No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DEMARIO DESHAWN SIMPSON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant has a right under the Federal Rules of Criminal Procedure to enter a partial guilty plea (without a plea agreement or any plea bargain) to an indictment, pleading guilty to some counts and not others.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Demario Deshawn Simpson requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on February 17, 2021, which affirmed the judgment of the United States District Court for the Western District of Michigan, Southern Division.

INTRODUCTION

Had Mr. Simpson walked into his arraignment and pleaded guilty, "straight up" (without a plea agreement), to one of the counts against him, and not guilty to the remaining counts charged, no one would have batted an eyelash, much less clutched their proverbial pearls. But since he decided to do (or try to do) just that in the days leading up to his trial, the district court balked and ultimately rejected his attempts, forcing him to stand trial on a charge for which he actually accepted responsibility . . . and which (with regard to the remaining charges) led to the admission of what otherwise would likely have been inadmissible evidence.

When he asked the Sixth Circuit to review the matter and recognize that he should have been allowed to plead guilty to one of the charges and proceed to trial on the others, the Sixth Circuit ignored other circuits' (namely, the Ninth Circuit's) favorable decisions on the matter, ignored the clear implications of the criminal procedural rules, and failed to even cite case law on the issue of partial guilty pleas (or any guilty pleas) proffered without a plea agreement. In making its decision, the circuit broke with other circuits (namely the Ninth and Tenth) and set up a system

in which a defendant cannot enter a partial guilty plea, even without a plea agreement involved, unless the district court approves, even if the plea satisfies all of Rule 11's criteria.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at *United States v. Simpson*, 845 Fed. App`x 403 (6th Cir. 2021). It is also attached at **Appendix A**.

The judgment of the United States District Court for the Western District of Michigan, Southern Division, from *United States v. Simpson*, No. 1:19-CR-137 (W.D. Mich. February 19, 2020), is unpublished and is attached at **Appendix B**. The transcript of the final pretrial conference, which includes the district court's decision to reject Mr. Simpson's proffered guilty plea, is attached at **Appendix C.**

JURISDICTION

The United States Court of Appeals decided this case on February 17, 2021. Mr. Simpson sought rehearing en banc in the Sixth Circuit. The court denied his petition for rehearing on March 25, 2021. He now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). He has provided notice of this petition to the government, in accordance with this Court's Rule 29.4(a).

RELEVANT CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

This case involves application of Federal Rule of Criminal Procedure 11, namely Rule 11(a)(1), which provides: "*In General.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere."

STATEMENT OF THE CASE

A. Federal jurisdiction has been proper since this case's inception, and this Court should exercise jurisdiction under Rule 10, subsections (a) and (c), to address the critical question of whether a defendant has a right to enter a partial guilty plea when no plea bargain or agreement is involved.

In accordance with this Honorable Court's Rules 14(1)(g)(ii) and 10(c), Mr. Simpson offers this statement of jurisdiction and suggestion of justifications for this Court's consideration of his case.

The Sixth Circuit in this case has decided a vital question of criminal procedure in a manner that conflicts with a plain reading of the federal procedural rules and with relevant case law and that represents an "important question of federal law that has not been, but should be, settled by this Court." *See* S. Ct. R. 10(c). It has also decided to split with the Ninth Circuit (and with the Tenth Circuit's strong "suggestions" or implications in its case law). *See* S. Ct. R. 10(a).

Mr. Simpson is thirty-three years old, born and bred in Kalamazoo, Michigan. His mother died of breast cancer in her forties, and this loss was a big one for Simpson. He had a strong relationship with his mom and his grandmother. As a kid, he enjoyed sports, and he's still proud of earning his high-school diploma. Sadly, his father was never a real part of his life, and the last time he saw his dad was when he was fifteen. Also sadly, petty crime has marked Mr. Simpson's life since his teen years. Drug dealing, firearms, and alcoholism have also hovered as demons in his life.

After his mom's death, Mr. Simpson slipped back toward his street life and life with people making some pretty poor choices. And on the evening of May 14, 2019 (into the wee hours of May 15), things caught up with him. That night, police conducted surveillance of a certain city block on Krom Street in Kalamazoo, Michigan. A group of men, Simpson among them, appeared to be posturing and "beefing" with others near a local market of dubious reputation.

Police stopped a Dodge Charger, in which some of the men in Mr. Simpson's group had been riding, because an officer said he saw one of the men with a pistol. With the police stop, the men exited the vehicle and took off. When officers caught up to the fellows, they found three firearms, and drugs on various of the men and in the Charger. Critically for this case, officers found a Taurus 9mm handgun in a field; they arrested Mr. Simpson near this area.

So, Mr. Simpson, as one of the men arrested that night, found himself facing federal criminal charges in the district court under 18 U.S.C. § 3231, which of course grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The government filed an eight-count indictment against three of the guys (including Mr. Simpson), charging drug and gun offenses (including firearm offenses under 18 U.S.C. § 924(c)(1)(A)(i)), and ultimately, Mr. Simpson's two codefendants pleaded guilty, in accordance with written plea agreements, while Mr. Simpson proceeded to trial.

The crux issue of Mr. Simpson's case was simple. Leading up to trial, he attempted to plead guilty to the drug charge (possession with intent to distribute

heroin) against him. He wanted to go to trial only on the firearm charges (felon in possession and possession of a firearm in furtherance of drug trafficking, under § 924(c)). Mr. Simpson admitted the drug offense, accepted responsibility for it, and wanted to "face the music" for it. From the time of his arrest, Mr. Simpson cooperated with law enforcement regarding his drug activities. He was candid with law-enforcement personnel: "Mr. Simpson admitted to possessing and selling the heroin removed from his buttocks. Mr. Simpson denied having any involvement with the handgun found near his cellular telephone." *See, e.g.*, RE. 123: Final PSIR, PageID # 1090. During his arrest, Simpson conceded he used his phone for drug deals, and he consented to a search of that phone.

Mr. Simpson simply did not want to take the fall for a gun he had not possessed. There were four men implicated with regard to the Taurus 9mm handgun in question, three of whom got charged with federal offenses. Possession of the gun—not the drugs—constituted the focus of Mr. Simpson's case, and Mr. Simpson stood ready to make trial easier for everyone . . . by pleading guilty ahead of time to the drug charge.

The district court, however, denied Mr. Simpson his right to enter a "partial plea" to the indictment. Essentially, the trial court said (with regard to a plea) that it would be all or nothing. So, trial commenced on October 8, 2019. Evidence the government presented involved inflammatory drug-related materials that would have been irrelevant and inadmissible had the court accepted Mr. Simpson's partial plea.

The following day, October 9, after the parties completed their presentations, the jury found Mr. Simpson guilty on all three counts with which he had been charged (possession with intent to distribute a controlled substance, being a felon in possession of a firearm, and possession of a firearm in furtherance of drug trafficking). RE. 93: Verdict, PageID # 432-34. Mr. Simpson moved the district court for a judgment of acquittal (on the two firearm counts) orally, following the government's proofs, and in writing two weeks later. The district court denied these motions. *See* RE. 105: Tr. Trans. Vol. II 10/9/19, PageID # 853; RE. 107: Order, PageID # 947, 949, 950, 952.

Sentencing proceedings, of course, followed. The probation office filed a final presentence investigation report (PSIR). Mr. Simpson and the government shared an objection to this PSIR's calculation of the advisory sentencing guidelines, namely the denial of acceptance-of-responsibility credit on the drug count. *See* RE. 123: Final PSIR, PageID # 1116-17. Even the government recognized that Mr. Simpson had attempted to plead guilty and admit his drug-dealing activity. While the court had not accepted a partial plea, throughout trial, Mr. Simpson did not deny his drug activity. Ultimately, the court denied credit for acceptance of responsibility, and while it granted a downward variance, it did so based on the offense, not for acceptance reasons. RE. 140: Sent. Trans. 2/18/20, PageID # 1194-95. It calculated a final offense level of 14, a criminal-history category of VI, and an advisory sentencing range of 37 to 46 months (with a consecutive 60 months under 18 U.S.C. § 924(c)(1)(A)(i)). *See id.* at 1183 (discussing final offense level of 14), 1194. The

court imposed a sentence of 24 months on the drug and felon-in-possession charges; with the consecutive 60 months under § 924(c), the total sentence fell at 84 months. The court also imposed 3 years of supervised release, a $1,200 fine, and a $300 special assessment. It filed its judgment on February 19, 2020, and Mr. Simpson filed his timely notice of appeal on February 21, 2020. Mr. Simpson then appealed his conviction and sentence, going so far as to request rehearing en banc when the Sixth Circuit panel ruled against him.

B. The Sixth Circuit failed completely in its consideration of the stakes here when it made no distinction between pleas offered under plea agreements (which a district court may reject) and pleas offered without the benefit of any sort of "deal." Its approach created a circuit split.

The Sixth Circuit (which had jurisdiction over the appeal under 28 U.S.C. § 1291) affirmed Mr. Simpson's conviction and sentence. *See United States v. Simpson*, 845 F. App`x 403, 415 (6th Cir. 2021). On the critical issue of the proffered partial plea, the panel offered two paragraphs. *See id.* at 408-09. Without distinguishing case law on plea agreements and deals (in contrast to pleas offered "straight up," without the benefit of any sort of bargain with the government), the court found simply that a defendant does not have a right to have a plea accepted, and district courts have the discretion to reject pleas. *See id.* at 408.

The court never cited Federal Rule of Criminal Procedure 11. Nor did it address other circuits' decisions finding a right, under the rule, to enter a guilty plea. It failed to distinguish pleas offered under plea agreements and pleas offered

"straight up," without an agreement or deal. The panel didn't even acknowledge the difference.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari in this case to affirm defendants' right, under the federal rules of criminal procedure, to enter a partial guilty plea (or any guilty plea offered without the benefit of a plea "deal"). It should use Mr. Simpson's case as a vehicle to resolve the circuit split on this matter.

Basically, the Ninth Circuit has said that defendants have a right, under Federal Rule of Criminal Procedure 11, to plead guilty, and the Sixth Circuit has said that defendants do *not* have such a right. The split begs for resolution . . . as does federal criminal justice as a whole. Rule 11 makes it pretty clear: trial courts have the discretion to reject a plea agreement. *See* Fed. R. Crim. P. 11(c)(3)(A) (allowing a court to reject a plea agreement tendered under Rule 11(c)(1)(A) or (c)(1)(C)). As to a guilty plea proffered without an agreement, however, "[a] defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere." Fed. R. Crim. P. 11(a)(1). Only in the case of nolo-contendere pleas does the rule require the court's consent for the plea itself.

The Ninth Circuit read the rule this way in *Vasquez-Ramirez v. United States District Court (In re Vasquez-Ramirez)*, 443 F.3d 692, 695-96 (9th Cir. 2006). In that case, the Ninth Circuit said, "Although Rule 11(c) explicitly gives judges discretion to reject certain types of plea agreements, Rule 11(a) does not authorize judges to reject unconditional guilty pleas." *Vasquez-Ramirez*, 443 F.3d at 695.

In coming to its decision, the Ninth Circuit pointed to this Court's reasoning in *United States v. Hyde*, 520 U.S. 670, 674 (1997). Citing *Hyde*, the *Vasquez-Ramirez* court admonished that this "Court has emphasized the importance of treating pleas and plea agreements distinctly." *Vasquez-Ramirez*, 443 F.3d at 695. The *Vasquez-Ramirez* court also looked to Federal Rule of Criminal Procedure 32, explaining that that rule provides for nondisclosure of presentence reports, even to district courts, until a defendant has pleaded guilty or nolo contendere (or has been found guilty). *Id.* at 698. The "obvious reason" for the rule, according to the *Vasquez-Ramirez* court, "is that the information in a presentence report, such as criminal history and related conduct, is irrelevant to the determination of guilt or innocence, and is only relevant to sentencing." *Id.*

A. The concept of partial pleas has been unremarkable, and widely accepted, nationwide, so the district court and Sixth Circuit's position here represented a break with the established jurisprudential trajectory.

Courts nationwide (district and appellate) seem to accept as unremarkable this idea that a defendant can enter a "straight-up" guilty plea—including a partial plea to an indictment—implicitly and without consternation recognizing a right to plead guilty to one count and proceed to trial on another. *See, e.g.*, *United States v. Johnson*, No. 3:17-CR-72 (W.D. Wisc. 2018) (RE. 2: Indictment, PageID # 1; RE. 24: Minutes of Change of Plea, PageID # 1; RE. 48: Motion to Exclude Expert, PageID # 1; RE. 69: Jury Verdict, PageID # 1) (defendant pleaded guilty to count one of the two-count indictment against him, proceeding to trial and ultimately having a jury find him guilty of count two of the indictment).

For multiple reasons, of course, (including concerns about separation of powers) federal criminal procedure does not allow a district court to involve itself in plea negotiations. *See, e.g.*, Fed. R. Crim. P. 11(c)(1); *see also Ellis v. United States District Court (In re Ellis),* 356 F.3d 1198, 1209 (9th Cir. 2004) (*en banc*). While plea agreements may receive judicial review, this sort of review does not extend to pleas themselves. *See* Fed. R. Crim. P. 11(c) (discussing a district court's consideration of plea agreements).

Jurists have said that "[t]raditionally, plea bargains have been subject to judicial approval. Plea bargains include sentence bargains and charge bargains." *See Ellis*, 356 F.3d at 1228 (Trott, J., concurring in part and dissenting in part). But plea bargains do not equate to pleas themselves. Procedural rules and the sentencing guidelines point to ensuring review of (and transparency for) such *bargains*. *See, e.g.*, U.S.S.G. § 6B1.1 Bargains generally involve plea agreements, which, again, stand distinct from pleas themselves. *See Ellis*, 356 F.3d at 1205 n.10 (distinguishing the two); *see also Vasquez-Ramirez*, 443 F.3d at 695.

Courts have far less discretion over bare *pleas* than *plea bargains*. *See Ellis*, 356 F.3d at 1200 (limiting district court's discretion to force withdrawal of a guilty plea in the wake of the court's rejection of the plea agreement). Returning to the Ninth Circuit, in that circuit, Rule 11(a) does not allow a judge to reject an unconditional guilty plea. *Vasquez-Ramirez*, 443 F.3d at 695. Rule 11 requires court consent only for nolo-contendere pleas, not for straight guilty pleas. *See id.*; *see also* Fed. R. Crim. P. 11(a). "Rule 11(b) lists various requirements that must be met

'before the court accepts a plea of guilty,' without giving judges the option of rejecting a plea once these requirements are satisfied." *Vasquez-Ramirez*, 443 F.3d at 695 (citation omitted). Against this background, the Ninth Circuit has said, "viewing Rule 11(a) and (b) together, it is clear that a court must accept an unconditional guilty plea, so long as the Rule 11(b) requirements are met." *Id.* at 695-96.

The district court in *Harmon v. United States*, No. 1:15-CV-82, 2018 U.S. Dist. LEXIS 36176, at *17 (S.D. In. Mar. 6, 2018) (unpublished), found the concept of a partial plea so unremarkable that it granted a motion under 28 U.S.C. § 2255 in part because the attorney was deficient when "he operated under the belief that if [the defendant] wanted to plead guilty, [he] would have to plead guilty to all charges, not just the drug charges." As the *Harmon* court explained it, "an open plea is simply a guilty plea without a plea agreement," and "a defendant may enter into an open guilty plea as to only a subset of all counts charged in an indictment." *Harmon*, 2018 U.S. Dist. LEXIS 36176, at *22-*23. To reach its conclusion, the court reviewed multiple cases supporting partial pleas and cited a treatise on federal practice and procedure that discussed evidentiary issues implicated by partial guilty pleas without questioning a basis for such pleas. *Id.* at *23.

Given the broad allowance of joinder in federal cases, one can readily see how a defendant might feel compelled to proceed to trial on some charges while readily admitting others. *See* Fed. R. Crim. P. 8(a). Allowing a defendant to plead guilty to certain charges in an indictment and to proceed to trial on others conserves judicial,

prosecutorial, and defense resources. Nothing in Rule 11 treats the counts of an indictment collectively. No one would argue that a factual basis on one count would suffice for all counts. Each count of an indictment is treated separately, and each must receive its own statutory citation; only if explicitly incorporated by reference will details in one count apply to another. *See* Fed. R. Crim. P. 7(c)(1).

The Tenth Circuit has found in favor of partial pleas. In *United States v. Martin*, 528 F.3d 746, 750 (10th Cir. 2008), the defendant had wanted to plead guilty to the assaults charged and proceed to trial on the rape allegations. The district court had conducted two hearings on the issue, ultimately refusing to accept a partial plea because the court "wanted to avoid making complicated evidentiary rulings and potentially confusing the jury by letting the defendant stipulate to half the government's case." *Martin*, 528 F.3d at 750. On appeal, the defendant argued that this refusal violated his constitutional right to plead guilty. *Id.* The Tenth Circuit expressed "doubts that the district court's desire to avoid confusing the jury or complicating the evidentiary issues was a sufficient basis for rejecting the partial plea." *Id.* In affirming the district court's decision, it did so on "another ground: the lack of a factual basis for [the defendant's] plea." *Id.*

The *Martin* court noted that no constitutional right exists to have a plea accepted without admitting the factual basis for it. *Id.*[1] And in that case, the defendant did not provide a sufficient factual basis. *Id.* As the Ninth Circuit found

[1]Basically, the *Martin* court did not find a constitutional right to plead guilty. It punted, to some extent, on the matter. *See Martin*, 528 F.3d at 750.

in *Vasquez-Ramirez*, of course, a right to enter a partial plea can arise from authority other than the U.S. Constitution. *See Vasquez-Ramirez*, 443 F.3d at 700 n.9. Rule 11 can provide that authority—and does so here. Likewise, Rule 10 and its provisions on guilty pleas at arraignment affirms that authority. Had Mr. Simpson pleaded guilty to the drug charge at his arraignment, the partial plea issue leading up to trial would not have arisen. He certainly had a right under Rule 11 to enter such a plea during his arraignment. *See* Fed. R. Crim. P. 10(a)(3) ("An arraignment must be conducted in open court and must consist of . . . asking the defendant to plead to the indictment or information") & 11(a)(1) (a defendant may plead guilty or not guilty); *see also United States ex rel. Williams Brierley*, 291 F. Supp. 912, 915 (E.D. Penn. 1968) ("In fact, it was only after his initial arraignment on the morning of April 17, 1962, when he entered a partial plea of guilty, that counsel was appointed to represent him.").

Partial pleas occur with sufficient regularity so as to constitute an option commentators have used as an analogy in discussing means to avoid undue prejudice in the context of proving prior convictions, and handling stipulations in that area entered in accordance with *Old Chief v. United States*, 519 U.S. 172 (1997). *See, e.g.*, Nancy J. King, *Once a Criminal . . . ?: Regulating the Use of Prior Convictions in Sentencing*, Marquette Lawyer 34 (Summer 2018).

Mr. Simpson did not look for a "right" to plea bargain here. *Cf. Ductant v. United States*, Nos. 2:11-CR-97/2:16-CV-748, 2020 U.S. Dist. LEXIS 29976, at *12 (M.D. Fla. Feb. 21, 2020) (unpublished) ("The United States Supreme Court has

long recognized that 'there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.'" (citations omitted)). Mr. Simpson did not go looking "to be offered a plea." *Cf. id.* He only sought to plead to the second count of the indictment exactly as that count was filed.

Even within the Sixth Circuit, this idea of a partial, "straight-up" plea was unremarkable up until Mr. Simpson's appeal. *See, e.g.*, *United States v. Burgess*, Nos. 90-6187/6329/6346, 1992 U.S. App. LEXIS 34740, at *1, *13 (6th Cir. Dec. 21, 1992) (unpublished) (considering an appeal in which one defendant "pleaded guilty to the conspiracy count and was convicted by the jury of the firearm offense"). Yet the Sixth Circuit failed to consider this jurisprudential landscape and simply threw *all* guilty pleas—with and without plea agreements or "deals" into a single hopper and found that a district court has the discretion to reject any plea. *Compare United States v. Simpson*, 845 F. App`x 403, 408-09 (6th Cir. 2021).

B. While the Ninth Circuit recognizes the distinctions between the subsections of Rule 11 and between pleas offered with and without plea agreements, in accordance with this Court's decisions, the Sixth Circuit fails to recognize these critical factors and differences.

Rule 11 explicitly differentiates between guilty pleas offered in accordance with a plea bargain and those offered without any such "deal." *Compare* Fed. R. Crim. P. 11(a)(1) *with* Fed. R. Crim. P. 11(c)(1). Mr. Simpson's case did not involve a plea *agreement* or *bargain*. He did not seek any sort of special treatment or concessions that might involve the district court's review and application of discretion. *See* Fed. R. Crim. P. 11(c)(3). So, the district court did not have to choose

whether or not to accept an agreement. *Cf.* Fed. R. Crim. P. 11(c)(4) & (c)(5). Mr. Simpson's offer of a guilty plea could easily have proceeded so as to satisfy the dictates of Rule 11: advising of rights, establishing a factual basis, ensuring voluntariness. *See* Fed. R. Crim. P. 11(b).

The Sixth Circuit, though, did not recognize these distinctions at all. Nor did it acknowledge that, at his arraignment, Mr. Simpson had had a right to enter a "partial" guilty plea to the charges against him. Instead, the panel decided only that the trial court had not abused its discretion in rejecting Mr. Simpson's proffer of a guilty plea on the second count against him. *See Simpson*, 845 F. App`x at 409.

In making coming to its conclusions, the lower court cited this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971), for the proposition that criminal defendants do "not have an 'absolute right to have a guilty plea accepted.'" *See id.* at 408. As the Ninth Circuit pointed out in *Vasquez-Ramirez*, however, *Santobello* does not and cannot answer the question presented in Mr. Simpson's case. *See Vasquez-Ramirez*, 443 F.3d at 700 n.9. Mr. Simpson will explore these considerations shortly.

The panel never even considered *Vasquez-Ramirez* and its conclusion that defendants can and do have a right to enter a guilty plea "straight up" when that plea satisfies the dictates of Rule 11. *See, e.g.*, *Vasquez-Ramirez*, 443 F.3d at 695-96 ("Thus, viewing Rules 11(a) and (b) together, it is clear that a court must accept an unconditional guilty plea, so long as the Rule 11(b) requirements are met.") & 700

n.9 (Rule 11 "does not allow a federal district judge to reject a guilty plea that meets the Rule 11(b) requirements").

Regarding even Sixth Circuit precedent, the panel missed the crux of the issue. In citing *United States v. Cota-Luna*, 891 F.3d 639 (6th Cir. 2018), the panel ignored the fact that that case addressed a plea agreement under Rule 11(c)(1)(C). *See Cota-Luna*, 891 F.3d at 647-48. The same holds for the panel's reference to *United States v. George*, 804 F. App`x 358, 361-62 (6th Cir. 2020), in which the court quoted *Santobello* for the proposition that, "[w]hile a defendant has 'no absolute right to have a guilty plea accepted,' a court must exercise 'sound judicial discretion' in determining whether to reject a plea." As in *Cota-Luna*, the *George* analysis involved a Rule 11(c)(1)(C) plea agreement. *See George*, 804 F. App`x at 361-62. These cases simply addressed markedly different situations from Mr. Simpson's.

C. This Court's jurisprudence supports the Ninth Circuit's finding of a right to enter a "straight-up" guilty plea under Rule 11, even if no constitutional *right to plead guilty exists.*

This Court's jurisprudence points to a right to enter a guilty plea (one not based on a plea agreement) under Rule 11. As the Ninth Circuit discussed in *Vasquez-Ramirez*, this Court's decisions do *not* suggest a lack of a right to plead guilty under Rule 11.

In looking at *Santobello v. New York*, the Ninth Circuit made certain critical observations. That court agreed, "of course, that a district court has discretion to reject a guilty plea in certain circumstances, namely when he feels the plea has failed to meet the Rule 11(b) requirements." *Vasquez-Ramirez*, 443 F.3d at 700 n.9.

It observed that "courts that discuss this 'well-settled proposition' often cite to *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)." *Id.* "But *Santobello* was decided before 1975, when Rule 11 was amended to remove the language that explicitly gave courts the ability to reject a guilty plea. No court seems to have analyzed whether this 'well-settled proposition' still applies post-1975." *Id.*

"In any event, the *Vasquez-Ramirez* court continued, "the Supreme Court in *Santobello* was reviewing a state court decision, . . . and therefore could only have held that there is no *constitutional right* to have a guilty plea accepted." *Id.* (citation omitted). That court did not dispute such a proposition related to constitutional law; it held "only that Rule 11 as currently written does not allow a federal district judge to reject a guilty plea that meets the Rule 11(b) requirements." *Id.*

This Court has considered similar issues more recently, in other contexts. For example, in *United States v. Hyde*, 520 U.S. 670, 671 (1997), the Court considered Federal Rule of Criminal Procedure 32(e), and a guilty plea made in accordance with a plea agreement, and an attempt to withdraw that plea. In that case, the issue involved an older version of Rule 32, one that provided that a district court could allow a defendant to withdraw their guilty plea before sentence was imposed if the defendant showed "a fair and just reason" for the withdrawal. *See Hyde*, 520 U.S. at 671. In *Hyde*, the defendant had pleaded guilty pursuant to a plea agreement, and the district court had accepted the plea but deferred decision on whether to accept the plea agreement. *Id.* The defendant then sought to withdraw

his plea, and this Court held "that in such circumstances a defendant may not withdraw his plea unless he shows a 'fair and just reason'" under the old version of Rule 32(e). *Id.*

In *Hyde*, this Court explicitly found that the text of Rule 11 shows that "guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time." *Id.* at 674. Under this reasoning, one must distinguish between "straight-up" pleas—which Rule 11 allows a defendant to enter as long as they (and the court) clear the procedural hurdles (rights advisement, voluntariness, factual basis)—and pleas entered under an agreement—which could involve the court having discretion to accept or reject them.

In dicta in *Hyde*, the Court discussed Rule 11's requirements related to advising defendants with regard to the rights they waive by pleading guilty, and in relation to inquiring into voluntariness. *See id.* After looking at the relevant subsections of Rule 11, the Court stated, "Based on this language, we conclude that once the court has taken these steps [into covering rights and voluntariness], it may, in its discretion, accept a defendant's guilty plea." *Id.* The district court's discretion, however, would not go to an overarching discretion to reject a "straight-up" plea after all aspects of Rule 11 had been satisfied, but rather, to determining *whether* Rule 11 had indeed been satisfied: did the defendant seem to be acting voluntarily and was there a satisfactory factual basis. *Compare id.* at 676 (listing factors for a successful plea as: swearing in open court that one committed the

offense; affirming that the guilty plea springs from an actual consciousness of guilt; providing a satisfactory factual basis); *see also id.* at 674 n.1 (noting rule's requirement of a satisfactory factual basis). And of course, the *Hyde* Court was operating in the context of a plea-agreement-based plea, where district-court discretion becomes a factor. *See id.* at 674-75.

The *Hyde* Court specifically found that "the Rules nowhere state that the guilty plea and the plea agreement must be treated identically." *Id.* at 677. More recently, this Court discussed "Type-C" plea agreements, entered under Rule 11(c)(1)(C) in *Hughes v. United States*, 138 S. Ct. 1765 (2018). Again, and unsurprisingly, this Court emphasized that, "Although in a Type-C agreement the Government and the defendant may agree to a specific sentence, that bargain is contingent on the district court *accepting the agreement* and its stipulated sentence. *See Hughes*, 138 S. Ct. at 1776 (emphasis added).

In considering pleas without plea agreements beside pleas with agreements, one might consider Rule 11 as *shifting* a district court's discretion. In the plea-agreement context (especially when a plea agreement includes a binding sentencing agreement), the district court's discretion lies in accepting or rejecting the plea. *See, e.g.*, *id.* at 1781 (Roberts, C.J., dissenting). "If the judge considers the parties' chosen sentence to be inappropriate, he does not have discretion to impose a different one. Instead, the court's only option is to reject the agreement and afford the defendant the opportunity to be released from his guilty plea." *Id.* In the context

of a guilty plea entered without a plea agreement, the district court's discretion lies not in accepting or rejecting the plea but in imposing sentence.

This reading of the Court's precedent finds support in older cases like *Santobello*. In that case, this Court said, "It is now clear, for example, that the accused pleading guilty must be counseled, absent a waiver," and Federal Rule of Criminal Procedure 11, "governing pleas in federal courts, now makes clear that the sentencing judge must develop, *on the record*, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." *Santobello*, 404 U.S. at 261. A guilty "plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." *Id.* at 261-62. Immediately after this latter sentence, the Court said, "There is, of course, no absolute right to have a guilty plea accepted." *Id.* at 262. And immediately after that statement, the Court continued, "A court may reject a plea in exercise of sound judicial discretion." *Id.*

This sequence firmly establishes that the judicial discretion at issue involves evaluating the voluntariness of the plea and the factual basis. Older versions of Rule 11 also support this interpretation. *See, e.g.*, *id.* at 261 n.1 (citing older version of the rule that provided, in part, a court could "refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea," and that courts should "not enter a judgment upon a plea of guilty unless [they are]

satisfied that there is a factual basis for the plea"); *see also North Carolina v. Alford*, 400 U.S. 25, 35 n.8 (1970) ("Throughout its history, that is, the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed. Rule Crim. Proc. 11 preserves this distinction in its requirement that a court cannot accept a guilty plea 'unless it is satisfied that there is a factual basis for the plea'; there is no similar requirement for pleas of *nolo contendere*, since it was thought desirable to permit defendants to plead *nolo* without making any inquiry into their actual guilt.").

Indeed, the *Santobello* court saw the judicial discretion at issue as *protecting* the interests of the accused—not as cutting off the defendant's plea options. "This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* Plea "circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.*

Justice Douglas reinforced this reading in his *Santobello* concurrence when he said, "But it is also clear that a prosecutor's promise may deprive a guilty plea of the 'character of a voluntary act.'" *Id.* at 266 (Douglas, J., concurring). Essentially, a guilty plea equates to a waiver of the constitutional right to trial, which a defendant can make freely. *See, e.g.*, *id.* at 267 (Marshall, J., dissenting) ("This and other

federal rights may be waived through a guilty plea"). Comparing Mr. Simpson's circumstances to those of a defendant who chooses to make a broad waiver of their appellate rights in a plea agreement underscores Mr. Simpson's right to have had his guilty plea accepted: district courts are not exercising any sort of discretion to reject broad appellate waivers; they do not see these waivers as problematic.

In *North Carolina v. Alford*, 400 U.S. 25 (1970), this Court offered more discussion to reinforce the idea that a court's discretion goes to a finding of voluntariness and a factual basis—not broad discretion to reject an otherwise satisfactory guilty plea. In that case, the Court noted that "[s]tate and lower federal courts are divided upon whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt." *Alford*, 400 U.S. at 33. Some courts, the *Alford* Court explained, gave "expression to the principle that 'our law only authorizes a conviction where guilt is shown,'" and "require[d] that trial judges reject such pleas." *Id.* at 33. The factual basis constituted the focus.

Rule 11 itself requires a court's consent (with consent involving an exercise of discretion) in the case of nolo-contendere pleas. *See* Fed. R. Crim. P. 11(a)(1); *see also Alford*, 400 U.S. at 37 ("Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in

the acts constituting the crime."). No such qualification applies to guilty pleas that do not involve plea agreements.

In discussing the U.S. Constitution's lack of a guarantee to have a guilty plea accepted, the *Alford* Court recognized that statutes and rules may supply such a guarantee in the Constitution's stead. While "[a] criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, . . . the States may by statute or otherwise confer such a right." *Alford*, 400 U.S. at 38 n.11 (citation omitted). "Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence." *Id.* The *Alford* Court explicitly declined to delineate the scope of a court's discretion under an older version of Rule 11 (one that more broadly spoke of a court's ability to accept or reject a plea). *Id.*

Rule 11 has, of course evolved. "The Rule has evolved over the course of 30 years from general scheme to detailed plan, which now includes a provision for dealing with a slip-up by the judge in applying the Rule itself." *United States v. Vonn*, 535 U.S. 55, 62 (2002); *see also United States v. Vonn*, 535 U.S. 55, 66 (2002) ("When *McCarthy* [*v. United States*, 394 U.S. 459 (1969),] was decided, Rule 11 was relatively primitive, requiring without much detail that the trial court personally address a defendant proposing to plead guilty and establish on the record that he was acting voluntarily, with an understanding of the charge and upon a factual basis supporting conviction."). Its current structure better demonstrates a

defendant's rights, especially his or her right to have a guilty plea accepted when that plea satisfies the rule's criteria.

D. The advisory sentencing guidelines even support a finding of a right to enter a plea in these circumstances.

Even the advisory sentencing guidelines militate in favor of recognizing a defendant's right to enter a guilty plea. Under U.S.S.G. § 3E1.1, a defendant should have the right to plead guilty before trial and receive sentencing credit for acceptance of responsibility. *See, e.g.*, U.S.S.G. § 3E1.1, comment. (n.2) (looking to "[e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction"). In the end, the rules of procedure provide for entry of a guilty plea when the provisions of Rule 11(b) are satisfied. The district court cannot refuse a plea if such a plea involves no agreement or bargain.

In offering its markedly truncated analysis of the plea issue, the Sixth Circuit failed to grapple with two significant factors. First, the panel seems to have ignored completely the distinction between rejecting a plea *agreement* and rejecting a "straight-up" plea—one involving no agreement. Second, the panel completely failed to consider the idea that a defendant has a right to enter a partial plea when no plea agreement is involved, even if that right springs from a source other than the U.S. Constitution.

Perhaps these failures spring from a common (and in some ways, logical) idea that criminal cases in America generally end with *either* plea *bargains* or trials; few

people think in terms of a straight-up plea to an indictment or other charging document. Even this Court said in *Santobello*, "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello*, 404 U.S. at 260. "Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.* Yet this dichotomy of plea bargain versus trial fails to account for that vital, if not often seen, third option of simply entering a guilty plea to charges . . . without the benefit of any sort of plea deal or agreement.

This Court has long recognized the factors necessary for acceptance of a guilty plea, factors now enumerated in Rule 11: an advice of rights, voluntariness, and a factual basis. *See, e.g.*, *Kercheval v. United States*, 274 U.S. 220, 223 (1927) ("Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."). A district court may exercise discretion in determining whether a proffered guilty plea satisfies these criteria. Otherwise, if a defendant offers a straight-up guilty plea to a charge or charges in an indictment, Rule 11 requires the district court to accept that plea. Mr. Simpson asks this Court to resolve the circuit split on this matter and so find.

CONCLUSION

In failing to consider the rights Rule 11 affords defendants, and failing to consider other circuits' approaches to the issue of guilty pleas, the Sixth Circuit split with cogent authority and concluded that a defendant does not have a right to enter a "straight-up" guilty plea. In doing so, the circuit failed to distinguish between pleas offered with the benefit of a plea agreement or deal and pleas proffered without an agreement.

The circuit's approach ignores logical, well-reasoned case law from other circuits, and the plain language of Rule 11. Mr. Simpson asks this Honorable Court to grant this Petition for a Writ of Certiorari, vacate the judgment of the Sixth Circuit Court of Appeals, and remand for reconsideration of his case in light of district courts' recognized obligation under Rule 11 to accept a guilty plea—even a partial one to only certain counts of an indictment—when offered without any sort of discretionary trappings like a plea agreement or deal.

Respectfully submitted,

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