



U.S. Department of Justice

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VIA ECF

May 1, 2025

The Honorable Richard D. Bennett
United States District Judge
United States District Court
for the District of Maryland
101 West Lombard Street
Baltimore, MD 21201

Re: *United States of America v. David Epstein*, Crim. No. RDB-23-0210

Dear Judge Bennett:

The Government writes this letter in advance of the continued sentencing of Defendant David Epstein, currently set for May 7, 2025 at 11:30 a.m. On October 8, 2024, the Court accepted Defendant's guilty plea to Count One of the Indictment, charging him with Wire Fraud, in violation of 18 U.S.C. § 1343. Defendant pleaded guilty pursuant to a plea agreement. ECF No. 23 (Plea Agreement). On March 26, 2025, the original date of Defendant's sentencing, the Court postponed imposition of a sentence on Defendant after Defendant and his counsel sought to explain certain of the facts in the parties' plea agreement. *See generally* Mar. 26, 2025 Hearing Transcript ("Mar. 26 Tr.").

For the reasons that follow, the Government respectfully requests that the Court proceed with sentencing on May 7, 2025 and impose a guideline term of imprisonment.

A. The Court Properly Accepted Defendant's Knowing and Voluntary Guilty Plea.

As an initial matter, the Court on October 8, 2024 conducted a full colloquy in accordance with Fed. R. Crim. P. 11 and properly accepted Defendant's plea to Count Three of the Indictment.

After being placed under oath, Defendant entered a plea of guilty to Count Three and pursuant to the parties' plea agreement. The Court then conducted a thorough and extensive colloquy under Rule 11 of the Federal Rules of Criminal Procedure to ensure that Defendant's plea was knowing and voluntary and that there was a factual basis for the plea.

At the outset, the Court confirmed that Defendant was not having any difficulty understanding the proceedings and that he could read and write the English language. October 8, 2025 Hearing Tr. ("Oct. 8 Tr.") at 7. The Court went on to confirm that Defendant did not have any problems or concerns with Mr. Bardos's legal representation of Defendant. *Id.* at 9-10.

After confirming that Defendant was satisfied with Mr. Bardos, the Court discussed the specific terms of the plea agreement with him. The Court began by confirming that Defendant had reviewed the plea agreement with counsel and understood it; Defendant confirmed that he did. *Id.* at 11. The Court confirmed that Defendant understood that the Court was not a party to the agreement, *id.* at 12, and that Defendant was pleading guilty freely and voluntarily. *Id.* at 13.

The Court then reviewed, among other things: (i) the various collateral consequences as a result of the conviction, *id.* at 13-18; (ii) the possibility of forfeiture, *id.* at 15-16; (iii) the maximum penalties associated with the charge of conviction, including supervised release, *id.* at 16-17; (iv) the role of the sentencing guidelines at sentencing, *id.* at 18-19; (v) the parties' stipulation as to the sentencing guidelines calculation (including an open enhancement), *id.* at 20-23; (vi) the fact that there is no parole in the federal system, *id.* at 25; (vii) that Defendant waived his rights to appeal his sentence, *id.* at 26; (viii) all of the rights—including trial rights—that Defendant was giving up by pleading guilty, *id.* at 27-31; and (ix) the essential elements of the count of conviction, *id.* at 32-33.

The Court then asked Government counsel to read or summarize the factual stipulation associated with the plea, and counsel did so. *Id.* at 33-38. Defendant's counsel clarified that the facts in the parties' plea agreement are facts that the Government would have shown at trial. *Id.* at 39. And Defendant and the Court then had the following exchange:

THE COURT: That's right. That's fine.

All right. Mr. Epstein, is that accurate summary of the facts in this case as summarized by the Government?

THE DEFENDANT: Oh, I'm sorry.

THE COURT: In terms this -- Mr. Bardos has noted there are no additions or modifications.

THE DEFENDANT: That's correct.

THE COURT: But there's some explanation, but my question to you is that an accurate -- the summary made by Mr. Riley, is that an accurate summary of the facts in this case?

THE DEFENDANT: Yes.

THE COURT: And did you, in fact, commit the crime as summarized by the Government?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And do you still wish to plead guilty, sir?

THE DEFENDANT: I do.

THE COURT: Specifically, Mr. Epstein, how do you plead to Count 3 of the indictment in this case; guilty or not guilty?

THE DEFENDANT: Guilty, Your Honor.

Id. at 40-41. Thereafter, the Court found that “the defendant is fully competent and capable of entering an informed plea and that the defendant is aware of the nature of the charges and the relevant consequences of his plea of guilty; and the Court further finds that his plea of guilty on advice of competent counsel with whose services he is satisfied is a knowing and voluntary plea supported by independent basis in fact sustaining each of the essential elements of the offense charged.” *Id.* at 41-42. The Court then accepted Defendant's guilty plea and adjudged Defendant guilty of Count Three. *Id.* at 43.

In short, there is no basis to believe that Defendant did not knowingly or willingly plead guilty to Count Three of the Indictment. Defendant thus waived all nonjurisdictional defects, including “the right to contest the factual merits of the charges.” *United States v. Willis*, 992 F.2d 489, 490 (4th Cir. 1993). Indeed, even if Defendant had “cold feet” about pleading guilty—and he does not—that still would not provide a basis for the Court to vacate the plea, given that the Rule 11 colloquy was properly conducted. *Cf. United States v. Wilson*, 81 F.3d 1300, 1309 (4th

Cir. 1996) (defendant’s “cold feet” after pleading guilty is not a sufficient basis to withdraw his plea); *United States v. Bowman*, 348 F.3d 408, 416 (4th Cir. 2003) (rejecting effort by defendant “to second guess his guilty plea”).

B. Defendant Has Not Sought To Withdraw His Plea, And His Plea Has An Adequate Factual Basis.

It is true that Defendant took issue with (or sought to provide an “explanation” of) a number of the facts he admitted under oath at the Rule 11 hearing, Mar. 26 Tr. at 81-91,¹ but that alone does not provide a basis for the Court to strike the guilty plea. Indeed, *United States v. Taylor*, the Fourth Circuit held that where a Defendant “equivocates about his guilty plea,” that “a second Rule 11 colloquy is not required[.]” 984 F.2d 618, 619 (4th Cir. 1993). As the Circuit put it, “the Rule 11 colloquy has a burden-shifting effect regardless of when the district court formally accepts the plea. Prior to sentencing, the defendant may withdraw his guilty plea only if he demonstrates a “fair and just reason” for doing so. *Id.* at 621.

Here, there has been no motion by Defendant to withdraw his guilty plea and thus no need for the Court to look to Fed. R. Crim. P. 11(d)(2)(B)² or the factors set out in *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991).³ Instead, Defendant, like the Government, wishes to proceed to sentencing.

And “[n]othing in Rule 11 authorizes a district court to withdraw a defendant’s guilty plea for him.” *United States v. Adame-Hernandez*, 763 F.3d 818, 825–26 (7th Cir. 2014) (“The acceptance of [the defendant’s] guilty plea was a judicial act distinct from the acceptance of the plea agreement itself. Once the district court accepts a guilty plea, the conditions under which the plea may be withdrawn are governed exclusively by Rule 11 of the Federal Rules of Criminal Procedure.”) (cleaned up).

Further, there is no question that there is an ample factual basis to support Defendant’s earlier plea of guilty—as the Court already found. Defendant does not argue to the contrary. Simply put, the Court “may conclude that a factual basis exists from anything that appears on the record.” *United States v. Stitz*, 877 F.3d 533, 536 (4th Cir. 2017); *see also United States v. Davila*, No. 20-4338, 2023 WL 3597567, at *4 (4th Cir. May 23, 2023) (court “could satisfy itself of the sufficiency of the factual basis through the facts that were proffered by the Government during the Rule 11 hearing and included in the PSR, neither of which Davila objected to”).

¹ Defendant did affirm in response to the Court’s concerns that he “did that” – referring to the scheme charged in Count Three. *Id.* at 91. And he further affirmed that “I committed fraud by changing the bank account,” *id.* at 92, referencing use his of fraudulent bank statement in connection with the scheme to obtain the PPP loan. Plea Agreement at 11.

² A defendant may withdraw a guilty plea if “the defendant can show a fair and just reason for requesting the withdrawal.” Fed. R. Crim. P. 11(d)(2)(B).

³ In *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991), the Fourth Circuit set forth the following six factors for a district court to consider in determining whether a defendant has met his burden:

- (1) whether the defendant has offered credible evidence that his plea was not knowing or otherwise involuntary;
- (2) whether the defendant has credibly asserted his legal innocence;
- (3) whether the defendant has had close assistance of counsel;
- (4) whether there has been a delay between entry of the plea and filing of the motion;
- (5) whether withdrawal will cause prejudice to the government; and
- (6) whether withdrawal will inconvenience the court and waste judicial resources.

Here, an adequate factual basis exists based on the parties' plea agreement, the facts proffered by the Government during the Rule 11 hearing that Defendant admitted the Government could prove at trial, the contents of the PSR—not objected to by Defendant—and the Government's sentencing submissions. This is so notwithstanding the recent gloss Defendant has tried to put on his earlier admissions under oath during the Rule 11 hearing, which reflect—in the Government's view—a lack of acceptance of responsibility. Simply put, the Court can and should reject Defendant's recent spin on the facts he admitted under oath during the Rule 11 proceeding and proceed to sentencing.

For all of these reasons, the Government respectfully requests that the Court proceed to sentencing and sentence Defendant to a guideline term of imprisonment.

Kelly O. Hayes
United States Attorney

By: /s/
Paul A. Riley
Assistant United States Attorney

cc: Rich Bardos, Esq. (by ECF)
Nicole Wonneman, U.S. Probation Officer (by electronic mail)