lower.

This petition follows.

REASONS FOR GRANTING THE PETITION

Federal Rule of Criminal Procedure 11 completely prohibits courts from participating in plea negotiations. *United States v. Baker,* 489 F.3d 366, 370 (D.C. Cir. 2007); *United States v. Bradley*, 455 F.3d 453, 460 (4th Cir. 2006); *United States v. Miles*, 10 F.3d 1135, 1139 (5th Cir. 1993). Minor and unintentional participation by the court in plea negotiations violates Rule 11. *United States v. Ayika*, 554 Fed. Appx. 302, 305 (5th Cir. 2014). "Rule 11(e)(1) prohibits absolutely a district court from 'all forms of judicial participation in or interference with the plea negotiation process.'" *United States v. Daigle*, 63 F.3d 346, 348 (5th Cir. 1995) (citation omitted).

For example, the Fifth Circuit held there was improper court participation in plea negotiations when the court indicated, during a meeting with the parties in chambers, it would cap the defendant's sentence at the nine years recommended by the government. *Id.* at 348-49. That court also held it was plain error when the district court urged the defendant to cut his losses, suggesting the court believed the defendant was guilty of the charged offenses, during plea discussions at a status conference where the defendant entered a plea agreement the next day. *Ayika*, 554 Fed. Appx. at 306. Similarly, the court found a Rule 11 violation when the district court suggested that it believed the defendant was guilty on the underlying charges and the court preferred a plea. *United States v. Pena*, 720 F.3d 561, 571-72 (5th Cir. 2013).

The prohibition against judicial participation in plea negotiations exists to: (1) avoid judicial coercion of an involuntary guilty plea; (2) protect "against unfairness

and partiality in the judicial process"; and (3) avoid the appearance that the judge is an advocate for the plea, rather than a "'neutral arbiter'". *Bradley*, 455 F.3d at 460 (quoting *United States v. Cannady,* 283 F.3d 641, 644-45 (4th Cir.2002)). "A coerced plea, of course, would violate a defendant's fundamental constitutional rights". *Id.* (citing *Waley v. Johnston,* 316 U.S. 101, 104 (1942)). "[A] judge's participation in plea negotiation is inherently coercive." *Id.* (quoting *United States v. Barrett,* 982 F.2d 193, 194 (6th Cir.1992)). These justifications apply equally when the court tries to influence a defendant to persist in his plea during the sentencing hearing, which occurred in Reid's case. *See United States v. Gonzalez-Melchor*, 648 F.3d 959, 963-64 (9th Cir. 2011) (the court's negotiation of an appellate waiver at sentencing invokes the same concerns as participation in plea negotiations).

This Court has drawn a distinction between when the court has accepted a defendant's plea, but not yet accepted the plea agreement. *Hyde*, 520 U.S. 670. This Court concluded that, once the district court has accepted the plea, but before it has accepted the plea agreement, the defendant does not have an absolute right to withdraw his plea, but instead must show a fair and just reason for withdrawal. *Id.* at 676-679. Of course, the defendant must be offered the opportunity to withdraw the plea if the court rejects the plea agreement. *Id.* at 677-78.

A defendant may withdraw a plea before the court accepts the plea, or, if the plea has been accepted, if the court rejects an 11(c)(1)(C) agreement or the defendant "can show a fair and just reason for requesting the withdrawal." Fed. R. Cr. P. 11(d). A fair and just reason to withdraw a plea has been described as "one that essentially

challenges either the fairness of the Rule 11 proceeding wherein the defendant tendered, and the court accepted, the plea or the fulfillment of a promise or condition emanating from the proceeding." *United States v. Lambey,* 974 F.2d 1389, 1394 (4th Cir.1992).

This Court has not yet spoken on the implications of court participation in plea negotiations after the defendant has entered a guilty plea that has been accepted by the court, but before the court has accepted the plea agreement. However, several circuits have reached differing views on this issue.

"[F]air and expeditious disposition of criminal cases is best achieved by the trial judge completely abstaining from any participation in any discussions or communications regarding sentence." *United States v. Werker*, 535 F.2d 198, 205 (2nd Cir. 1976). Promises made by the district court regarding sentencing violate Rule 11. *Id.* at 200.

The Fifth Circuit addressed a set of facts similar to those in Reid's case. The defendants had entered into plea agreements, which the district court rejected based on its perceived inadequacies of the negotiated sentences. *Miles*, 10 F.3d at 1137-39. After questions presented by the government, the district court suggested that it would only accept a plea that included much higher sentences, which led both defendants to plead to additional charges resulting in higher sentences than originally negotiated. *Id.* at 1139-42. Reid likewise acquiesced in his plea, which imposed a sentence over double the high-end of his guideline range, because the court pressured Reid at sentencing with the promise of imposing a higher sentence than

negotiated even though Reid had not pled guilty to the counts that would warrant the increased sentence.

Based on the district court's statements at a sentencing hearing, although not technically within the purview of plea agreement discussions, the Ninth Circuit held: "the appellate-waiver, negotiated by the district court at sentencing in exchange for a reduced sentence, is invalid and unenforceable." *Gonzalez-Melchor*, 648 F.3d at 960, 963. "[A] district court's direct negotiation of an appellate-waiver during sentencing raises many of the same concerns as a district court's participation in plea negotiations." *Id.* at 963-64. Even at the sentencing stage, the court's participation is inherently coercive. *Id.* at 964.

The Sixth Circuit similarly held that the Rule 11 "rationale applies with equal force whether the judge is negotiating an agreement to plead guilty or an agreement to waive objections to the presentence report in return for consideration at sentencing." *United States v. Markin*, 263 F.3d 491, 498 (6th Cir. 2001). Even though the defendant had entered a guilty plea that had been accepted by the district court at the time the district court improperly participated in negotiations about the sentence, the court was nonetheless troubled that the district court participated in "sentencing discussions in which a criminal defendant offers to waive a legal argument in return for consideration in sentencing." *Id.* at 496-97. The Sixth Circuit indicated it was imposing a rule cautioning "the district courts to avoid involvement in the kind of sentencing discussions that occurred here and which engendered this serious controversy over the propriety of the sentencing procedures." *Id.* at 498.

Contrarily, the Tenth Circuit has decided the mater differently. *United States v. Carver*, 160 F.3d 1266 (10th Cir. 1998). The court held that, once the parties have reached a plea agreement, Rule 11 "does not prevent the sentencing judge from questioning the defendant regarding the terms, consequences, and acceptance of the plea agreement or from providing the defendant with information relating to these matters." *Id.* at 1269.

Additionally, the district court has an obligation to ensure that a plea was appropriate and this duty continues until the judgment is entered. *United States v. Smith,* 160 F.3d 117, 121 (2nd Cir. 1998). If the court has accepted the plea, but later finds it inadequate, the district court should vacate the plea. *Id.*; *United States v. Mastrapa*, 509 F.3d 652, 661 (4th Cir. 2007).

In an *en banc* proceeding, the Ninth Circuit has clarified that when a district court accepts a guilty plea, and defers a decision on accepting the plea agreement, the court is strictly bound by Rule 11. *In re Ellis*, 356 F.3d 1198, 1200 (9th Cir. 2004). If the district court rejects the plea agreement, it must give the defendant an opportunity to withdraw the plea, but the district court cannot *sua sponte* withdraw the plea. *Id.* The district court accepted the defendant's plea to second-degree murder, in which the Rule 11(c)(1)(C) agreement provided for a sentence of 132 months. *Id.* at 1201 and 1204. However, at sentencing, the district court refused to accept the plea agreement and refused to address the defense's position about whether the defendant wanted to withdraw his plea or proceed with the charge to which he previously pled. *Id.* at 1202-03. The district court took the position that it

had never accepted the plea, and indicated Ellis' only choice was to proceed to trial on the first-degree murder charge. *Id.* at 1203.

Ellis filed a writ of mandamus to the appellate court. *Id.* The Ninth Circuit held that the district court had improperly inserted itself into charging decisions – a "function 'generally within the prosecutor's exclusive domain'" - by vacating Ellis' plea and reinstating a higher charge than that to which Ellis pled. *Id.* at 1203 and 1209 (citation omitted). "The only course available for the district court, upon rejecting the plea agreement, is to advise the defendant of his rights, including the right to withdraw the guilty plea." *Id.* at 1207. The reinstatement of the original charge, over objection by the government, impinged on the separation of powers doctrine. *Id.* at 1209. Mandamus was granted due to the "uncorrectable prejudice" resulting from the district court's refusal to proceed on the charge to which the defendant had pled. *Id.* at 1210.

Here, the district court improperly interfered in plea negotiations under the threat of giving Reid a "guideline sentence" which the district court represented would be higher than his negotiated sentence in the plea agreement. JA 49. Even though the court had previously accepted the plea, the court indicated it was not going forward unless it was convinced Reid understood the plea, based at least in part on Reid's letter to the court. JA 49. In other words, the court implied it was going to vacate Reid's previous plea, which a court can do at any time. *See Mastrapa*, 509 F.3d at 661; *Mercer v. United States*, 2017 WL 1207566, *4-*6 and *10 (E.D. Tenn. Mar. 31, 2017). To get Reid to agree to the plea agreement, the court incorrectly and

improperly told Reid that he could go along with the negotiated sentence or be sentenced "according to the guidelines, but if I do that, Mr. Reid, I'm going to tell you that the sentence would be more than what is agreed to between you and the government, but that's your choice, not mine." JA 49.

Therefore, this situation is akin to interference in plea negotiations, since the district court suggested it would vacate Reid's plea if Reid did not agree to the negotiated sentence. JA 49. This pressure by the district court resulted in exactly what Rule 11 is designed to prevent: judicial coercion, unfairness in the judicial process and the potential appearance that the judge is an advocate for the plea, rather than a "'neutral arbiter'". *Bradley*, 455 F.3d at 460. The district court expressed doubts that it could accept Reid's plea based on the letter, yet told Reid he would either need to go forward with the plea or be subjected to a higher "guidelines" sentence, even though the PSR calculated the guidelines for the three counts to which Reid pled at much lower (117 months maximum) than the 240 month negotiated sentence. JA 49 and JA 85, ¶100. This type of judicial pressure is exactly why "Rule 11(c)(1)'s prohibition on judicial involvement in plea negotiations not only helps to ensure the voluntariness of a defendant's guilty plea; it also protects the integrity of the court and preserves public confidence in the judicial process." *Bradley*, 455 F.3d at 461. The type of coercion that occurred here "violate[s] a defendant's fundamental constitutional rights". *Id.* at 460 (citing *Waley,* 316 U.S. at 104).

Although there is guiding framework found in these various circuit court cases, this Court should decide this issue to set the parameters restricting courts from

pressuring defendants into going forward with a plea when confusion about the plea arises. In particular, this Court should confirm that, even at the sentencing stage, courts cannot bargain about sentences so that a defendant goes forward with the plea. *See Ellis*, 356 F.3d 1198. The type of judicial participation at issue here is exactly what Rule 11 is calculated to prevent.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit in this case.

Respectfully submitted.

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