

## Sample Guilty Plea Colloquy – Magistrate Judge Spaulding

### Judge To Counsel:

I understand that your client wishes to plead guilty to Count(s) \_\_\_\_\_ of the Indictment [pursuant to a Plea Agreement] [without a Plea Agreement], is that correct?

### Judge To Defendant:

I am not the Judge who will sentence you if you plead guilty. I am a Magistrate Judge. I can conduct a guilty plea proceeding with your permission. I have a document signed by you indicating that you agree to let me do that. Is that correct?

I am going to have you placed under oath and ask you some questions. The first group of questions are designed to make sure you understand what the proceeding is about. Then I talk to you about what the United States would have to prove as to each Count to which you propose to plead guilty. We will talk about the penalties you face and the rights that you lose if you plead guilty. [I will also review the promises in the plea agreement.] At the end, I'm going to ask you about what you did to make sure your conduct violates the crime(s) to which you propose to plead guilty.

Because you will be under oath, if anything you tell me is not completely truthful, you could be separately prosecuted for perjury or making a false statement and anything you tell me today could be used against you in that prosecution. So, if you do not understand something I ask, please let me know and I'll try to ask the question more clearly. Your lawyer will be here throughout the proceeding, and you may speak with him privately at any time. We make a record of what occurs here through a digital recording, which is the reason for the microphones. So I need to you answer my questions out loud rather than nodding or shaking you head.

Do you have any questions before I proceed further?

### Judge to Courtroom Deputy Clerk:

Please place the Defendant under oath.

### Courtroom Deputy Clerk to Defendant:

Do you solemnly swear or affirm that the testimony you shall give in the cause before this Court will be the truth, the whole truth and nothing but the truth?

Please state your name and spell your last name for the record.

Judge to Defendant:

Have you ever been known by any other name?

How old are you?

How far did you go in school?

Do you read, speak and understand English? [Are you able to understand what I am asking as it is being translated for you?]

Are you a citizen of the United States?

*The next group of questions are designed to make sure you understand what this proceeding is about.*

Have you ever been under the care of a psychiatrist or psychologist?

Are you currently taking medicine of any kind? If so, what is the name of the medicine or what is it for?

In the last 2 days, have you taken any drugs, alcohol or medicine [other than your prescription medicine,] including anything over-the-counter like aspirin?

[Is the medicine, or lack of prescribed medicine, or the underlying condition for which the medicine has been prescribed making it difficult for you to think clearly today?]

Is there anything that is interfering with your ability to think clearly and concentrate today?

*Next, I will review with you the charges to which you propose to plead guilty and tell you what the United States would have to prove before your could be found guilty.*

**[Judge will read or summarize each count of the indictment to which the Defendant proposes to plead guilty and tell the Defendant the essential elements that would have to be proved as to each count.]**

Do you understand what would have to be proved before you could be found guilty of the charge in Count(s) \_\_\_?

You have the right to have the full indictment read to you. I have only read parts of the indictment. Would you like to have the full indictment read to you or do you waive or give up the reading of the full indictment because you have already reviewed it with counsel?

Have you reviewed the indictment with your attorney?

Have you have enough time to talk with your attorney?

Are you satisfied with your attorney's representation of you in this case?

Judge to Counsel:

Do you have any question about your client's competency?

Does the United States have any question about the Defendant's competency?

Judge to Defendant:

I find that you are competent, which means that you are able under the law to plead guilty if you want to plead guilty but you do not have to plead guilty. I have a number of things I need to talk with you about yet, so if at any time in this proceeding you decide you do not want to plead guilty, please let me know. I will stop this proceeding and the case will proceed as previously scheduled.

*Next, I need to talk with you about the reason you are proposing to plead guilty.*

First, has anyone done anything wrong or unfair, threatened you in any way to get you to plead guilty to this charge(s)?

Do you want to plead guilty because you committed the crime(s) or for some other reason?

**If no plea agreement:**

[Has anyone made you any promises about what sentence you will receive or anything else that will occur in exchange for your guilty plea(s)?]

**With a plea agreement:**

[I have a document entitled plea agreement. I am going to ask my courtroom deputy clerk to hand it to you. I want to make sure it is your plea agreement and that you have initialed every page and every change and signed it at the end.

Is that your plea agreement?

[To counsel for the United States:] Is that the plea agreement of the United States?

None of the Judges of the Court helped to write this plea agreement. It will be up to the Judge who will sentence you if you plead guilty, to decide whether or not to accept the terms of the plea agreement.

Did you read the entire plea agreement before you signed it?

Did you talk with your lawyer about the plea agreement before you signed it?

Do you believe you understand the plea agreement?

I am not going to read the whole document. I am going to go over the promises you make to the United States and the promises the United States makes to you. When I am finished, I am going to ask you if you believe there are any other promises that are not contained in the plea agreement.

**[Court will review the promises in the plea agreement]**

[If property is subject to forfeiture] The plea agreement provides that you will forfeit or give up to the United States money or property gained during the commission of the offense or used during the offense. Under the Constitution of the United States, all of us are protected from having an excessive fine imposed. An argument could be made that requiring you to forfeit money or property as part of the punishment you receive in this case violates the excessive fine clause. Under the plea agreement, you agree that you will not make that constitutional argument.

Have you talked with your attorney about that constitutional right?

Is that a right you are willing to give up?

The plea agreement also talks about your right to appeal from or challenge a mistake in your sentence. I want to review that with you. First, let me tell you that if you plead guilty, you are admitting for all time that you committed this crime(s). You give up any defenses or excuses you may have, you give up any motions your attorney has filed or you've talked with him about filing, and you give up the right to come back to this Court or go to another Court and argue that you should not have been found guilty. The right to come back to this Court or go to another Court is called the right to appeal. So, if you plead guilty, you have no right to appeal from the finding that you are guilty.

If you think the Judge makes a mistake in the sentence you receive, you usually do have the right to ask for that mistake to be corrected. You can do that by filing a direct appeal to the next higher court or by collaterally challenging your sentence, usually by filing a paper in this Court under 28 U.S.C. § 2255. Under the plea agreement, you are giving up some of your rights to appeal from or collaterally challenge a mistake in your sentence. You can only do that if the sentence is above the sentencing guideline range as

determined by the Court, if the sentence is more than the sentence permitted by the law, or if the sentence violates that Eighth Amendment to the Constitution, which is your protection against cruel and unusual punishment. However, if the United States appeals from your sentence, then you have the right to file a direct appeal for any reason.

Do you understand how that limits your right appeal from or collaterally challenge a mistake in your sentence?

Is that a right you are willing to give up?

[Following review of the plea agreement promises] Those are all of the promises written in the plea agreement. Has anyone made you any other promises about what sentence you will receive or anything else that will occur in exchange for your plea of guilty?]

*Next, I will review the maximum possible penalties you face if you plead guilty to the charge(s).*

**(Court will advise Defendant of the maximum and minimum mandatory penalties)**

The Judge who will sentence you will look at something called the Sentencing Guidelines to help to decide what sentence you should receive in this case. The Judge must consider the Sentencing Guidelines, but he is not required to impose a sentence within the sentencing guideline range.

Have you and your attorney talked about how the sentencing guidelines might apply in your case?

I cannot tell you what your sentencing guideline range will be for you because I do not have all the information I need to do that. If you plead guilty, the Court's probation office will conduct a presentence investigation. They will look at what happened here, whether you accepted responsibility, whether you have any prior criminal history, and things of that nature and prepare a written report. You and your attorney will receive a copy of the report before the sentencing. The attorney for the United States will also receive a copy of the report. If there is anything in the report that you think is not correct, your lawyer can make an objection. If the objection is not resolved before the sentencing, then the Judge who will sentence you will hold a hearing and rule on the objection. Only at the point the report is finished and the Judge has ruled on the objections will there be enough information to know for sure what your sentencing guideline range is.

Your lawyer is giving you his best estimate of what the sentencing guideline range is likely to be but he can't know for sure until the presentence report is prepared and the objections are ruled on. So, it is important for you to understand that if the sentencing

guideline range or the sentence is something different than you expect it to be, you would not be allowed to withdraw your guilty plea for that reason.

If you happen to learn what the sentencing guideline range is for someone else who committed a crime similar to the crime(s) you propose to plead guilty to, you should not assume that you can calculate your sentencing guideline range based on the sentencing guideline range for another person. That is because the sentencing guideline range is an individualized determination. So, for example, if two people did the very same thing but one of them had more criminal convictions than the other, the person with the greater number of criminal convictions is almost always going to have a higher sentencing guideline range than the person who has fewer or no prior criminal convictions. Also, some people may qualify for departures from the sentencing guideline range and there are many individual factors the sentencing Judge considers.

That's a long explanation because it is important that you understand that if the sentencing guideline range or the sentence turns out to be something different than you expect it to be, you cannot withdraw your guilty plea for that reason. Is that clear?

We do not have parole in federal prison system anymore. That used to be a kind of early release program. Now, if you are sentenced to a term in jail, you will serve almost all if not all of any term of imprisonment imposed.

I mentioned supervised release as part of a possible sentence. Supervised release is a time a Defendant serves under the supervision of the Court's probation office after getting out of jail. Probation is a time served by a Defendant under the supervision of the Court's probation office without going to jail in the first instance. Under either type of supervision, there will be things that you must do and things that you cannot do. If you violate a condition of supervision, your supervision can be taken away. In the case of probation, you could be sent to jail. In the case of supervised release, you could be sent back to jail to serve the term of supervised release in addition to the time you served on the original sentence.

If you are not a citizen of the United States, you may be deported or removed from the United States as a result of being convicted in this case. If you are deported or removed before you complete your term of supervision and you later come back to the United States – legally or illegally – you will still be required to finish your term of supervision. In other words, your supervision does not go away simply because you are deported or removed from the United States.

You could be required to contribute financially to the costs of your supervision if you have the money to do that.

**[In controlled substances cases:** You should know that in drug cases such as this one, you may be required to forfeit certain benefits from the federal government for a period of time.]

**[In child pornography and other sexual offense cases:** After you complete your term of imprisonment, an evaluation will be conducted to determine whether it is safe to release you from custody. If there is a concern about whether you can be released, you may be subject to additional civil commitment after your criminal sentence is completed. You may also be required to register under the Sex Offender Registration and Notification Act. Failure to comply with those registration requirements is a separate felony offense.]

You will be required to cooperate in the collection of a DNA sample if that becomes required by the law.

Judge to Counsel for the United States:

Are there any other penalties applicable to the Defendant that I overlooked?

Judge to Defendant:

Do you understand all the possible penalties you face if you plead guilty to this charge(s)?

*Next, I am going to review with you the rights you lose if you plead guilty.*

You have the right to a trial before a jury composed of 12 people. During the trial you would be presumed to be innocent. The United States would have to prove that you were guilty beyond a reasonable doubt. You wouldn't have to prove anything.

During the trial, the witnesses would have to come into Court and testify in front of you. Your lawyer could ask them questions, and he could ask the Judge to keep out all or parts of anything the witnesses said and all or parts of any other evidence offered against you.

You would also have the right to require witnesses and evidence to be brought into Court and presented to the jury on your behalf.

During the trial, you could testify – talk to the jury under oath – if you wanted to, but you also have the right not have to testify and neither the Judge nor the jury could decide that you did anything wrong based on your decision not to testify. That is your right against self-incrimination and it gives you the absolute right to remain silent.

If you plead guilty and the District Judge accepts your plea, do you understand that there will be no trial, you give up any defenses or excuses you have and all the rights I've talked about, including the right to remain silent, and the District Judge will find you guilty based on your guilty plea?

**[If no plea agreement:** If you plead guilty, you are admitting for all time that you committed the crime(s). You give up any defenses or excuses you may have and all motions your attorney filed for you or you talked about filing, and you give up the right to come back to this Court or go to another Court and argue that you should not have been found guilty. The right to come back to this Court or go to another Court is called the right to appeal. So if you plead guilty, you have no right to appeal from the finding that you are guilty. If you think the Judge makes a mistake in the sentence you receive, you can appeal from the sentence but not from the finding that you committed the crime. Do you understand that difference?]

The crime(s) to which you propose to plead guilty is a felony offense. If you plead guilty, you will lose your civil rights. Those include, but are not limited to, the right to vote, to keep and bear firearms, to hold public office and to serve on a jury.

There is a right you do not give up by pleading guilty, and that is the right to be represented by an attorney. If you decide to go to trial, your attorney will represent you at trial and at every other stage of the case. If you decide to plead guilty, your attorney will represent you all the way through the sentencing. If you believe the Judge makes a mistake in the sentence you receive and you want to appeal from the sentence [subject to the limits in the plea agreement that we talked about], the Court would appoint an attorney to represent you for the direct appeal if you could not afford to hire someone.

I've talked about many things. Do you have any questions about anything I've talked about? [Do you have any questions about anything in the plea agreement that I did not talk about?]

What did you do that makes you guilty of the crime charged in Count(s) \_\_\_\_?

**(Defendant will be required to admit in his own words what he did that establishes each element of each offense to which the Defendant wishes to plead guilty.)**

Judge to Counsel for the United States:

Factual basis from the United States.

Judge to the Defendant:

Is what the United States says it could prove true to the extent it talks about what you did and what you knew?

I find that the facts are sufficient to allow you to plead guilty if you still want to do that. I told you when we started that you did not have to plead guilty. Now we are getting close to the time when I am going to ask you how you would like to plead.

First, though, is there anything you want to tell me or ask me that bears on your decision to plead guilty that we have not talked about?

Would you like to change anything you told me under oath that you think might not have been completely truthful?

Have you had any problems hearing or understanding anything during the proceeding?

Do you want to talk with your attorney further before I ask you how you would like to plead?

Judge to Counsel for the United States:

Are there any victims who wish to be heard?

Judge to Defendant:

How then do you plead to the charge in Count(s) \_\_\_\_\_ of the Indictment?

Are you freely and voluntarily entering this plea(s) of guilty?

I find that the plea(s) of guilty is knowingly, intelligently and voluntarily made. It is not the result of force or threats or promises [other than the promises contained in the plea agreement.] I will recommend that the District Judge accept your guilty plea [and the plea agreement.] Sentencing is usually at least 75 days from today because that is how long it takes to do the presentence investigation. I do not have the sentencing date for you. Your attorney will tell you when sentencing is scheduled and he will also explain the presentence process to you.