No. 20-423

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

REPLY BRIEF OF PETITIONER

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No Good Plea Goes Unpunished

As framed in the petition for a writ of certiorari, 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.

As reframed by the Solicitor General in the brief in opposition, the question presented is:

> Whether the district court plainly erred in rejecting a plea agreement under which petitioner would plead guilty to only one of ten felony tax counts charged in the indictment, based on the court's determination that the agreement would require it to impose an inappropriately low sentence.

Take your pick. Regardless of how the question presented is framed or reframed, the answer remains the same: Yes, a district court plainly errs and violates the separation of powers when it refuses to dismiss counts as part of a plea agreement just because the judge feels that the statutory maximum sentence authorized by the count of conviction is "too lenient" and "inappropriately low."

According to the Solicitor General, "[i]n this Court, petitioner shifts gears, apparently abandoning her claim that the district court violated Rule

11(c)(1) and instead arguing that the district court violated the separation of powers by interfering with the Executive Branch's charging discretion." BIO:15. Petitioner has not shifted gears nor abandoned her claim; she has drilled down on the root purpose of Rule 11(c)(1)'s mandate that a judge has no role to play in the parties' negotiation of a plea agreement. Judicial participation in plea negotiations is categorically prohibited, in part because it can coerce a defendant into pleading guilty rather than exercising her right to a trial for fear that the judge has prejudged her guilty and will punish her more harshly if convicted after a trial. *United States v. Casallas*, 59 F.3d 1173, 1178 (11th Cir. 1995).

Separation of powers concerns also animate Rule 11(c)(1)'s prohibition against judicial participation in plea discussion, as the petition emphasized. When a judge announces that he is rejecting a plea agreement on the basis that it yields "too lenient" a sentence, the judge has effectively taken a seat at the negotiating table. By communicating to the prosecutor and the defendant the outcome that he finds *unacceptable*, the judge is directing the negotiations toward the outcome the judge prefers.

It is one thing to permit the judge to reject a plea agreement where the plea is not "voluntary and knowing," *Santobello v. New York*, 404 U.S. 257, 261 (1971), or otherwise fails to meet the "prerequisites to accepting a guilty plea." *United States v. Hyde*, 520 U.S. 670, 674 (1997). It is quite another for a judge

to reject an arms-length plea agreement of the parties—and thus the prosecutorial discretion exercised by the government—simply because the judge does not like the outcome. As Judge Posner explained, when a judge rejects a plea agreement and "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." Petition at 36 (quoting *United States v. O'Neill*, 437 F.3d 654, 663 (7th Cir. 2006) (Posner, J., concurring)); *see also United States v. Barrett*, 982 F.2d 193, 194 (6th Cir. 1992) (holding that judge participated in plea negotiations by stating "there is no way on God's green Earth I'm going to sentence him to only seven years, and I think the likelihood is I'm going to exceed the guidelines" and when he rejected the suggestion "that 150 to 170 months would be more appropriate" by stating "Don't put any money on it Mr. Lehmann. Don't bet your nest egg on it."), *abrogated on other grounds, United States v. Davila*, 569 U.S. 597 (2013); *Casallas*, 59 F.3d at 1177-78 (judge's statements "crossed the line into the realm of participation" when judge "contrasted the fifteen-year minimum mandatory that Casallas faced by going to trial in Texas with the ten-year minimum mandatory that Casallas faced by pleading to the conspiracy count").

Participating in the plea discussions by refusing to enforce an agreement to dismiss charges creates a controversy where one no longer exists. This is inimical to the limited "judicial Power" of federal courts to preside over "Cases"

and "Controversies." U.S. CONST. art. III, § 2, cl. 1; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937) (a case or controversy is a "dispute between parties who face each other in an adversary proceeding"). Indeed, the government admits as much in the context of Rule 48(a) dismissal:

> 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 Page 20 of 42.

The Solicitor General contends that the court "was careful not to involve itself in plea negotiations or to suggest which charges (if any) petitioner should plead to," and "simply declined to accept the particular plea agreement presented to it." BIO:9. But this is belied by the judge's order, holding that 36 months in prison was unreasonable, too lenient, irrational, and inappropriate; describing petitioner's criminal history and how she "managed" to "only" serve 13 days in prison; finding that the relevant conduct in the presentence report was serious; and concluding that petitioner engaged in additional offenses not charged in the indictment. App.40-41. And when the parties returned to the court with a second plea agreement providing for harsher punishment, the court rejected that as well and proposed an agreement under Rule 11(c)(1)(B)

instead. App.5-6. Far from "simply declining" the plea agreement, the judge was engineering the plea discussions and directing the prosecutor to extract a quantum of punishment that the judge would find reasonable, rational, and appropriate, even if harsher than the prosecutor proposed to inflict.

Significantly, the Solicitor General acknowledges that under separation of powers principles, *Rinaldi v. United States*, 434 U.S. 22 (1977), and Rule 48(a), Fed. R. Crim. P., "[w]here a government's request to dismiss charges is *not contingent* on the disposition of the remaining charges, a court generally must grant that request, unless denying leave is necessary to 'protect a defendant against prosecutorial harassment.'" BIO:9 (emphasis added). In this Court, the Solicitor General parts ways with petitioner when the proposed dismissal of charges is packaged as part of a plea agreement under Rule 11. But the Solicitor General cites no authority of this Court holding that a judge's displeasure with the statutorily-authorized sentencing options cabined by a charge-bargain is grounds for rejecting the proposed dismissal of criminal charges.

The Solicitor General resorts to citing a "Policy Statement" of the advisory United States Sentencing Guidelines that directs judges to "consider whether 'the remaining charges adequately reflect the seriousness of the actual offense behavior [so] that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.' Sentencing

Guidelines § 6B1.2(a)." BIO:8. But the policy preferences of the Sentencing Commission do not confer upon the judge the power to command the Department of Justice to pursue charges that it prefers to abandon, whether in tandem with a defendant's guilty plea or not. *See United States v. Goodall*, 236 F.3d 700, 701-02 (D.C. Cir. 2001) ("[P]olicy statements, such as § 6B1.2, are non-binding 'norms' to which courts may refer in deciding whether to accept or to reject plea agreements. A District Court judge certainly remains free to rely on the applicable Guidelines range in determining whether to accept or reject a Rule 11(e)(1)(C) plea agreement. Section 6B1.2 does not compel this, however.").

As long as the proposed dismissal is not tied to a defendant pleading guilty, the Solicitor General and the Sentencing Commission recognize that "the judge should defer to the government's position except under extraordinary circumstances," *see* U.S.S.G. § 6B1.2 (commentary), even where such executive function could thwart a judge's sentencing preferences on the remaining counts. But why should the calculus change when the defendant has agreed to plead guilty (or in the case of petitioner, already has pleaded guilty) to a charge in exchange for the dismissal? At least when the defendant has agreed to plead guilty as part of the charge bargain, the judge retains jurisdiction to impose a sentence on the count to which the defendant has entered her plea. But when the dismissal of some counts is not conditioned on

a guilty plea, the judge may find himself without jurisdiction to impose any sentence at all, if, for example, the defendant is ultimately acquitted on the remaining counts.

The Solicitor General would presumably concede that, if the prosecutor had moved under Rule 48(a) to dismiss *all* charges against petitioner without a guilty plea—no strings attached—the judge would have been required to grant the motion, even though dismissal would have resulted in no sentence at all. In the judge's view, dismissal of all charges would have produced an "unreasonable" or "outright irrational" outcome, given "petitioner's extensive criminal history and the other 18 U.S.C. 3553(a) sentencing factors," BIO:3-4, but the judge's displeasure with that outcome would not provide grounds to deny the dismissal of all counts. *See* BIO:9 (citing *Rinaldi* and Rule 48(a)).

And if, instead, the prosecutor had moved under Rule 48(a) to dismiss only Counts 2-10—again, no strings attached—leaving only Count 1 pending against petitioner, separation of powers principles would again have required that the judge grant that motion, *id.*, even though the 36-month, maximum sentence available upon conviction on Count 1 would have been, in the judge's view, "inappropriately low." And with no plea agreement tied to the dismissal, petitioner might have proceeded to trial and, if acquitted of Count 1 (as she was in this case), the court would have had no authority to impose any sentence at all.

The Solicitor General fails to explain why a judge cannot reject the dismissal of some or all charges, when the defendant pleads to none; but the judge's disdain for the maximum sentence available for the count(s) to which the defendant agrees to plead guilty provides grounds for the judge to reject the dismissal of other pending charges.

The Solicitor General goes to great pains to distinguish the admittedly different procedural postures of the four cases cited by petitioner: *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 re Flynn*, 973 F.3d 74, 82 (D.C. Cir. Aug. 31, 2020) (D.C. Cir. Aug. 31, 2020) (en banc). Procedural differences notwithstanding, all of those cases stand for the fundamental proposition that the judiciary cannot compel the government to pursue a prosecution it prefers to abandon, whether by outright dismissing the entire prosecution or by dismissing only nine out of ten charges. Indeed, during the *Flynn* litigation, where General Flynn had already pleaded guilty (like petitioner had), the government argued that a judge may *not* second-guess the prosecutor's decision to dismiss charges under Rule 48(a) based on the judge's concerns about the appropriate sentence:

> Amici also argue that dismissal at this stage [after Flynn had plead guilty and was awaiting sentencing, as was the case with petitioner] would interfere with the district court's authority to "decide what sentence to impose." Scholars Br. 13. But a district court lacks the authority to impose a criminal sentence after an

> unopposed motion to dismiss with prejudice, just as it lacks the authority in a civil case to award damages after the plaintiff moves to dismiss. Thus, in *Fokker*, this Court explained that "the Judiciary's traditional authority over sentencing decisions" could not justify judicial interference with "the Executive's traditional power over charging decisions." 818 F.3d at 746. And in *In re United States*, the Seventh Circuit directed a district court to grant a motion to dismiss, notwithstanding the court's belief that "the government was trying to circumvent [its] sentencing authority" through dismissal. 345 F.3d at 452.

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 31-32 of 42.

And at oral argument before the en banc D.C. Circuit, the government argued that "as a separation of powers matter," decisions on whether to bring, maintain, or dismiss criminal charges "are taken off the table for judicial review." Transcript of Oral Argument, August 11, 2020, at p. 61, *In re Michael T. Flynn,* 973 F.3d at 82 (No. 20-5143). When presented with an extreme hypothetical by Judge Wilkins, the government responded that, under principles of separation of powers, the court's discretion to deny dismissal under Rule 48(a) is so narrow that even if the prosecutor accepted a bribe to file the motion to dismiss, the district court still would have *no authority* to deny the motion to dismiss if the government stood by its decision to dismiss the case:

> JUDGE WILKINS: Excuse me, sir. My hypothetical is that the U.S. Attorney is the one in the videotape taking a bribe, and the

> judge makes that factual finding that the person standing in front of him, the U.S. Attorney, is the person in the videotape.
>
> [DOJ] MR. WALL: . . . The Executive Branch could prosecute, and the Court could sanction or have contempt under separate authorities, but it would not be a basis for denying the Rule 48(a) motion . . . .
>
> JUDGE WILKINS: And that is based on Fokker?
>
> [DOJ] MR. WALL: And the constitutional backdrop on which Fokker relied . . . I think the Court would be required to grant the motion and dismiss the prosecution. It couldn't keep it alive.
>
> * * *
>
> [DOJ] MR. WALL: . . . there's no r[o]le for courts to play under Rule 48(a) even if they think that the Executive has failed to prosecute for some improper reason like bribery, like favoritism, like corruption. Everyone agrees that the Executive can't be made to prosecute the case no matter how impermissible its motives for declining to do so.
>
> And all we're saying is that as a rule-based matter, the same rule applies to Rule 48(a) if we have brought the charge. Fokker says dismissing is the same as bringing as a constitutional matter. It's bad conduct to be sure. It should be punished to be sure. There are other remedies for it. But they don't concern Rule 48(a).
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> * * *
>
> [DOJ] MR. WALL: As Fokker says, there is no substantial role for courts to perform that sort of judicial scrutiny and oversight. The Executive Branch's conduct of prosecutions is . . . is not governed by courts under Rule 48(a), that's right.

Id. at p. 87-89.

The parallels to *Flynn* are undeniable. Both petitioner and General Flynn pleaded guilty pursuant to a plea agreement. The government agreed

that in exchange for their guilty pleas, the government would not pursue other charges, thus capping the sentences that petitioner and General Flynn faced. *See United States v. Flynn,* No. 17-232 (EGS) (D.D.C. Dec. 8, 2020) (Memorandum Opinion, ECF No. 311) ("Under the terms of the Plea Agreement, the government agreed not to further prosecute Mr. Flynn for the criminal conduct described in the [Statement of Facts]") (citing Plea Agreement, ECF No. 3 at 2 ¶ 3). In petitioner's case, she expected to be sentenced on the count to which she pleaded guilty; so did General Flynn.

But in petitioner's case, the judge announced that he would deny a government motion to dismiss the *other charges to which petitioner had* ***pleaded not guilty***, because the judge was not satisfied with the 36-month maximum sentence he could impose on the count to which petitioner did plead guilty. In the court of appeals, the government defended the judge's authority to deny the government's motion to dismiss.

In General Flynn's case, contrary to the expectations set forth in the plea agreement, the government moved to dismiss *the count to which General Flynn* ***pleaded guilty***, arguing that the judge had no authority to deny the government's motion. In the court of appeals, the government supported General Flynn's mandamus petition, arguing that the judge had no authority to deny the government's motion to dismiss. Although the en banc majority of the D.C. Circuit declined to compel the district judge to grant the motion to

dismiss then and there—without reaching the question of whether the district judge would "violate the separation of powers or some other clear and indisputable right" should the judge ultimately deny the motion to dismiss, *In re Flynn*, 973 F.3d 74, 82 (D.C. Cir. Aug. 31, 2020) (en banc)—three circuit judges doubted that the district judge could deny the motion. *Id.* at 85 (Griffith, J., concurring); *id*. at 104 (Henderson, J., with whom Rao, J., joins, dissenting).

We will not hear again from the D.C. Circuit on this question because, since the filing of this petition, the President pardoned General Flynn, thus mooting out the question. *See United States v.* Flynn, No. 17-232 (EGS) (D.D.C. Dec. 8, 2020) (Memorandum Opinion, ECF No. 311). Mr. Flynn will never be sentenced for the crime to which he pleaded guilty.

The President has not pardoned petitioner, nor do we expect him to. Petitioner remains in custody serving a 72-month sentence on counts that the government agreed to dismiss as part of her plea agreement—a sentence that is twice as long as the statutory maximum sentence for the count to which she had pleaded guilty. Her case is not moot.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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