

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CRIMINAL NO. 04-30059
)	
RANDOLPH MCAFEE,)	
)	
Defendant.)	

PLEA AGREEMENT

Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the United States of America, by Jan Paul Miller, United States Attorney for the Central District of Illinois, and Joseph H. Hartzler, Assistant United States Attorney, and the defendant, Randolph McAfee, personally and by the defendant's attorney, James Elmore, hereby enter into this plea agreement.

1. This document contains the complete and only plea agreement between the United States Attorney for the Central District of Illinois and the defendant. This agreement supersedes and replaces any and all prior plea agreement, including any formal or informal, written or oral, express or implied agreements between the parties. No other agreement, understanding, promise, or condition between the United States Attorney for the Central District of Illinois and the defendant exists, except as set forth in this plea agreement.

2. This plea agreement is binding only upon the United States Attorney for the Central District of Illinois and the defendant. It does not bind any United States Attorney outside the Central District of Illinois, nor does it bind any state or local prosecutor. In addition, the plea agreement does not bind the Tax Division of the United States Department of Justice or the Internal Revenue Service of the United States Department of the Treasury.

3. This agreement is made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). Therefore, if the Court rejects this plea agreement, this agreement shall become null and void. In that case, neither party shall be bound by any terms of this agreement, and the defendant will be given an opportunity to withdraw his guilty plea. On the other hand, if the Court accepts this plea agreement, the Court will be bound to impose the specific sentence of imprisonment to which the parties have agreed – 20 months – as set forth below. If the Court accepts this plea agreement and imposes the agreed-upon sentence of imprisonment of 20 months, then the defendant will *not* be given an opportunity to withdraw his guilty plea even if, either before or after sentencing, the law applicable to this case changes or the U.S. Supreme Court declares that the U.S. Sentencing Guidelines are unconstitutional or do not apply in cases such as this case.

CHARGE(S), ELEMENTS, AND PENALTIES

4. The defendant will plead guilty to the Information in which the defendant is charged with one count of bank fraud, in violation of Title 18, United States Code, Section 1344.

Elements of the Offense

5. The defendant has read the charge to which the defendant is pleading guilty, and the charge has been explained to the defendant by the defendant's attorney. Furthermore, the defendant fully understands the nature and elements of the crime to which the defendant is pleading guilty. To sustain the charge of bank fraud, the United States must prove the following propositions beyond a reasonable doubt:

- a. That there was scheme to defraud a financial institution or to obtain money or property owned by, or under the custody or control of, a financial institution by means of false pretenses, representations or promises, as charged in the information;
- b. That the defendant executed, attempted to execute or caused the execution of the scheme in the manner charged in the information.
- c. That the defendant did so knowingly and with the intent to defraud; and

- d. That the deposits of the financial institution were insured by the Federal Deposit Insurance Corporation at the time of the charged offense.

Maximum Penalties of Imprisonment

6. The defendant understands and agrees that the offense to which he will plead guilty carries the following potential penalties:

- up to 30 years in prison;
- up to a \$1,000,000 fine;
- up to five years of supervised release; and
- a \$100 mandatory special assessment.

Supervised Release

7. The defendant further understands that upon violation of any of the terms of the defendant's supervised release, the supervised release may be revoked and the defendant may be imprisoned for all or part of the supervised release period without credit for time previously served.

Restitution

8. The defendant understands and agrees that the Court will be required to order the defendant to pay restitution. Restitution may include the cost of incarceration and supervision. The parties to this agreement acknowledge that the Court may order restitution in whatever amount it deems proper. The

parties have not reached an agreement concerning the amount of restitution the defendant owes the victims of his offense. Rather, the parties anticipate that the government will attempt to contact all of the financial institutions and mortgage companies (“lenders”) that it can identify as victims of the defendant’s offense and which it can locate. The government will ask each such lender to calculate and document, as best possible, the *principal* financial loss it suffered as a result of the defendant’s offense. Each lender should calculate its principal loss as the amount of each fraudulently obtained loan that was not repaid at the time the offense was discovered, less the amount the lender recovered or can expect to recover from the real property pledged to secure that loan. The parties understand that the total loss that the lenders suffered as a result of the defendant’s offense may be substantially higher than \$800,000 or substantially lower than \$500,000. The parties agree that the Court should order the defendant to make restitution to each of the victim lenders in the amount that each such entity provably suffered as a result of the defendant’s offense even if the total amount of restitution falls outside the range of total loss (\$500,000 to \$800,000) to which the parties have agreed. The defendant agrees that he will not seek to withdraw his guilty plea regardless of the final restitution amount, even if the victim lenders claim a total loss of far less than \$500,000 or, indeed, even if *no* victim lender responds to the government’s request for loss information.

STATUTORY AND GUIDELINE WAIVERS

**Waiver of Right of Appeal from Conviction &
Limited Waiver of Right to Appeal Sentence**

9. The defendant is aware that federal law, specifically, Title 28, United States Code, Section 1291, affords a defendant a right to appeal a final decision of the district court and that federal law, specifically, Title 18, United States Code, Section 3742, affords a defendant a right to appeal the conviction and/or sentence imposed. Understanding those rights, and having thoroughly discussed those rights with the defendant's attorney, the defendant knowingly and voluntarily waives the right to appeal any and all issues relating to this plea agreement and conviction. The defendant similarly waives any right to appeal any sentence, including any issue relating to any fine or restitution the Court might impose at sentencing, and the manner in which the sentence, including any fine or restitution, was determined, on any ground whatever, except that the defendant may appeal any sentence of imprisonment of more than 20 months if the Court imposes such a sentence without giving the defendant an opportunity to withdraw his guilty plea.

Waiver of Right to Collateral Attack

10. The defendant also understands that he has a right to attack the conviction and/or sentence imposed collaterally on the grounds that it was

imposed in violation of the Constitution or laws of the United States; that he received ineffective assistance from his attorney; that the Court was without proper jurisdiction; or that the conviction and/or sentence was otherwise subject to collateral attack. The defendant understands such an attack is usually brought through a motion pursuant to Title 28, United States Code, Section 2255. The defendant and the defendant's attorney have reviewed Section 2255, and the defendant understands his rights under the statute. Understanding those rights, and having thoroughly discussed those rights with the defendant's attorney, the defendant knowingly and voluntarily waives his right to collaterally attack the conviction and/or sentence. The defendant's attorney has fully discussed and explained the defendant's right to attack the conviction and/or sentence collaterally with the defendant. The defendant specifically acknowledges that the decision to waive the right to challenge any later claim of the ineffectiveness of the defendant's counsel was made by the defendant alone notwithstanding any advice the defendant may or may not have received from the defendant's attorney regarding this right. Regardless of any advice the defendant's attorney may have given the defendant, in exchange for the concessions made by the United States in this plea agreement, the defendant hereby knowingly and voluntarily waives his right to collaterally attack the conviction and/or sentence. The rights waived by the defendant include his right to challenge the amount of

any fine or restitution, in any collateral attack, including, but not limited to, a motion brought under Title 28, United States Code, Section 2255.

Waiver of Jury Determination of Sentencing Factors

11. The defendant understands that the Court will accept as proven beyond a reasonable doubt any facts that the defendant admits as part of this plea agreement or any facts that the defendant otherwise admits as part of a hearing or stipulation in this case. The defendant understands that he *may* have a right to require the United States to prove to a jury beyond a reasonable doubt any disputed facts that might increase his sentence either under the United States Sentencing Guidelines or otherwise. To the extent that he has such a right, the defendant expressly waives any right he may have to a *jury* determination of any disputed facts relevant to his sentencing. The defendant hereby consents to have the District Court determine, based on proof beyond a reasonable doubt presented at a sentencing hearing, any disputed fact that might increase his sentence, including any disputed facts relevant to any sentencing factor, adjustment and departure under the Sentencing Guidelines.

CRIMINAL HISTORY

12. There is no agreement as to the defendant's criminal history or, if the U.S. Sentencing Guidelines apply, the criminal history category applicable to the defendant. Although the defendant's criminal history cannot be determined prior

to the completion of the presentence investigation, the parties have entered into this agreement based on the mutual understanding that the defendant is a Criminal History Category I offender under the Sentencing Guidelines. The Court may reject this agreement if the presentence investigation determines that the defendant's criminal history category is higher than Category I. The defendant acknowledges that the government may request that the Court reject this agreement if the presentence investigation determines that the defendant's criminal history category is higher than Category I.

13. The defendant and the defendant's attorney acknowledge that they have reviewed, and the defendant understands, the *possible* application of United States Sentencing Guidelines Section 5H.1 through Section 5H1.12, Section 5K.2.0 through Section 5K2.21, and other grounds for downward departure from the Sentencing Guideline range, if the Court decides that those Guidelines apply in this case. The defendant acknowledges that he has fully discussed any potential basis for downward departure with the defendant's attorney. The defendant agrees that, if the Court accepts this plea agreement and imposes the sentence of imprisonment to which the parties agree, he will seek no Guidelines departures at sentencing, except the defendant may raise any departure based upon extraordinary, unforeseeable facts that occur after the date the plea agreement is signed by the defendant.

14. The defendant and his attorney acknowledge that they have reviewed Section 5K1.1 of United States Sentencing Guidelines, and they understand that the defendant is not eligible for a downward departure pursuant to Section 5K1.1.

DEFENDANT'S OBLIGATIONS

15. The defendant understands and agrees to pay the mandatory \$100 Special Assessment for the count of the Information to which the defendant is entering a plea of guilty as required under Title 18, United States Code, Section 3013. The defendant agrees to pay this mandatory special assessment at the time of sentencing by delivering a check or money order made payable to the United States District Court and understands that he will be required to do so as a condition of this plea agreement. The failure to comply with this requirement, however, will not constitute grounds for the defendant to withdraw any plea of guilty.

THE UNITED STATES ATTORNEY'S OBLIGATIONS

16. The United States Attorney for the Central District of Illinois agrees to bring no additional criminal charges in the Central District of Illinois against the defendant relating to or arising from the offenses charged in this Information, except for any crime of violence or any crime unknown to the United States Attorney for the Central District of Illinois prior to the time this plea agreement is

signed by the parties.

17. In exchange for the defendant's forfeiture of his right to a jury trial in this case and the various other concessions he has made pursuant to this plea agreement, the government agrees that it will not request that the Court reject this plea agreement unless the defendant's criminal history places him in a criminal history category higher than Category I.

AGREEMENTS AS TO SENTENCE AND SENTENCING GUIDELINES

AND STIPULATED FACTS RELEVANT TO SENTENCING

18. The parties understand that a case challenging the constitutional validity of the U.S. Sentencing Guidelines is now pending before the United States Supreme Court. The parties further understand that the Supreme Court's decision in that case could affect whether those Guidelines should apply in this case. The parties recognize that the Supreme Court's decision might effectively render the Sentencing Guidelines inapplicable to this case. Alternatively, the Supreme Court's decision might effectively render the Guidelines applicable to this case. The defendant understands that, if the United States Sentencing Guidelines apply to this case, then the Court would consider any applicable Sentencing Guidelines in determining the defendant's sentence and the Court may, in some circumstances, depart upward or downward from the Sentencing Guideline range. The defendant also understands that, if the United States

Sentencing Guidelines do *not* apply to this case, then the Court may consider *any* information and factors the Court deems relevant and may sentence the defendant to any sentence within the statutory maximum sentence set forth above in Paragraph 6.

a. In either event – that is, whether the Sentencing Guidelines apply or do not apply in this case, the parties agree that the appropriate sentence of imprisonment that the Court should impose in this case is 20 months.

b. The parties have reached no agreement as to the appropriate fine or period of supervised release or restitution that the Court should impose as part of the sentence. Therefore, the Court is free to impose whatever fine, period of supervised release and restitution order it deems appropriate.

c. The parties have also reached no agreement on whether the Court should recommend the defendant for the “shock incarceration” program administered by the Bureau of Prisons pursuant to 18 U.S.C. Section 4046. The government, however, agrees not to oppose the defendant’s request for such a recommendation by the Court. The defendant acknowledges that, even if the Court recommends him for the shock incarceration program and even if he qualifies for that program, the Bureau of Prison has the sole discretion to decide whether to accept him into that program. The defendant further acknowledges that he has no right to challenge the Bureau of Prison’s decision on whether to

place him in its shock incarceration program. The defendant also acknowledges that the government may, upon request, provide factual information to the Court and/or the Bureau of Prisons relating to the defendant and the shock probation program.

19. Based on the information known to the parties, the parties agree and stipulate as follows:

a. If the U.S. Sentencing Guidelines apply to this case, then the base offense level applicable in this case is 6, pursuant to U.S.S.G. Section 2F1.1(a) of the Sentencing Guidelines in effect at the time of the offense.

b. The exact amount of the total financial loss caused by the defendant's scheme cannot be calculated without an unreasonable expenditure of time and resources. Although the total value of the fraudulently obtained loans can be calculated, the loss that the lenders suffered depends on the value of the collateral - the properties - that were pledged to secure those loans. *See* U.S.S.G. Section 2F1.1, comment. (n.8(b))(1978). Each of those properties was appraised by a real estate appraiser at or near the time of a loan, but those appraisals are not reliable. Moreover, the defendant caused some of the properties to be repaired prior to re-sale, a circumstance that would increase the value of the lender's collateral. Additionally, at least some of the mortgages were sold and re-sold to other lenders after the initial loans were made, and consequently the parties lack

confidence that they can even identify the victims of the defendant's scheme in order to ask those victims to calculate their losses. Nevertheless, the parties agree that the defendant and his partner bought and re-sold approximately 100 properties as part of their scheme and that the total loss to the lenders and gain to the defendant and his co-defendant can be fairly estimated to be more than \$500,000 but less than \$800,000. Therefore, under either the 1997 or 1998 version of the Guidelines, the base offense level should be increased 10 levels pursuant to Section 2F1.1(b)(1)(K), if the Guidelines apply.

c. The defendant's offense involved repeated acts over a period of time, each of which was not purely opportune, and the offense involved a scheme to defraud more than one victim. Thus, if the U.S. Sentencing Guidelines apply, then the offense level should be increased by two levels, pursuant to U.S.S.G. Section 2F1.1(b)(2).

d. If the U.S. Sentencing Guidelines apply to this case, no provision of Chapter 2 of those Guidelines, other than those mentioned above, apply in this case.

e. If the U.S. Sentencing Guidelines apply to this case, no provision of Chapter 3, Parts A-C, of those Guidelines apply in this case. More specifically, the defendant did not know, nor should he have known, that any victim of his offense was unusually vulnerable or otherwise particularly

susceptible to his criminal conduct. Additionally, none of the people whom the defendant supervised and managed has been charged with, or has admitted, criminal responsibility for the commission of the offense. The Court should not increase the defendant's offense level under Section 3B1.1(Aggravating Role) of the Sentencing Guidelines. Furthermore, the defendant did not occupy a position of public or private trust and therefore did not abuse such a position. Nor did he use a special skill in a manner that significantly facilitated the commission or concealment of the offense.

f. If the U.S. Sentencing Guidelines apply to this case, then the adjusted offense level should be reduced by 2 levels pursuant to U.S.S.G. Section 3E1.1 if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct.

g. If the applicable offense level is 16 or greater prior to the reduction for acceptance of personal responsibility, that offense level should be reduced an additional one level pursuant to U.S.S.G. Section 3E1.1(b)(2) because the defendant timely notified the United States Attorney's Office of his 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.

20. The defendant and the government agree that the statements in the preceding paragraphs about sentencing guidelines are not binding on the Court.

Those statements relate only to the understandings and predictions of the parties regarding the sentencing guidelines that may be applicable to the defendant's offenses, based upon the information of which they are currently aware. The Court will remain free to make its own independent determination of the applicable guidelines and sentencing range. The Court, however, is not free to impose any sentence of imprisonment, other than a sentence of imprisonment of 20 months, unless the Court rejects this plea agreement and gives the defendant an opportunity to withdraw his guilty plea and the defendant elects not to withdraw his guilty plea.

21. The defendant agrees and understands that the defendant will not be allowed to withdraw the defendant's guilty plea because of an objection to the calculation of the Sentencing Guidelines or to the Court's sentencing findings *unless* the Court rejects this plea agreement and declines to impose a sentence of imprisonment of 20 months.

FACTUAL BASIS

22. The defendant will plead guilty because the defendant is in fact guilty of the charge contained in the Information. In pleading guilty to that charge, the defendant stipulates to and admits to the following facts:

a. In 1997, McAfee and Shipley set up a small business called Central Illinois Real Estate. The purpose of the business was to buy and re-sell

houses and small apartment buildings in and around central Illinois. After incorporating the company, McAfee and Shipley looked for relatively low-cost properties in Springfield that might be available for sale. They looked especially for properties that were in need of repair or that would be sold through a distress sale such as a tax or foreclosure sale.

b. At the same time, McAfee and Shipley advertised that individuals interested in owning property (referred to hereafter as “Borrowers”) could purchase property through them with “no downpayment” or “no money down.” When Borrowers contacted their company, McAfee or Shipley gave the Borrowers the addresses of the properties that were available for sale and either showed those properties to the Borrowers or directed the Borrowers to visit those properties.

c. If a Borrower expressed an interest in purchasing a particular property, McAfee or Shipley signed a contract to buy the property for their company and persuaded the Borrower to sign a contract to purchase the property from their company at a much higher price. They did not disclose to the Borrowers the fact that they or their company did not actually own the properties at the time they contracted to sell them. Nor did they disclose to the Borrowers the prices at which they agreed to buy those properties.

d. McAfee and Shipley arranged for each Borrower to apply,

usually through a mortgage broker, for a mortgage loan in an amount that was typically about 75% or 80% of the price at which the defendant's company had contracted to sell the property to the Borrower. That loan amount always exceeded the price at which the defendant's company had contracted to purchase the property.

e. McAfee and Shipley assisted Borrowers in completing and submitting their loan applications. Those applications often contained false information, including falsely inflated figures for the balances in the Borrowers' bank accounts. When lenders requested verification of those amounts, McAfee and Shipley prepared false Verifications of Deposit (VODs), which reflected higher balances in the Borrowers' accounts than they Borrowers' accounts actually had. Shipley signed the counterfeit VODS in the names of real or fictitious bank officers.

f. McAfee and Shipley certified and caused Borrowers to certify to lenders that Borrowers would pay the difference between the stated purchase prices and the amounts of the loans. McAfee and Shipley knew full well that the Borrowers would not pay that difference and that, contrary to the certifications made to the lenders, the Borrowers in fact would make no downpayments, pay no second mortgages, and hold no equity interest in the properties they purchased.

g. During 1997 and 1998, McAfee and Shipley sold approximately 100 properties in this way. They reported to lenders that each such property was being sold for a particular price, when in fact McAfee and Shipley accepted as payment in full the amounts of the mortgage loans the Borrowers obtained. For each such sale, the amount of the mortgage loan exceeded the amount McAfee and Shipley paid to purchase the property by more than \$5,000.

h. During the summer of 1997, McAfee and Shipley purchased the two adjacent properties at 1126 and 1130 East Miller Ave., Springfield, Illinois, for \$35,000. They persuaded a borrower to purchase one of those properties - namely, 1126 Miller - from them for a stated price of \$70,000, which they later reduced to \$65,000. They assisted the borrower in obtaining a mortgage loan of \$39,000 from OCWEN Federal Bank FSB by falsely representing to OCWEN that the borrower would pay the difference between the stated purchase price and the loan amount. In fact McAfee and Shipley intended to, and did, accept the loan amount as payment in full for the property. McAfee and Shipley also prepared and submitted to OCWEN a VOD which reflected that the borrower had more than \$15,000 in an account at Carrollton Bank, which they knew was false.

i. On or about October 3, 1997, for the purpose of executing their

scheme, the defendant caused the false VOD to be submitted to OCWEN and thereby influenced OCWEN to loan the borrower \$39,000 from funds in its custody and control.

j. At the time of the offense, OCWEN Federal Bank FSB was an insured depository institution, the deposits of which were insured by the Federal Deposit Insurance Corporation.

EFFECT OF VIOLATION OF AGREEMENT

23. The defendant further agrees that, if the defendant violates the terms of this plea agreement, the United States has the option to declare the plea agreement null and void. In the event the United States exercises its option to declare the plea agreement null and void, the United States will be completely released from all of its obligations under this plea agreement. The United States will then be free to seek additional charges against the defendant, to seek a higher sentence, a higher amount of loss, and additional sentencing enhancements, and the defendant may not use as evidence in any proceeding this agreement, any of its terms, or any statements or representation made during negotiations of this agreement. In the event the United States exercises its option to declare the plea agreement null and void, the defendant will be allowed to withdraw from any previously accepted guilty plea. The defendant also agrees to waive any and all double jeopardy rights and the applicable statute of limitations

if the United States declares this agreement null and void and causes additional charges to be filed against the defendant or seeks to have the defendant resentenced.

24. Whether or not the defendant has violated the terms of the plea agreement shall be determined by the Court. The burden of proof shall rest with the United States to establish by a preponderance of the evidence that the defendant violated the terms of the plea agreement.

WAIVER OF CONSTITUTIONAL RIGHTS

25. The defendant understands that by pleading guilty the defendant surrenders the following rights among others:

a. The right to plead not guilty or persist in the plea of not guilty if already made. If the defendant persisted in a plea of not guilty to the charges the defendant would have the right to a public and speedy trial.

b. The right to a trial by jury. The defendant has an absolute right to a jury trial. The jury would be composed of twelve persons selected at random. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict the defendant unless, after hearing all the evidence, it was persuaded that the United States had met its burden of proving the defendant guilty beyond a reasonable doubt. The

defendant could also ask for a trial by the Judge instead of a trial by a jury.

c. The right to the assistance of counsel. The defendant has the right to be represented by an attorney at every stage of the proceedings and, if the court finds the defendant is unable to afford an attorney, one will be appointed to represent the defendant at no cost to the defendant.

d. The right to confront and cross-examine adverse witnesses. At a trial, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to see and hear those government witnesses and the defendant's attorney would be able to cross-examine them. In turn, the defendant's counsel could present witnesses and other evidence on the defendant's behalf. If the witnesses for the defendant refused to appear voluntarily, their attendance could be required through the subpoena power of the court.

e. The right against compelled self-incrimination. At a trial, the defendant would have a privilege against self-incrimination so that the defendant could decline to testify, and no inference of guilt could be drawn from the defendant's refusal to testify. If the defendant desired to do so, the defendant could testify on the defendant's own behalf.

26. The defendant understands that by pleading guilty the defendant is waiving all the rights set forth in the prior paragraphs. The defendant's attorney

has explained those rights to the defendant and the consequences of the waiver of those rights.

AGREED:

Defendant's Attorney:

27. I have discussed this plea agreement fully with my client, and I am satisfied that my client fully understands its contents and terms. No threats, promises, or representations have been made, nor agreements reached, express or implied, to induce my client to plead guilty other than those stated in this written Plea Agreement. I have reviewed with my client United States Sentencing Guidelines Sections 1B1.3 and 1B1.4 (relevant conduct).

Date: 10-28-04

s/ James Elmore
James Elmore
Attorney for Randolph McAfee

Defendant:

28. I have read this entire Plea Agreement carefully and have discussed it fully with my attorney. I fully understand this Agreement, and I agree to it voluntarily and of my own free will. I am pleading guilty because I am in fact guilty, and I agree that the facts stated in this Agreement about my criminal conduct are true. No threats, promises, or commitments have been made to me or to anyone else, and no agreements have been reached, expressed or implied, to influence me to plead guilty other than those stated in this written Plea

Agreement. I am satisfied with the legal services provided by my attorney. I understand that by signing below I am stating I agree with everything stated in this paragraph, and I am accepting and entering into this Plea Agreement.

Date: 10/28/04

s/ Randolph McAfee

Randolph McAfee

Defendant

United States:

29. On behalf of the United States of America, I accept and agree to this Plea Agreement.

Date: 11/01/04

JAN PAUL MILLER
UNITED STATES ATTORNEY

s/ Joseph H. Hartzler

Joseph H. Hartzler

Assistant United States Attorney