

RULE 11 – GUILTY PLEA

I. INTRODUCTION

We are here in the Matter of United States of America vs. [Name], at docket number [xx-cr-xxx].

Counsel, could you please enter your appearances:

[Government Counsel] –

[Defense Counsel] -

[To Defendant] –

- Are you _____ the person named as a Defendant in this indictment?

[To Prosecutor] - Have you provided notice of the proceeding to any victim(s) of the offense as required by the Justice for All Act of 2004? 18 U.S.C. § 3771.

EXPLAIN QUESTIONING PROCESS:

[To Defendant] **Mrs./Mr.** _____ – There are two ground rules that apply throughout the hearing today:

- First, if at any time you don't understand any question I ask you, or anything the parties say, please let me know and we will try to find a way to say it in a better way. Otherwise I am going to assume you heard and understand everything, okay?
- Second, if at any time you want to talk to your lawyer, please just let me know and I'll give you sufficient time to do so.

II. COMPETENCE

The first thing we have to discuss is competence. That is because I have to be sure that you are competent to change your plea today.

- How old are you?
- How far did you go in school?
- Can you read and write?
- Are you currently under the care of a doctor or psychiatrist?
- Are you currently taking any medication? [*The defense attorney should have submitted a written document indicating all current medications.*] If so, for each medication:
 - a. What is the purpose of the medication?
 - b. Are you taking the prescribed amounts?
 - c. Does it alone, or in combination with other medications, prevent you from understanding what is happening here today?
- Are you prescribed any medication that you are NOT taking?
 - What is that medication? Why are you not taking it? Does the fact that you are not taking that medication affect your ability to understand what is happening today?
- Have you used any other drug or consumed any alcohol in the past 24 hours?
- Has your lawyer explained to you what may happen as a result of today's hearing and your change of plea?
- Do you authorize **Attorney _____** to act and speak on your behalf throughout the hearing today?
- I understand you wish to change your plea to **Count(s) _____** of the **[indictment / information]**. Is that correct?

[To Defense Counsel] – **Attorney _____**:

- Has anything come to your attention that casts any doubt on the Defendant's competence to change his/her plea?

FINDING: Having observed the Defendant in making her/his answers and her/his demeanor, manner, and attitude, and having observed the Defendant does not appear to be under the influence of medicine, drugs, or any other substance that may affect her/his judgment in the matter, I find the Defendant is competent to enter a plea.

[To Defendant] – Mrs./Mr. _____:

- Has your attorney explained to you the consequences that may flow from these proceedings? That is, has your lawyer explained to you what may happen as a result of this proceeding?

[To Defense Counsel] – Attorney _____:

- Do you approve of the change of plea and recommend that I accept it?

The clerk may proceed. [Clerk obtains tender of a guilty plea.]

III. CHARGE(S) AND PENALTIES

[To Defendant] Mrs./Mr. _____ :

One of the purposes of this proceeding is to allow me to determine that you know what you are doing and you are doing so voluntarily.

- Did you plead guilty to **Count(s) _____** contained in this **[Indictment / Information]** because you are actually guilty and for no other reason?

If the plea turns into an Alford plea (400 U.S. § 25 (1970)), determine:

- a. *Whether the Defendant has considered alternative courses of action and made voluntary and intelligent choice;*
- b. *Whether competent counsel's advice is that plea is to Defendant's advantage.*
- c. *Whether Defendant demonstrates clearly expressed desire to plead guilty.*

Specifically, ask Defendant:

- a. *To explain in detail why pleading guilty.*
- b. *What benefit she/he believes will come from pleading guilty?*
- c. *Have you consulted with your lawyer in detail on this subject and are you satisfied with her/his advice?*

[To Defense Counsel] - Attorney _____:

- Are you satisfied that **Defendant** _____ has pleaded guilty because she/he is actually guilty?

[To Defendant] - Mrs./Mr. _____ :

- Did you receive a copy of the **[Indictment / Information]**?
- Did you have enough time to discuss the charge(s) with your lawyer?
- Did your lawyer explain to you:
 - a. the elements and nature of the crimes charged? That is, what it is the Government would have to prove beyond a reasonable doubt in order for you to be convicted?
 - b. the penalties that can be imposed?

[To Defense Counsel] - Attorney _____:

- Are you satisfied that **Mrs./Mr.** _____ understands the charge contained in **Count(s)** _____ charged in the **[Indictment / Information]** and the penalties that can be imposed?

[To Government Counsel] – Inquire about forfeiture.

- [CHECK CHARGING INSTRUMENT FOR FORFEITURE]: The indictment **does/does not** include forfeiture allegations.
- [If applicable] How does the government plan to proceed with respect to the forfeiture allegations in this matter?

**IV. REVIEW THE INDICTMENT / INFORMATION WITH THE
DEFENDANT:**

[To Defendant] **Mrs./Mr.** _____: You are charged in an [Indictment / Information] at **Count(s)** _____.

- **You are charged at [Court reads from Indictment/Information]:**
Count [X]
Count [X]
- Do you understand this charge?
- [If applicable] Do you understand this charge is a felony offense?
- If you are not a United States citizen, by pleading guilty to these crimes you may be removed from the United States, denied citizenship, and denied admission to the United States in the future. Do you understand?
- By pleading guilty to this crime, you:
 - a. **May be imprisoned for a total of [if an applicable mandatory minimum, at least _____ years] and up to _____ years** [maximum and minimum sentences, describing effects of drug quantity, previous convictions, etc.].
 - b. **May be required to pay a fine of \$X,000.00 on Count(s) _____.**
 - c. **May be placed on supervised release for not more than _____ years on Count(s) _____.** [Maximum and minimum] to follow any term of imprisonment.

i) If you violate the terms of that supervised release, you could be put back into prison for not more than _____ **years** on **Count(s)** _____, and placed on an additional term of Supervised release of _____ **years** less any term of imprisonment imposed upon the violation.

d. Must pay a mandatory assessment of \$100 **per count** if convicted.

- **[If applicable]** You may also be required by court order to make full restitution to any victim of the offense.
- **[If applicable]** You may also be required to forfeit certain property to the government.

[In any 18 U.S.C. § 922(g) case (e.g., felon-in-possession), consider warning of possibility of Armed Career Penalties under 18 U.S.C. § 924(e)(1), i.e., 15-year mandatory minimum and maximum of life.]

V. DEFENDANT'S RIGHTS

[To Defendant] Mrs./Mr. _____ :

- Do you understand that even now, if you wished, you still could plead not guilty?
- By pleading guilty you are giving up some important rights, so I want to go over those with you now.
- You have the right to a speedy trial by jury, the right to the assistance of your lawyer at the trial and, if you cannot afford a lawyer, you have the right to a lawyer appointed for you at government expense.
- At a trial, you would not have to prove that you are innocent. You would be presumed innocent and the government would have to prove you guilty beyond a reasonable doubt.
- At a trial, the government's witnesses would have to come into open court and testify in front of you and your lawyer. Your lawyer would have the opportunity to cross-examine any government witnesses, to object to evidence the government offered, to offer evidence favorable to you, and to compel witnesses to come to court.

- At a trial you would have the right to testify if you wanted to, but you would also have the right not to testify and you could not be required to testify at a trial.
- Also, if you chose not to testify, I would instruct the jury that it could draw no inference or suggestion of guilt from the fact that you did not testify.
- At a trial, you could only be found guilty upon a unanimous vote of the jury.
- If I accept your guilty plea, you will have given up your right to a trial and the other rights I have described, and there will be no trial of any kind on these charges.
- And I will enter a judgment of guilty and sentence you on the basis of your guilty plea. If all of that happens, you will have virtually no right of appeal from your conviction.
- **[If applicable]** Do you understand that in any prosecution for perjury or false statement, the government would have the right to use against you any statement that you have given under oath?
- Do you understand these trial rights that I've just described to you?
- Do you still choose to plead guilty to the charges contained in **Count(s)** _____ of the **[Indictment / Information]**?

VI. FACTUAL BASIS FOR FINDING OF GUILT

[To Government Counsel] **Attorney** _____, I am looking at the Prosecution Version dated **[date]**, is this the evidence the government would produce if this matter should go to trial?

[Listen to entire recital of evidence or, in the alternative, admit written prosecution version and do inquiry.]

[To Defense Counsel] **Attorney** _____ -

- Have you reviewed the prosecution version with your client?
- Did you have enough time to do so?

- Are you satisfied that the government can in fact produce the evidence **[contained in the prosecution version]**?
- Are you satisfied that the admissible part of that evidence would permit a properly instructed jury to determine beyond a reasonable doubt that the Defendant is guilty of **[each of] the crime(s)** to which she/he is pleading guilty?

[To Defendant] Mrs./Mr. _____ - do you understand the evidence the prosecutor would produce if this matter should proceed to trial?

- Have you read and discussed the prosecution version with your lawyer?
- Is there any portion of the prosecution version that you *disagree with*?
- Is this information true to your own personal knowledge?

[If not satisfied with the status of the factual basis of the plea, inquire of the Defendant as to the essential details of the crimes to which a plea is entered.]

I find that there is sufficient factual basis for the guilty plea(s) to the **crime(s)** charged in each of the counts of the **[Indictment / Information]**.

If Alford plea, require strong evidence of actual guilt.

VII. VOLUNTARINESS AND PLEA AGREEMENT

[To Defendant] Mrs./Mr. _____, has anyone threatened you or tried to force you in any way to plead guilty?

If Alford plea, has Defendant made intelligent conclusion that Defendant's interests require guilty plea?

- **[If no apparent plea agreement]** Do you have any plea agreement, written or verbal, with the prosecution or any agreement about the sentence or about other charges?

or

- **[If written plea agreement]** I understand that you have agreed to plead guilty because of discussions among you and your lawyer and the prosecutor that have resulted in a written plea agreement, is that correct?

VIII. MISSOURI V. FRYE – 132 S. Ct. 1399 (2012)

[To Government Counsel] Attorney _____, has your office extended any prior formal plea offers to the Defendant? If yes, list the date of each offer. **[If no prior formal plea offer was ever offered, there is no need to ask anything further of any party on this topic.]**

[To Defense Counsel] Attorney _____ - Have you communicated **[the offer]** **[each of those offers]** to your client?

[To Defendant] Mrs./Mr. _____ - Do you agree that your lawyer has explained to you **[the offer]** **[each of the offers]** just referred to by the prosecutor?

IX. WRITTEN PLEA AGREEMENT

In examining the written plea agreement [referring to one or both documents but without naming cooperation agreement as such]:

- Is this your signature on **page** ___?
- Do you sign it voluntarily?
- Did you read it before you signed it?
- Did you review it with your lawyer before you signed it?
- Did you have sufficient time to do that?
- Did you understand everything in it before you signed it?

- In signing it, did you intend to agree to all of its terms and conditions?

Highlight:

- **Agreement to dismiss charges [Fed. R. Crim. P. 11 (e)(1)(a) agreement] and right to withdraw guilty plea if I reject that part:**
- **Sentencing guideline agreement and/or sentencing recommendation [Fed. R. Crim. P. 11e(1)(b) agreement]:**

This language tells me that you and the prosecutor have agreed to and/or permits you, your lawyer and the prosecutor to make recommendations on sentencing, but the agreement and/or the recommendations are not binding on me as the sentencing judge. The authority to determine the appropriate sentence in this case rests with me as the judge, and if I do not accept those recommendations or if the sentence is more severe than you hoped for, you will have no right to withdraw your guilty plea. Do you understand?

- **If waiver of right to appeal or § 2255, or if forfeiture provision, examine on those particular aspects. For example:**

“Ordinarily you would have the right to appeal your sentence or the sentencing procedures or any error that I might make in these guilty plea proceedings by taking your case to a higher court, but you are agreeing here not to take any appeal of _____ **months** to a higher court. In other words, if I sentence you at _____ **months** or less, I am the last judge in your case and you are agreeing that you will not be able to overturn what I do. Do you understand?”

- ***If Fed. R. Crim. P. 11(e)(1)(c) agreement (“C Plea”), detail the specific agreement re: sentencing limitations and inform the Defendant that if the judge does not ultimately accept those provisions, she/he will have the opportunity to withdraw the plea.***

X. SENTENCING GUIDELINES

- There are advisory sentencing commission guidelines that will affect your sentence. I have a responsibility to calculate the guideline range, to consider that range, to consider possible departures under the guidelines, and to consider other sentencing factors listed in a federal statute (18 U.S.C. § 3553(a)). Have you and your lawyer talked about how these issues may affect your sentence?
- I won't know what guideline range applies to your case until I read a presentence report the probation office will prepare. I'll give you and the government an opportunity to object to any of the information in the report. After I determine what guideline range does apply to your case, I may not follow the guideline range, but instead impose a sentence that is more severe or less severe than the sentence called for by the guideline. Do you understand?
- And do you understand that if the sentence is more severe that would not be a reason for you to be permitted to withdraw your guilty plea?

XI. CONCLUDING QUESTIONS

- Both you and the government have the right to appeal any sentence that I impose **[unless plea agreement limits]**. Do you understand?
- You will be required to actually serve in a jail or prison all of any imprisonment term I impose except for good-time deductions.
- Aside from the written plea agreement, has anyone made any promise to you in an effort to get you to plead guilty?
- Has anyone made any promise to you as to what sentence I will impose?
- Has anyone made any promise to you as to what the prosecutor's sentencing recommendation will be (other than what is contained in the written plea agreement)?
- I ask you finally, then, do you still wish to plead guilty to the charges contained in **Count(s) _____** of the **[Indictment / Information]**?

[To lawyer] **Attorney** _____ - Do you, as **Mrs./Mr.** _____'s lawyer, still recommend that I accept the guilty plea?

**XII. ACCEPTANCE OR RESERVATION OF ACCEPTANCE OF GUILTY
PLEA**

[To Defendant] - **Mrs./Mr.** _____ -

- I find that you understood my questions and provided appropriate responses.
- You are not under the influence of any substance that might affect your judgment.
- You acknowledge that you are in fact guilty as charged in **Count(s)** _____ of the **[Indictment / Information]**.
- You know of your right to a trial and the rights associated with the right to a trial.
- You know the maximum possible punishment [and minimum, *if applicable*] that may be imposed if you are convicted.
- I also find that you have not been coerced but that you have voluntarily and knowingly pleaded guilty to **Count(s)** _____ of the **[Indictment / Information]**.
- I, therefore, accept your guilty plea and adjudicate you guilty.

– or –

[If Fed. R. Crim. P. 11(c)(1)(a) or (c) agreement.]

I will reserve decision on accepting the plea agreement until I have reviewed the presentence report.

I hereby order the preparation of a presentence report.

[Counsel to arrange with probation officer.]

XIII. DETENTION / RELEASE ON CONDITIONS

OPTIONS:

- Mandatory detention case?
- Seeking bail?
- Decide whether to release on bail and under what conditions.

If released, give bail jumping and additional criminal conduct warnings:

[To Defendant] - Mrs./Mr. _____ -

- You have now pleaded guilty to a federal felony, so you are in a different position with this Court. You are required to appear as directed by the Court. It is not your lawyer's responsibility to get you here, it is your responsibility to appear. You need to stay in touch with your lawyer so you will know when you need to come back. Failure to appear is an additional federal felony and the punishment imposed on failure to appear is imposed consecutive to any other sentence.
- Also, if you commit another offense while on release, that too is an additional felony for which punishment would be imposed in addition to any punishment given on the underlying offense.
- Getting in trouble now, or failing to appear as directed are not good ideas.

[If Detained:]

- The defendant is remanded herewith into the custody of the United States Marshal for the District of Maine. He is to be retained in that custody pending further order of this Court.