

GUILTY PLEA OUTLINE
August 2014 Revision [Draft One]

FILED
SEP 29 2014

U.S. DISTRICT COURT
ELKINS WV 26241

US v. Jessica Elvora Keens
Case No. 2:14CR20
Violation 21 USC 841(b)(1)(F)

Date: 9/29/14
Counsel for Defendant: Walfe

- Clerk call the case
- Counsel note their appearance
- Note Defendant is present in person
- Have Defendant Sworn
- Right to ask questions about anything during the hearing
- Right to consult with your counsel during the hearing
 - Right to privacy
 - Microphone
 - If you don't have sufficient privacy at counsel table, let me know - we will recess
- Conduct colloquy with Defendant re: **telling the truth**
 - Court will be asking questions
 - Answer - Court will assume you understood the question
 - If don't understand a question - say so
 - Required to give truthful answers
 - Testifying falsely to a matter material to the proceeding could:
 - Subject you to prosecution by the Government for:
 - felony false swearing under oath
 - felony perjury
 - contempt of court
 - If convicted of false swearing, perjury, or contempt of court, you could face penalties of fine and or imprisonment which are in addition to any penalty you may face as a result of your proposed plea
- Everything I ask you will be material-important to this change of plea hearing and all future appeals and collateral attacks [habeas corpus motions]
- Plea and Plea agreement**
 - What plea do you anticipate the Defendant will make
 - Is that pursuant to a plea agreement
 - Have AUSA summarize the plea agreement
 - Tell Defendant to listen to the summarization
 - Ask Defendant:
 - Is that the agreement - deal you made with the AUSA?
 - Ask AUSA if the agreement is the sole agreement offered to Defendant
 - Ask counsel for Defendant to confirm:
 - Is the sole agreement or offer made to Defendant
 - That he reviewed each offer or agreement with Defendant

Confirm with Defendant that his counsel discussed each agreement or offer with him or her

Order the agreement filed

Conduct Colloquy re: **Consent**

Do you understand you are pleading guilty to a felony charge?

Have you discussed with your attorney:

That I hold the position of Magistrate Judge

That a Magistrate Judge may hear and accept a felony guilty plea with your consent

That a District Judge does not need your consent to hear and accept your guilty plea

That a Magistrate Judge does not have that power

Any consent you give to a Magistrate Judge to hear and accept a guilty plea must be your own voluntary and informed decision

Do you want to consent to me, a Magistrate Judge conducting your plea hearing and deciding whether any plea you may make should be accepted?

Are you willing to reduce your oral consent to writing?

Order the signed consent form filed

Colloquy concerning **Competency**

What is your name

How old are you **23**

How far did you go in school **HS**

Are you able to read, speak and comprehend American English **4**

On a scale of 1-10, 1 being the worst and 10 being the best, where would you rate yourself with respect to your ability to read, write and comprehend American English **8**

Can you see to read today **4**

Can you hear what is being said today **4**

Are you able to concentrate on what is going on around you today **4**

Have you understood what I have asked or said to you up to this point **4**

Have you been treated for a mental illness, psychiatric or psychological problem in the last 6 months **N**

Describe the condition treated

Describe the treatment [drugs, therapy, combination]

Have you been treated for addiction to narcotic drugs within the last 60 days **N**

Describe the addiction being treated

Describe the treatment [substitute drugs (dosage, taper off plan, when last taken and amount taken), counseling (inpatient/outpatient), combination]

Is your mind clear **4**

Describe for me what you intend to do today during this hearing **OK**

Optional: Ask counsel if he/she thinks Defendant is competent

In the last 24 hours have you taken an illegal drug or drugs **N**

In the last 24 hours have you taken a prescription medication whether it was prescribed for you or another person **N**

What medicines have you taken

- ~~When~~
- ~~What dosage~~
- ~~Is that the normal dosage~~
- ~~What effect does the medication have on you~~
 - ~~alone~~
 - ~~in combination with all other medications~~
 - ~~in combination with the conditions or all other conditions~~

~~In the last 24 hours have you taken any over the counter medications you can buy without a prescription.~~ **TYLENOL HEADACHE**

In the last 24 hours have you consumed alcohol **N**

As you sit here today do you have any physical, emotional, psychological or psychiatric (mental) condition which affects in any way your ability **N**

To hear and respond to my questions **N**

To communication with your attorney about your case **N**

To make decisions about your case **N**

3

Information and Grand Jury

- You have a Constitutional Right to have the Government present the charge against you to a Grand Jury
- Grand Jury is group of at least 16 people selected from within NDWV
- They hear evidence presented to them by the Government
- They can subpoena witnesses on their own
- After hearing the evidence, they secretly deliberate and decide two things:
 - Is there probable cause to believe a crime has been committed
 - Is there probable cause to believe that you committed the crime
- If 12 or more of the 16 or more grand jurors who heard the evidence and deliberated decide there is such probable cause, then they return an indictment
- The indictment becomes the statement of a formal charge against you
- If 12 or more can't agree there is probable cause, no indictment is returned
- The prosecution not anyone but the grand jurors is present in the room during these deliberations and votes
- You cannot be forced to give up your Constitutional right to proceed by grand jury indictment
- You may voluntarily give up that right if you want to and agree to proceed by information
- If you do that, there will be no grand jury
- There will be no screening of the evidence by a grand jury to determine if there is probable cause
- It is your way of saying you consent to the United States Attorney directly filing the criminal charge against you without presenting it to a grand jury for probable cause screening
- If an indictment was previously returned against you, but now you are proceeding under an information instead of the indictment
 - The information will replace the indictment
 - By pleading guilty to the charge in the information you give up the right to

raise or challenge any defect that may have existed in the grand jury process

- If you consent to proceed by the information, your consent must be voluntarily given
- Your consent cannot be the result of coercion, pressure, force, undue influence, threat or promise of reward
- Do you understand your rights with regard to:
 - Proceeding by indictment return by a Grand Jury
 - Waiver of your Constitutional right to the Grand Jury process
 - Consent to proceed by Information filed directly against you by the United States Attorney
- Have you seen the Information
- Have you read it
- Have you reviewed the charge or charges in it with your lawyer
- Do you understand those charges
- Do you need more time to discuss those charges with your lawyer
- Do you want to give up your Constitutional right to proceed by the Grand Jury Indictment process
- Do you want to proceed by the Information that has been filed against you by the United States Attorney
- Are those two decisions freely and voluntary made
- Written Waiver and Consent signed by Defendant
- File Waiver and Consent

Indictment

- Did you receive a copy of the Indictment Y
- Did you read the charges made against you in that indictment word for word and line by line Y
- Did your attorney read and review the charges with you word by word and line by line Y
- Do you understand those charges Y
- Do you need any additional time to further discuss those charges with your attorney N

Elements of each Offense being pled to [whether by information or by indictment]

Competency of Lawyer

- How did you get along with your lawyer
- Have you had experience with any lawyers prior to this one with WOLFE
- How did WOLFE compare to the lawyer you had in a prior matter
- Did you file any complaints against your previous lawyer or make any claim he or she was ineffective
- How many times did you and your lawyer get together in person or on the phone or some other way to talk about your case 20
- Did your lawyer spend enough time with you so that you feel you have a complete understanding of your case and the law Y
- Did you ask your lawyer questions Y
- Did he/she answer your questions to your satisfaction Y
- Is there any question you asked that your lawyer refused or failed to answer N
- Do you think it was improper that your lawyer failed or refused to answer a question

- Is there anything you asked your lawyer to do for you that you think he/she improperly failed or refused to do for you *N*
- Did your lawyer discuss the elements of the crime that the Government must be able to prove for you to be found guilty in a manner similar to what I just did *Y*
- Did you and your lawyer discuss the evidence the Government says it has and says it will use to prove your guilt *Y*
- Did you and your lawyer review- look at that evidence *Y*
- After looking at the evidence and discussing your case with your attorney, did you come to a conclusion on your own that the Government had sufficient evidence it could present at trial to convince a jury you were guilty beyond a reasonable doubt *Y*
- Did your lawyer and you discuss any possible defenses you may have to the charge or charges *Y*
- Why aren't you using one of those defenses *None available*
- Did you and your lawyer talk about evidence you may be able to present which might create reasonable doubt in the minds of the jurors as to your guilt *Y*
- Did you ask your lawyer to investigate that evidence *Y*
- Did your lawyer do what you asked *Y*
- Is there any witness you think can help you defend yourself at a trial *N*
- Did you tell your lawyer about that witness *Y*
- Did your lawyer interview the witness or witnesses like you wanted *Y*
- If not why not *N/A*
- Is there any witness you told him/her about and he/she did not interview them *N*
- Are there any witnesses you know of today that you think can help you that you have not told your lawyer about *N*
- Did you and your lawyer talk about the criminal proceedings you have been going through and will continue to go through *Y*
- Did you and your lawyer talk about how a jury trial would be conducted if you did not plead guilty *Y*
- Did you and your lawyer discuss the maximum statutory penalties that you subject yourself to by pleading guilty *Y*
- Review those penalties with Defendant from the plea agreement *OK*
- Do you understand that if you are convicted of this felony charge and you are not a United States Citizen, you will be removed from the United States, you will be denied citizenship in the United States, and you will be denied admission or re-admission to the United States [MANDATORY]**
- Did you and your lawyer discuss-talk about and do you understand from that discussion:
 - That as part of the sentencing process, the District Judge will calculate the applicable advisory sentencing guideline range *Y*
 - Will consider that range, possible departures to the range under the advisory Sentencing Guidelines *Y*
 - Will consider other sentencing factors under 18 U.S.C. 1853(a) *Y*
 - That the District Judge does not have to apply the calculated advisory Guideline sentence as the actual sentence that is imposed on you *Y*
 - That the advisory sentencing guidelines are not mandatory on the District

Judge Y

Did your lawyer promise how much time you were going to get N

Did your lawyer promise you probation N

Did your lawyer promise you any special downward departures under the guidelines N

Do you understand your lawyer cannot promise you what your actual sentence is going to be Y

Do you understand he/she can't promise you any sentence because Y

Only the District Judge calculates and imposes the actual sentence

DJ will not consider what actual sentence he/she should impose until

He/she reviews the Order from today's hearing

He/she reviews a pre-sentence report prepared by the probation officer

He/she reviews any objections that may be filed to that report

He/she hears the government and you at your sentencing hearing

Do you understand your sentencing hearing will not likely be for another 6-8 weeks

Are you completely satisfied with the legal assistance, counseling, advice and actions of your attorney in his/her representation of you in this case Y

Is there anything your attorney should have done and did not do in your case N

Is there anything your attorney did do that you believe he/she should not have done N

As you sit here today, do you know what actual sentence will be imposed on you by the District Judge N

Are you willing to plead guilty not knowing what your actual sentence is going to be Y

Do you fully understand that if you receive an actual sentence of more time in prison than you are hoping for, you will not have the right to withdraw your guilty plea Y

Did your attorney tell you to plead guilty N

Are you pleading guilty because you don't believe your attorney is capable of representing you in a jury trial N

Understanding of Written Plea Agreement

Did you read each and every word and line of your written plea agreement Y

Did your lawyer read each of every word and line of your written plea agreement to you Y

As he/she did so, did he/she stop at legal words and legal citations and explain them words and legal citations to your satisfaction Y

Where were you and your when he/she read the plea agreement to you his office

Do you understand all of the terms and provisions in that agreement Y

Do you want any additional time to further discuss the agreement with your lawyer N

Did you talk with any family or close personal friends about your decision to sign a plea agreement Y

Has anyone, your attorney, the AUSA, the investigator made any promises to you in order to get you to plead guilty that are different from the agreement N

Was it your idea or your lawyer's idea for you to sign this plea agreement MYNE

Do you understand the Court had nothing to do with negotiating or preparing the

- language in your plea agreement Y
- That means, the District Judge will withhold his/her decision whether to accept the plea agreement or any provision in it until
- A pre-sentence report has been prepared
 - You and the government have had a chance to file objections to the report
 - You and the government have had a chance to speak at your sentencing hearing
- Do you understand that Y
- Did you and your lawyer talk about that Y
- Along that line, your agreement has non-binding recommendations and non-binding stipulations in paragraphs 10 ABC and 11
- With respect to the non-binding sentencing recommendations, do you understand the District Judge who will sentence you can
- Reject all or any part of those recommendations and Y
 - Impose a sentence that is more severe - more time than Y it would have been had he/she gone along with each of the recommendations Y
- If that would happen, do you understand, that you will not then have a right to withdraw your plea of guilty made today Y
- With respect to the non-binding stipulation, do you understand that the District Judge who will sentence you can
- Reject the stipulation or any part of the stipulation you and the government have agreed to in paragraph 11 Y
 - Make his/her own findings of fact that may be different from what you and the Government agreed to
 - Using the pre-sentence report Y
 - Using witnesses who may give testimony and evidence at your sentencing hearing Y
 - Without a jury Y
 - And by the preponderance of evidence standard as opposed to the beyond a reasonable doubt standard Y
 - Use her own findings in your sentencing Y
 - Impose a sentence that is more severe - more time than it would have been had he/she gone along with the stipulation
- If that would happen and it result in an actual sentence which is more severe, do you understand you will not have a right to change your mind and withdraw your guilty plea Y
- Did you and your lawyer talk about the non-binding recommendations and non-binding stipulations like I just did Y
- Do you need any additional time to privately discuss the plea agreement with your attorney or for him to privately further explain anything I said Y
- There are certain terms in your agreement that are considered as **binding terms** under FRCP 11(E)(1)(c). _____
- Did your lawyer explain to you what binding meant
 - Simply stated, it means: You and the Government want the District Judge to be bound by what you have agreed to in those specific provisions

- Do you understand that just because you and the Government agree to those terms does not automatically make those terms binding on the District Judge
- In fact, do you understand the District Judge may want to reserve his/her decision on whether to be bound by - to go along with those terms until he/she has reviewed the pre-sentence report, the objections to that report and heard you and the Government at sentencing
- Do you understand that the District Judge has the right not to be bound by - not to follow those terms we just reviewed
- If the District Judge decides not to be bound to the so-called "binding" terms of your plea agreement, do you understand the Judge will tell you he/she won't be bound and give you the opportunity then to withdraw your guilty plea
- If you don't withdraw your guilty plea, do you further understand the District Judge can then sentence you without being bound by the so-called "binding" terms of your agreement
- Did you and your lawyer talk about the binding terms of your agreement like I just did
- Do you need any additional time to privately discuss the plea agreement with your attorney or for him to privately further explain anything I said
- Have you understood everything I've asked you about so far

Voluntariness of Plea

- Has anyone attempted in any way to force you to plead guilty *N*
- Has anyone threatened you into pleading guilty *N*
- Has anyone threatened someone close to you in order to get you to plead guilty *N*
- Is the decision to plead guilty your idea or your lawyer's idea *MINE*
- Other than what is contained in your plea agreement, has anyone offered or promised you anything to get you to plead guilty *N*
- Is your decision to plead guilty your own free, voluntary, and intelligent decision *Y*

Consequences of Pleading Guilty

- Did you and your lawyer talk about the consequences of your pleading guilty *Y*
- From that discussion, do you understand:
 - One, you will be adjudicated guilty of a felony offense *Y*
 - Two, you may lose the right to vote *Y*
 - Three, you may lose the right to serve on a grand or petit state or federal jury *Y*
 - Four, you may lose the right to run for and hold a public office *Y*
 - Five, you **will lose the right to possess a firearm or ammunition for a firearm, as those terms are defined by federal law, for any purpose and for the rest of your life** *Y*
 - Six, you will be subject to a sentence which may include incarceration for 5 years *Y*
 - Seven, if the District Judge finds you are able to pay a fine, you may be subject to a fine up to 250,000 *Y*
 - Eight, you could be both fined and imprisoned *Y at least*
 - Nine, you will be subject to a term of supervised release of 1 years, which is in addition to any term of imprisonment *Y*

- Ten, you will be subject to a special assessment of 100 [100 on each charge] whether you have the money to pay it or not Y
- Did you and your lawyer talk about how the District Judge **will** use your prior criminal history, if you have any, in the sentencing process Y
- From that discussion, do you understand that your prior criminal history could increase the amount of time you get under a guideline calculated sentence and under the actual sentence the District Judge imposes Y
- From that discussion, do you understand that if you have any of the following types of convictions
 - prior firearms offense convictions
 - prior violent felony offense convictions
 - prior drug offense convictions
 - the District Judge will take those convictions into consideration at sentencing and they will increase any guideline calculated sentence the any actual sentence you receive Y
- Did your lawyer ask and did you in response tell your lawyer all about any and all prior criminal history you have Y
- Did you and your lawyer review any criminal history the government disclosed in the pre trial discovery procedures Y
- Did what the government's records show match your understanding of your own criminal history Y
- ~~If there was any dispute or difference in the two, has it been resolved to your satisfaction~~ N/A
- If not, do you understand completely that the District Judge at sentencing will determine your prior criminal history for sentencing purposes from information she receives through the pre-sentence report and any evidence presented during sentencing Y
- Do you also understand he/she will make those determinations without a jury using a preponderance of evidence standard Y
- Do you understand that if the District Judge finds you have the ability to pay, he/she may impose on you the costs of your own incarceration, community confinement, and supervised release Y
- Do you understand that you will be required to submit a DNA sample and that the sample will be maintained as a permanent record under your name and social security number Y
- If you are not presently a citizen of the United States, do you understand that by pleading guilty to this felony:
 - On completion of any sentence of incarceration, you will be deported from the United States Y
 - You will be denied entry in to the United States at any of its border crossings Y
 - Any application you make for citizenship will be denied Y
- Do you understand there is no parole in the federal system Y
- That mean you will do the time which the District Judge sentences you to serve Y
- Do you understand that while you are in prison you may be able to earn good Y

time credit against your sentence

- However, good time is not controlled by the Court **Y**
- It is controlled by the warden and staff in the prison where you will be serving your time - your sentence **Y**
- Do you understand that **Y**

Did you and your lawyer review how the Advisory Uniform Sentencing Guideline Chart works [exhibit]

Did he show you how the Criminal History columns across the top of the chart worked **Y**

Did he show you how the Offense Levels going down the left side of the chart worked **Y**

Did he show you how going over from an offense level it intersects with criminal history categories showing a range of months of possible imprisonment under the guidelines **Y**

Do you completely understand that you cannot take what your lawyer showed you as his/her promise or guarantee to you that at sentencing the District Judge will see it the same way as he/she did and give that guideline range sentence as your actual sentence **Y**

If the District Judge sees it differently and gives you an actual sentence which is more than you may have anticipated or expected, do you understand you will not be able to say then or later **Y**

Judge, if I'd known you were going to give me that much time

I would have never pled guilty

I want to change my mind and withdraw my guilty plea

You will **not have the right then to withdraw you plea of guilty** **Y**

Did anything I have discussed with you to this point come as any surprise to you **Y**

Does that mean: It doesn't come as any surprise because you have fully talked over all of these consequences of pleading guilty with your lawyer **Y**

Appeal, Collateral Attack and Waivers

Do you understand that under certain circumstances you or the Government may appeal any sentence imposed by the District Judge **Y**

The right of appeal includes your right to appeal your sentence and how the District Judge arrived at it to the 4th Circuit Court of Appeals by giving notice of intent to appeal within 14 days of sentencing - Do you understand that **Y**

You may also file a motion under 28 USC 2255, commonly called a writ of habeas corpus motion, challenging your sentence and how the sentence is being carried out - Do you understand that **Y**

Do you understand your agreement, paragraph 13 waives, gives up your right to appeal that actual sentence if: PROBATION **Y**

Do you also understand that under that same paragraph in your agreement, with some limitations, you waive - give up your right to file a habeas corpus type motion if your actual sentence is: PROBATION **Y**

Did you intend to give up your right of appeal and right of collateral challenge as set forth in paragraph 13 of your agreement

Did you understand that paragraph when you signed the plea agreement.

Has anything about your understanding of that paragraph changed since you signed the agreement and today *N*

Rights Given Up By Guilty Plea

Do you understand you have a right to plead not guilty *Y*

Do you understand you have a right to a jury trial *Y*

At that jury trial you have the following rights: *Y*

You are presumed innocent of all charges *Y*

The Government has the burden of proving beyond a reasonable doubt that you are guilty *Y*

The Government can only use lawful evidence *Y*

You are entitled to the assistance of counsel for your defense *Y*

You have a right to be at the trial and to see, hear, and have all witnesses cross-examined in your defense *Y*

You have a right to testify if you want to *Y*

You cannot be forced to take the stand and testify *Y*

You are not required to call witnesses in defense of the case against you

If you decide not to testify or not to call witnesses, the fact that you did not testify or call witnesses is not and cannot be used against you *Y*

You have a right to a unanimous verdict *Y*

Do you understand that by pleading guilty there will be no jury trial and all of the rights associated with it will be gone *Y*

Have you discussed your right to a jury trial with your attorney *Y*

Do you want a jury trial *N*

Is that your own free, voluntary, and intelligent decision *Y*

Summary Questions

Have you understood each and every question I have asked you *Y*

Did your attorney instruct you to answer any of my questions in a particular way *N*

Are the answers you gave me today your own answers *Y*

Did you truthfully answer each and every question I have asked you today *Y*
Proffered by agreement of counsel

Independent Factual Basis In Support Of The Plea *GUILTY*

Doe Defendant desire to make a statement at this time *N*

Findings

Competent and Capable

Waiver Right To Have District Judge and Consented To Magistrate Judge take plea

Understands Right to Grand Jury Indictment Process and Consented to Information

Understands the Charge [Information or Indictment] and the elements of the charge

Understands the consequences of pleading guilty including but not limited to a sentence within the statutory maximum

Understands his plea agreement

Understands the rights he/she is giving up by pleading guilty including the rights associated with a jury trial

Understands his/her limited waiver of direct appeal and collateral attack rights in his plea agreement

Plea of Guilty was free of pressure, coercion, undue influence, hope of reward; was

knowing, intelligently and freely made; and is therefor accepted by the Court

- Find Defendant Guilty of the charge to which he/she pled
- District Judge will ~~adjudicate~~ ^{ACCEPT AND} guilt and sentence

ORDER

- Pre-sentence Investigation Report be prepared
- Release of Detention of Defendant 18 USC 3143(a)