

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA

v. Criminal Case 20-165-JEB

KEVIN CLINESMITH,

Defendant

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Washington, D.C
Wednesday, August 19, 2020
1:10 p.m.

TRANSCRIPT OF AUDIO-VIDEO PLEA HEARING
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: Anthony F. Scarpelli, AUSA
Neeraj Patel, Special AUSA
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Court Reporter: Lisa Walker Griffith, RPR
U.S. District Courthouse
Room 6507
Washington, D.C. 20001
(202) 354-3247

P R O C E E D I N G S

1
2 THE COURTROOM DEPUTY: This is criminal case
3 20-165. United States of America versus Kevin Clinesmith.
4 Counsel please identify on yourselves for the record.

5 MR. SCARPELLI: Good afternoon, Your Honor.
6 Anthony Scarpelli Assistant U.S. Attorney's Office for the
7 District of Columbia along with Neeraj Patel, who is a
8 Special Assistant United States U.S. Attorney for the
9 District of Columbia. Also with us is Department of Justice
10 investigator Timothy Fuhrman.

11 THE COURT: Okay. Good afternoon to all of you.

12 MR. SHUR: Good afternoon, Justin Shur, Megan
13 Church and Emily Damrau for Mr. Clinesmith.

14 THE COURT: Good afternoon, to all of you.

15 Good afternoon to you, Mr. Clinesmith. Mr.
16 Clinesmith, do you understand that you have the right to
17 have your plea taken in person but, given the pandemic,
18 because we have suspended all in-court proceedings, we're
19 holding these by video and audio. You do have the right to
20 wait until we begin in-person, in-court proceedings and have
21 your plea taken then or we can go forward today. What is
22 your preference, Mr. Clinesmith?

23 THE DEFENDANT: I am fine with today, sir.

24 So I think the first thing we need to do is
25 arraign Mr. Clinesmith. Then I want to mention a couple of

1 preliminary issues.

2 THE COURTROOM DEPUTY: Your Honor, let the record
3 reflect that defendant, Kevin Clinesmith, has been provided
4 with a copy of the criminal information.

5 Mr. Clinesmith, you are hereby charged in Criminal
6 Case 20-165, with one count of false statements under 18 USC
7 1001(a)(3). Do you wish to waive formal reading of the
8 information?

9 THE DEFENDANT: Yes, I do.

10 THE COURTROOM DEPUTY: For the purposes of the
11 portion of this proceeding, how do you wish to plea?

12 THE DEFENDANT: Guilty.

13 THE COURT: Okay. So let me mention a few
14 threshold questions. I know this case has certainly
15 generated a lot of media and public attention. Counsel made
16 points, I think it is important to put these on the record.

17 The first is, as many of you know, I am currently
18 the presiding judge of the Foreign Intelligence Surveillance
19 Court or FISC. This case involves oral statements in
20 relation to a FISA application and three renewals.

21 The case, however, is a criminal case. It is not
22 a FISC case. And it is a case that was randomly assigned to
23 me. In other words, like any criminal case, be it an
24 indictment or an information, it's placed in the random
25 wheel which spins and lands on a particular judge. And this

1 one happened to land on me. So the fact that I am on the
2 FISC or that I am its presiding judge had nothing whatsoever
3 to do with the assignment of the criminal case to my
4 criminal District Court docket.

5 The second is that I fully believe that my role on
6 the FISC and as presiding judge does not preclude my fairly
7 presiding over this case. Now, while I did not sign any of
8 the four applications that are at issue here, I could see
9 that the FISC itself could be viewed as a victim of false
10 statements. And as I said, I am the presiding judge of the
11 FISC and therefore represents its interests.

12 So, to ensure that this didn't make either side
13 uncomfortable with my presiding over this criminal case, and
14 I think particularly the defense would have reason to have
15 some facial concern about this, I had my chambers reach out
16 to counsel on Monday to advise them that I would be raising
17 this potential recusal issue at the outset of today's
18 hearing.

19 I had my chambers inform counsel that either side
20 could move for my recusal at the outset of this hearing and
21 that I would not require argument and that I would be happy
22 to recuse with no further questions asked. I enabled each
23 side to have two days to consider their positions. So I
24 will turn to that now.

25 Mr. Scarpelli, does the government wish me to

1 recuse from providing over this case?

2 MR. SCARPELLI: No, Your Honor.

3 THE COURT: Thank you.

4 Mr. Shur, does the defense wish me to recuse from
5 presiding over this case?

6 MR. SHUR: No, Your Honor.

7 THE COURT: Does either side have any question as
8 to my involvement in this matter in the FISC or my FISC role
9 as it relates to this case?

10 Mr. Scarpelli?

11 MR. SCARPELLI: The government does not, Your
12 Honor.

13 THE COURT: Mr. Shur?

14 MR. SHUR: No questions for the defense.

15 THE COURT: Okay. All right. Is the government
16 prepared to proceed with the plea today?

17 MR. SCARPELLI: Yes, Your Honor.

18 THE COURT: Is the defense?

19 MR. SHUR: Yes, Judge.

20 THE COURT: Then I'm going to have the courtroom
21 deputy swear Mr. Clinesmith in before we proceed.

22 (The defendant was placed under oath.)

23 THE COURTROOM DEPUTY: State your full name for
24 the record.

25 THE DEFENDANT: Kevin Eugene Clinesmith.

1 THE COURT: Mr. Clinesmith, if you would be so
2 kind as to keep your voice up so we can make sure to hear
3 you and so the court reporter can.

4 Because I've placed you under oath, if you answer
5 any of these questions falsely, you could be prosecuted for
6 perjury or false statements. Do you understand?

7 THE DEFENDANT: I do.

8 THE COURT: Okay. Tell me your date of birth.

9 THE DEFENDANT: 8-18-1982.

10 THE COURT: How far did you go to school?

11 THE DEFENDANT: I have a masters of law.

12 THE COURT: Have you taken any drugs or medication
13 or anything else in the last two days that might make it
14 difficult for you to follow these court proceedings?

15 THE DEFENDANT: No, Your Honor.

16 THE COURT: Were you born in the United States?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Does either counsel have any question
19 as to the defendant's competence to enter the plea today,
20 Mr. Scarpelli?

21 MR. SCARPELLI: No, Your Honor.

22 THE COURT: Mr. Shur?

23 MR. SHUR: No, Judge.

24 THE COURT: Okay. Given those representations, I
25 find the defendant is fully competent and capable of

1 entering the plea today.

2 Now, Mr. Clinesmith, you should have before you a
3 plea agreement which is 10 pages long. Do you in fact have
4 that?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: The 10th page appears to bear your
7 signature. Is that in fact your signature?

8 THE DEFENDANT: Yes, it is my signature, Your
9 Honor.

10 THE COURT: Did you read and understand this
11 agreement before you signed it?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Is this the agreement you wish to
14 enter into today?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Okay. I'm going to go over the
17 agreement. I'm not going to hit up on every term. I'm
18 going to go over some of the non-sentencing terms and then
19 the sentencing terms. But I just want to make sure you
20 understand that, as long as a term is in the plea agreement,
21 just because I don't mention it, you are still bound by that
22 term. Do you understand that?

23 THE DEFENDANT: I do, Your Honor.

24 THE COURT: Do you understand that you are
25 pleading guilty to a criminal information under which you've

1 just been arraigned and it charges you with one count of
2 false statement in violation of 18 USC Section 1001(a)(3).

3 Do you understand that?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Now, in exchange for your plea of
6 guilty, the government agrees that it will not prosecute you
7 further criminally for any of the conduct you committed that
8 is set forth in the statement of offense, which is the
9 second document you should have in front of you. First, do
10 you also have that document?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Do you understand that the government
13 will not prosecute you for any other charges based on any of
14 the conduct in that statement of offense?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Now, the government has also agreed
17 not to seek a change in your release conditions pending
18 sentencing. In other words, many people, between the time
19 of their plea and sentencing, are actually detained in jail.
20 And the government here is not going to be asking for you to
21 be detained, although the final decision of your decision
22 rests with me. Do you understand that?

23 THE DEFENDANT: Yes, I do, Your Honor.

24 THE COURT: Let's talk about sentencing now for a
25 minute. Do you understand that the maximum penalty for this

1 charge is five years in jail, a fine of \$250,000, a term of
2 supervised release of up to three years and a \$500 special
3 assessment, as well as any fine or interest on such fine
4 that I so order?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Now, have you had a chance to talk
7 with your lawyers about the United States Sentencing
8 Guidelines?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Under those guidelines, there is a
11 grid which sets forth along one axis the base offense level,
12 and on the other, the criminal history conduct; and where
13 those two axis intersect is the box that sets forth your
14 applicable sentencing range. Do you understand that?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Now, in this case, your offense level
17 is either four or six, depending on whether the government
18 seeks a two level enhancement for abuse of position of
19 trust. And your criminal history category is one, which is
20 the lowest category because you have zero criminal history
21 points. Under either level six or level four, your
22 sentencing guideline range is zero months to six months. Do
23 you understand that?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Now, do you understand that I'm not --

1 I have to start with the sentencing guideline range of zero
2 to six months but I'm not bound by that range and I could
3 sentence you above that range to any amount of time up to
4 the statutory maximum. Do you understand that?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: And has anybody told you the sentence
7 I am going to give you in this case?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: And they couldn't because the only one
10 who knows is me and I don't know until I've reviewed all the
11 material in connection with sentencing.

12 All right. Let's talk now about the statement of
13 offense, which is the other document that I mentioned
14 earlier. And that document is eight pages long and also
15 appears to bear your signature on page eight. That is in
16 fact your signature?

17 THE DEFENDANT: Yes, it is, Your Honor.

18 THE COURT: Did you read and understand this
19 document before you signed it?

20 THE DEFENDANT: I did, Your Honor.

21 THE COURT: This document actually sets forth the
22 facts that the government contends occurred here, in other
23 words, the acts that you actually committed. And do you
24 agree that what the government sets forth here is in fact
25 true?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: And most specifically that, on six,
3 that you intentionally altered an e-mail to add the
4 language, "and not a source" in regard to individual one and
5 you knew that such statement was not in fact true?

6 (No verbal response)

7 THE COURT: Mr. Shur, I'm not sure if you are
8 conferring with your client. But I didn't hear a response
9 to that question.

10 MR. SHUR: Yes, Judge, I apologize. We just put a
11 line on mute for a second so Mr. Clinesmith and I could
12 confer.

13 THE COURT: Okay.

14 THE DEFENDANT: Sir, at the time I believed that
15 the information I was providing in the e-mail was accurate.
16 But I am agreeing that the information that I entered in the
17 e-mail was not originally there and that I inserted that
18 information.

19 THE COURT: So in other words, that you agree that
20 you intentionally altered the e-mail to include information
21 that was not originally in the e-mail?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: All right. So have you had enough
24 time here to talk with your lawyers and are you satisfied
25 with their services?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: I want to talk about the rights you
3 are giving up by agreeing to plead guilty. Do you
4 understand that you are not required to plead guilty and you
5 do have the right to go to trial on this charge if you
6 wanted to?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: If you decided to go to trial, you
9 would have the right to have your lawyers with you. And
10 they could make motions, makes objections and cross-examine
11 government witnesses. Do you understand that?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: The government would have the burden
14 of proving you guilty beyond a reasonable doubt and they
15 would have to convince 12 jurors to unanimously convict you.
16 Do you understand that?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: If you went to trial, you would have
19 the opportunity to present evidence and that means you could
20 put witnesses on the witness stand or your lawyer could put
21 witnesses on the witness stand and submit documentary and
22 other types of evidence. But if you decided not to
23 introduce any evidence, I would tell the jury they couldn't
24 hold that against you because the burden of proof would be
25 entirely on the government and you would be presumed

1 innocent. Do you understand?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: If you went to trial, you would have
4 the right to testify on your own behalf. If you chose not
5 to, I would tell the jury they could not hold that against
6 you because you would have the absolute right to remain
7 silent and not to incriminate yourself. Do you understand
8 that?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Now, if you went to trial and were
11 convicted, you would have the right to appeal. If you
12 couldn't afford an attorney, I would appoint one for you.
13 Do you understand that?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: But if you take this plea today, there
16 will be no trial and there will be no appeal, except in a
17 couple of circumstances I'm about to mention. Do you
18 understand?

19 THE DEFENDANT: I do.

20 THE COURT: The only circumstances in which you
21 could appeal are if I sentenced you outside of the
22 sentencing guidelines, if you claimed you received
23 ineffective assistance from your lawyers or if you
24 discovered new and previously undiscoverable information
25 that was material. Do you understand that, otherwise, you

1 would have no right to appeal?

2 THE DEFENDANT: I understand, Your Honor.

3 THE COURT: Do you also understand that, if I
4 accept your plea, you may be deprived of valuable civil
5 rights, including the right to vote and the right to hold
6 certain jobs, the right to serve on a jury and the right to
7 possess any firearm?

8 THE DEFENDANT: I do, Your Honor.

9 THE COURT: Has anybody forced you or threatened
10 you to get you to plead guilty?

11 THE DEFENDANT: No, Your Honor.

12 THE COURT: Do you have any questions as to the
13 rights you are giving up or anything else in connection with
14 this guilty plea?

15 THE DEFENDANT: No, Your Honor.

16 THE COURT: How do you plead then to the charge of
17 false statements. Guilty or not guilty?

18 THE DEFENDANT: Guilty, Your Honor.

19 THE COURT: I'm satisfied the defendant has
20 entered a knowing and voluntary plea and there is a factual
21 basis for such plea. I, therefore, will accept the plea and
22 find him guilty of one count of false statements.

23 Is there anything before we set a sentencing date,
24 is there anything else in connection with the plea that the
25 government wishes me to inquire about?

1 MR. SCARPELLI: No, Your Honor.

2 THE COURT: Anything else, Mr. Shur, that you wish
3 me to inquire about?

4 MR. SHUR: No, Your Honor.

5 THE COURT: Okay. So let's set a sentencing date.
6 The last plea I took last week, I set a date for November
7 10. So I'm happy to set a date the following week or if
8 counsel prefer a different timetable, that's fine. But
9 that's my, that's the timetable I'm working on right now.

10 Mr. Scarpelli?

11 MR. SCARPELLI: Your Honor, the parties had spoken
12 before this hearing and we were going to see if December 9,
13 10, 11 work for the court or December 16, 17 or 18.

14 THE COURT: I've got a bench trial on the 9th.
15 But I could do the 10th or the 11th. Whichever you prefer.

16 Mr. Scarpelli, do you have a preference?

17 MR. SCARPELLI: We do not.

18 THE COURT: Mr. Shur?

19 MR. SHUR: No preference, judge.

20 THE COURT: All right. Let's say December 10th at
21 11:00 A.M. for sentencing. I would ask that the pretrial
22 memoranda be submitted a week in advance.

23 And Mr. Scarpelli, if the government is seeking a
24 two level enhancement, then I would ask that you submit such
25 brief three weeks in advance of sentencing, and that Mr.

1 Shur, you can then respond in one week in advance of
2 sentencing. Otherwise, presentencing memoranda may be
3 submitted one week in advance.

4 MR. SCARPELLI: Understood.

5 THE COURT: All right. Anything the government
6 wishes to raise regarding conditions?

7 MR. SCARPELLI: Yes, Your Honor. With respect to
8 release conditions, in light of the fact that the defendant
9 has known about this matter for quite some time and hasn't
10 fled, we do not oppose his release conditions remaining that
11 he is on pretrial release.

12 We would ask additionally that he surrender his
13 passport and not obtain any foreign travel documents. And
14 with respect to travel within the United States, his travel
15 will be limited to Washington, D.C., Maryland, Virginia,
16 Ohio, Michigan and West Virginia. But he may travel to
17 other locations within the United States with prior approval
18 from the government. He will give us at least three days
19 advance notice.

20 Additionally he will also provide the government
21 his travel itinerary, with dates of travel and where he will
22 stay for travel anywhere outside of the D.C., Maryland and
23 Virginia area.

24 THE COURT: Okay. Mr. Shur, any objections to any
25 of those provisions?

1 MR. SHUR: No objection, Your Honor.

2 THE COURT: Okay. I will then follow the
3 government's recommendation and require that Mr. Clinesmith
4 abide by those travel restrictions and surrender his
5 passport. I will also follow the government's
6 recommendation that he remain on his personal recognizance
7 pending sentencing which is also part of the plea agreement
8 to which the government agreed.

9 Mr. Clinesmith, do you understand those
10 restrictions?

11 THE DEFENDANT: I do, Your Honor.

12 THE COURT: Okay. Anything else either side wants
13 to raise before we conclude these proceedings,
14 Mr. Scarpelli?

15 MR. SCARPELLI: Your Honor, I would just ask the
16 Court, we had provided the Court the waiver of trial by jury
17 and waiver of indictment. And if the Court, at its
18 convenience, signs those documents.

19 THE COURT: Yes. I will do that. I will
20 actually, as to those documents, Mr. Clinesmith, you
21 understand that we've already talked about your jury rights.
22 There is also a document called waiver of indictment. And
23 as I'm sure your lawyers have explained to you, what that
24 means is that the government in this case is proceeding by
25 information rather than indictment.

Please Note: This hearing was held in compliance with the COVID-19 pandemic and the standing orders of this court, and is therefore subject to the technological limitations of court reporting remotely, including static, signal interference and other restrictions.

Lisa Walker Griffith, RPR

Date