No. _____

In The

Supreme Court of the United States

LAQUANDA GILMORE GARROTT

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

One long-standing principle of separation of powers is that the Executive Branch decides who to prosecute for a crime, which charges to file and whether to proceed with—or instead terminate—a prosecution. In this case, in exchange for petitioner's guilty plea to one charge, the government agreed to dismiss all others. Although the judge retained the power to imprison petitioner up to the statutory maximum term, the judge rejected the plea agreement and refused to dismiss the remaining charges because he believed that even the statutory maximum prison sentence for the count of conviction was "too lenient." The question presented is:

> Whether a district judge violates the separation of powers by rejecting a plea agreement containing a "charge bargain"—a guilty plea to one or more counts in exchange for dismissal of the others—based solely on the judge's view that the maximum sentence available on the count(s) of conviction would be too lenient.

PARTIES TO THE PROCEEDINGS

The petitioner, LaQuanda Gilmore Garrott, was the defendant in the district court and the appellant in the Eleventh Circuit. Ms. Garrott is an individual, so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

The respondent is the United States.

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PETITION FOR A WRIT OF CERTIORARI

LaQuanda Gilmore Garrott respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ORDERS AND OPINIONS OF THE COURTS BELOW

The opinion of the Eleventh Circuit, *United States v. Garrott*, No. 19-13299, is available at 812 F. App'x 905 (11th Cir. 2020) and contained in the Appendix at App. 1.

The order of the district court rejecting the provision in the plea agreement dismissing counts is contained in the Appendix at App. 39.

JURISDICTION

The Eleventh Circuit issued its decision on May 1, 2020.

On March 19, 2020, the Court ordered that in light of the pandemic, "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." *Order Regarding Filing Deadlines*, 589 U.S. (Mar. 19, 2020).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions are contained in the Appendix as follows: Article II, Section 1, Clause 1 (App. 60); Article II, Section 2, Clause 1 (App. 61); Article II, Section 3 (App. 62); Article III, Section 1 (App. 63); and Article III, Section 2 (App. 64).

The provisions of law are contained in the Appendix as follows: Federal Rule of Criminal Procedure 11 (App. 65) and Federal Rule of Criminal Procedure 48(a) (App. 71).

INTRODUCTION

No Good Plea Goes Unpunished

Few legal issues have gripped the Nation more in recent times than the question of whether a federal judge can reject the decision of the Department of Justice to dismiss criminal charges pending against a defendant. The media has widely reported on the ongoing saga of General Michael T. Flynn, a high-profile defendant who pled guilty and was awaiting sentencing when the Department of Justice determined that the criminal case against him should be dismissed.

Following the district court's refusal to immediately grant dismissal, General Flynn's case traversed multiple motions in the district court, the appointment of a former federal judge as amicus counsel for the district court, a petition for a writ of mandamus to the United States Court of Appeals for the D.C. Circuit, a panel opinion granting mandamus, an en banc opinion reversing the panel and denying mandamus, and the filing of numerous amici briefs, including

by former Attorney General Edwin Meese III, Senate Majority Leader Mitch McConnell and other Senators, members of the United States House of Representatives, and by various State Attorneys General, all supporting the settled constitutional principle that the Department of Justice, as the Executive Branch of government, has absolute and exclusive authority to decide whether to prosecute a case, and the "'indubitable' power to 'direct that the criminal be prosecuted no further.' *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013) (opinion of Kavanaugh, J.)." UNITED STATES' RESPONSE TO PETITION FOR REH'G EN BANC, *In re: Michael T. Flynn*, U.S.C.A. No. 20-5143, 2020 WL 5104220 (D.C. Cir. August 31, 2020), Doc#1852570 (filed July 20, 2020) at Page 9 of 24. In the words of the Department of Justice, "[o]nce the prosecution and the defense agree that a case should come to an end, there no longer remains a case or controversy over which a court may exert judicial power." *Id*.

Petitioner LaQuanda Garrott has not achieved similar fame, nor has her case received any media attention. Her fate was determined in an unpublished opinion by the United States Court of Appeals for the Eleventh Circuit. But her case raises the same legal issue now captivating the Nation's attention in General Flynn's case.

Charged in a ten-count indictment, Ms. Garrott reached an agreement with the government under Rule 11(c)(1)(A), Fed. R. Crim. P., to plead guilty—and in fact did plead guilty—to one count in exchange for dismissal of the other nine counts. But at the scheduled sentencing, the district judge expressed his view that

the 36-month statutory maximum prison sentence on the count to which Ms. Garrott had pled "would not merely be unreasonable but would be outright irrational … too lenient … inappropriate." App. 4, 5 (underlining in original). Announcing that he would not dismiss the remaining counts despite the parties' agreement, the district judge permitted Ms. Garrott to withdraw her plea. App. 5.

Ms. Garrott then reached another plea agreement with the government, calling for Ms. Garrott to plead guilty to two counts in exchange for dismissal of the other eight; the agreement would "bind the district court to a sentence at the bottom of the guidelines range" below the combined 72-month statutory maximum. App. 5. The judge declined to accept that plea agreement, too. App. 5.

Ms. Garrott proceeded to trial on all ten counts. She was acquitted of two counts, convicted of eight, and sentenced to 72 months incarceration, double the maximum sentence she was facing on the single count to which she had originally entered her (later withdrawn) guilty plea. App. 4, 7.

On plain error review, the Eleventh Circuit affirmed, citing *United States v. Bean*, 564 F.2d 700, 703-04 (5th Cir. 1977) (a binding decision by the former Fifth Circuit), for the proposition that "[a] decision that a plea bargain will result in the defendant's receiving too light a sentence under the circumstances of the case is a sound reason for a judge's refusing to accept the agreement." App. 10.

The Eleventh Circuit's holding does not square with cases in other circuits, which recognize that "in the context of reviewing a proposed plea agreement under Rule 11, a district court lacks authority to reject a proposed agreement based on

mere disagreement with a prosecutor's underlying charging decisions." *United States v. Fokker Servs. B.V.,* 818 F.3d 733, 745 (D.C. Cir. 2016). "[T]rial judges are not free to withhold approval of guilty pleas . . . merely because their conception of the public interest differs from that of the prosecuting attorney." *Id.* (quoting *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973)). As the Department of Justice reiterated in the case of General Flynn, "'the Judiciary's traditional authority over sentencing decisions' could not justify judicial interference with 'the Executive's traditional power over charging decisions.'" BRIEF OF THE UNITED STATES, *In re: Michael T. Flynn,* U.S.C.A. No. 20-5143, 2020 WL 5104220 (D.C. Cir. Aug. 31, 2020), Doc#1845183 (filed June 1, 2020) at Page 32 of 42 (quoting *Fokker Servs.,* 818 F.3d at 746). Once "no case or controversy exists between the actual parties—the government and the defendant— … any continuation of the criminal proceedings would transform them into a judicial, rather than executive, prosecution." UNITED STATES' RESPONSE TO PETITION FOR REH'G EN BANC, *In re: Michael T. Flynn*, U.S.C.A. No. 20-5143, 2020 WL 5104220 (D.C. Cir. Aug. 31, 2020), Doc#1852570 (filed July 20, 2020) at Page 6 of 24.

The legal issue is an important one, given that the overwhelming majority of criminal cases are resolved by way of plea bargains. In 2012, the Court highlighted that "[n]inety-seven percent of federal convictions … are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Last year's statistics continue to bear out this trend. The United States Sentencing Commission reports that 97.6% of federal convictions are obtained through a guilty plea and only 2.4%

of cases go to trial.[1] Accordingly, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 566 U.S. at 144 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)). In the lion's share of cases resolved by way of plea, prosecutors agree to dismiss (or not seek additional) charges. Accordingly, the Court should grant Ms. Garrott's petition to address whether a district judge may reject a valid plea agreement calling for dismissal of certain charges, based solely on the judge's view that the maximum sentence available on the count(s) of conviction would be too lenient.

[1] *See* U.S. Sentencing Comm'n, 2019 Annual Report and Sourcebook of Federal Sentencing Statistics tbl.11 (2019), www.ussc.gov/sites/default/files/pdf/research-and-publications/annualreports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf.

STATEMENT OF THE CASE

Ms. Garrott was indicted on ten counts of assisting in the filing of false tax returns in violation of 26 U.S.C. § 7206(2). Each count carried a statutory maximum sentence of 36 months in prison. App. 2.

A. First Plea Agreement, Rule 11(c)(1)(A)[2]

In a written plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(A), Ms. Garrott agreed to plead guilty to count one of the indictment, exposing her to the maximum prison sentence for that count, and the government agreed to terminate prosecution of the remaining nine counts in the indictment. App. 2, 23(I)(C), 24(III)(1). The government made no promises about what sentence Ms. Garrott should receive, and the district court retained full discretion to impose any sentence on Ms. Garrott up to 36 months in prison. App. 25(IV)(4). On behalf of the government, the plea agreement was signed and

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[2] Rule 11(c)(1)(A) provides:

> (1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
>
> (A) not bring, or will move to dismiss, other charges;

App. 67-68.

approved by the line prosecutor and by the Chief of the Criminal Division of the U.S. Attorney's Office for the Middle District of Alabama. App. 32.

A magistrate judge held a change of plea hearing, expressed no impediment to Ms. Garrott tendering a guilty plea or to the factual basis for it, and accepted Ms. Garrott's guilty plea. App. 2. The matter was set for sentencing before the district judge. App. 2. But at the sentencing hearing, having reviewed the probation department's presentence report, the district judge rejected the government's agreement to end the prosecution of Ms. Garrott on the remaining counts in the indictment. App. 3-5; *see* Rule 11(c)(3)(A), Fed. R. Crim. P. ("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.").

The presentence report highlighted Ms. Garrott's criminal history and calculated an advisory guidelines range of 51 to 63 months without an acceptance-of-responsibility reduction (37 to 46 months incarceration with full credit for acceptance-of-responsibility). App. 4. "[B]ecause she pleaded guilty to just one count, the plea agreement limit[ed Ms.] Garrott's sentence to no more than the statutory maximum of 36 months' imprisonment," App. 39-40, which the judge felt was "too lenient." App. 5. At that hearing, followed by a written order, the court held: "So for that reason, Ms. Garrott, I am rejecting the plea agreement at this time in your case. *And the provision I'm particularly rejecting is the dismissal of all the charges except for the one count*." App. 3, 36:11 (emphasis added). The

written order concluded with a footnote: "Another binding plea agreement—under Rule 11(c)(1)(A) or (c)(1)(C)—after a binding plea agreement has been rejected, would most likely be viewed as a guess as to what the judge is thinking, or bait to catch the best deal." App. 43.

Following this order, Ms. Garrott withdrew her guilty plea. App. 5; *see* Rule 11(d)(2)(A), Fed. R. Crim. P. ("A defendant may withdraw a plea of guilty … after the court accepts the plea, but before it imposes sentence if: … the court rejects a plea agreement under 11(c)(5)").

B. Second Plea Agreement, Rule 11(c)(1)(C)[3]

One month later, the parties entered into a new plea agreement. Ms. Garrott agreed to plead guilty to counts one and two. App. 5, 51:7.[4] The

[3] Rule 11(c)(1)(C) provides, in relevant part that

> (1) …the plea agreement may specify that an attorney for the government will:
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> ***
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

App. 67-68.

[4] Due to an apparent oversight, the second plea agreement was not made part of the district court or appellate records. The Assistant Federal Defender who represented Ms. Garrott at trial retained a copy, which shows that Ms. Garrott agreed to plead guilty to counts one and two, specifically. The identity of the two counts is not essential to this petition, but Ms. Garrott includes that detail in the petition because it is noteworthy that the district judge later entered post-trial judgments of acquittal

government agreed to dismiss the remaining eight counts and to recommend a sentence at the bottom of the advisory sentencing guidelines range that would be binding upon the district court pursuant to Rule 11(c)(1)(C). App. 5.

The district court rejected this plea agreement as well, told the parties that the court viewed their proposed plea agreements as "manipulating the Court," and asked if the parties were ready for trial. App. 5-6, 52. Ms. Garrott's lawyer responded: "I don't know what other option there is, Your Honor, I guess, other than her pleading guilty to all of the counts in the indictment." App. 52:11-13. The court proposed an agreement under Rule 11(c)(1)(B): "I mean, there's always a [Rule 11(c)(1)(B) agreement]. I don't know—that's what most courts do is a (B). I'm just saying."[5] App. 5-6. As the judge described it, "[t]his is all about sentencing. And sentencing is the court's prerogative, and I won't be manipulated into caps, bottoms, whatever, when I've told you this is a serious case." App. 6.

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on those two counts because the evidence presented at trial was constitutionally insufficient.

[5] Rule 11(c)(1)(B) provides, in relevant part that

> (1) … the plea agreement may specify that an attorney for the government will:
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> ***
>
> (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court);

App. 67-68.

C. Trial and Sentencing

Ms. Garrott proceeded to trial and was convicted on all ten counts. However, based on insufficiency of the evidence, the district court entered a post-trial, judgment of acquittal on two counts: Count one (the count to which Ms. Garrott had pled guilty as part of the first plea agreement under Rule 11(c)(1)(A)) and count two (the additional count to which Ms. Garrott had agreed to plead guilty under Rule 11(c)(1)(C)). App. 59. The district court upheld the jury's verdict of guilty on the remaining eight counts (the counts that the government had proposed *not* to prosecute as part of both plea agreements, see ante n. 4). App. 59.

The district court sentenced Ms. Garrott to 72 months in prison, exactly *double* the 36-month statutory maximum that the government had agreed would have been sufficient punishment for Ms. Garrott under the original plea agreement. App. 7. The court also ordered Ms. Garrott to pay $56,897 in restitution to the IRS. App. 7, 21. Explaining his reasons for imposing a sentence higher than previously negotiated,

> [t]he district court emphasized that "the problem . . . driving the size of [her] sentence" was her extensive criminal history. Pointing to the § 3553(a) factors, the district court explained that (1) Garrott's conduct contributed to the rampant tax fraud that was going on in Montgomery at the time, (2) the crime and the amount of loss were serious, (3) the sentence was appropriate to deter "other people who might think that they could help cheat the government," and (4) it wanted to protect the public from any further crimes Garrott would commit.

App. 7.

D. Appeal to the Eleventh Circuit

In the court of appeals, Ms. Garrott argued that the district court improperly participated in plea negotiations by rejecting her guilty plea to count one and the government's proposal to end prosecution on the remaining counts and foreclosing any possibility of a plea with provisions that would be binding on the court. App. 5-6.[6]

Applying plain error review without objection from Ms. Garrott, the Eleventh Circuit affirmed. The court held that the district court's statements did not rise to the level of engaging in plea discussions. App. 11. The Eleventh Circuit also held that "[t]he district court was well within its authority" to reject the government's proposal to end prosecution on the remaining counts in the indictment in exchange for Ms. Garrott's guilty plea. App. 10. Quoting *United States v. Bean*, 564 F.2d 700, 703-04 (5th Cir. 1977), a binding decision by the former Fifth Circuit,[7] the court held that a plea agreement that "will result in the defendant's receiving too light a sentence under the circumstances of the case is a sound reason for a judge's refusing to accept the agreement." App. 10.

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[6] Ms. Garrott also argued that her sentence was substantively unreasonable, but that issue is not a subject of this petition.

[7] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981).

Bean held that because "a plea bargain to dismiss charges is an indirect effort to limit the sentencing power of the judge ... over the duration of imprisonment," the judge may properly reject the prosecutor's proposal to dismiss counts in an indictment if the judge views the resulting sentence as "too light." *Bean,* 564 F.2d at 704. The defendant in *Bean* was charged with one count of theft of property and one count of burglary. Pursuant to a plea agreement, Bean plead guilty to the theft count and the prosecutor agreed to dismiss the burglary count. *Id*. at 701. The court deferred acceptance of the plea agreement, expressing reluctance about the government's agreement to dismiss the more serious burglary count. *Id.* The court eventually rejected the plea agreement, "stating that the bargain was 'contrary to the manifest public interest.'" *Id.* The court granted Bean's motion to withdraw his guilty plea, denied Bean's motion to enforce the plea agreement, and the case proceeded to trial. Bean was convicted on both counts. *Id.*

On appeal, the Fifth Circuit rejected Bean's challenge to the district court's refusal to enforce the plea agreement. The court held that Rule 11 "does not contravene a judge's discretion to reject such a plea. The Rule itself states that 'the court may accept or reject the agreement....' Fed. R. Crim. P. 11(e)(2). Indeed, the judge must refuse the plea in the absence of a factual basis for the plea. *See* Fed. R. Crim. P. 11(f)." *Id*. at 702-03. The court found that "[t]he plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a

plea agreement," so the "decision is left to the discretion of the individual judge." *Id*. at 703.

The court found little guidance from other circuits on how the district court should exercise its discretion to reject a plea agreement. The court noted that most cases at the time dealt with a challenge to the factual basis for the plea, the timeliness of the plea in relation to deadlines imposed by the court, or the *Alford* plea, "where the defendant wishes to plead guilty while maintaining his innocence." *Id*.; *see North Carolina v. Alford*, 400 U.S. 25 (1970). However, "little attention ha[d] been given to the formulation of a standard for the district court's exercise of discretion." *Bean*, 564 F.2d at 703.

In the absence of substantive guidance from the circuits, the *Bean* court concluded that the "broad standards that apply in sentencing" should govern the court's discretion in accepting or rejecting a plea agreement:

> In considering plea bargains, courts may be governed by the same broad standards that apply in sentencing. The trial court's control over the length of sentence is analogous to that in plea bargains since in plea bargaining the defendant is ultimately concerned with the duration of imprisonment. Even when the agreement relates to the dismissal of some of the charges, the primary effect is to limit the punishment which the court may impose. See Alschuler, The Trial Judge's Role in Plea Bargaining, Part I, 76 Colum.L.Rev. 1059, 1074 (1976). Consistently, this circuit, as well as other circuits, has permitted the decision of the trial court as to sentencing to prevail except in extreme circumstances.

Id.

With respect to the district court's discretion to reject a plea agreement that contemplates dismissal of charges, the *Bean* court considered and rejected the

Rule 48(a) standard applied to government motions to dismiss an indictment. *Id.* at 704. The court acknowledged that "Rule 48(a) requires leave of court to grant a dismissal," and that "appellate review of these refusals has been more stringent than review of sentencing." *Id*. However,

> since the counts dismissed pursuant to plea bargains often carry heavier penalties than the counts for which a guilty plea is entered, a plea bargain to dismiss charges is an indirect effort to limit the sentencing power of the judge. *See Alschuler*, supra at 1074, 1136-37. Because the judge's discretion over the duration of imprisonment is being limited, the standard for review of refusal of plea bargains should be closer to the standards for review of sentencing than for review of a dismissal which does not involve a plea bargain under Rule 48(a).

Id. The court concluded that the trial judge acted "well within the scope of his discretion" when he rejected Bean's plea and held: "A decision that a plea bargain will result in the defendant's receiving too light a sentence under the circumstances of the case is a sound reason for a judge's refusing to accept the agreement …. Rule 11 does not compel a judge to impose an inappropriate sentence." *Id.*

The Fifth Circuit continues to follow *Bean*. *See United States v. Jeter,* 315 F.3d 445, 447 (5th Cir. 2002) (citing *Bean* to hold that "[t]he court's belief that the defendant would receive too light a sentence is a sound reason for rejecting a plea agreement" and that "[t]he Government's authority in choosing what offenses a defendant will face is tempered by the role of the district court in accepting or rejecting plea agreements.").

Several other circuits embrace the essential holding of *Bean*. *See, e.g.*, *United States v. Brown*, 595 F.3d 498, 518 (3d Cir. 2010) (holding that district judge did not abuse his discretion in rejecting a charge bargain that the judge thought was "unacceptably lenient"); *United States v. Jackson*, No. 97-4081, 1997 WL 602426, at *1 (4th Cir. 1997) (affirming rejection of plea agreement where defendant pleaded to one count in exchange for dismissal of other count because plea agreement "did not adequately represent [defendant's] criminal conduct"); *United States v. Carrigan*, 778 F.2d 1454, 1464 (10th Cir. 1985) ("The reasoning and holding of *Bean* apply to the case before us. The ultimate effect of the dismissal of charges against Landry under the plea bargain was to restrict the district court's ability to impose what it considered an appropriate sentence….").[8]

[8] *But see United States v. Vanderwerff*, 788 F.3d 1266, 1277 (10th Cir. 2015) ("The district court's decision is particularly troubling because Mr. Vanderwerff's plea agreement involved a charge bargain, where the zone of judicial discretion is ordinarily quite limited…. Notwithstanding the district court's laments that charge bargains 'shunt[ ] to the margins' its 'act of judging,' the law expressly contemplates that charge bargaining is a province primarily for the exercise of prosecutorial—not judicial—discretion.") (internal citations omitted); *United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995) ("Thus, while district courts may reject charge bargains in the sound exercise of judicial discretion, concerns relating to the doctrine of separation of powers counsel hesitancy before second-guessing prosecutorial choices."). Ms. Garrott's petition does not canvas the circuit cases, like *Robertson*, addressing when a judge may reject plea agreements under Rule 11(c)(1)(C), formerly Rule 11(e)(1)(C), that bind the court to a particular sentence / range, although Ms. Garrott acknowledges that they all appear to hold (wrongly, we submit) that "the court has the power—and under the Sentencing Guidelines, the explicit obligation—to consider whether that sentence is adequate and to reject the plea agreement if the court finds it not to be." *United States v. Kraus*, 137 F.3d 447, 453 (7th Cir. 1998)*; see Robertson*, 45 F.3d at 1439 ("As such, 11(e)(1)(C) pleas directly and unequivocally infringe on the sentencing discretion of district courts. In our judgment, the court's categorical refusal to accept pleas pursuant to subsection (C) can only be understood

REASON FOR GRANTING THE WRIT

In *Rinaldi v. United States,* the Court held that the district court abused its discretion when it denied an unopposed government motion to dismiss an indictment and set aside a conviction. 434 U.S. 22, 32 (1977). The Court rejected the contention of the courts below that the "leave of court" prerequisite to dismissing an indictment, Rule 48(a), Fed. R. Crim. P., authorized the district court to deny the motion to dismiss based solely on the court's view that termination of the prosecution "clearly disserved the public interest." *Id.* at 29.

The question presented in Ms. Garrott's case is whether, in light of the same separation of powers principles that animated the decision in *Rinaldi*, a district judge can reject dismissal of counts agreed to by the parties under Rule 11(c)(1)(A), based solely on the judge's view that the maximum sentence available on the count(s) to which the defendant pleads guilty would be too lenient (which, in the judge's view, would "clearly disserve[] the public interest," *Rinaldi*, 434 U.S. at 29).

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as its refusal to completely yield its discretion in sentencing. There can be little doubt that rejecting a plea agreement due to the court's refusal to permit the parties to bind its sentencing discretion constitutes the exercise of sound judicial discretion.").

I. Other circuits have held that a district judge cannot countermand the decision of a prosecutor to dismiss charges merely because the judge believes that the prosecutor is being too lenient.

Three circuits, in the context of petitions for writs of mandamus, have addressed the limit of a district judge's authority to reject an agreement between the government and a defendant that contemplates the dismissal of charges. *See In re: United States*, 345 F.3d 450, 452 (7th Cir. 2003); *In re Ellis*, 356 F.3d 1198, 1209 (9th Cir. 2004); *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 737 (D.C. Cir. 2016). In all three cases, the petitioners met the demanding standard for mandamus relief, which requires a showing that the "right to issuance of the writ is 'clear and indisputable,'" *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) (quoting cases), "a clear legal error," *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 762 (D.C. Cir. 2014) (discussing *Cheney*), "where there is clear abuse of discretion or 'usurpation of judicial power.'" *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953). "[M]andamus is the appropriate remedy … to correct a *plain error*." *U.S. ex rel. Chicago Great W. R. Co. v. I.C.C.*, 294 U.S. 50, 61 (1935) (emphasis added). In all three cases, the Circuits held that the district judge committed clear error in derailing the agreement of the parties.

The "plain error" standard, applied without objection by the Eleventh Circuit in evaluating Ms. Garrott's appeal, mirrors the mandamus standard: To be plain error, "the legal error must be clear or obvious, rather than subject to

reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009).[9] Thus, the plain error standard ("clear or obvious" error) applied by the Eleventh Circuit in Ms. Garrott's case, is the functional equivalent of the mandamus standard ("clear legal error") applied by the Seventh, Ninth, and D.C. Circuits to command the district judges to abide by the agreements of the parties. Yet, in Ms. Garrott's case, the Eleventh Circuit found no "plain" (*i.e.*, no "clear") error in the district judge's refusal to accept the government's agreement to dismiss charges.

A. The Seventh Circuit

> The historic and still the central function of mandamus is to confine officials within the boundaries of their authorized powers, and in our system of criminal justice, unlike that of some foreign nations, the authorized powers of federal judges do not

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[9] The Court has established a four-prong test for plain error review:

> First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—*discretion* which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Puckett, 556 U.S. at 135 (underlining added, *italics* in original, other internal citations and quotations omitted). If the Court agrees that rejecting dismissal of counts is "clear or obvious error," then Ms. Garrott is entitled to relief because she did not "waive" her argument, the error "substantially affected" the length of her sentence, and, for the reasons expressed in this petition, the usurpation of judicial power "seriously affects the fairness, integrity or public reputation of judicial proceedings."

> include the power to prosecute crimes. A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them.

In re: United States, 345 F.3d 450, 452 (7th Cir. 2003) (internal citations and quotations omitted).

In *In re: United States*, the defendant was a law enforcement officer who was charged with one count of civil rights violations and two counts of obstruction of justice. Pursuant to a plea agreement, the defendant pleaded guilty to one count of obstruction of justice in exchange for the government's agreement to dismiss the remaining two counts. *Id.* at 451.

At the sentencing hearing, the judge asked the prosecutor to explain why the government was dismissing the civil rights count, which carried a more severe sentence. "The prosecutor explained that his main aim was to get a felony conviction, which would bar [the defendant] from remaining in law enforcement, without the risk of a trial, which might result in [defendant] being acquitted." *Id.* The judge was not satisfied and "rejected the plea agreement on the ground that the one count of which [defendant] would be convicted if the agreement were accepted did not reflect the gravity of his actual offense." *Id.*

The defendant decided to proceed with the guilty plea, even without the benefit of a plea agreement. After the judge "sentenced him to 16 months in prison, the top of the guideline range,"[10] *id.* at 452, the government moved to dismiss the

[10] Until the Court's decision in *Booker v. United States*, 543 U.S. 220 (2005), the U.S. Sentencing Guidelines were mandatory.

two remaining counts. The judge dismissed the second obstruction of justice count "but refused to dismiss the civil rights count and instead appointed a private lawyer to prosecute it." *Id.* The judge felt "that the government was trying to circumvent his sentencing authority because it considered the sentence that he would have imposed had [defendant] been convicted of the civil rights violation excessive, even though it would have been consistent with the sentencing guidelines." *Id.*

The government petitioned the Seventh Circuit "to issue a writ of mandamus commanding the district judge to dismiss that count as well and to rescind the appointment of the prosecutor." *Id.* In analyzing the rule governing motions to dismiss, the Seventh Circuit acknowledged that "Rule 48(a) . . . requires leave of court for the government to dismiss an indictment, information, or complaint—or, we add, a single count of such a charging document." *Id.* at 452. But this "leave of court" condition on dismissal of charges, the Seventh Circuit held, could not serve as a barrier to dismissal if "[t]he district judge simply disagrees with the Justice Department's exercise of prosecutorial discretion." *Id.* at 453. Rather, the "principal purpose" of the "leave of court" provision, the court held, "is to protect a defendant from the government's harassing him by repeatedly filing charges and then dismissing them before they are adjudicated." *Id.* (citing *Rinaldi*, 434 U.S. at 29 n. 15). Finding "no issue of that sort here," and reiterating that "[t]he government want[ed] to dismiss the civil rights count with prejudice, and that is what [the defendant] want[ed] as well," the Seventh Circuit

granted the government's petition for mandamus, ordering the district judge "to grant the government's motion to dismiss the civil rights count against the defendant," and to vacate the appointment of the special prosecutor. *Id.* at 454. Along the way, the court made this observation:

> Paradoxically, the plenary prosecutorial power of the executive branch safeguards liberty, for, in conjunction with the plenary legislative power of Congress, it assures that no one can be convicted of a crime without the concurrence of all three branches (again, criminal contempt of judicial orders constitutes a limited exception). When a judge assumes the power to prosecute, the number shrinks to two.

Id.

Three times in the opinion, the court cited its earlier decision in *United States v. Martin*, 287 F.3d 609, 623 (7th Cir. 2002). In *Martin*, the Seventh Circuit affirmed a district court's rejection of a plea agreement that contained a charge bargain: Plead guilty to one count in exchange for dismissal of the other two, which capped the defendant's exposure to a statutory maximum sentence of 240 months. With a plea agreement in hand, the defendant pled guilty but, before sentencing, perjured himself by giving false "testimony at trial [that] was directly contradictory to his prior sworn testimony. [The defendant] denied that he and the other three defendants on trial engaged in any drug deals, purchases, or conspiracy." *Id.* at 622. At sentencing, the district judge rejected the plea agreement, "finding it did not adequately reflect the severity of the defendant's conduct and would 'undermine the sentencing guidelines.'" *Id.* The government (gladly, it seems) obtained a superseding indictment charging five counts (instead

of just the original three); a jury found the defendant guilty of all five, and the judge sentenced him to 360 months incarceration. *Id.*

The court of appeals overruled the defendant's argument that, by rejecting the plea agreement, "the district court usurped the authority of the prosecutor in violation [of] the principle of separation of powers," *id.*, noting that the government "did not once object to the district court's rejection of the plea agreement, and does not assert that prosecutorial authority has been, in any way, usurped." *Id.* at 623. Not surprisingly, the government "was not upset by the rejection of the plea agreement because [the defendant], after accepting the benefits of the plea agreement, attempted to sabotage the U.S. Attorney's case by taking the witness stand and committing perjury in the trial of three other co-conspirators." *Id.*[11]

[11] Although not cited or addressed in *In re: United States, Martin* cited *United States v. Greener*, 979 F.2d 517 (7th Cir. 1992), in which the Seventh Circuit upheld the rejection of plea agreements that, in the view of the district judge, "would not adequately represent the defendant's criminal conduct and would undermine the sentencing guidelines." *Id.* at 520. The district judge rejected a plea agreement to count IV, alleging a "violation of 18 U.S.C. § 922(a)(1)(A)," *id.* at 518, which carries a 60-month statutory maximum sentence. 18 U.S.C. § 924(a)(1)(D). The defendant ultimately pled guilty to count II, alleging a "violation of 26 U.S.C. § 5861(e)," *id.*, which carries a 120-month statutory maximum sentence. 26 U.S.C. § 5871. Even though rejection of the charge bargain exposed the defendant to a higher statutory maximum, the guideline sentence imposed on the count of conviction—41 months—was well below the 60-month statutory maximum sentence of the count to which the defendant had proposed to plead guilty in the rejected plea agreement. Ms. Garrott, in contrast, received a sentence that was double the statutory maximum of the count to which the government had agreed she could (and did) plead guilty as part of the rejected plea agreement.

B. The Ninth Circuit

> [W]hen the district court made the further decision that the second degree murder charge itself was too lenient, it intruded into the charging decision, a function generally within the prosecutor's exclusive domain.

In re Ellis, 356 F.3d 1198, 1209 (9th Cir. 2004) (quotations omitted).

Sitting en banc, the Ninth Circuit, too, granted mandamus relief, finding error in a district court decision to vacate an agreed-upon plea to a second-degree murder charge and reinstating the first-degree murder charge because the court believed (as the district judge believed in Ms. Garrott's case) that the lesser charge was too lenient in light of the defendant's criminal history and because the circumstances of the offense were serious. *Id*.

The 16-year old defendant in *Ellis* was charged with first degree murder and was to be tried as an adult due to a prior conviction for residential burglary. *Id*. at 1201. After much negotiation, the government agreed to file a superseding information charging the defendant with second degree murder, to which the defendant would plead guilty. "The agreement recognized that the court could impose any sentence authorized by law, but provided that either party had the right to withdraw from it if the court pronounced a sentence of incarceration other than 132 months." *Id*.

The court accepted the defendant's guilty plea but announced at the sentencing hearing that it would not accept the plea agreement to second degree murder because "[t]he presentence report had disclosed three prior juvenile

adjudications and seven other arrests and charges for serious crimes...." *Id.* at 1202. The government urged the court to reconsider, expressed concern about the evidence available to prove first-degree murder, and informed the court that the victim's family supported the plea to second degree murder. The court nevertheless concluded:

> I have read the government's Sentencing Memorandum, together with the Defendant's Sentencing Memorandum, and I have listened to the government and the Defendant. I must tell you, justice in my opinion hasn't been done in this case, the way it stands now. I think the matter should go to a jury. I think the matter should go to a jury, period. So the ball is back in the government's court.

Id. The court then arraigned the defendant on the still-pending first-degree murder indictment and set the date for jury trial. *Id.*

The defendant filed a motion to "compel the district court to afford him the opportunity to withdraw his second-degree murder guilty plea or to allow him to persist in that plea," which the government supported. *Id.* The court refused to hear argument on the motion, stating, "I never intended to accept the plea agreement in this case, nor did I accept the plea in this case." *Id.* at 1203. "With his only alternative being proceeding to trial on a first degree murder charge—a case even the government no longer desired to charge and was not sure it could prove—Ellis filed this petition for writ of mandamus, which the government did not oppose." *Id.*

The Ninth Circuit granted the writ, concluding that the district court's order was "clearly erroneous," *id.* at 1210, because the district court had

"effectively and improperly inserted itself into the charging decision by vacating Ellis's plea and reinstating the first degree murder indictment. The procedures contemplated by Rule 11 guard against an intrusion of this nature into the separate powers of the executive branch." *Id*. at 1209. Noting that

> many of the policies underlying Rule 48 are equally applicable to judicial consideration of charge bargains, [c]ourts should be wary of second-guessing prosecutorial choices because courts do not know which charges are best initiated at which time, which allocation of prosecutorial resources is most efficient, or the relative strengths of various cases and charges.

Id. at 1210 (internal citations and quotations omitted). The writ was necessary to avoid the "uncorrectable prejudice" that could ensue if the court insisted that the government proceed with the first degree charge: The defendant might be acquitted and "go free" (because he could not thereafter be tried on the lesser included offense). *Id*.[12]

Admittedly, the Ninth Circuit expressed the view that it is "properly within the judicial function" to reject a plea agreement under Rule 11 "when the court believes a sentence is too lenient or otherwise not in the public interest." *Id*. at 1209. That dicta was then followed, however, by the recognition that

> when the district court made the further decision that the second degree murder charge itself was too lenient, it intruded into the charging decision, a function generally within the prosecutor's exclusive domain. Because the prosecutor represents the executive

[12] In Ms. Garrott's case, the district judge rejected both proposed plea agreements, so she withdrew her plea to count one and was acquitted of that count, as well as count two, after a trial. *See ante* n. 4. The judge's rejection of the plea agreements thus cost the government convictions on those counts.

> branch, the district court's reinstatement of the first degree murder charge over the government's objection disregarded the traditional requirement of separation of powers—that the "judiciary remain independent of executive affairs."

Id. (internal quotation omitted).[13]

C. The District of Columbia Circuit

> The Executive's charging authority embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought. It has long been settled that the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences.

United States v. Fokker Servs. B.V., 818 F.3d 733, 737 (D.C. Cir. 2016).

Fokker Services agreed to an 18-month Deferred Prosecution Agreement (DPA) with the government after voluntarily disclosing that it had potentially violated federal sanctions and export control laws. *Id.* Pursuant to the DPA, the government filed a one-count information against Fokker for conspiracy to violate the International Emergency Economic Powers Act. *Id.* at 739. The parties submitted a joint motion to exclude time under the Speedy Trial Act, which "excludes '[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, *with the approval of the court*, for the purpose of allowing the defendant to

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[13] *See also In re Vasquez-Ramirez*, 443 F.3d 692, 698 (9th Cir. 2006) ("The judge's sentencing discretion will be cabined only by the prosecutor's decision regarding which charges to pursue, and by Congress's decision to create a statutory maximum sentence for those charges. A judge has no constitutional role in either of these decisions; one is strictly executive and the other is strictly legislative.").

demonstrate his good conduct.'" *Id.* at 738 (quoting 18 U.S.C. § 3161(h)(2)) (emphasis added).

The district court denied the joint motion because "in the court's view, the prosecution had been too lenient in agreeing to, and structuring, the DPA." *Id.* at 737-38. In other words, "the court rejected the DPA as an [in]appropriate exercise of prosecutorial discretion." *Id.* at 740 (internal quotations omitted).

Both parties filed a timely notice of appeal, and the D.C. Circuit appointed an amicus to argue on behalf of the district court. *Id.* "Conclud[ing] that the district court's decision 'constitute[d] a clear legal error,'" *id.* at 749, the D.C. Circuit found that there were no grounds to read the "approval of the court" language as conferring "free-ranging authority in district courts to scrutinize the prosecution's discretionary charging decisions." *Id.* at 741.

The court of appeals compared its authority to scrutinize a DPA with that of a Rule 48(a) motion to dismiss—which the court stated "involves no formal judicial action imposing or adopting its terms." *Id.* at 746. Because each shared similar prosecutorial charging decisions, the court concluded there was no reason to expand the court's authority for a DPA beyond that of Rule 48(a). *Id.* at 743. Additionally, the Court found unpersuasive amicus' attempt to analogize to the court's role in reviewing Rule 11 plea agreements, which, the court stated, does not grant the district court authority to "second-guess the prosecution's charging decisions." *Id.* at 745. The D.C. Circuit expressly stated that "in the context of reviewing a proposed plea agreement under Rule 11, a district court lacks

authority to reject a proposed agreement based on mere disagreement with a prosecutor's underlying charging decisions." *Id.* at 745. "[T]rial judges are not free to withhold approval of guilty pleas . . . merely because their conception of the public interest differs from that of the prosecuting attorney." *Id.*[14]

The decision in *Fokker Servs.* animated the litigation in General Flynn's case. *In re Flynn*, No. 20-5143, 2020 WL 5104220 (D.C. Cir. Aug. 31, 2020) (en banc). Pursuant to a plea agreement, General Flynn pled guilty and was awaiting sentencing when the government moved to dismiss all charges. The district judge did not immediately grant the motion; instead, he appointed an amicus curiae to

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[14] *Fokker* quoted from an earlier D.C. Circuit case, *United States v. Ammidown*, which announced

> the appropriate doctrines governing trial judges in considering whether to deny approval either to dismissals of cases outright or to the diluted dismissal—a guilty plea to a lesser included offense.
>
> First, the trial judge must provide a reasoned exercise of discretion in order to justify a departure from the course agreed on by the prosecution and defense. This is not a matter of absolute judicial prerogative. The authority has been granted to the judge to assure protection of the public interest, and this in turn involves one or more of the following components: (a) fairness to the defense, such as protection against harassment; (b) fairness to the prosecution interest, as in avoiding a disposition that does not serve due and legitimate prosecutorial interests; (c) protection of the sentencing authority reserved to the judge. The judge's statement or opinion must identify the particular interest that leads him to require an unwilling defendant and prosecution to go to trial.

497 F.2d 615, 622 (D.C. Cir. 1973). *Fokker* did not address, much less endorse, those factors.

present arguments in opposition to the motion. *Id.* at *1. General Flynn petitioned the D.C. Circuit for mandamus relief; a panel granted the petition in part, issuing the writ to compel the judge to dismiss the charges. *Id.* On petition for en banc review filed by the judge himself, the D.C. Circuit vacated the panel order and denied the writ, finding that General Flynn (and the government) had "an adequate alternate means of relief" and no "extraordinary harm" would befall them "from waiting to seek [] review (if necessary) after the District Court decides the motion in the ordinary course." *Id.* at *2-*3. The en banc majority expressly reserved on the question of whether the judge would "violate the separation of powers or some other clear and indisputable right" should the judge ultimately deny the motion to dismiss. *Id.* at *5.

The concurring judge noted that "it would be highly unusual" if the judge denied the motion, "given the Executive's constitutional prerogative to direct and control prosecutions and the district court's limited discretion under Rule 48(a), especially when the defendant supports the Government's motion." *Id.* at *7 (concurring). The two dissenting judges likewise thought that "there can be little question that the district court must ultimately grant the government's motion to dismiss." *Id.* at *23 (Henderson, J., with whom Rao, J., joins, dissenting). Highlighting "the essential connection between the Constitution's structure of separated powers and the liberty interests of individuals," the dissenters concluded the writ should issue:

> By allowing the district court to scrutinize the reasoning and motives of the Department of Justice, the majority ducks our obligation to correct judicial usurpations of executive power and leaves Flynn to twist in the wind while the district court pursues a prosecution without a prosecutor. The Constitution's separation of powers and its protections of individual liberty require a different result.

Id. at 24.

II. The question presented is important and timely, and this case presents an excellent vehicle to address it.

Ms. Garrott's is the right case to resolve the question presented, as the parties were in agreement that this case should have ended at the original sentencing hearing; the judge should have imposed a sentence of (up to) the statutory maximum of 36 months. Instead, the district judge committed plain, clear, obvious, and indisputable error by refusing to impose the sentence, steering this case to a trial that the parties were willing to forego, and then imposing a 72-month sentence, double in duration of the one to which the parties had agreed.

Surely the government will oppose this petition and defend the actions of the district judge, as the government did in the court of appeals. *See United States v. O'Neill*, 437 F.3d 654, 660 (7th Cir. 2006) (Posner, J., concurring) ("Although the Department of Justice is dutifully defending the judge's action, it is doing so to maintain good relations with the district court, not because it thinks that what the judge did was right. The judge upended the Department's own agreement."). But the government is hard-pressed to deny the importance or timeliness of the question presented, given the government's position in the case of General Flynn

and the widespread attention it has received. The government's briefing in General Flynn's case makes the argument for Ms. Garrott:

> Article II [of the United States Constitution] provides that "[t]he executive Power shall be vested in a President," U.S. Const. art. II, § 1, cl. 1; that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States," § 2, cl. 1; and that the President "shall take Care that the Laws be faithfully executed," § 3. Taken together, those provisions vest the power to prosecute crimes in the Executive. *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013). The Supreme Court thus has recognized that, as a general matter, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). This Court has likewise recognized that "[t]he power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws." *CCNV v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986). Notably, "[t]he Executive's charging authority embraces decisions about … whether to dismiss charges once brought." *Fokker*, 818 F.3d at 737.
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> Article III, meanwhile, provides that the federal courts may exercise only "judicial Power" over "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. A case or controversy is a "dispute between parties who face each other in an adversary proceeding." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937). And "an actual controversy must be extant at all stages of review." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). It follows that, if the dispute between the parties comes to an end, the court's exercise of judicial power must end as well. For instance, if all parties to a civil case agree that the case should be dismissed, the stipulated dismissal "resolves all claims before the court" and "leav[es] [the court] without a live Article III case or controversy." *In re Brewer*, 863 F.3d 861, 869 (D.C. Cir. 2017). Likewise in a criminal case: if the United States and the defendant agree that the indictment should be dismissed, there remains no dispute between the parties, there is no need for a court to impose judgment against the defendant, and there is thus no basis for the further exercise of judicial power.

BRIEF OF THE UNITED STATES, *In re: Michael T. Flynn,* U.S.C.A. No. 20-5143, 2020 WL 5104220 (D.C. Cir. Aug. 31, 2020), Doc#1845183 (filed June 1, 2020) at Pages 12-14 of 42. At bottom, "there is . . . no case or controversy within the meaning of Art. III of the Constitution," when "both litigants desire precisely the same result." *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971).

In Ms. Garrott's case, "both litigants desire[d] precisely the same result": A plea of guilty to count one with a sentence not exceeding the statutory maximum. But because the judge thought Ms. Garrott needed to serve more time in prison, the judge refused to abide by the agreement and foisted upon the parties a trial that neither party requested. Some might describe as "activist" a judge who insists that the parties continue to litigate even after they have reached an agreement. After all, "[j]udges are like umpires … [t]hey make sure everybody plays by the rules, but it is a limited role … it's [their] job to call balls and strikes, and not to pitch or bat." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, Hearings before the Committee on the Judiciary, United States Senate, 109th Congress, U.S. Gov't Printing Office, 2005, pp. 55-56. The already over-burdened court system would burst at the seams if even more cases were pushed to trial by judges who thought the parties should "play on."

To be sure, the Court has stated, more than once, that a defendant does not have "an absolute right to have his guilty plea accepted by the court. As provided in Rule 11, Fed. Rules Crim. Proc., … the trial judge may refuse to accept such a

plea and enter a plea of not guilty on behalf of the accused." *Lynch v. Overholser*, 369 U.S. 705, 719 (1962); *accord Santobello v. New York*, 404 U.S. 257, 262 (1971) ("There is, of course, no absolute right to have a guilty plea accepted."). But that principle was articulated in *Lynch*, a case in which the "judge refused to accept the plea since a psychiatric report in the judge's possession indicated that Lynch had been suffering from 'a manic depressive psychosis, at the time of the crime charged,' and hence might have been not guilty by reason of insanity." *North Carolina v. Alford*, 400 U.S. 25, 34 (1970). While holding that there was no error in rejecting the guilty plea where the judge entertained doubts about the defendant's guilt, the Court in *Lynch* "implied that there would have been no constitutional error had his plea been accepted even though evidence before the judge indicated that there was a valid defense." *Alford*, 400 U.S. at 35 (finding guilty plea valid despite defendant's "protestations of innocence"). So, a court need not accept every proposed guilty plea; a court may properly reject a plea if not "voluntary and knowing," *Santobello v. New York*, 404 U.S. 257, 261 (1971), if the product of coercion or mental defect, if not supported by a factual basis, or if the defendant does not "understand[] the maximum possible penalty that he may face by pleading guilty," or "the important constitutional rights he is waiving, including the right to a trial"—what the Court describes as the "prerequisites to accepting a guilty plea." *United States v. Hyde*, 520 U.S. 670, 674 (1997). But those cases do not stand for the proposition that a judge can refuse to accept a guilty plea solely on the basis of his disdain for the bargain that the defendant has

obtained. And those cases presented no impediment to the Seventh, Ninth, or D.C. Circuits granting mandamus relief when the district judge impeded the parties' efforts to resolve criminal prosecutions by way of agreement rather than trial.

No one can seriously doubt that, if the government had initially charged Ms. Garrott with just one count, and she had agreed to plead to it in exchange for the government's agreement to file no additional charges, the judge would have had no wiggle room to reject that resolution—no matter how "lenient" or "unreasonable … outright irrational … … [or] inappropriate" the judge perceived the outcome, App. 4, 5, for he could not command the government, much less the grand jury, to return a superseding indictment. The converse must likewise hold true: The judge cannot command the government to proceed to trial on counts that it has decided to abandon in exchange for a guilty plea to another count, merely because the judge believes that the *maximum* sentence he can impose is *too lenient*.[15] This is fair and balanced, given that a judge's hands are tied even when he believes that the mandatory *minimum* sentence he must impose is *too harsh*.[16]

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[15] See *United States v. O'Neill*, 437 F.3d 654, 660 (7th Cir. 2006) (Posner, J., concurring) ("There is also a futility to such judicial interventions, since the prosecution can give a defendant a sentencing discount by dropping counts or otherwise altering the charges against him, and its decision is not judicially reviewable."); *In re United States*, 345 at 454 ("[A] judge could not possibly win a confrontation with the executive branch over its refusal to prosecute, since the President has plenary power to pardon a federal offender, U.S. Const. art. II, § 2, cl. 1—even before trial or conviction.").

[16] *See generally Wade v. United States*, 504 U.S. 181, 185 (1992) (accepting the petitioner's concession, "as a matter of statutory interpretation, that [18 U.S.C.] § 3553(e) imposes the condition of a Government motion upon the district court's

Insofar as a judge cannot deny the parties "leave of court" under Rule 48(a) to dismiss charges that have resulted in a constitutionally valid conviction and prison sentence, *see Rinaldi*, 434 U.S. at 25 (ordering dismissal after defendant tried, convicted and sentenced to 12 years imprisonment), a judge cannot refuse the dismissal of charges contemplated by a valid plea agreement under Rule 11(c)(1)(A) just because the judge would prefer to impose a more heavy-handed sentence than authorized by the statute of conviction. To be sure,

> [s]entencing judges are placed in a quandary by being authorized on the one hand to reject a plea that specifies a sentence that the judge considers too lenient and on the other hand being forbidden by Fed. R. Crim. P. 11(c)(1) "to participate in these discussions," that is, the discussions between the prosecutor and the defense lawyer or defendant that resulted in the plea agreement. If the judge gives no explanation for why he is rejecting the agreement, the defendant is left in the dark, *but if he explains the grounds of his rejection he may be thought to have initiated and participated in a discussion looking to the negotiation of a new plea agreement.* Reconciling these directives is the judicial equivalent of squaring the circle…. *It is another reason against the district judge's policy of refusing to accept the sentence negotiated by the parties.*

O'Neill, 437 F.3d at 663 (Posner, J., concurring) (emphasis added).

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authority to depart" below the mandatory minimum and such "Government-motion requirement" is not itself "unconstitutional"); *Bordenkircher v. Hayes*, 434 U.S. 357, 358 (1978) ("Due Process Clause of the Fourteenth Amendment is [not] violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged."); *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature."); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.) ("[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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