

UNITED STATES OF AMERICA, v. Bryan UNDERWOOD,..., 2012 WL 3744673...

2012 WL 3744673 (D.D.C.) (Verdict, Agreement and Settlement)
United States District Court, District of Columbia.

UNITED STATES OF AMERICA,
v.

Bryan UNDERWOOD, Defendant.

No. 11-261 (ESH).
August 30, 2012.

Factual Proffer in Support of Guilty Plea

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I. SUMMARY OF THE PLEA AGREEMENT

Defendant **BRYAN UNDERWOOD** agrees to admit guilt and enter his plea of guilty to Count One of the Indictment which charges him with attempt to communicate national defense information to a foreign government, in violation of  18 U.S.C. § 794.

II. ELEMENTS OF THE OFFENSE

The essential elements of the offense of attempt to communicate national defense information to a foreign government, in violation of  18 U.S.C. § 794, each of which the government must prove beyond a reasonable doubt, are:

1. That the defendant attempted to communicate, deliver, or transmit documents, photographs, or information relating to the national defense to a foreign government, or to representatives, officers, agents and employees thereof;
2. That the defendant acted with intent or reason to believe that the documents, photographs, or information in question were to be used to the injury of the United States or to the advantage of a foreign nation; and
3. That the defendant acted willfully.

III. BRIEF STATEMENT OF THE FACTS

The following statement of facts does not purport to include all the defendant's illegal conduct or all the evidence that the government would have presented at trial. It is intended to represent sufficient information for the Court to find a factual basis for accepting the defendant's guilty plea. Had this case gone to trial, the government would have presented evidence of the following facts:

UNITED STATES OF AMERICA, v. Bryan UNDERWOOD, ..., 2012 WL 3744673...

1. From November 2009 to August 2011, defendant **Bryan Underwood** worked as a Cleared American Guard (“CAG”) at the construction site of the new United States Consulate in Guangzhou, China (“New Consulate Compound” or “NCC”). CAGs are American civilian security guards with a TOP SECRET security clearance. Underwood's duties included guarding restricted areas of the NCC to prevent unauthorized persons from viewing or tampering with sensitive areas of the construction site. CAGs are one of several security measures used by the United States Government to prevent foreign governments from improperly obtaining sensitive and/or classified information from the NCC.
2. In the course of his employment as a CAG (and in the course of his former employment as a Marine Security Guard), Underwood received briefings on how to handle and protect classified information. As a CAG, Underwood held a TOP SECRET security clearance. In consideration of his being granted access to classified information, Underwood entered into non-disclosure agreements with the United States. In addition, as a CAG at the NCC, Underwood received briefings and written instructions on the security protocols for the NCC including the prohibition of cameras (including cellphone cameras) and photography in certain areas of the NCC.
3. On or about February 15, 2011, Underwood was asked by a United States law enforcement agent (“U.S. Handler”) to participate in a counter-surveillance project for the NCC in which Underwood was to report to the U.S. Handler any suspected attempts by the Chinese Government to recruit him for intelligence purposes. This counter-surveillance project was separate and apart from his employment as a CAG. Underwood agreed.
4. In March 2011, Underwood lost a substantial amount of money in the stock market and devised a plan to use his participation in the counter-surveillance project as a “cover” for actually making contact with the Chinese government and selling information and access to the NCC, including restricted areas. As part of this plan, Underwood wrote a letter to the Chinese Ministry of State Security (“MSS”), a Chinese foreign intelligence agency, expressing his “interest in initiating a business arrangement with your office” and attempted to deliver that letter to a location he believed to be the MSS office in Guangzhou.
5. In May 2011, while on guard duty, Underwood secreted a camera into a restricted building of the NCC and then took thirty photographs of that restricted building and its contents. Fifteen of these photographs depict areas and/or information that are classified at the SECRET level. In furtherance of his plan, Underwood also created a schematic which listed all security upgrades to the NCC and drew a diagram of the surveillance camera locations at the NCC. In August 2011, Underwood was interviewed by U.S. law enforcement agents in Hong Kong, and his plan to sell information and access to the NCC to the MSS began to be revealed.
6. On or about August 5-6, 2011, Underwood was voluntarily interviewed by U.S. law enforcement agents about his participation in the counter-surveillance project. During these interviews, Underwood admitted to making efforts to contact the MSS, but falsely claimed that he took these actions on behalf of the counter-surveillance project. His statements included the following:
 - a. He researched on the public internet for the location of the MSS office in Guangzhou.
 - b. He asked his Mandarin language teacher to obtain the telephone number for the MSS in Guangzhou. The language teacher indicated that the number was unlisted.
 - c. He asked a Chinese guard at the NCC for the telephone number for the local MSS. Later, another Chinese guard at the NCC provided Underwood with the telephone number and location of the local MSS office.
 - d. He drafted a letter to the MSS which disclosed his access as a CAG to the NCC and his desire to work for the MSS.

UNITED STATES OF AMERICA, v. Bryan UNDERWOOD, ..., 2012 WL 3744673...

e. He took a taxi to the suspected location of the MSS office and attempted to give the letter to a guard. The guard turned Underwood away without accepting the letter.

f. He intentionally left the letter in the open in his apartment hoping that the MSS would find it. He believed the MSS routinely conducted searches of apartments occupied by Americans.

g. He drew a diagram of the locations of the surveillance cameras at the NCC. He obtained these locations from a diagram located on a computer system at the NCC.

h. He used his Blackberry cellphone to take four photos of a restricted building at the NCC. He later deleted these photos. Underwood turned over his Blackberry cellphone to the U.S. law enforcement agents and gave them consent to search. (A subsequent forensic examination of the Blackberry cellphone revealed three “deleted” photographs of the inside of a restricted building at the NCC.)

i. He created a “master” schematic which listed all security upgrades to the building site.

j. He “mentally” constructed a plan in which the MSS could gain undetected access to a restricted building at the NCC for approximately six hours in order to install listening devices or other technical penetrations.

k. He knew that he had far exceeded the guidance provided to him by his U.S. Handler and that he had not been authorized to provide any sensitive or classified information to anyone.

l. He stated (falsely) that he never intended to provide any of this information to the MSS, but believed he could make himself very attractive to the MSS by offering concrete information.

7. On August 7, 2011, U.S. law enforcement agents conducted a consent search of Underwood's apartment in Guangzhou. Items seized from the apartment included:

a. A sealed enveloped addressed in Chinese to, “Ministry of State Security, 5, 6 bureau.” Inside the envelope was a type-written letter in English which read:

Dear Sir or Ma'm [sic]

I am sending this letter to inform you of my interest in initiating a business arrangement with your office. I know I have information and skills that would be beneficial to your offices [sic] goals. And I know your office can assist me in my financial endeavors. I would like to set up a meeting with one of your employees at a pre-designed place that we both mutually agree upon. I would prefer to meet with a female employee to deflect any and all suspicions. Any and all points of interest will be discussed at this meeting.

Below is my phone# and email. Please SMS or email a response for this letter.

Hoosier[XXX]@yahoo.com

150 1321 [XXX]

(the “Walk-In Letter”).

UNITED STATES OF AMERICA, v. Bryan UNDERWOOD, ..., 2012 WL 3744673...

b. A list of phone numbers for the MSS with a handwritten note in Chinese which read, “Tell them -> I am an American; I am with the US Consulate; I have information regarding the US Consulate.” And,

c. A 4GB camera card which held 30 photographs of the inside area and contents of a restricted building of the NCC. (A subsequent forensic examination of the camera card revealed that the photographs were taken on a Canon camera on May 5, 2011.)

8. From August 8-18, 2011, Underwood was voluntarily interviewed several times by U.S. law enforcement agents at his hotel in Springfield, Virginia, and at the Washington Field Office of the Federal Bureau of Investigation (“FBI”). During these interviews:

a. Underwood repeated the information that he gave on August 5-6, 2011.

b. He stated that he printed out a schematic with the layout of the security cameras at the NCC, and devised a plan on how the MSS could access the NCC.

c. He stated that, in May 2011, he took photographs of restricted areas of the NCC with his Canon camera and a 4GB camera card.

d. He stated that he knew taking the photographs was a security violation.

e. He stated (falsely) that he was helping the counter-surveillance project. He stated (falsely) that his purpose in gathering this material was to have something ready to give to the MSS if the opportunity presented itself.

f. He was shown a copy of the Walk-In Letter seized from his apartment, and he acknowledged writing it.

g. He was shown copies of the photographs from the 4GB camera card seized from his apartment, and he acknowledged taking those photographs.

9. On August 19, 2011, Underwood was voluntarily interviewed again by U.S. law enforcement agents in the Washington, D.C. area. During this interview, Underwood admitted that he had planned to sell information and access to the NCC to the MSS for his personal financial gain. He stated:

a. In mid-March 2011, he became panicked about his financial situation when his stock brokerage options account was frozen. (Financial records from Underwood's stock brokerage account confirm that the total value of his account plummeted from \$68,813 in February 2011, to *negative* \$48,689 in March 2011, to *negative* \$89,624 in April 2011.)

b. The counter-surveillance project provided him with a cover to sell information and access to the Chinese government. If any U.S. personnel caught him, he could say he was working on the counter-surveillance project. If the Chinese government subsequently tried to blackmail him, he would tell the U.S. authorities that he passed the information to the Chinese government as part of the counter-surveillance project.

c. He intended to use the photographs of the restricted areas to show the MSS his level of access to the NCC.

d. He intended to sell his information and access to the NCC to the MSS for \$3-5 million dollars.

UNITED STATES OF AMERICA, v. Bryan UNDERWOOD,..., 2012 WL 3744673...

e. The photographs of the NCC restricted areas, the Walk-In Letter, the diagram of the locations of the NCC security cameras, the schematic for accessing the NCC, and the MSS telephone number list were all part of his plan to sell access to the NCC to the MSS. His prior claims that these actions were done as part of the counter-surveillance project were false.

10. The photographs from the 4GB camera card were shown to an expert at the U.S. Diplomatic Security Service who had original classification authority for facilities, security, and countermeasures at the NCC. The expert determined that, at all times relevant to the indictment, 15 of the 30 photographs contained images classified at the SECRET level. The expert determined that the disclosure of this material could cause serious damage to the United States by, among other things, assisting a foreign government in planting listening devices (or other surveillance devices) in sensitive areas of the NCC.

11. At all times relevant to the indictment, the restricted building illegally photographed by Underwood was protected by a number of security measures including, but not limited to: an outer perimeter wall surrounding the NCC; locked and gated fences within the NCC; locked doors to the restricted building; an elaborate badging/identification system that controlled the access of individual personnel to various areas of the NCC; and a squad of CAGs (many of whom, like Underwood, are former Marine Security Guards).

12. On September 1, 2011, Underwood was arrested in this case and presented before a United States Magistrate Judge. The United States Magistrate released Underwood on the conditions that: (1) he stay within a 50-mile radius of Springfield, Virginia; (2) notify pretrial services of any change in address; and (3) re-appear before Judge Huvelle at 9:30 a.m., on September 21, 2011. On September 21, 2011, Underwood failed to appear for Court and a warrant for his arrest was issued. On September 24, 2011, Underwood was arrested inside of a hotel in Los Angeles, California. Underwood's failure to appear for Court was willful.

13. The U.S. government has found no evidence that Underwood succeeded in passing information concerning or access to the NCC to anyone. Respectfully Submitted

RONALD C. MACHEN JR.

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BY: <<signature>>

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DEFENDANT'S ACKNOWLEDGMENT

I have read this factual proffer, understand it, and agree that it is true and accurate. While it is not a complete recitation of all that I did or all that I know, it represents some of my conduct and some of my knowledge concerning my own involvement in illegal activity as well as the activities of some of my co-conspirators. No threats have been made to me nor am I under the influence of anything that could impede my ability to understand this factual proffer fully.

Date: 8/30/2012

<<signature>>

BRYAN UNDERWOOD

ATTORNEY'S ACKNOWLEDGMENT

I have read each of the pages constituting this factual proffer, reviewed them with my client, and discussed it with my client.

Date: 8/30/12

<<signature>>

Erich Ferrari, Esq.

Counsel for Defendant

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