

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10988

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TESA KEITH,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

UNITED STATES' OPPOSED MOTION TO DISMISS APPEAL OR,
ALTERNATIVELY, FOR AN UNOPPOSED EXTENSION OF TIME
TO FILE ITS BRIEF AS APPELLEE

The government moves for dismissal of defendant-appellant Tesa Keith's appeal. The government charged Keith, a former state employee of the San Angelo State Supported Living Center (the Center), with violating 18 U.S.C. 242 after she kicked a resident at the Center in the head, injuring the resident. Keith pleaded guilty to this charge and entered into a written agreement in which she expressly waived the right to challenge on appeal the constitutionality of Section 242. Notwithstanding that waiver, Keith now argues for the first time on appeal

that Section 242 exceeds Congress’s powers under the Fourteenth Amendment because, in her view, the statute’s “under color of law” element could sweep in the conduct of “private individuals, who are not government officials at all.” Br. 6-7.¹ For reasons explained below, this Court should dismiss Keith’s appeal.

If the Court denies this motion, the government requests an extension of 30 days from the date of denial to file a brief on the merits. Keith is opposed to dismissal, and intends to file a response, but unopposed to the alternative request for an extension of time.

BACKGROUND

The Center is a residential facility operated by the State of Texas that “serve[s] people with intellectual and developmental disabilities who are medically fragile or who have behavioral problems.” ROA.106. On June 13, 2017, Keith, then-employed as a Direct Service Provider at the Center, had an altercation with a resident at the facility. ROA.10, 107. During the altercation, Keith kicked the resident in the face, leaving the resident’s face and head bloodied and bruised. ROA.10, 107.

On April 19, 2019, the government charged Keith with a single count of deprivation of rights under color law under 18 U.S.C. 242. ROA.10. On May 1,

¹ “Br. ___” refers to the page numbers in Keith’s opening brief. “ROA. ___” refers to the page numbers of the Record on Appeal.

2019, Keith pleaded guilty to violating Section 242. ROA. 48-61; see also ROA.92-99 (attached as Attachment A). Under the plea agreement, Keith waived her rights to “appeal the conviction, sentence, fine and order of restitution or forfeiture”; “contest the conviction, sentence, fine and order of restitution or forfeiture in any collateral proceeding”; and to raise “any argument that (1) the statutes to which [she] is pleading guilty are unconstitutional and (2) the admitted conduct does not fall within the scope of the statute of conviction.” ROA.96-97. The only exceptions to the waiver were for “a sentence exceeding the statutory maximum punishment,” “an arithmetic error at sentencing,” a “challenge [to] the voluntariness of the * * * plea of guilty or [the] waiver,” and “a claim of ineffective assistance of counsel.” ROA.96-97.

The district court held a plea colloquy in which it reviewed with Keith and her attorney the terms of the plea agreement, including the waiver of appellate rights. ROA.59. After the colloquy, the district court found that Keith was “fully competent and capable of entering an informed plea” and that “her plea of guilty * * * [was] a knowing and voluntary plea.” ROA.59; see also ROA.97 (stating that Keith’s “knowing and voluntary waiver of the right to appeal” includes “waiving the right” to challenge the constitutionality of Section 242).

On August 23, 2019, the district court sentenced Keith to 51 months’ imprisonment followed by three years of supervised release. ROA.81-82.

ARGUMENT

A. *Keith's Appeal Must Be Dismissed Because She Expressly Waived Her Right To Challenge On Appeal The Constitutionality Of Section 242, And That Waiver Is Valid And Enforceable*

This Court conducts a two-step inquiry to determine whether an appeal is barred by an appellate waiver. The Court asks whether the waiver “(1) was knowing and voluntary and (2) applies to the circumstances at hand, based on the plain language of the agreement.” *United States v. Purser*, 747 F.3d 284, 289 n.10 (5th Cir.), cert. denied, 574 U.S. 960 (2014). Whether an appellate waiver is valid is a question of law, reviewed de novo. *United States v. Rodriguez-Estrada*, 741 F.3d 648, 650 (5th Cir. 2014).

“To be valid, a defendant’s waiver of his right to appeal must be informed and voluntary.” *United States v. Portillo*, 18 F.3d 290, 292 (5th Cir. 1994). When the record shows that the defendant “read and understood the plea agreement, which included a clear waiver of appellate rights, and acknowledged that he understood specifically that he was giving up his appellate rights, his waiver was both knowing and voluntary.” *United States v. Sanchez Guerrero*, 546 F.3d 328, 335 (5th Cir. 2008), cert. denied, 556 U.S. 1172 (2009). In addition, “[i]f the district court accurately explains the terms and consequences of the waiver of appeal and the defendant states on the record that he understands them,” then this

Court will uphold the waiver as valid and enforceable and dismiss the defendant's appeal. *United States v. Jacobs*, 635 F.3d 778, 781 (5th Cir. 2011).

Keith concedes that she waived her right to appeal her conviction as part of her plea agreement and does not argue that her waiver was unknowing or involuntary. As relevant here, Keith expressly waived "the right to raise on appeal or on collateral review any argument that * * * the statutes to which the defendant is pleading guilty are unconstitutional." ROA.97. That language plainly applies to Keith's argument that Section 242 exceeds Congress's authority under the Fourteenth Amendment. See Br. 6-7. Moreover, the record shows that when Keith pleaded guilty, the district court reviewed with her the terms of the plea agreement, including the waiver of appellate rights. ROA.53-54, 56-59. Keith acknowledged under oath that she understood the consequences of entering into the plea agreement and that she was waiving her right to appeal. ROA.53-54, 58-59. She also informed the district court that she had an opportunity to discuss her case and the plea agreement with her lawyer. ROA.54. She did not raise any questions about the plea agreement or the appellate waiver to the district court. ROA.48-61, 62-86. Based on these representations and the absence of any questions from Keith, the district court found that Keith knowingly and voluntarily entered into the plea agreement, including the terms of the appellate waiver. ROA.59.

Because the record shows that Keith expressly waived her right to challenge on appeal the constitutionality of Section 242, and because the record shows that she understood those terms, this Court should dismiss Keith's appeal. See *Jacobs*, 635 F.3d at 783-784.

B. Class v. United States Does Not Control This Case

Keith suggests that under *Class v. United States*, 138 S. Ct. 798 (2018), this Court may ignore her waiver of appellate rights and entertain her constitutional challenge to Section 242. See Br. 4-5. For two reasons, that is incorrect.

First, this case is distinguishable from *Class* because, as set forth above, Keith expressly waived her right to challenge on appeal the constitutionality of Section 242. In *Class*, the Supreme Court held that “a guilty plea by *itself*” does not “bar[] a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal.” 138 S. Ct. at 803 (emphasis added). The defendant in *Class* was charged with illegally carrying a firearm on the grounds of the United States Capitol. *Id.* at 802. He sought to dismiss the indictment, arguing that the statute under which he was charged was unconstitutional. *Ibid.* The district court denied his motion, and the defendant ultimately entered into a written plea agreement that waived a number of appellate rights and preserved several others. *Ibid.* The agreement, however, was silent on “the right to raise on direct appeal a claim that the statute of conviction was unconstitutional.” *Ibid.* The

Supreme Court concluded that such silence did not did not suffice to “relinquish [Class’s] right to appeal the District Court’s constitutional determinations.” *Id.* at 803. *Class* does not control here because, unlike in that case, Keith’s plea agreement is not silent about her ability to raise constitutional claims on appeal. Compare ROA.97 (stating that Keith waives on appeal “any argument that [Section 242] [is] unconstitutional”), with *Class*, 138 S. Ct. at 802 (explaining that, in *Class*, “[t]he agreement said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional”). On the contrary, Keith’s plea agreement contained an express waiver of her right to challenge on appeal the constitutionality of Section 242. ROA.97.

Second, even if Keith had not expressly waived her right to challenge the constitutionality of Section 242 on appeal, *Class* makes clear that Keith’s claim is nonetheless barred because that claim is “foreclosed by the admissions inherent in [her] guilty plea[.]” 138 S. Ct. at 804 (quoting *United States v. Broce*, 488 U.S. 563, 576 (1989)). The Court in *Class* permitted the defendant to challenge his statute of conviction only because he could do so without “contradict[ing] the terms of the indictment or the written plea agreement.” *Ibid.* The Court distinguished *Class*’s case from its previous decision in *Broce*, where it found that the defendants were barred from pursuing a double jeopardy challenge on appeal as a result of pleading guilty to two separate indictments alleging two separate

conspiracies. See *ibid.* Similarly, here, Keith contends that Section 242 exceeds Congress's authority under the Fourteenth Amendment because the statute's "under color of law" element could sweep in the conduct of private individuals who are not state actors. See Br. 3, 6-7. But in pleading guilty, Keith admitted that, at the time of the offense, she was a state actor. ROA.17-19 (factual resume in which Keith stipulates she "act[ed] under color of law"); ROA.55-56 (representation by Keith during plea colloquy that "all of the facts" in the factual resume are true). Because a defendant to whom a statute has been constitutionally applied lacks standing to attack a statute by arguing that it may be unconstitutionally applied to others, see, e.g., *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 38 (1999), Keith's admission that she was a state actor at the time of the offense forecloses any constitutional challenge to Section 242 on appeal. See also *United States v. Robinson*, 367 F.3d 278, 290 (5th Cir.), cert. denied, 543 U.S. 1005 (2004). Thus, unlike in *Class*, Keith's constitutional claim would not "extinguish the government's power to 'constitutionally prosecute' [her] if the claim were successful." 138 S. Ct. at 806 (internal quotation marks omitted) (quoting *Broce*, 488 U.S. at 575).

Accordingly, *Class* does not affect the valid appellate waiver in this case.

CONCLUSION

This Court should dismiss the appeal. Should the Court deny the motion, the government requests an extension of time of 30 days from the date of denial to respond to Keith's brief.

Respectfully submitted,

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
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s/ Junis L. Baldon

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CERTIFICATE OF SERVICE

I certify that on December 19, 2019, I electronically filed the foregoing UNITED STATES' OPPOSED MOTION TO DISMISS APPEAL OR, ALTERNATIVELY, FOR AN UNOPPOSED EXTENSION OF TIME TO FILE ITS BRIEF AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system.

I further certified that all parties are CM/ECF registered, and service will be accomplished by the appellate CM/ECF system.

s/ Junis L. Baldon
JUNIS L. BALDON
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached UNITED STATES' OPPOSED MOTION TO DISMISS APPEAL OR, ALTERNATIVELY, FOR AN UNOPPOSED EXTENSION OF TIME TO FILE ITS BRIEF AS APPELLEE:

(1) complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1775 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

s/ Junis L. Baldon
JUNIS L. BALDON
Attorney

Date: December 19, 2019

Attachment A

CLERK OF DISTRICT COURT
NORTHERN DIST. OF TX
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

2019 APR 22 AM 11:13

DEPUTY CLERK 

UNITED STATES OF AMERICA

v.

TESA KEITH

NO. 6:19-CR-20-C

PLEA AGREEMENT

Tesa Keith, the defendant; Lara M. Wynn, the defendant's attorney; and the United States of America (the government) agree as follows:

1. **Rights of the defendant:** The defendant understands that the defendant has the rights:

- a. to plead not guilty;
- b. to have a trial by jury;
- c. to have the defendant's guilt proven beyond a reasonable doubt;
- d. to confront and cross-examine witnesses and to call witnesses in the defendant's defense; and
- e. against compelled self-incrimination.

2. **Waiver of rights and plea of guilty:** The defendant waives these rights and pleads guilty to the offense alleged in the information, charging a violation of 18 USC § 242, deprivation of rights under color of law. The defendant understands the nature and elements of the crime to which the defendant is pleading guilty, and agrees that the factual resume the defendant has signed is true and will be submitted as evidence.

3. **Sentence:** The maximum penalties the Court can impose include:

- a. imprisonment for a period of not more than 10 years;
- b. a fine not to exceed \$250,000;
- c. a term of supervised release of not more than three years;
- d. a mandatory special assessment of \$100.00;
- e. restitution to victims or to the community, which may be mandatory under the law, and which the defendant agrees may include restitution arising from all relevant conduct, not limited to that arising from the offense of conviction alone;
- f. costs of incarceration and supervision; and
- g. forfeiture of property.

4. **Immigration consequences:** The defendant recognizes that pleading guilty may have consequences with respect to the defendant's immigration status if the defendant is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses. The defendant understands this may include the offense to which the defendant is pleading guilty, and for purposes of this plea agreement, the defendant assumes the offense is a removable offense. Removal and other immigration consequences are the subject of a separate proceeding, however, and the defendant understands that no one, including the defendant's attorney or the district court, can predict to a certainty the effect of the defendant's conviction on the defendant's immigration status. The defendant nevertheless affirms that the defendant wants to plead guilty regardless of any immigration

consequences that the defendant's plea of guilty may entail, even if the consequence is the defendant's automatic removal from the United States.

5. **Court's sentencing discretion and role of the Guidelines:** The defendant understands that the sentence in this case will be imposed by the Court after consideration of the United States Sentencing Guidelines. The guidelines are not binding on the Court, but are advisory only. The defendant has reviewed the guidelines with the defendant's attorney, but understands no one can predict with certainty the outcome of the Court's consideration of the guidelines in this case. The defendant further understands that the government will make certain recommendations to the Court as described in paragraphs 8 and 9 of this agreement and that those recommendations are not binding on this Court. The defendant will not be allowed to withdraw the defendant's plea if the defendant's sentence is higher than expected. The defendant fully understands that the actual sentence imposed (so long as it is within the statutory maximum) is solely in the discretion of the Court.

6. **Mandatory special assessment:** Prior to sentencing, the defendant agrees to pay to the U.S. District Clerk the amount of \$100.00 in satisfaction of the mandatory special assessment in this case.

7. **Defendant's agreement:** Upon demand, the defendant shall submit a personal financial statement under oath and submit to interviews by the government and the U.S. Probation Office regarding the defendant's capacity to satisfy any fines or restitution. The defendant expressly authorizes the United States Attorney's Office to immediately obtain a credit report on the defendant in order to evaluate the defendant's ability to satisfy any financial obligation imposed by the Court. The defendant fully

understands that any financial obligation imposed by the Court, including a restitution order and/or the implementation of a fine, is due and payable immediately. In the event the Court imposes a schedule for payment of restitution, the defendant agrees that such a schedule represents a minimum payment obligation and does not preclude the U.S. Attorney's Office from pursuing any other means by which to satisfy the defendant's full and immediately enforceable financial obligation. The defendant understands that the defendant has a continuing obligation to pay in full as soon as possible any financial obligation imposed by the Court.

8. **Government's agreement:** The government will not bring any additional charges against the defendant based upon the conduct underlying and related to the defendant's plea of guilty. The government agrees to recommend that the Court impose a prison sentence at the low end of the guidelines range. The government further agrees to recommend that the defendant should receive credit for any time that the defendant spent in state custody in Case No. A-19-0633 for the 51st District Court of Tom Green County, Texas, beginning on August 1, 2018. The government understands that this recommendation is not binding on the Court. The government will file a Supplement in this case, as is routinely done in every case, even though there may or may not be any additional terms. This agreement, except as described in paragraph 9 of this agreement, is limited to United States Department of Justice Civil Rights Division, the United States Attorney's Office for the Northern District of Texas and does not bind any other federal, state, or local prosecuting authorities, nor does it prohibit any civil or administrative proceeding against the defendant or any property.

9. **Disposition of Case No. A-19-0633 out of the 51st District Court of Tom Green County, Texas:** The government agrees that, upon the entry of the defendant's guilty plea, the government will recommend that the State of Texas dismiss Case No. A-19-0633, currently pending in the 51st District Court of Tom Green County, Texas.

10. **Violation of agreement:** The defendant understands that if the defendant violates any provision of this agreement, or if the defendant's guilty plea is vacated or withdrawn, the government will be free from any obligations of the agreement and free to prosecute the defendant for all offenses of which it has knowledge. In such event, the defendant waives any objections based upon delay in prosecution. If the plea is vacated or withdrawn for any reason other than a finding that it was involuntary, the defendant also waives objection to the use against the defendant of any information or statements the defendant has provided to the government, and any resulting leads.

11. **Voluntary plea:** This plea of guilty is freely and voluntarily made and is not the result of force or threats, or of promises apart from those set forth in this plea agreement. There have been no guarantees or promises from anyone as to what sentence the Court will impose.

12. **Waiver of right to appeal or otherwise challenge sentence:** The defendant waives the defendant's rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal the conviction, sentence, fine and order of restitution or forfeiture in an amount to be determined by the district court. The defendant further waives the defendant's right to contest the conviction, sentence, fine and order of restitution or forfeiture in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. The

defendant, however, reserves the rights (a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) an arithmetic error at sentencing, (b) to challenge the voluntariness of the defendant's plea of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel.

13. **Additional Waiver of Defendant's Right to Appeal:** Defendant's knowing and voluntary waiver of the right to appeal or collaterally attack the convictions and sentence includes waiving the right to raise on appeal or on collateral review any argument that (1) the statutes to which the defendant is pleading guilty are unconstitutional and (2) the admitted conduct does not fall within the scope of the statute of conviction.

14. **Representation of counsel:** The defendant has thoroughly reviewed all legal and factual aspects of this case with the defendant's attorney and is fully satisfied with that attorney's legal representation. The defendant has received from the defendant's attorney explanations satisfactory to the defendant concerning each paragraph of this plea agreement, each of the defendant's rights affected by this agreement, and the alternatives available to the defendant other than entering into this agreement. Because the defendant concedes that the defendant is guilty, and after conferring with the defendant's attorney, the defendant has concluded that it is in the defendant's best interest to enter into this plea agreement and all its terms, rather than to proceed to trial in this case.

15. **Entirety of agreement:** This document is a complete statement of the parties' agreement and may not be modified unless the modification is in writing and signed by all parties. This agreement supersedes any and all other promises,

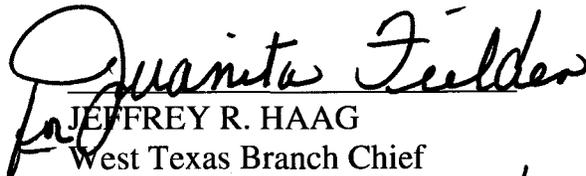
representations, understandings, and agreements that are or were made between the parties at any time before the guilty plea is entered in court. No promises or representations have been made by the United States except as set forth in writing in this plea agreement.

AGREED TO AND SIGNED this 17th day of April, 2019.

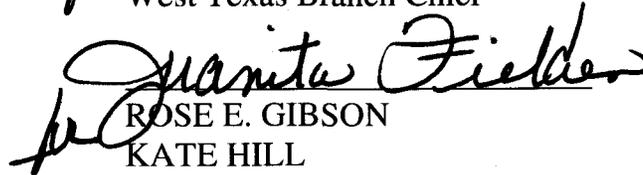
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I have read or had read to me this plea agreement and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree to it.

Tesa Keith

TESA KEITH
Defendant

4-17-2019

Date

I am the defendant's attorney. I have carefully reviewed every part of this plea agreement with the defendant. To my knowledge and belief, my client's decision to enter into this plea agreement is an informed and voluntary one.

Lara M. Wynn

LARA M. WYNN
Attorney for Defendant

4-17-19

Date