

UNITED STATES, v. Bryan UNDERWOOD., 2012 WL 3744675 (2012)

2012 WL 3744675 (D.D.C.) (Verdict, Agreement and Settlement)
United States District Court, District of Columbia.

UNITED STATES,

v.

Bryan UNDERWOOD.

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

Verdict

Ronald C. Machen Jr., United States Attorney, for the District of Columbia, John Han, Assistant United States Attorney, United States Attorney's Office, National Security Section, 555 Fourth St., NW, Washington, D.C. 20530, (202) 252-7680, john.han@usdoj.gov.

Brandon L. Van Grack, Trial Attorney, National Security Division, U.S. Department of Justice, 600 E St., NW, Washington, D.C. 20004, (202) 233-2252, brandon.van.grack@usdoj.gov.

VIA E-MAIL

Erich C. Ferrari, Esq

Ferrari Legal, P.C.

1455 Pennsylvania Ave., NW

Suite 400

Washington, DC 20004

email: ferrari@ferrari-legal.com

Dear Counsel:

This letter sets forth the complete offer of a plea agreement to your client, **Bryan Underwood** (the “defendant” or “your client”) from the Office of the United States Attorney for the District of Columbia and the National Security Division of the United States Department of Justice (collectively, “the Government” or “the United States”). If your client accepts the terms and conditions of this offer, please have your client execute this document in the space provided below and return it to me by August 24, 2012, 3:00 p.m. Upon receipt of the executed document, this letter will become the plea agreement. The terms of the offer are as follows:

1. *Charges and Statutory Penalties.* Your client agrees to plead guilty to Count One of the Indictment which charges your client with attempt to communicate national defense information to a foreign government, in violation of  18 U.S.C. § 794.

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Your client understands that pursuant to  18 U.S.C. § 794, this offense is punishable by imprisonment for any term of years or for life,¹ a maximum fine of \$250,000, a 5-year term of supervised release, an order of restitution, and an obligation to pay any applicable interest or penalties on fines or restitution not timely made. In addition, your client agrees to pay a special assessment of \$100 to the Clerk of the United States District Court for the District of Columbia at the time of sentencing.

2. *Dismissal of Remaining Counts.* The Government agrees to dismiss all of the remaining counts of the Indictment at sentencing. Your client, however, agrees and acknowledges that the charges to be dismissed at the time of sentencing were based in fact, and that your client is not a “prevailing party” within the meaning of the “Hyde Amendment,” Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

3. *Factual Stipulations.* Your client agrees that the attached Statement of Facts in Support of Guilty Plea fairly and accurately describes your client's actions and involvement in the offense to which your client is pleading guilty. At the time of signing this plea agreement, your client will adopt and sign the Factual Proffer in Support of Guilty Plea as a written proffer of evidence.

4. *Offense Level under the Sentencing Guidelines.* Your client understands that the sentence in this case will be determined by the Court, pursuant to the factors set forth in  18 U.S.C. § 3553(a), including a consideration of the guidelines and policies promulgated by the United States Sentencing Commission, Guidelines Manual (2011) (hereinafter “Sentencing Guidelines” or “U.S.S.G.”). Pursuant to [Federal Rule of Criminal Procedure 11\(c\)\(1\)\(B\)](#), and to assist the Court in determining the appropriate sentence, the parties stipulate to the following Guidelines calculation.

A. Offense Level under the Guidelines

The parties agree that the following Sentencing Guidelines sections and calculations apply:

U.S.S.G. § 2M3.1 (a)(2)	Base Offense Level	37
U.S.S.G. § 3C1.1	Obstructing or Impeding Justice (App. Note 4(E) - Willfully Failing to Appear)	+2
Adjusted Offense Level		39

B. Adjustment for Acceptance of Responsibility

Provided that your client clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through your client's allocation and subsequent conduct prior to the imposition of sentence, the Government agrees that a 2-level reduction would be appropriate, pursuant to  U.S.S.G. § 3E1.1(a).

Furthermore, assuming your client has accepted responsibility as described in the previous sentence, the Government agrees that an additional 1 -level reduction would be appropriate, pursuant to  U.S.S.G. § 3E1.1(b), because your client has assisted authorities by providing timely notice of your client's intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines Offense Level for the offense is 36.

C. Criminal History Category

Based on the criminal records available to this Office, your client has no criminal convictions. Accordingly, your client's Criminal History is Category I.

D. Applicable Guidelines Range

Based upon the calculations set forth above (Offense level 36, Criminal History Category I), your client's Stipulated Sentencing Guidelines range is 188-235 months.

5. *Guidelines Departures.* The parties reserve their respective positions with respect to  U.S.S.G. § 2M3.1, Application Note 2 (“likely to cause little or no harm” to national security) and  U.S.S.G. § 5K2.16 (voluntary disclosure of offense).

6. *Agreement as to Sentencing Allocation.* The parties further agree that a sentence within the applicable Guidelines Range established by the Sentencing Guidelines, if determined in accordance with the parties' stipulations in this Agreement, would constitute a reasonable sentence in light of all of the factors set forth in  18 U.S.C. § 3553(a). However, the parties agree that your client may seek a sentence below the Guidelines Range. The government will not seek a sentence above the Stipulated Guidelines Range, 188-235 months. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, see  U.S.S.G. § 3E1.1, and/or imposition of an additional adjustment for obstruction of justice, see  U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should your client move to withdraw your client's guilty plea after it is entered, or should it be determined that your client has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) engaged in additional criminal conduct after signing this Agreement.

In addition, the Government reserves its right to full allocution in any post-sentence litigation in order to defend the Court's ultimate decision on such issues. Your client further understands that the Government retains its full right of allocution in connection with any post-sentence motion which may be filed in this matter and/or any proceeding(s) before the Bureau of Prisons. In addition, your client acknowledges that the Government is not obligated and does not intend to file any downward departure sentencing motion under  U.S.S.G. § 5K1.1, or any post-sentence downward departure motion in this case pursuant to  Fed.R.Crim.P. 35(b).

7. *Court Not Bound by the Plea Agreement.* It is understood that pursuant to Fed.R.Crim.P. 11(c)(1)(B) and 11(c)(3)(B), the Court is not bound by the above stipulations, either as to questions of fact or as to the parties' determination of the applicable Guidelines range, or other sentencing issues. In the event that the Court considers any Guidelines adjustments, departures, or calculations different from any stipulations contained in this Agreement, or contemplates a sentence outside the Guidelines range based upon the general sentencing factors listed in  18 U.S.C. § 3553(a), the parties reserve the right to answer any related inquiries from the Court.

8. *Court Not Bound by the Non-Mandatory Sentencing Guidelines.* It is understood that the sentence to be imposed upon your client is determined solely by the Court. It is understood that the Sentencing Guidelines are not binding on the Court. Your client acknowledges that your client's entry of a guilty plea to the charged offense authorizes the sentencing court to impose any

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sentence, up to and including the statutory maximum sentence, which may be greater than the applicable Guidelines range. The Government cannot, and does not, make any promise or representation as to what sentence your client will receive. Moreover, it is understood that your client will have no right to withdraw your client's plea of guilty should the Court impose a sentence outside the Guidelines range.

9. *Waiver of Rights.* In entering this plea of guilty, your client understands and agrees to waive certain rights afforded to your client by the Constitution of the United States and/or by statute, including: the right against self-incrimination with respect to the offense(s) to which your client is pleading guilty; the right to be tried by a jury, or by a judge sitting without a jury; the right to be assisted by an attorney at trial; and the right to confront and cross-examine witnesses. Your client further agrees that the District Judge should make any Sentencing Guidelines determinations.

10. *Appeal Waiver.* Your client is aware that federal law, specifically  18 U.S.C. § 3742, affords your client the right to appeal his sentence. Your client is aware that the Government's factual stipulations and predictions about the calculation of the sentencing guidelines are not binding on the sentencing judge. Knowing that, your client waives the right to appeal his sentence or the manner in which it was determined pursuant to  18 U.S.C. § 3742, except to the extent that (a) the Court sentences your client to a period of imprisonment longer than the statutory maximum, or (b) the Court departs upward from the applicable Sentencing Guideline range pursuant to the provisions of U.S.S.G. § 5K.2 or based on a consideration of the sentencing factors set forth in  18 U.S.C. § 3553(a). Further, your client reserves the right to make a collateral attack upon your client's sentence pursuant to 28 U.S.C. § 2255, if new and currently unavailable information becomes known to him. In agreeing to this waiver, your client is aware that your client's sentence has yet to be determined by the Court. Realizing the uncertainty in estimating what sentence the Court ultimately will impose, your client knowingly and willingly waives your client's right to appeal the sentence, to the extent noted above, in exchange for the concessions made by the Government in this Agreement.

11. *Non-Disclosure Agreement.* Your client agrees that he will never disclose to any person or entity, except to persons or entities specifically authorized by the United States Government, any classified information, any non-public United States Government information (whether or not such information is formally classified), and all other information belonging to the United States Government and acquired by virtue of his employment as a Cleared American Guard in Guangzhou, China. Your client further agrees that he will never disclose to any representative of the press or media, without the express permission of the FBI, any information concerning the espionage activities that resulted in his arrest and conviction. Moreover, your client shall not circumvent this Plea Agreement by communicating with an associate or a family member for the purpose of assisting or facilitating their public dissemination of any information concerning the espionage activities that resulted in his arrest and conviction, whether or not such an associate or other family member is personally or directly involved in such dissemination.

Your client acknowledges that he remains bound by all previous non-disclosure agreements that he executed, including those non-disclosure agreements that he executed as part of his employment as a Cleared American Guard and United States Marine.

12. *Assignment of any Profits or Proceeds from Publicity.* Your client hereby assigns to the United States any royalties, remunerations, profits, and emoluments which he may receive or be entitled to receive in connection with any publication or dissemination of information relating to his person, to his employment as a Clear American Guard, his espionage activities, the facts and circumstances leading to his arrest and conviction, and agrees that any such royalties, remunerations, profits, and emoluments constitute the proceeds of his espionage activity for purposes of  18 U.S.C. § 794(d)(1). This assignment shall include all profits and proceeds for the benefit of your client, regardless of whether such profits and proceeds are payable to himself or to others, directly or indirectly, for his benefit or for the benefit of his associates or a current or future member of his family. Your client shall not circumvent this assignment by assigning the rights to his story to an associate or to a current or future member of his family, or to another person or entity who would provide some financial benefit to him, to his associates,

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or to a current or future member of his family. Moreover, your client shall not circumvent this assignment by communicating with an associate or a family member for the purpose of assisting or facilitating their profiting from a public dissemination, whether or not such an associate or other family member is personally or directly involved in such dissemination.

13. *Detention Pending Sentencing.* Your client agrees not to object to the Government's recommendation to the Court at the time of the plea of guilty in this case that, pursuant to [18 U.S.C. § 3143](#), your client be detained without bond pending your client's sentencing in this case.

14. *Breach of Agreement.* Your client understands and agrees that if, after entering this Plea Agreement, your client fails specifically to perform or to fulfill completely each and every one of your client's obligations under this Plea Agreement, or engages in any criminal activity prior to sentencing, your client will have breached this Plea Agreement. In the event of such a breach: (a) the Government will be free from its obligations under the Agreement; (b) your client will not have the right to withdraw the guilty plea; (c) your client shall be fully subject to criminal prosecution for any other crimes, including perjury and obstruction of justice; and (d) the Government will be free to use against your client, directly and indirectly, in any criminal or civil proceeding, all statements made by your client and any of the information or materials provided by your client, including such statements, information and materials provided pursuant to this Agreement or during the course of any debriefings conducted in anticipation of, or after entry of this Agreement, including your client's statements made during proceedings before the Court pursuant to [Fed.R.Crim.P. 11](#).

Your client acknowledges discussing with you [Fed.R.Crim.P. 11\(f\)](#) and [Federal Rule of Evidence 410](#), rules which ordinarily limit the admissibility of statements made by a defendant in the course of plea discussions or plea proceedings if a guilty plea is later withdrawn. Your client knowingly and voluntarily waives the rights which arise under these rules.

Your client understands and agrees that the Government shall only be required to prove a breach of this Plea Agreement by a preponderance of the evidence. Your client further understands and agrees that the Government need only prove a violation of federal, state, or local criminal law by probable cause in order to establish a breach of this Plea Agreement.

Nothing in this Agreement shall be construed to permit your client to commit perjury, to make false statements or declarations, to obstruct justice, or to protect your client from prosecution for any crimes not included within this Agreement or committed by your client after the execution of this Agreement. Your client understands and agrees that the Government reserves the right to prosecute your client for any such offenses. Your client further understands that any perjury, false statements or declarations, or obstruction of justice relating to your client's obligations under this Agreement shall constitute a breach of this Agreement. However, in the event of such a breach, your client will not be allowed to withdraw this guilty plea.

15. *Waiver of Statute of Limitations.* It is further agreed that should the conviction following your client's plea of guilty pursuant to this Agreement be vacated for any reason, then any prosecution related to the statement of offense, indictment, and/or information that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement (including any counts that the Government has agreed not to prosecute or to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against your client, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution related to the statement of offense, indictment, and/or information that is not time-barred on the date that this Agreement is signed.

16. *Vacate Current Trial Date.* Upon signing this plea agreement, the defendant agrees to vacate the current trial date of October 29, 2012, all current motions schedules, and government discovery obligations. Should the plea agreement not be entered with the Court, the parties will ask for a trial date after March 18, 2013, based on (1) the parties' understanding of the availability of the Court; (2) the need to resolve classified discovery issues; and (3) the difficulty in scheduling out-of-town and out-of-

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the-country witnesses between the Thanksgiving and New Years holidays. The parties agree that these factors would support a tolling of the speedy trial act in the interest of justice.

17. *Forfeiture*. Not Applicable.

18. *Complete Agreement*. No other agreements, promises, understandings, or representations have been made by the parties or their counsel than those contained in writing herein, nor will any such agreements, promises, understandings, or representations be made unless committed to writing and signed by your client, defense counsel, and an Assistant United States Attorney for the District of Columbia.

Your client further understands that this Agreement is binding only upon the Criminal and Superior Court Divisions of the United States Attorney's Office for the District of Columbia and the Department of Justice National Security Division. This Agreement does not bind the Civil Division of the United States Attorney's Office for the District of Columbia or any other United States Attorney's Office, nor does it bind any other state, local, or federal prosecutor. It also does not bar or compromise any civil, tax, or administrative claim pending or that may be made against your client.

If the foregoing terms and conditions are satisfactory, your client may so indicate by signing the Agreement in the space indicated below and returning the original to me once it has been signed by your client and by you or other defense counsel.

Sincerely,

<<signature>>

RONALD C. MACHEN JR.

United States Attorney for the District of Columbia

<<signature>> 8/30/12

John Han

Assistant United States Attorney

United States Attorney's Office

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<<signature>> 8/30/12

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Defendant's Acceptance

I have read or had read to me this Agreement and discussed it with my attorney. I fully understand this Agreement and agree to it without reservation. I do this voluntarily and of my own free will, intending to be legally bound. No threats have been made to me nor am I under the influence of anything that could impede my ability to understand this Agreement fully. I am pleading guilty because I am in fact guilty of the offenses identified in this Agreement.

I reaffirm that absolutely no promises, agreements, understandings, or conditions have been made or entered into in connection with my decision to plead guilty except those set forth in this Agreement. I am satisfied with the legal services provided by my attorney in connection with this Agreement and matters related to it.

8/30/2012

Date

<<signature>>

BRYAN UNDERWOOD

Defendant

Attorney's Acknowledgment

I have read each of the pages constituting this Agreement, reviewed them with my client, and discussed the provisions of the Agreement with my client, fully. These pages accurately and completely sets forth the entire Agreement.

8/30/12

Date

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<<signature>>

Erich Ferrari, Esq.

Counsel for Defendant

Footnotes

- 1 The maximum penalty of death is inapplicable to the specific facts of this case.

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