

Exhibit C for Motion For Leave to Amend in
CF-2007-3829

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
-vs-) No. 10-CR-58-JHP
)
BRANDON JAY McFADDEN,)
)
Defendant.)

* * * * *

TRANSCRIPT OF CHANGE OF PLEA HEARING
BEFORE THE HONORABLE FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

MAY 6, 2010

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A P P E A R A N C E S

MS. JANE W. DUKE and MS. PATRICIA S. HARRIS, United States Attorney's Office, P.O. Box 1229, Little Rock, Arkansas, 72203, United States Attorneys on behalf of the Plaintiff;

Mr. NEAL B. KIRKPATRICK, 1861 East 15th Street, Tulsa, Oklahoma, 74104, Attorney on behalf of the Defendant.

REPORTED BY: KEN SIDWELL, CSR-RPR
United States Court Reporter
P.O. Box 3411
Muskogee, Oklahoma 74402

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Before I can accept a plea of guilty,
3 sir, I have to be satisfied that you're competent to plead
4 guilty, that you understand your rights, that you understand
5 the consequences of pleading guilty, and that you're
6 pleading guilty voluntarily. I will, therefore, be asking
7 you a series of questions concerning those issues. It's
8 important that you tell the truth in response to the
9 questions that I ask you, sir. If you fail to tell the
10 truth or make any false statements, your answers could be
11 used in a prosecution for perjury or making false
12 statements. Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Is Brandon Jay McFadden your true and
15 correct name, sir?

16 THE DEFENDANT: Yes.

17 THE COURT: Have you ever been known by any other
18 name?

19 THE DEFENDANT: No.

20 THE COURT: What is your age and your date of
21 birth, sir?

22 THE DEFENDANT: Thirty-three years old. 10-6 of
23 '76.

24 THE COURT: And what's your educational
25 background?

1 THE DEFENDANT: College graduate.

2 THE COURT: Can you read, write, and understand
3 the English language, sir?

4 THE DEFENDANT: Yes.

5 THE COURT: Are you currently taking any drug or
6 medication, sir?

7 THE DEFENDANT: No, I'm not.

8 THE COURT: Have you been prescribed any drug or
9 medication which you should be taking, but that for some
10 reason you're not taking?

11 THE DEFENDANT: No, sir.

12 THE COURT: Have you taken or consumed any alcohol
13 in the last 24 hours?

14 THE DEFENDANT: No.

15 THE COURT: Have you taken or consumed any other
16 drug or illegal substance in the last 24 hours?

17 THE DEFENDANT: No, sir.

18 THE COURT: Have you ever been treated for or
19 diagnosed with any type of mental illness, sir?

20 THE DEFENDANT: No, sir.

21 THE COURT: Have you ever been treated or
22 diagnosed with any type of addiction?

23 THE DEFENDANT: No, sir.

24 THE COURT: Do you fully understand these
25 proceedings, sir?

1 THE DEFENDANT: Yes.

2 THE COURT: Are you competent to proceed today?

3 THE DEFENDANT: Yes, I am.

4 THE COURT: Counsel, do you believe that your
5 client fully understands these proceedings and is competent
6 to proceed today?

7 MR. KIRKPATRICK: I do, Your Honor.

8 THE COURT: Mr. McFadden, have you had enough time
9 to fully confer with your attorney?

10 THE DEFENDANT: Yes, I have.

11 THE COURT: Have you, in fact, fully conferred
12 with your attorney about all aspects of this case, sir,
13 including any defense that you might have or any information
14 that might be favorable to you?

15 THE DEFENDANT: Yes.

16 THE COURT: Are you satisfied that your attorney
17 has fully investigated your case and properly advised you?

18 THE DEFENDANT: Yes.

19 THE COURT: Are you completely satisfied with the
20 services of your attorney, sir?

21 THE DEFENDANT: Yes, I am.

22 THE COURT: It's my understanding, sir, that you
23 made your initial appearance and arraignment in this case
24 less than 30 days ago. And under the law, you're entitled
25 to have 30 days preparation time before called upon to go to

1 trial or have a plea in this case.

2 Do you want to proceed today with this change
3 of plea and waive your 30 days preparation time, or do you
4 want to have this case passed so that you have that full 30
5 days?

6 THE DEFENDANT: Proceed today.

7 THE COURT: We've got a form that indicates you
8 want to waive your 30 days of preparation time. If that's
9 what you want to do, sign the form. If you don't want to do
10 that, don't sign the form, sir.

11 Based upon your statements to me, Mr. McFadden,
12 and your signature on this waiver form, I'm going to show
13 that you've waived your right to have the 30 day preparation
14 time prior to trial.

15 You have the right, Mr. McFadden, to have
16 this guilty plea proceeding conducted in front of a district
17 judge. The district judge in your case is Judge Payne. You
18 have the right also to waive your right to have this
19 proceeding in front of Judge Payne and consent to have it
20 heard before a magistrate judge, which is what I am. If you
21 consent to have this guilty plea proceeding in front of a
22 magistrate judge, it will have the same force and effect as
23 if you had the change of plea proceeding conducted by a
24 district judge. Do you want to waive your right to have
25 this proceeding in front of a district judge and consent to

1 have it in front of a magistrate judge?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. We've got another form
4 that indicates that's what you want to do. If you want to
5 do that, sir, sign the form. If you don't want to do that,
6 don't sign the form.

7 All right. Mr. McFadden, based upon your
8 statements to me, your signature on this consent form, I'll
9 show that you consented to have this guilty plea proceeding
10 conducted in front of a magistrate judge.

11 Mr. McFadden, although you told me that it's
12 your desire to enter a plea of guilty, you understand, sir,
13 that you're not required to plead guilty?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. You've entered a plea of
16 not guilty and you've got the right to maintain that plea of
17 not guilty, in which case you would have a right to a jury
18 trial. Do you understand that, sir?

19 THE DEFENDANT: Yes, I do.

20 THE COURT: I know that you've gone over this with
21 your attorney, but the law requires that I go over with you
22 here in open court some of the rights that you would have at
23 a jury trial.

24 You would have the right to a speedy and
25 public trial by jury. You would have the right to be

1 represented by counsel at trial and at every other stage of
2 the proceeding. If you were financially unable to obtain
3 counsel, the court would appoint counsel for you. You would
4 have the right to see and hear the testimony of all the
5 witnesses called to testify against you, and the right to
6 cross-examine them. You would have the right to use the
7 subpoena power of the court to compel the attendance of
8 witnesses at trial, and the production of other forms of
9 evidence at trial. You would have the right to testify and
10 present witnesses and evidence if you chose to do so, but
11 you would also have the right not to be compelled to
12 incriminate yourself by taking the witness stand, and if you
13 did not take the witness stand, no inference of guilt could
14 be drawn from your failure to take the witness stand.

15 Furthermore, sir, you could not be convicted
16 unless all 12 members of the jury agreed that your guilt of
17 the essential elements of the crime charged had been proven
18 beyond a reasonable doubt. And if you were convicted, you
19 would have the right to have the jury determine, beyond a
20 reasonable doubt, any facts, except the fact of a prior
21 conviction that would increase your sentence. Do you
22 understand all of those rights, sir?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: Do you understand, sir, that, if you
25 plead guilty, you'll be giving up your right to a jury trial

1 and the other rights that I've just reviewed with you, and
2 there won't be a trial of any kind in this case?

3 THE DEFENDANT: Yes, I do.

4 THE COURT: Do you understand, sir, that, if you
5 waive your right to jury trial and plead guilty, the Court
6 will decide all of the facts concerning your sentence by a
7 preponderance of the evidence?

8 THE DEFENDANT: Yes.

9 THE COURT: Have you received a copy of the
10 indictment in the case, sir?

11 THE DEFENDANT: Yes, I have.

12 THE COURT: And have you read it?

13 THE DEFENDANT: Yes.

14 THE COURT: And do you understand the nature of
15 each of the -- or of the charge to which you're going to
16 enter a plea of guilty?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Would you like to have that charge
19 read to you here in open court or explained to you in any
20 way?

21 MR. KIRKPATRICK: We'll waive, Your Honor.

22 THE COURT: Do you waive that, Mr. McFadden?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: The charge that you're pleading guilty
25 to in Count 1 would be a conspiracy to distribute drugs,

1 sir. And in order for the government to prove that case,
2 they would have to establish the essential elements: That,
3 at some time here in the Northern District of Oklahoma, two
4 or more persons reached an agreement or came to an
5 understanding to distribute methamphetamine; that you, the
6 defendant, voluntarily and intentionally joined in that
7 agreement or understanding either at the time that it was
8 reached or at a later time while it was still in effect; and
9 at the time that you joined in the agreement or
10 understanding, you knew then the purpose of the agreement or
11 understanding; and the agreement or understanding involved
12 at least 350 grams of a mixture of a substance containing a
13 detectable amount of methamphetamine.

14 Do you understand that's what the government
15 would have to prove beyond a reasonable doubt if this case
16 went to a jury?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: All right. The maximum possible
19 punishment that could be imposed on a plea of guilty to this
20 offense is five years -- a minimum of five years and up to
21 40 years; a two million dollar fine; a minimum of four years
22 supervised release. What's the maximum supervised release
23 that could be imposed?

24 MR. KIRKPATRICK: It's five years, I believe, Your
25 Honor.

1 THE COURT: Up to five years. Is that right,
2 Ms. Duke?

3 MS. DUKE: I believe that's correct, Your Honor.

4 THE COURT: All right. A minimum of four years
5 supervised release and a maximum of five years of supervised
6 release; a two million dollar fine; and \$100 special
7 assessment. You understand that's the maximum punishment
8 you're facing if you go ahead and plead guilty?

9 THE DEFENDANT: Yes, sir, I do.

10 THE COURT: Does the government agree that that is
11 the maximum possible punishment that could be imposed in
12 this case?

13 MS. DUKE: Yes, Your Honor.

14 THE COURT: Mr. Kirkpatrick, do you agree that
15 those are the maximum possible punishments?

16 MR. KIRKPATRICK: Yes, Your Honor.

17 THE COURT: Do you understand, sir, that, in
18 determining your sentence, the Court will consider the
19 sentencing guidelines?

20 THE DEFENDANT: Yes.

21 THE COURT: And you understand, sir, that those
22 sentencing guidelines are only advisory?

23 THE DEFENDANT: Yes.

24 THE COURT: All right. The Court will be required
25 to calculate the sentencing guidelines and consider them in

1 deciding your sentence, but the Court doesn't have to follow
2 the guidelines and may sentence you up to the maximum that
3 we've previously talked about. Is that clear to you?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: You understand, sir, that, if there's
6 been any guideline calculation done by your attorney or
7 anyone else at this point, it's only an estimate, and that
8 does not in any way limit the sentence that the Court could
9 impose?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you understand, sir, that, in
12 deciding your sentence, the Court can consider any reliable
13 information that comes to its attention, including criminal
14 conduct that you're not pleading guilty to? Do you
15 understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: Is there a written plea agreement in
18 this case, counsel?

19 MR. KIRKPATRICK: There is, Your Honor.

20 THE COURT: Has it been signed?

21 MR. KIRKPATRICK: It has.

22 THE COURT: May I see a signed copy of it, please?

23 MS. DUKE: May I approach, Your Honor?

24 THE COURT: Mr. McFadden, I've been given a
25 written plea agreement that has, on each of the pages, some

1 initials in the bottom right-hand corner, and what appears
2 to be your signature on three or four different places on
3 this document. Are those your initials on each of those
4 pages, sir?

5 THE DEFENDANT: Yes.

6 THE COURT: And are those your signatures on those
7 several places on this document?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Have you read this written plea
10 agreement, sir?

11 THE DEFENDANT: Yes, I have.

12 THE COURT: Do you understand all of the
13 provisions of this written plea agreement?

14 THE DEFENDANT: Yes.

15 THE COURT: Do you have any questions concerning
16 this written plea agreement, sir?

17 THE DEFENDANT: No, sir.

18 THE COURT: Does the written plea agreement, sir,
19 contain each and every term of the agreement between you and
20 the government?

21 THE DEFENDANT: Yes.

22 THE COURT: Has anybody, sir, including your
23 attorney or anyone acting for the government, made any
24 promise or assurance to you of any kind that's not contained
25 in this written plea agreement?

1 THE DEFENDANT: No.

2 THE COURT: Do you fully understand, sir, the
3 provisions in the written plea agreement, waiving your right
4 to appeal or collaterally attack the sentence in this case?

5 THE DEFENDANT: Yes, I do.

6 THE COURT: Do you understand, sir, that the
7 stipulations or agreements in this plea agreement concerning
8 the sentencing guidelines are not binding on the Court?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And is it your desire, sir, to freely
11 and voluntarily agree to this written plea agreement?

12 THE DEFENDANT: Yes, it is.

13 THE COURT: Is there any reason, counsel, why the
14 written plea agreement should not be made a part of the
15 record in this case?

16 MR. KIRKPATRICK: The defendant is aware of none,
17 Your Honor.

18 THE COURT: The government aware of any reason why
19 this written plea agreement should not be made a part of the
20 record in this case?

21 MS. DUKE: No, Your Honor. It's my understanding
22 that, pursuant to local practice, that the plea agreement
23 supplement remains under seal.

24 THE COURT: The written plea agreement supplement,
25 which is the same document, or a document that's attached to

1 every plea agreement in this district, will, as we have done
2 in all the other cases, be filed under seal.

3 Mr. McFadden, after considering our discussion
4 here this afternoon concerning the essential elements of the
5 crimes charged -- or of the crime charged, the maximum
6 penalties that can be imposed, and the rights that you have
7 to a trial, do you still want to waive your right to a jury
8 trial, sir?

9 THE DEFENDANT: Yes, I do.

10 THE COURT: We've got a form that indicates you
11 want to waive your right to a jury trial. If that's what
12 you want to do, sir, go ahead and sign the form. If you
13 don't want to do that, don't sign the form.

14 Has Ms. Duke signed that? Based upon your
15 statements to me here in open court, Mr. McFadden, and your
16 signature on this form, along with your attorney's
17 signature, I'm going to show that you've waived your right
18 to have a jury trial in regard to Count 1 of this
19 indictment.

20 Once again, Mr. McFadden, considering
21 everything we've discussed here this afternoon, is it still
22 your desire to enter a plea of guilty to Count 1 of this
23 indictment?

24 THE DEFENDANT: Yes, it is.

25 THE COURT: Is your plea of guilty, sir, and the

1 waiver of your rights made voluntarily?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. Considering all of those
4 matters, sir, how, in fact, do you plead to Count 1 of the
5 indictment?

6 THE DEFENDANT: Guilty, sir.

7 THE COURT: Are you being forced to plead guilty,
8 sir?

9 THE DEFENDANT: No, sir.

10 THE COURT: Is your waiver of your rights
11 voluntarily and completely of your own free choice?

12 THE DEFENDANT: Yes, it is.

13 THE COURT: Are you being threatened to get you to
14 plead guilty, sir?

15 THE DEFENDANT: No.

16 THE COURT: Are you under any type of pressure to
17 plead guilty, sir?

18 THE DEFENDANT: No, sir.

19 THE COURT: Are you relying upon any
20 representation or promise which is not clearly and
21 specifically set forth in your plea agreement?

22 THE DEFENDANT: No, sir.

23 THE COURT: Are you pleading guilty, sir, because
24 you are, in fact, guilty?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: What did you do, sir, that makes you
2 guilty of this offense?

3 MR. KIRKPATRICK: Your Honor, there's been a
4 statement of -- a statement of fact supporting the offense I
5 was furnished by the special attorney. I was unclear at the
6 time whether they are going to read that or we should.

7 THE COURT: It's my practice to ask the defendant
8 what he did to make -- to show that he's guilty of this
9 offense.

10 Mr. McFadden, what is it you did that makes
11 you guilty of this?

12 THE DEFENDANT: From January 7th of -- to May of
13 2008, I conspired with others, including Tulsa police
14 officer, Jeff Henderson, to distribute methamphetamine in
15 the Northern District of Oklahoma. During the time period,
16 that I used the position as a special agent with ATF to
17 further the drug conspiracy and abused my position as a
18 special agent. During this time, myself and Henderson
19 seized drugs and money which were kept for our own personal
20 benefit, falsified investigative reports, and failed to
21 document events, and obstruct justice through falsely
22 testimony under oath and persuading other individuals to do
23 the same.

24 In 2007, myself and Henderson -- Officer
25 Henderson seized methamphetamine from a Tulsa area drug

1 dealer named Ryan Logsdon. Working together with one of
2 Officer Henderson's cooperating witnesses, myself and
3 Henderson sold the methamphetamine back to Ryan Logsdon
4 during the transactions that occurred at the Tulsa Community
5 College. Ryan Logsdon later became a co-conspirator in a
6 drug conspiracy with McFadden and Henderson.

7 Also, in the spring of 2007, myself and Tulsa
8 police officer, who was not Jeff Henderson, performed a
9 traffic stop on an individual who later became a
10 co-conspirator with myself. During the traffic stop, I and
11 the other Tulsa police officer seized cash and
12 methamphetamine from the individual which was kept for our
13 own personal benefit.

14 On or about June the 12th, 2007, myself and
15 other Tulsa police officers, one of who was Henderson,
16 conducted a warrantless search at a residence in Tulsa.
17 Discovered a large sum of cash. Myself, Henderson, and
18 other officers kept almost \$10,000 of cash for their own
19 personal benefit.

20 In May 12th of 2008, myself and other -- a
21 Tulsa police officer make a traffic stop on two people.
22 During the traffic stop, myself seized a quantity of
23 methamphetamine which was delivered to Ryan Logsdon to
24 distribute. The two individuals in possession of the
25 methamphetamine were never charged with any drug offense.

1 Sometime in May of 2008, I provided cash to
2 an individual who thought was conducting a law enforcement
3 controlled buy for myself in effort to gain a downward
4 departure in his pending federal case. Instead of being a
5 law enforcement controlled buy, this transaction was -- was
6 actually for my own personal benefit and I actually took the
7 drugs to Ryan Logsdon and had Logsdon distribute the drugs.

8 On another occasion in 2008, I arranged for a
9 drug transaction between Ryan Logsdon and an unidentified
10 female in which the female was going to sell methamphetamine
11 to Ryan Logsdon. During the transaction, I showed up in my
12 capacity of a special agent with ATF, seized the drugs and
13 did not arrest anyone. I later sold the drugs to Ryan
14 Logsdon, in which in turn for him to distribute it.

15 In April of 2008, myself and Officer
16 Henderson testified falsely in a criminal case in the
17 Northern District of Oklahoma, the United States versus
18 Larry Barnes and Larita Barnes. In the jury trial, McFadden
19 and -- myself and Henderson also got Ryan Logsdon to testify
20 falsely that he made a controlled buy from the Barnes on May
21 the 8th of 2007, when, in fact, it did not happen. Both the
22 Barnes were convicted on jury trial based on the false
23 testimony of myself, Logsdon, and Henderson.

24 MR. KIRKPATRICK: I think that suffices, Your
25 Honor.

1 THE COURT: Mr. McFadden, did some or all of these
2 activities occur in the Northern District of Oklahoma?

3 THE DEFENDANT: Yes.

4 THE COURT: And during those activities that
5 you've described, you agreed with at least one more person
6 to distribute methamphetamine?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And, in fact, methamphetamine was
9 distributed, wasn't it?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And when you made this agreement to
12 distribute methamphetamine, you knew that it was illegal to
13 do so?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And you entered into that agreement
16 knowingly and voluntarily?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And do you agree, sir, that at least
19 350 grams of methamphetamine, or of a substance containing a
20 detectable amount of methamphetamine was distributed during
21 this conspiracy?

22 THE DEFENDANT: Yes, I do.

23 THE COURT: Ms. Duke, is the government satisfied
24 that Mr. McFadden has given a sufficient factual basis for
25 the Court to accept a plea of guilty in this case?

1 MS. DUKE: Yes, Your Honor, as to Count 1, it is
2 sufficient. I have a couple of other stipulations that I
3 would like to set forth for the record, if I might?

4 THE COURT: You may.

5 MS. DUKE: The Court has already noted that the
6 parties have stipulated to a drug amount for relevant
7 conduct purposes, and that amount is between 350 to 500
8 grams of methamphetamine.

9 The parties have also stipulated, pursuant to
10 the plea agreement, to a two point enhancement for abuse of
11 a position of trust, as well as a two point enhancement for
12 obstruction of justice.

13 The parties have also stipulated that Mr.
14 McFadden might be eligible for a two point reduction for the
15 safety valve application, and a three point reduction for
16 acceptance of responsibility.

17 The government is also agreeing that it has
18 no objection to Mr. McFadden remaining on his conditions of
19 release pending sentencing.

20 And the United States would further ask the
21 record to reflect that Mr. McFadden has agreed through the
22 plea agreement to submit to forfeiture of the Chevrolet
23 Silverado, which is alleged in the indictment as subject to
24 forfeiture.

25 THE COURT: Mr. Kirkpatrick, are you satisfied

1 that the statements of your client, Mr. McFadden, provide a
2 sufficient factual basis for the Court to accept a plea of
3 guilty to Count 1 of this indictment?

4 MR. KIRKPATRICK: I am, Your Honor.

5 THE COURT: With regard to the agreement,
6 Ms. Duke, that the government has entered into to -- with
7 regard to his bond pending sentencing, what exactly is the
8 agreement that the government has made, because that's not
9 reflected in the plea agreement.

10 MS. DUKE: Your Honor, the agreement is simply --
11 I know Mr. Kirkpatrick has filed a motion today with the
12 Court for Mr. McFadden to remain on his current conditions.
13 The government does not oppose that motion.

14 THE COURT: And that's the only agreement?

15 MS. DUKE: That's the only agreement.

16 THE COURT: The decision is still the Court's?

17 MS. DUKE: Yes. Yes, certainly, Your Honor. I
18 didn't mean to imply otherwise. I apologize.

19 THE COURT: That's all right. I just want to make
20 sure that the record is clear as to what the agreement is.

21 MS. DUKE: Yes.

22 THE COURT: Is that your understanding of the
23 agreement, Mr. Kirkpatrick?

24 MR. KIRKPATRICK: Yes, Your Honor. That the
25 government would not oppose our motion. And I was advised

1 this morning to file -- to file such a motion, and I did.

2 THE COURT: All right. Mr. McFadden, based upon
3 the statements that have been made here in court, I find
4 that you are, in fact, competent to enter a plea of guilty
5 in this case, sir. I find that you've made your plea of
6 guilty freely and voluntarily, and I find that you have a
7 full understanding of its consequences. I further find that
8 you've admitted the essential elements of the crime charged,
9 and that there's a factual basis for your plea of guilty.
10 I, therefore, accept your plea of guilty, sir, and find you
11 guilty as charged.

12 The next step in this process, sir, is for a
13 presentence investigation report to be prepared, and that
14 report will be prepared by our probation office. You'll be
15 asked to give information for that report, and your attorney
16 may be present while you're being interviewed by the
17 probation office in order to prepare that report. You and
18 your counsel will be given an opportunity to read that
19 presentence report before the sentencing hearing, and both
20 you and your counsel will be afforded an opportunity to
21 speak on your behalf at sentencing before Judge Payne before
22 he decides what sentence to impose in this case. Do you
23 understand all of that, sir?

24 THE DEFENDANT: Yes, I do.

25 THE COURT: Your sentencing, sir, will be set on

1 July the 28th at 2:30 in the afternoon, and that will be in
2 front of Judge Payne.

3 Now, let's take up this issue of whether or
4 not Mr. McFadden will be allowed to be released on his
5 conditions of release pending sentencing in this case.
6 Mr. Kirkpatrick, I'll be happy to hear whatever you have to
7 say to that.

8 MR. KIRKPATRICK: Well, Your Honor, our rationale
9 is set forth I think adequately in the motion. The fact of
10 the matter is that, from the beginning of these proceedings
11 and from the first time he was aware of the existence of the
12 indictment, Mr. McFadden has accepted responsibility in
13 every way for what he did. He did, first of all, by
14 appearing in this court essentially voluntarily, by driving
15 himself from Lubbock, Texas to Tulsa and turning himself
16 over to the authorities, spending a couple of nights in
17 jail. And then, after that, appearing at a detention
18 hearing at which it was decided that he did not constitute a
19 flight risk or a danger to society, and he was, in fact,
20 granted pretrial release on conditions.

21 I think the United States in this case will
22 stipulate that which I know to be true, and that is that the
23 defendant is not a flight risk, nor is he, in his present
24 posture, a danger to society. He has, by his -- by his
25 mature acceptance of the consequences of his act manifested

1 in the -- in the statement of facts, which he read to the
2 Court, by his mature acceptance of those particular facts,
3 the defendant has shown that he can, in fact, at least
4 insofar as his presence in this court, be trusted to appear.

5 I believe that, even though the statute
6 requires that the Court find exceptional circumstances, I
7 believe those exceptional circumstances do exist. And those
8 are the circumstances that I've just outlined for the Court.
9 And that is that the defendant has had every opportunity
10 abscond. He's had every opportunity to avoid his
11 responsibility. He's had every opportunity to do that which
12 would make the Court ill-disposed to have him -- to release
13 him, and he has not. In fact, he's done everything he's
14 supposed to do. And we think, under those circumstances, he
15 can -- the Court can, in all -- in all honesty, allow him to
16 stay out.

17 THE COURT: There's no dispute, it doesn't appear,
18 between the parties, and there doesn't appear to be any
19 dispute in the factual record that Mr. McFadden currently is
20 not a flight risk and that Mr. McFadden is not a danger to
21 the community as those terms are used under the Bail Reform
22 Act. But under 3143 of the Bail Reform Act, the statute
23 says that, if a man or a woman stands up and pleads guilty
24 and is found guilty of the type of offense that Mr. McFadden
25 just pled guilty to, that he shall be detained. That's what

1 Congress says should happen, that he should now be detained.
2 Because we've changed from the situation that we were in at
3 pretrial where he was presumed innocent. That's not the
4 case anymore. He's now been found guilty, and Congress says
5 he should be detained. And the one exception to that is if
6 you can clearly show that there's an exceptional reason why
7 it would not be appropriate to detain him. And I'm trying
8 to elicit, what is the reason why Mr. McFadden shouldn't be
9 detained as Congress has directed that he should be?

10 MR. KIRKPATRICK: From the outset, Your Honor, the
11 defendant has offered his full, complete, and forthright
12 cooperation with the United States in this case. He has
13 voluntarily given a great deal of evidence about a great
14 many offenses which have occurred here in Tulsa. We
15 anticipate that he will appear before the grand jury. We
16 anticipate that in the future he will appear as a witness in
17 prosecutions to come. We believe that it is necessary, to
18 maximize his cooperation, that he remain free. And that, I
19 submit, is an exceptional circumstance.

20 THE COURT: Ms. Duke, might I hear from the
21 government as to what the government's position is with
22 regard to whether or not this record shows that there's some
23 exceptional reason why this defendant's detention would not
24 be appropriate?

25 MS. DUKE: Your Honor, as Mr. Kirkpatrick has

1 reflected, Mr. McFadden has been cooperative in the
2 investigation. We do anticipate possible additional
3 requirements of meeting with him and things of that nature.
4 He has been very cooperative. I must admit I have not
5 researched the Tenth Circuit law as to what those
6 exceptional circumstances might be in this circuit.

7 THE COURT: Well, I've spent most of the morning
8 researching it, and the cases seem to say that there has to
9 be something very unique, very unusual, very out of the
10 ordinary. And there are cases that speak of the fact that
11 many defendants cooperate, and that that's not an
12 exceptional circumstance.

13 MR. KIRKPATRICK: If I might, Your Honor? This is
14 an exceptional case. And I think given the fact that it is
15 such an exceptional case, and given the fact that Mr.
16 McFadden's position in the case is what it is, we submit,
17 under those circumstances, that this definitely would fall
18 under the definition of exceptional as defined in the brief
19 that I submitted to the Court.

20 THE COURT: Well, the statute doesn't talk about
21 an exceptional case. It talks about a case where there are
22 exceptional reasons why the person's detention would not be
23 appropriate.

24 MR. KIRKPATRICK: Well, Your Honor, addressing --

25 THE COURT: And one of those reasons that appears

1 over and over again in the cases is if it would be helpful
2 to the continuing efforts of the government that the person
3 remain released. And I'm trying to elicit from either you
4 or Ms. Duke of whether that's the situation we've got
5 here.

6 MR. KIRKPATRICK: That is the situation, Your
7 Honor.

8 THE COURT: I haven't heard that so far.

9 MR. KIRKPATRICK: Well, I thought I did explain
10 that, Judge. If I didn't, I beg your pardon.

11 THE COURT: Is that the situation we have,
12 Ms. Duke?

13 MS. DUKE: It is, Your Honor. It would certainly
14 be beneficial for him to be available whenever we would need
15 to meet with him or confer with him.

16 MR. KIRKPATRICK: I would also point out, Your
17 Honor, that home confinement or electronic monitoring would
18 certainly serve that purpose as well.

19 THE COURT: As I said, I don't have a concern
20 about flight risk or danger to the community. I've received
21 reports from the pretrial office that he's behaved admirably
22 while he's been on release, that he's obeying all of the
23 directions and all of the rules that they give him, so I
24 have no reason to believe that he's a flight risk, I have no
25 reason to believe currently he's a danger to the community.

1 But the statute says I'm supposed to be looking at whether
2 or not there's an exceptional reason why he shouldn't be
3 detained. And now I'm hearing from the government that,
4 from the government's perspective, this is an exceptional
5 case because it would be helpful if he were not detained.

6 MS. DUKE: Yes, it would, Your Honor. It would,
7 Your Honor.

8 THE COURT: And that's the representation that the
9 government is making today?

10 MS. DUKE: Yes, sir. Yes, sir.

11 THE COURT: And you would anticipate some
12 continued cooperation?

13 MS. DUKE: Certainly, Your Honor.

14 THE COURT: Ongoing?

15 MS. DUKE: Yes, sir.

16 THE COURT: And that would be facilitated by
17 allowing him to remain on his pretrial release?

18 MS. DUKE: Yes, it would. I anticipate multiple
19 occasions in which his appearance would be necessary.

20 THE COURT: All right. Based upon the
21 representations of counsel and the arguments of counsel, and
22 most especially based upon the representation of the United
23 States Attorney that this is an exceptional case where his
24 continued release pending sentencing would be beneficial to
25 the government's continuing efforts in this regard, the

1 Court is going to allow Mr. McFadden to remain free on his
2 pretrial -- his presentencing release until his sentencing
3 before Judge Payne as I've already set forth.

4 Mr. McFadden, you'll remain under the same
5 rules and conditions that you've been under, and so follow
6 whatever those rules are and continue to comply with them as
7 you have in the past. I've given you the date that you will
8 be back here for sentencing.

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Anything else from the government with
11 regard to this matter, Ms. Duke?

12 MS. DUKE: No, Your Honor.

13 THE COURT: Anything else from the defense?

14 MR. KIRKPATRICK: No, Your Honor.

15 THE COURT: All right. You all may be excused.

16 We'll be adjourned.

17 *(Off the record at 2:50 p.m.)*

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C E R T I F I C A T E

I, Ken Sidwell, Certified Shorthand Reporter for the Eastern/Northern Districts of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in the above-captioned case.

I further certify that I am not employed by nor related to any party to this action, and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 7th day of May, 2010.

s/Ken Sidwell
Ken Sidwell, CSR-RPR
United States Court Reporter