No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRYANT D. ARON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

1) Plea agreements under Fed. R. Crim. P. 11(c)(1)(C) bind a district court if the court accepts the agreement. A district court can also reject the agreement or defer pending the completion of a presentence investigation report. If a district court does not explicitly do any of the three options, and the status is ambiguous heading into a sentencing hearing, should a reviewing court consider the agreement accepted out of fairness to the parties?

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OPINION BELOW

The decision of the Court of Appeals for the Seventh Circuit ("Seventh Circuit") is a published opinion. The opinion is attached as Appendix A and is reported at *United States v. Aron*, 98 F.4th 879 (7th Cir. 2024).

JURISDICTION

On April 16, 2024, the Seventh Circuit entered its opinion in Mr. Aron's appeal. The opinion affirmed Mr. Aron's conviction and sentence.

On July 3, 2024, in Application No. 23A1170, Associate Justice Amy Coney Barrett granted Mr. Aron's application for an extension of time to file this petition. The deadline was extended to September 13, 2024.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure Rule 11(c)(1)(C) and (c)(3)(A) provide, in relevant part:

(c) Plea Agreement Procedure

(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:

> (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).

(3) Judicial Consideration of a Plea Agreement

> (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

INTRODUCTION

Mr. Aron's case creates a circuit split and provides an opportunity for this Court to clarify the procedures a reviewing court must take in response to district court ambiguity about a Fed. R. Crim. P. 11(c)(1)(C) ("binding plea agreement") agreement. The case demonstrates the potential ambiguity and pitfalls that are possible with this type of plea agreement, which leads to uncertainty for the government and the defendant, removing this important tool to resolution of cases before trial.

In Mr. Aron's case, he entered into a binding plea agreement. A magistrate judge held Mr. Aron's change of plea hearing and the magistrate judge was ambiguous as to what would occur regarding the district court's acceptance, rejection, or deferral of consideration of the agreement. Following that hearing, the district court entered what appears to have been a form order, in which the district court accepted the magistrate's recommended disposition, finding Mr. Aron guilty, and then said, "[s]ubject to this Court's consideration of the Plea Agreement pursuant to Federal Rule of Criminal Procedure 11(c), if applicable and necessary, the plea of guilty to the offense charged in Count 1 of the Indictment is hereby ACCEPTED, and the Defendant is adjudged GUILTY of the offense." (R.55.) It then held a "sentencing hearing," hearing objections to the Guidelines range. Only then, well into the hearing, it rejected the agreement.

Mr. Aron's case creates a split in how the circuits address cases involving ambiguity in a court's consideration of binding plea agreements. Before this case, the

Seventh Circuit tracked courts like the Fourth and Sixth Circuits, where ambiguity was read in favor of acceptance. This approach led to erring on the side of certainty. But Mr. Aron's case now casts that uniformity into doubt, as ambiguity is now read in favor of deferral. This Court can provide direction as to how a district court should act to accept, reject, or defer consideration of an agreement, and how a reviewing court should consider an ambiguous record.

STATEMENT OF THE CASE[1]

Mr. Aron wanted to take responsibility for his actions by pleading guilty. Mr. Aron agreed to a binding plea agreement under Fed. R. Crim. P. 11(c)(1)(C) in which the Government agreed to an eight-year sentence based on the United States Sentencing Guidelines ("Guidelines"). (Oct. 6, 2021, Tr. 10:17-20.)

On June 28, 2021, Mr. Aron entered his plea of guilty in front of a magistrate judge (June 28, 2021, Tr. 2:3-6), which was later accepted by the district court, which adjudicated him guilty. (R.55:1.) The district court then set the case for sentencing. (R.56:1), as well as scheduling a judgment and sentencing date of October 6, 2021. (R.56:2.) The district court also submitted proposed conditions of supervised release. (R.63.)

At Mr. Aron's sentencing hearing, the district court heard arguments from the parties for the sentence and took a recess. (Oct. 6, 2021, Tr. 22:4-9.) After taking this short recess, the district court chose to reject the binding plea that the court had issued a written order accepting. (*Id*. at 23:10-12.) Based on the PSR and sentencing arguments from both parties, the court concluded that 96 months, above the bottom of what would have been the appropriate Guidelines range, was insufficient. (*Id*.) Mr. Aron was left to change his plea or risk facing a steeper penalty than the parties agreed upon. (*Id*. at 24:6-15.) This followed Mr. Aron's possession of a firearm and the events prompting this case.

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[1] The following abbreviations are used herein: Criminal Record on Appeal, cited by document number and page: "R. __:__," Appellate Court Record, cited by document number and page: "App. R. __:__," and Sentencing Transcripts, cited by page and line: "Sent. Tr. __:__.

A Fort Wayne Police cruiser encountered a Nissan Rogue. (*Id.*) The cruiser attempted to stop the vehicle. But the Nissan accelerated, and the officer pursued. The vehicle eventually crashed. A man fled the Nissan, and the officer followed. (*Id.* at ¶5.) Once the man was in custody and backup arrived, the interrogation began. *(Id.* at ¶6.) He was later identified as Bryant Aron. *(Id.* at ¶4.) Law enforcement discovered a loaded magazine in his pocket. (*Id.* at ¶6.) Because of this, the discovery escalated to include a search of the Nissan. (*Id.*) The officers found a firearm in the hatchback area of the car. (*Id.)* The Government indicted Mr. Aron with illegal possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (R.1:1.)

Mr. Aron and the Government entered into a binding plea agreement under Rule 11(c)(1)(C) and agreed to a 96-month sentence. (R.49.) Mr. Aron was offered this sentence based on his anticipated Guidelines range had the Government appropriately given him the third point of acceptance credit. (Oct. 6, 2021, Tr. 13:1-10.) The Government calculated Mr. Aron's offense level as 26, then applied a three-level benefit for Mr. Aron's acceptance of responsibility. (*Id.*) This calculation included a four-level enhancement for using the possessed firearm in connection with another offense. The Government then calculated Mr. Aron's criminal history to be category VI. (*Id.*) With an offense level of 23 and criminal history category of VI, the anticipated Guidelines range for Mr. Aron was 92-115 months. (*Id.*) This is the same range Mr. Aron ultimately would have faced had he been given the full benefit of acceptance of responsibility had he pleaded guilty to a different agreement rather than enter a binding plea.

Mr. Aron's change of plea hearing was heard before a magistrate judge. During this hearing, the magistrate made clear that if accepted, the district court would be bound under the agreement. (June 28, 2021, Tr. 17:7-13.) Specifically, the district court would be bound under Rule 11(c)(1)(C) to impose a sentence of 96 months. (June 28, 2021, Tr. 17:2-13.) But the magistrate did not state any presumed outcome regarding the plea: acceptance, rejection, or deferral. (*Id*. at 17-18.) The magistrate judge noted alternatives, and the possibility of deferral of the decision, but did not convey any recommendation or determined outcome. (*Id*. at 15:1-5.) Yet the magistrate did note that "these agreements are generally valid." (*Id*. at 23:23-24.) The magistrate then entered a plea colloquy with Mr. Aron including, but not limited to, informing Mr. Aron of the rights he would be forfeiting, listing off the essential elements of the offense charged, and establishing the facts of the case. Mr. Aron ultimately entered a plea of guilty to the indictment. (*Id*. at 31:7-9.)

Following that hearing, the magistrate issued a recommendation stating that "I RECOMMEND that the Court accept Defendant's plea of guilty and that Defendant be adjudged guilty of the offense charged in the single-count Indictment, and have sentence imposed." (R.53:3-4.) The district court then issued a written order accepting this plea.

> The Court being duly advised, ADOPTS the Findings and Recommendation [ECF No. 53] in its entirety and ACCEPTS the recommended disposition. Subject to this Court's consideration of the Plea Agreement pursuant to Federal Rule of Criminal Procedure 11(c), if applicable and necessary, the plea of guilty to the offense charged in Count 1 of the Indictment is hereby ACCEPTED, and the Defendant is adjudged GUILTY of the offense.

(R.55:1.)

At that time, the district court set the matter for sentencing. (R.56.) At the start of that hearing, the district court began by calling the case, stating "[t]his case is now before the Court for the sentencing of the defendant." (Oct. 6, 2021, Tr. 2:9-10.) The district court then recounted the procedural history of the case. (*Id*. at 3:4-24.) It said nothing about the binding plea. The district court then heard argument on Guidelines objections and made factual findings. (*Id*. at 5.)

The defense did not file a written objection to the PSR. That said, Mr. Aron's counsel orally objected to the pending charge's inclusion in the presentence report and commented, "even if the [c]ourt were to find that enhancement was not applicable, as this is a binding plea, *it would not have an impact* on the 96 months' binding agreement." (*Id*. at 5:7-6:1) (emphasis added.) The Government agreed that the dispute over the four-level enhancement "*doesn't affect the binding plea*," and made a similarly brief explanation about why the enhancement still should apply. (*Id*. at 6:6-12) (emphasis added.) The district court overruled the objection and kept the four-level enhancement. (*Id*. at 6:14-17.)

Despite prior references from the parties, it was only after 7 and a half pages of transcript that the district court first alerted the parties that it was still considering the plea agreement. (*Id*. at 8:19-22.) After hearing the position of the parties on the agreement, as well as the nature of how the sentence was determined using the Guidelines, the district court rejected the Rule 11(c)(1)(C) plea agreement. (Oct. 6, 2021, Tr. 24:4-5.) The court rejected the agreement stating that "[i]t does not

promote respect for the law, protect the public from further crimes by the defendant, and will not serve as an adequate deterrence." (*Id.* at 22:20-22.) It repeated those same phrases again with respect to the sentence. (*Id.* at 23.) The district court also stated that the sentence would "create a disparity in sentencing." (*Id.* at 23:4-5.) The district court felt that Mr. Aron's criminal history and alleged prior firearm offense similarly were problematic for the proposed sentence based on the Guidelines. (*Id.* at 22.) The district court felt there were far more aggravating factors than mitigating ones. (*Id.* at 23:20-2.) Following the rejection, Mr. Aron changed his plea to not guilty and the court scheduled Mr. Aron's case for trial. (*Id.* at 25:8-10.)

Mr. Aron was convicted of violating § 922(g)(1). (Final PSR ¶1.) The court then sentenced Mr. Aron using the Guidelines range calculated without including any benefit for Mr. Aron's willingness to take responsibility as he had wanted to do. (Sent. Tr. 6:8-10.) Mr. Aron was then given a 120-month sentence, the longest the statute allowed, run consecutive to any other sentence. (Sent. Tr. 18:2-25.) The district court calculated Mr. Aron's Guidelines range with offense level 26 and criminal history category VI, the same as calculated for his original plea agreement but without acceptance of responsibility credit. (Sent. Tr. 6:8-10.) As a result, his advisory Guidelines range was 120 months, the statutory maximum and the 10-year sentence he eventually received. (Sent. Tr. 18:2.)

Mr. Aron appealed, arguing among other things that the district court's record was ambiguous, so it had accepted his plea agreement. Citing only Rule 11(c)(1)(C) and U.S.S.G. § 6B1.1, the Seventh Circuit appeared to promote the process that the

default position in binding plea agreements is to defer until reviewing the PSR and searching for points consistent with that position. *Aron*, 98 F.4th at 883. It then discussed selected portions of the magistrate's hearing discussing how a PSR would be created and statements suggesting the district court might accept the agreement based on subsequent information. *Id.* at 884-85. It then glossed over the district court's order stating it accepted the recommendation and, in form language, was deferring consideration of the agreement, if any. *Id.* at 885. The Seventh Circuit held that there was no ambiguity, or that any tracked with deferring until the court reviewed the PSR. *Id.*

REASONS FOR GRANTING THE PETITION

I. *United States v. Aron* Creates a Circuit Split Regarding How to Construe Ambiguity in Considering a Rule 11(c)(1)(C) Agreement.

In many circuits, to account for the power differential between the defendant and the Government and courts, a reviewing court will err on the side of finding the acceptance of a binding plea agreement in situations where there is ambiguity as to the court's actions. But Mr. Aron's case represents a shift in that structure, instead appearing to return to the case before *Booker* made the Guidelines advisory: that binding plea agreements are presumed deferred pending the review of a presentence investigation report. This shift could significantly impact the likelihood a defendant would agree to such a plea, leading to disruption in the plea process and an impact on trial schedules and other judicial resources.

Generally, federal plea agreements only bind the parties: the Government and the defendant. But Rule 11(c)(1)(C) permits parties to stipulate to a "specific sentence or sentencing range" that could be binding on the court. These are called "binding plea agreements" or "sentence bargains."

When the parties have negotiated a binding plea, Rule 11 requires a district judge to "make a *definite* announcement of acceptance, rejection, or deferral of her decision about a plea bargain" until a presentence report is produced. *See, e.g., United States v. Ritsema*, 89 F.3d 392, 401 (7th Cir. 1996) (citing *United States v. Blackwell*, 694 F.2d 1325, 1339 (D.C. Cir. 1982)) (emphasis added). This "requirement ... is indispensable to a criminal justice system so heavily dependent on plea bargaining."

Id. Yet this Court has held that a guilty plea can be accepted while deferring consideration of a plea agreement. *United States v. Hyde*, 520 U.S. 670, 674 (1997). The United States Sentencing Guidelines also have a policy statement that promotes the default being deferral to consider the Guidelines range or particular sentencing rationale that is recorded in the statement of reasons a remnant of the pre-*Booker* era. U.S.S.G. § 6B1.2(b). This means that clarity about both the initial district court action on a plea agreement, and how a reviewing court considers ambiguity in that action, is critical. This is further made true by the benefits from binding plea agreements.

While occasionally controversial, binding plea agreements can serve a unique and important function in the era of United States Sentencing Guidelines sentencing. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 Hofstra L. Rev. 639, 641 (2008). Binding plea agreements negate uncertainty at sentencing that may help promote non-trial dispositions, conserving judicial resources. Due to the certainty for the defense and the conservation of judicial and prosecutorial resources, the prevalence of binding plea agreements has grown. Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World off Bargained Punishment*, 58 Stan. L. Rev. 293, 299-300 (2005). As a result, some have called for a broadened use of these agreements, with greater deference by the district court to the negotiated disposition of the parties, while maintaining procedural and substantive fairness. *See, e.g.,* Wes R. Porter*, The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed*

Role for Binding Plea Agreements Post-Booker, 27 Wm. Mitchell L. Rev. 469, 518 (2011).

In reviewing the matter recently, as a matter of first impression, the Fourth Circuit concluded that a district court can "constructively accept" a binding plea agreement and that, as a result, ambiguity regarding the district court's decision is read in favor of acceptance. In *United States v. Dunlap*, 104 F.4th 544 (4th Cir. 2024), the Fourth Circuit faced a similar situation to that of Mr. Aron. In a combined change of plea hearing for the co-defendants, the district court did not accept, reject, or defer the agreement. *Dunlap*, 104 F.4th at 546. But a later docket notation stated that the court accepted the agreement, and that notation went unchanged. *Id.* At separate sentencing hearings, the district court expressed concerns with the agreed-to disposition. *Id.* The court later rejected the agreement. *Id.* At a subsequent sentencing of the co-defendant, the district court again rejected the agreement, stating that the agreement "[had] been accepted subject to [the court's] imposition of the sentence that's prescribed in it." *Id.* at 547. The court, again feeling the sentence was inappropriate, rejected the agreement. *Id.*

On appeal, the Fourth Circuit deemed the record ambiguous as to whether the court accepted the agreement. *Id.* at 549. In contrast to the docket entry, the Fourth Circuit credited the district court the defendants to withdraw following rejection as creating ambiguity. *Id.*

Having not previously decided how to address such ambiguity, the court looked to other circuits' treatment of the issue. Crediting the Sixth and Seventh Circuits, the

Fourth Circuit held that a reviewing court construes ambiguity in favor of the defendant. *Id*. at 549-50. The court stated that the onus was on the district court to make a clear record and recognized the greater power in the hands of the prosecution as reasons for its ruling. *Id*. This ruling joined the perspectives of the Sixth and Seventh Circuits, among others.

Dunlap is and was consistent with the views of the Sixth Circuit and other circuits. Perhaps the best-known case in this area is *United States v. Skidmore*, 998 F.2d 372 (6th Cir. 1993). In *Skidmore*, the Sixth Circuit, reviewing the predecessor to Rule 11(c)(1)(C), stated that failure to clearly accept or reject an agreement does not amount to a rejection. *Skidmore*, 998 F.2d at 375 (citation omitted). As a result, if the status of the agreement is ambiguous, the Sixth Circuit holds that the ambiguity is construed against the district court and in favor of acceptance. *Id*.

The Seventh Circuit in *United States v. Brown*, 571 F.3d 690 (7th Cir. 2009), as least as described in *Dunlap*, agreed that *Skidmore* stands for resolution of ambiguity in favor of acceptance, but did not decide the issue as it deemed the agreement accepted. *Brown*, 571 F.3d at 694-95. While not necessary to the ruling in *Brown*, the Seventh Circuit at that time noted that a defendant is left at the mercy of not only the government but "must also defer to the authority of the district court, which retains the right to reject the plea agreement." *Id*. at 549-50. As a result, the Seventh Circuit felt clarity was key. The Tenth Circuit has also used *Skidmore* to find constructive acceptance of a plea agreement when a district court did not make clear whether it accepted or rejected the agreement but acted pursuant to its terms. *United*

States v. Smith, 500 F.3d 1206, 1213 n. 3 (10th Cir. 2007). *See also United States v. Gardner*, 5 F.4th 110, 120 (1st Cir. 2021) (Lynch, J., dissenting) (noting that ambiguity should be construed if favor of acceptance to avoid potentially upsetting a bargain that both parties struck.). The circuits to have directly addressed the question about how to construe ambiguity have sided with the defendant, but that appears to no longer be true.

Aron throws the Seventh Circuit's precedent into disarray and effectively creates a circuit split regarding construing ambiguity. On appeal, the Government could point to only three places where it argued that the district court indicated it deferred consideration of the agreement. First, and like *Dunlap*, the Government pointed to the form document the district court submitted that accepted the magistrate's change of plea recommendation. (R.55:1.) Yet the precise language of that order was that the district court referred generally to the consideration of Rule 11(c), "if applicable and necessary." (R.55:1.) That rule contains five numbered subsections and further, multiple lettered subsections, many of which are inapplicable and one of which speaks generally to the court's consideration of any plea agreement. Fed. R. Crim. P. 11(c)(3). This was no clearer than the district court's explicit docket entry entered into the record in *Dunlap*. And the stock language failed to provide clear indication of the court's intent.

The second item the Government pointed to was the plea agreement, which contained a section stating the district court would defer. Third, the Government suggested the parties' actions at the "sentencing hearing" demonstrated the parties

understood the matter was deferred. Yet none of these were conclusive and many were like facts from *Dunlap*.

The plea agreement cannot represent the court's intent if it is not a party to it. And the district court's actions were again like *Dunlap*, where the court started in discussion of sentence, and then later rejected the plea agreement and offered the opportunity to withdraw the guilty plea. (Oct. 6, 2021, Tr. 5:7-6:1, 6:6-12.) Instead, the parties made not-even-half-hearted objections to the Guidelines range, noting that they did not matter due to the binding plea agreement. (Oct. 6, 2021, Tr. 5:7-6:1.) The parties were also ambiguous in their apparent understanding about whether the agreement had been accepted.

Rather than finding ambiguity like the Fourth Circuit in *Dunlap* and construing it as acceptance, the Seventh Circuit felt there was nothing to demonstrate acceptance, implicitly or explicitly. It also made a point to cite U.S.S.G. § 6B1.1 commentary where the Guidelines recommend deferral. *Aron*, 98 F.4th at 883. The Seventh Circuit pointed to the plea agreement, which the court did not sign or review on the record before sentencing, as a basis to presume deferral. *Id*. at 884. The court then credited statements made by the magistrate judge at the change of plea hearing that "if it is necessary for [the court] to accept your plea agreement because it contains binding terms, then she will do that at the sentencing hearing before imposing sentence." *Id*. (citation omitted). But the district court did not state or adopt this. Rather, it was just the magistrate judge's position. The magistrate made similar comments throughout the change of plea, but all were the magistrate

judge's guess as to what would happen, and far from facts of the case. The Seventh Circuit then made quick work of noting that the district court's order referenced Rule 11 and the parties' actions, stating in conclusory fashion that they too demonstrated deferral, as contrast to the *Dunlap* court's even-handed approach first searching for ambiguity, then acting accordingly. To that end, *Aron* stands, it appears to diverge from what was considered circuit precedent in *Brown* and treads a new path toward the consideration of any information demonstrating deferral, or likely even rejection, as the presumed approach of a district court, absent clear statements to the contrary. This shift could upend a tool for all parties and the courts.

As noted above, one of the primary purposes of Rule 11 binding plea agreements is to create certainty in an uncertain world of federal sentencing. Post-*Booker*, it is now harder to predict how a district court may sentence someone, even if the parties have an accurate picture of the Guidelines at play. In a circuit where courts defer to acceptance in favor of powerless defendants, that uncertainty can be mitigated or put at rest. But in a circuit applying the reasoning from *Aron*, a defendant replaces sentencing uncertainty with both plea *and* sentencing uncertainty. Now, in many situations in which another circuit may consider a plea implicitly accepted, instead a court may reject the parties' will and do so in an unclear and delayed fashion. This may well chill the use of this tool for federal prosecutors and defendants to resolve cases without costly trials and significant judicial resources. As a result, this matter is ripe for review, clarification, and decision by this Court.

CONCLUSION

For these reasons, Mr. Aron asks the Court to issue a Writ of Certiorari and review this case on the merits.

Date: 9/30/24_____

Respectfully Submitted,

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