

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

DAVID M. BANEY

No. 18 CR 50005

Judge John J. Tharp, Jr.

PLEA AGREEMENT

1. This Plea Agreement between the United States Attorney for the Northern District of Illinois, JOHN R. LAUSCH, JR., and defendant DAVID M. BANEY, and his attorney, FRANK COOK, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure and is governed in part by Rule 11(c)(1)(A), as more fully set forth below. The parties to this Agreement have agreed upon the following:

Charges in This Case

2. The indictment in this case charges defendant with robbery affecting interstate commerce, in violation of Title 18, United States Code, Section 1951(a) (Count 1), bank robbery, in violation of Title 18, United States Code, Section 2113(a) (Count 3), and using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of Title 18, United States Code, Section 924(c)(1)(A)(ii), (Counts 2 and 4).

3. Defendant has read the charges against him contained in the indictment, and those charges have been fully explained to him by his attorney.

4. Defendant fully understands the nature and elements of the crimes with which he has been charged.

Charges to Which Defendant Is Pleading Guilty

5. By this Plea Agreement, defendant agrees to enter a voluntary plea of guilty to the following counts of the indictment: Count 1, which charges defendant with robbery affecting interstate commerce, in violation of Title 18, United States Code, Section 1951(a), Count 3, which charges defendant with bank robbery, in violation of Title 18, United States Code, Section 2113(a), and Count 4, which charges defendant with using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of Title 18, United States Code, Section 924(c)(1)(A)(ii).

Factual Basis

6. Defendant will plead guilty because he is in fact guilty of the charges contained in Counts 1, 3, and 4 of the indictment. In pleading guilty, defendant admits the following facts and that those facts establish his guilt beyond a reasonable doubt:

a. With respect to Count 1 of the indictment:

On January 11, 2018, at Machesney Park, in the Northern District of Illinois, Western Division, defendant DAVID M. BANEY, did obstruct, delay, and affect “commerce,” and the movement of articles and commodities in commerce, by “robbery,” as defined in Title 18, United States Code, Section 1951(b), in that the defendant did unlawfully take and obtain United States Currency and cigarettes from the person and in the presence of an employee of a Kelley’s Market/Mobil convenience

store and gas station (Kelley's Market), located at 8200 North 2nd Street, Machesney Park, Illinois, against the employee's will, by means of actual and threatened force, and fear of injury to that employee, in violation of Title 18, United States Code, Section 1951(a).

Specifically, on January 11, 2018, the defendant entered the Kelley's Market/Mobil gas station and convenience store located at 8200 North 2nd Street, Machesney Park, Illinois wearing a mask. At the time he entered the Kelley's Market, the defendant possessed an object that appeared to be a firearm and he intended to rob the Kelley's Market. Only one Kelley's Market employee was present at that time. The defendant ordered the employee of Kelley's Market to give him cash from the registers and from a safe. The employee handed him approximately \$170 of United States Currency from the registers, but could not access the safe. The defendant also demanded the employee give him two cartons of Newport 100 cigarettes. The defendant left the Kelley's Market with the cash and cigarettes. Defendant acknowledges the Kelley's Market operates in interstate commerce at approximately 49 locations in Wisconsin and Illinois by stocking and selling gasoline and other items that have traveled in interstate commerce.

b. With respect to Count 3 of the indictment:

On or about January 11, 2018, at Loves Park, in the Northern District of Illinois, Western Division, defendant DAVID M. BANEY, by force and violence and by intimidation, did take from the person and presence of a bank employee, money,

namely approximately \$24,402, belonging to and in the care, custody, control, management, and possession of JPMorgan Chase Bank, N.A., doing business as Chase Bank, located at 7997 North Alpine Road, Loves Park, Illinois, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Section 2113(a).

Specifically, at approximately 10:55 a.m. on January 11, 2018, defendant robbed the Chase Bank located at 7997 North Alpine Road, Loves Park, Illinois. Defendant walked into the bank wearing a mask. He approached a gate that led to the back of the teller stations, but the gate was locked. He then approached a teller who was behind the teller stations and told the teller not to press any buttons. The teller asked the defendant if the teller could get his keys. The defendant nodded up and down. The teller then opened his top drawer and placed United States Currency into a clear plastic coin bag. The defendant then told the teller to get more money and told a second teller to get more from the other teller stations. The second teller told the defendant suspect he did not have access to the other drawers. The first teller then opened his lower drawer and placed more United States Currency into the bag. During the robbery a customer exited the bathroom. The defendant pointed the gun at customer and told him to stay back. In total, defendant obtained \$24,402 from Chase Bank during the robbery. Defendant acknowledges that the deposits of Chase Bank were insured by the Federal Deposit Insurance Corporation at the time of the robbery.

d. With respect to Count 4 of the indictment:

On or about January 11, 2018, at Loves Park, in the Northern District of Illinois, Western Division, defendant DAVID M. BANEY, did use, carry, and brandish a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, namely, bank robbery, in violation of Title 18, United States Code, Section 2113(a), as charged in Count Three of the Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A)(ii).

Specifically, during the robbery of the Chase Bank located at 7997 North Alpine Road, Loves Park, Illinois that took place on January 11, 2018, the defendant carried a gun and pointed the gun at a bank employee.

Maximum Statutory Penalties

7. Defendant understands that the charges to which he is pleading guilty carry the following statutory penalties:

a. Count 1 carries a maximum sentence of 20 years' imprisonment. Count 1 also carries a maximum fine of \$250,000. Defendant further understands that with respect to Count 1 the judge also may impose a term of supervised release of not more than three years.

b. Count 3 carries a maximum sentence of 20 years' imprisonment. Count 3 also carries a maximum fine of \$250,000. Defendant further understands that with respect to Count 3, the judge also may impose a term of supervised release of not more than three years.

c. Count 4 carries a maximum sentence of life imprisonment, and a statutory mandatory minimum sentence of 7 years. The sentence of imprisonment on Count 4 is required to be consecutive to any other sentence imposed. Pursuant to Title 18, United States Code, Section 3561, defendant may not be sentenced to a term of probation on this count. Count 4 also carries a maximum fine of \$250,000. Defendant further understands that with respect to Count 4 the judge also may impose a term of supervised release of not more than five years.

d. Defendant further understands that the Court must order restitution to the victims of the offense in an amount determined by the Court.

e. Pursuant to Title 18, United States Code, Section 3013, defendant will be assessed \$100 on each count to which he has pled guilty, in addition to any other penalty or restitution imposed.

f. Therefore, under the counts to which defendant is pleading guilty, the total maximum sentence is life imprisonment, and the minimum sentence is 7 years' imprisonment. In addition, defendant is subject to a total maximum fine of \$750,000, a period of supervised release, and special assessments totaling \$300, in addition to any restitution ordered by the Court.

Sentencing Guidelines Calculations

8. Defendant understands that in determining a sentence, the Court is obligated to calculate the applicable Sentencing Guidelines range, and to consider that range, possible departures under the Sentencing Guidelines, and other

sentencing factors under 18 U.S.C. § 3553(a), which include: (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii) the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (iii) the kinds of sentences available; (iv) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (v) the need to provide restitution to any victim of the offense.

9. For purposes of calculating the Sentencing Guidelines, the parties agree on the following points:

a. **Applicable Guidelines.** The Sentencing Guidelines to be considered in this case are those in effect at the time of the offense. The following statements regarding the calculation of the Sentencing Guidelines are based on the November 2018 Guidelines Manual.

b. **Offense Level Calculations.**

Count 1

i. The base offense level is 20, pursuant to § 2B3.1.

ii. The offense level is increased by 3 levels to level 23 pursuant to Guideline § 2B3.1(b)(2)(E) because a dangerous weapon was brandished or possessed.

iii. Therefore, the total offense level for Count 1 is 23.

Count 3

iv. The base offense level is 20, pursuant to § 2B3.1.

v. The offense level is increased two levels because the property of a financial institution was taken, pursuant to § 2B3.1(b)(1).

vi. Based on Application Note 4 to Guideline § 2K2.4, the firearm enhancement provided for by Guideline § 2B3.1(b)(2) will not apply because of defendant's plea of guilty to the firearms offense, charging a violation Title 18, United States Code, Section 924(c).

vii. The offense level is increased by one level because the loss is more than \$20,000, pursuant to 2B3.1(b)(7)(B).

viii. Therefore, the total offense level for Count 3 is 23.

Count 4

ix. Pursuant to Guideline § 5G1.2(b), the guideline sentence for the firearms offense charged in Count 4 is the minimum term of imprisonment required by statute, namely a term of imprisonment of 7 years, which is required to be run consecutively to any other term of imprisonment imposed on defendant.

Grouping

x. Pursuant to § 3D1.2(d), the offenses are not grouped. The group with the highest offense level is the robbery offense charged in Count One with an offense level of 23, and counts as one unit, pursuant to § 3D1.4(a). The Chase Bank robbery charged in Count Three is the same offense level, resulting in one unit, pursuant to § 3D1.4(a). Therefore, there are two units and the highest offense level (23), is increased two levels to 25, pursuant to § 3D1.4.

Acceptance of Responsibility

xi. Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. If the government does not receive additional evidence in conflict with this provision, and if defendant continues to accept responsibility for his actions within the meaning of Guideline § 3E1.1(a), including by furnishing the United States Attorney's Office and the Probation Office with all requested financial information relevant to his ability to satisfy any fine or restitution that may be imposed in this case, a two-level reduction in the offense level is appropriate.

xii. In accord with Guideline § 3E1.1(b), defendant has timely notified the government 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. Therefore, as provided by Guideline § 3E1.1(b), if the Court determines the offense level to be 16 or greater prior to determining that defendant

is entitled to a two-level reduction for acceptance of responsibility, the government will move for an additional one-level reduction in the offense level.

c. **Criminal History Category.** With regard to determining defendant's criminal history points and criminal history category, based on the facts now known to the government and stipulated below, defendant's criminal history points equal 13 and defendant's criminal history category is VI:

i. On or about January 6, 2004, the defendant was convicted of domestic battery in the Circuit Court for Winnebago County, Illinois, case number 03 CF 7867, and sentenced to 12 months' probation. The probation sentence was vacated on July 2, 2004, and the defendant was sentenced to 68 days incarceration. Defendant receives 0 criminal history points pursuant to Guidelines § 4A1.1(b).

ii. On or about January 6, 2004, the defendant was convicted of violation of a protective order in the Circuit Court for Winnebago County, Illinois, case number 04 CM 1041, and sentenced to 24 months' probation. Defendant receives 0 criminal history points pursuant to Guidelines § 4A1.1(c).

iii. On or about June 28, 2004, the defendant was convicted of possession of a controlled substance in the Circuit Court for Winnebago County, Illinois, case number 04 CF 472, and sentenced to 120 days incarceration with 90 days stayed, and 30 months' probation. On July 18, 2005, the probation sentence was vacated and the defendant was sentenced to 180 days incarceration 60 days stayed, and two years' probation. On June 15, 2007, the probation was unsuccessfully

terminated. Defendant receives 0 criminal history points pursuant to Guidelines § 4A1.1(b).

iv. On or about May 27, 2005, the defendant was convicted of battery in the Circuit Court for Winnebago County, Illinois, case number 05 CM 3073, and sentenced to 30 days incarceration and 12 months' probation. Defendant receives 0 criminal history points pursuant to Guidelines § 4A1.1(c).

v. On or about May 27, 2005, the defendant was convicted of retail theft in the Circuit Court for Winnebago County, Illinois, case number 05 CM 3074, and sentenced to 30 days incarceration and 12 months' probation. Defendant receives 0 criminal history points pursuant to Guidelines § 4A1.1(c).

vi. On or about June 21, 2007, the defendant was convicted of robbery in the Circuit Court for Winnebago County, Illinois, case number 06 CF 3633, and sentenced to 4 years incarceration. Defendant receives 3 criminal history points pursuant to Guidelines § 4A1.1(a).

vii. On or about June 21, 2007, the defendant was convicted of possession of a stolen motor vehicle in the Circuit Court for Winnebago County, Illinois, case number 07 CF 307, and sentenced to 4 years incarceration. Defendant receives 3 criminal history points pursuant to Guidelines § 4A1.1(a).

viii. On or about April 14, 2010, the defendant was convicted of retail theft in the Circuit Court for Winnebago County, Illinois, case number 09 CF 3912, and sentenced to 180 days' incarceration with 136 days suspended pending

completion of 24 months probation. Defendant receives 1 criminal history point pursuant to Guidelines § 4A1.1(c).

ix. On or about April 15, 2013, defendant was convicted of aggravated battery in the Circuit Court of Winnebago County, Illinois, case number 12 CF 1342, and on or about January 29, 2016, was sentenced to 6 years incarceration. Defendant receives 3 criminal history points pursuant to Guidelines § 4A1.1(a).

x. On or about January 29, 2016, defendant was convicted of aggravated battery in the Circuit Court of Winnebago County, Illinois, case number 12 CM 3120, and sentenced to 6 years incarceration. Defendant receives 3 criminal history points pursuant to Guidelines § 4A1.1(a).

d. Anticipated Advisory Sentencing Guidelines Range.

Therefore, based on the facts now known to the government, the anticipated offense level is 22, which, when combined with the anticipated criminal history category of VI, results in an anticipated advisory sentencing guidelines range of 84 to 105 months' imprisonment, in addition to any supervised release, fine, and restitution the Court may impose. Defendant also acknowledges that he is subject to a statutory minimum sentence of 7 years' imprisonment.

e. Defendant and his attorney and the government acknowledge that the above guidelines calculations are preliminary in nature, and are non-binding predictions upon which neither party is entitled to rely. Defendant understands that

further review of the facts or applicable legal principles may lead the government to conclude that different or additional guidelines provisions apply in this case. Defendant understands that the Probation Office will conduct its own investigation and that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final guideline calculation. Accordingly, the validity of this Agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations, and defendant shall not have a right to withdraw his plea on the basis of the Court's rejection of these calculations.

10. Both parties expressly acknowledge that this Agreement is not governed by Fed. R. Crim. P. 11(c)(1)(B), and that errors in applying or interpreting any of the sentencing guidelines may be corrected by either party prior to sentencing. The parties may correct these errors either by stipulation or by a statement to the Probation Office or the Court, setting forth the disagreement regarding the applicable provisions of the guidelines. The validity of this Agreement will not be affected by such corrections, and defendant shall not have a right to withdraw his plea, nor the government the right to vacate this Agreement, on the basis of such corrections.

Agreements Relating to Sentencing

11. Each party is free to recommend whatever sentence it deems appropriate.

12. It is understood by the parties that the sentencing judge is neither a party to nor bound by this Agreement and may impose a sentence up to the maximum penalties as set forth above. Defendant further acknowledges that if the Court does not accept the sentencing recommendation of the parties, defendant will have no right to withdraw his guilty plea.

13. Regarding restitution, defendant acknowledges that the total amount of restitution owed to Kelly's Market/Mobil is \$179, and the restitution owed to Chase Bank is \$24,402, minus any credit for funds repaid prior to sentencing, and that pursuant to Title 18, United States Code, Section 3663A, the Court must order defendant to make full restitution in the amount outstanding at the time of sentencing.

14. Restitution shall be due immediately, and paid pursuant to a schedule to be set by the Court at sentencing. Defendant acknowledges that pursuant to Title 18, United States Code, Section 3664(k), he is required to notify the Court and the United States Attorney's Office of any material change in economic circumstances that might affect his ability to pay restitution.

15. Defendant agrees to pay the special assessment of \$300 at the time of sentencing with a cashier's check or money order payable to the Clerk of the U.S. District Court.

16. Defendant agrees that the United States may enforce collection of any fine or restitution imposed in this case pursuant to Title 18, United States Code,

Sections 3572, 3613, and 3664(m), notwithstanding any payment schedule set by the Court.

17. After sentence has been imposed on the counts to which defendant pleads guilty as agreed herein, the government will move to dismiss Count 2 of the indictment.

Acknowledgments and Waivers Regarding Plea of Guilty

Nature of Agreement

18. This Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 18 CR 50005.

19. This Agreement concerns criminal liability only. Except as expressly set forth in this Agreement, nothing herein shall constitute a limitation, waiver, or release by the United States or any of its agencies of any administrative or judicial civil claim, demand, or cause of action it may have against defendant or any other person or entity. The obligations of this Agreement are limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities, except as expressly set forth in this Agreement.

Waiver of Rights

20. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

a. **Trial rights.** Defendant has the right to persist in a plea of not guilty to the charges against him, and if he does, he would have the right to a public and speedy trial.

i. The trial could be either a jury trial or a trial by the judge sitting without a jury. However, in order that the trial be conducted by the judge sitting without a jury, defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

ii. If the trial is a jury trial, the jury would be composed of twelve citizens from the district, selected at random. Defendant and his attorney would participate in choosing the jury by requesting that the Court remove prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges.

iii. If the trial is a jury trial, the jury would be instructed that defendant is presumed innocent, that the government has the burden of proving defendant guilty beyond a reasonable doubt, and that the jury could not convict him unless, after hearing all the evidence, it was persuaded of his guilt beyond a reasonable doubt and that it was to consider each count of the indictment separately. The jury would have to agree unanimously as to each count before it could return a verdict of guilty or not guilty as to that count.

iv. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, and considering

each count separately, whether or not the judge was persuaded that the government had established defendant's guilt beyond a reasonable doubt.

v. At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them.

vi. At a trial, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court. A defendant is not required to present any evidence.

vii. At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If defendant desired to do so, he could testify in his own behalf.

b. **Appellate rights.** Defendant further understands he is waiving all appellate issues that might have been available if he had exercised his right to trial, and may only appeal the validity of this plea of guilty and the sentence imposed. Defendant understands that any appeal must be filed within 14 calendar days of the entry of the judgment of conviction.

21. Defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraphs, with the exception of the appellate rights

specifically preserved above. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights.

Presentence Investigation Report/Post-Sentence Supervision

22. Defendant understands that the United States Attorney's Office in its submission to the Probation Office as part of the Pre-Sentence Report and at sentencing shall fully apprise the District Court and the Probation Office of the nature, scope, and extent of defendant's conduct regarding the charges against him, and related matters. The government will make known all matters in aggravation and mitigation relevant to sentencing.

23. Defendant agrees to truthfully and completely execute a Financial Statement (with supporting documentation) prior to sentencing, to be provided to and shared among the Court, the Probation Office, and the United States Attorney's Office regarding all details of his financial circumstances, including his recent income tax returns as specified by the probation officer. Defendant understands that providing false or incomplete information, or refusing to provide this information, may be used as a basis for denial of a reduction for acceptance of responsibility pursuant to Guideline § 3E1.1 and enhancement of his sentence for obstruction of justice under Guideline § 3C1.1, and may be prosecuted as a violation of Title 18, United States Code, Section 1001 or as a contempt of the Court.

24. For the purpose of monitoring defendant's compliance with his obligations to pay a fine and restitution during any term of supervised release to

which defendant is sentenced, defendant further consents to the disclosure by the IRS to the Probation Office and the United States Attorney's Office of defendant's individual income tax returns (together with extensions, correspondence, and other tax information) filed subsequent to defendant's sentencing, to and including the final year of any period of supervised release to which defendant is sentenced. Defendant also agrees that a certified copy of this Agreement shall be sufficient evidence of defendant's request to the IRS to disclose the returns and return information, as provided for in Title 26, United States Code, Section 6103(b).

Other Terms

25. Defendant agrees to cooperate with the United States Attorney's Office in collecting any unpaid fine and restitution for which defendant is liable, including providing financial statements and supporting records as requested by the United States Attorney's Office.

26. Defendant understands that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

Conclusion

27. Defendant understands that this Agreement will be filed with the Court, will become a matter of public record, and may be disclosed to any person.

28. Defendant understands that his compliance with each part of this Agreement extends throughout the period of his sentence, and failure to abide by any

term of the Agreement is a violation of the Agreement. Defendant further understands that in the event he violates this Agreement, the government, at its option, may move to vacate the Agreement, rendering it null and void, and thereafter prosecute defendant not subject to any of the limits set forth in this Agreement, or may move to resentence defendant or require defendant's specific performance of this Agreement. Defendant understands and agrees that in the event that the Court permits defendant to withdraw from this Agreement, or defendant breaches any of its terms and the government elects to void the Agreement and prosecute defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

29. Should the judge refuse to accept defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound to it.

30. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

31. Defendant acknowledges that he has read this Agreement and carefully reviewed each provision with his attorney. Defendant further acknowledges that he

understands and voluntarily accepts each and every term and condition of this Agreement.

AGREED THIS DATE: _____

JOHN R. LAUSCH, JR.
United States Attorney

DAVID M. BANEY
Defendant

MICHAEL D. LOVE
Assistant U.S. Attorney

FRANK COOK
Attorney for Defendant