

A P P E N D I X 5
Motion to Withdraw Transcript

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA,) 3:16-cr-05358-RJB
Plaintiff,) TACOMA, WASHINGTON
v.) October 20, 2017
GEORGE E. HERNANDEZ, JR.,) SENTENCING HEARING
Defendant.)

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: MICHAEL DION
SIDDHARTH V. VELAMOOR
Assistant United States Attorneys
United States Attorney's Office
700 Stewart Street
Suite 5220
Seattle, Washington 98101

For the Defendant: EMILY M. GAUSE
Attorney at Law
1001 Fourth Avenue
Suite 4400
Seattle, Washington 98154

MORNING SESSION
OCTOBER 20, 2017

00:02:26 3 THE COURT: This is 16-5358, United States versus
00:02:32 4 George Hernandez. We set this morning for sentencing.

00:02:39 5 Before we can deal with that, we must deal with a question
00:02:44 6 raised by the defendant's motion to withdraw his guilty plea.
00:02:50 7 The defendant is present in court with his attorney,
00:02:54 8 Ms. Gause. Mr. Dion is here for the Government.

00:03:04 9 MR. DION: And Mr. Velamoor,

00:03:09 10 THE COURT: Yes, Mr. Velamoor.

00:03:13 11 Let's first turn our attention to the motion to withdraw
00:03:19 12 the guilty plea. I have read the motion and the supporting
00:03:25 13 papers, and the opposition and the exhibits attached to the
00:03:29 14 opposition.

00:03:30 15 | Ms. Gause.

00:03:33 16 MS. GAUSE: Good morning, Your Honor. Mr. Hernandez
00:03:40 17 does wish to withdraw his plea of guilty.

00:03:44 18 THE COURT: Wait a minute. Wait a minute. I am not
00:03:46 19 hearing you very well.

00:04:01 20 MS. GAUSE: Is this better, Your Honor?

00:04:04 21 Mr. Hernandez does wish to withdraw his plea of guilty
00:04:08 22 this morning. He wishes to do so after carefully considering
00:04:13 23 all of the risks, including the fact that he is facing a
00:04:19 24 potential 15 year mandatory minimum if he is successful in
00:04:24 25 withdrawing his plea.

00:04:26 1 A part of why there was such a delay in making this
00:04:30 2 decision was because both Mr. Hernandez and I went through
00:04:35 3 all of the risks associated with making such a plea. He
00:04:40 4 wishes to proceed forward with this motion.

00:04:45 5 As this Court knows, withdrawing a guilty plea before
00:04:49 6 imposition of sentence should be allowed as long as there is
00:04:54 7 a fair and just reason to do so. There are many, many
00:04:58 8 reasons that the Court can consider in identifying what a
00:05:03 9 fair and just reason is. In fact, any reason for withdrawing
00:05:07 10 the plea -- if there is any reason that exists now that did
00:05:12 11 not exist at the time that Mr. Hernandez made the decision to
00:05:17 12 plead guilty, that can be a fair and just reason for
00:05:21 13 withdrawing the guilty plea. That includes newly-discovered
00:05:25 14 evidence, intervening circumstances or inadequate Rule 11
00:05:30 15 plea colloquies.

00:05:32 16 We are not arguing that there was inadequate plea colloquy
00:05:37 17 here. We are arguing that there have been intervening
00:05:39 18 circumstances and newly-discovered evidence that
00:05:41 19 Mr. Hernandez is now aware of that he was not aware of at the
00:05:45 20 time he made the difficult decision about whether to proceed
00:05:48 21 forward to trial or enter a plea of guilty.

00:05:51 22 One of the pieces of information we have been most focused
00:05:57 23 on is information pertaining to the confidential informant in
00:06:01 24 this case, Your Honor. It is -- it is concerning that we
00:06:09 25 continue to repeatedly see times when the Government does

00:06:13 1 hold back quite a bit of information, and this is becoming
00:06:18 2 more routine. It is not just freely given under the local
00:06:24 3 rules of discovery. Defense counsel actually has to search
00:06:28 4 for and request the information in order to obtain it,
00:06:33 5 oftentimes having to bring it to a court to make the decision
00:06:38 6 about some of these discovery issues. It is not something
00:06:42 7 that is just turned over.

00:06:45 8 In this case, the search warrant affidavit, which is the
00:06:50 9 critical piece of information here that we have been
00:06:55 10 examining, but for the search warrant affidavit, we don't
00:06:59 11 have a search, but for the search, we don't have an
00:07:03 12 indictment against Mr. Hernandez.

00:07:06 13 The search warrant affidavit completely omits anything
00:07:11 14 about the CI's criminal history. Essentially, it doesn't
00:07:16 15 mention that there was any criminal history whatsoever, nor
00:07:20 16 that there were any payments received, nor any other details
00:07:23 17 about the CI's cooperation.

00:07:27 18 After Mr. Hernandez pled guilty and he hired me, one of
00:07:34 19 the first things we set out to find out is if we could
00:07:38 20 identify who the CI was. We did hire an investigator. The
00:07:42 21 investigator was able to obtain information, including
00:07:46 22 finding the person we believed to be the CI. We were -- we
00:07:50 23 were not conclusively able to determine this because we can't
00:07:54 24 really do that without the Government's assurance that we
00:07:58 25 found the correct person. We were able to use the name to

00:08:01 1 then search criminal history for that person and found a
00:08:07 2 bunch of it, including history that tends to suggest that he
00:08:12 3 was, in fact, cooperating and had the benefit of a delayed
00:08:18 4 sentencing hearing in Pierce County Superior Court for months
00:08:23 5 and months and months, which oftentimes suggests that he is
00:08:27 6 continuing to cooperate for a benefit. That information is
00:08:31 7 the new information that Mr. Hernandez has now that he didn't
00:08:36 8 have before the plea.

00:08:38 9 It is correct that in the complaint affidavit, which is
00:08:44 10 different from the search warrant affidavit, it was provided
00:08:48 11 to Mr. Hernandez that the CI had a felony drug history and
00:08:55 12 that I think the phrase is "it should be assumed he is
00:09:02 13 receiving payments or benefits for his" -- yes, I want to
00:09:09 14 read it correctly, Your Honor. "For purposes of this
00:09:12 15 affidavit, it should be assumed that the CI is cooperating in
00:09:17 16 return for payment."

00:09:18 17 Those two lines in the Complaint that are contained in the
00:09:25 18 Government's response on page six; one, that the CI has
00:09:31 19 multiple felony convictions including drug trafficking and
00:09:34 20 possession crimes; and, two, for purposes of this affidavit,
00:09:39 21 it should be assumed that the CI is cooperating in return for
00:09:43 22 payment. Those two facts were never supplemented. There is
00:09:49 23 nothing else in the discovery showing a CI agreement, even
00:09:54 24 with a redacted name. I understand that sometimes the
00:09:57 25 Government wishes to continue to protect the CI's identity.

00:10:00 1 I understand there is a privilege there for informants.

00:10:04 2 However, there is no information that supplements these two

00:10:07 3 sentences in the Complaint anywhere in the discovery.

00:10:11 4 There is no information about how many convictions, how

00:10:15 5 recent the convictions were, or whether he had a pending

00:10:19 6 conviction at the time that he provided information about my

00:10:23 7 client.

00:10:24 8 There is no evidence of a CI agreement, how much the CI is

00:10:30 9 paid, when the CI is paid. And these are all -- this is all

00:10:35 10 very relevant information, in particular to Mr. Hernandez'

00:10:40 11 case where all of the information against Mr. Hernandez is

00:10:45 12 provided by the CI. The one CI. That CI's information and

00:10:52 13 cooperation provides the sole basis to search

00:10:56 14 Mr. Hernandez' -- the locations they associated with

00:11:02 15 Mr. Hernandez and his vehicles.

00:11:05 16 There wasn't a wiretap. There weren't other sources of

00:11:09 17 information. It was this one CI, which is why the

00:11:12 18 information concerning his veracity or credibility is so

00:11:17 19 crucial to Mr. Hernandez' case.

00:11:22 20 The Government has argued that the defendant never filed

00:11:27 21 any pretrial motions before he pled guilty. He never

00:11:31 22 requested some of this discovery, and that is because it was

00:11:36 23 mentioned in the Complaint that was enough for the defendant

00:11:40 24 to be fully informed and aware of the information prior to

00:11:44 25 pleading guilty.

00:11:45 1 Your Honor, I suggest that is not enough. When
00:11:52 2 Mr. Hernandez hired me, he got a fresh set of eyes on the
00:11:56 3 discovery. He got a different perspective on what things
00:12:00 4 could have or should have been done to defend him.
00:12:04 5 Unfortunately, his defense attorneys didn't push these
00:12:08 6 issues. I am not going to argue that they were ineffective,
00:12:13 7 but I am suggesting that if a defendant has all of his
00:12:17 8 information coming from his attorney and his attorney doesn't
00:12:21 9 even suggest to him that those might be possible things that
00:12:25 10 the defense could do to get into information and to go down
00:12:30 11 those paths, he is not operating with a full knowledge of
00:12:34 12 what his options are. I think that is true here.

00:12:42 13 It is true that we did seek additional information by way
00:12:47 14 of a couple of defense requests, and the Court has those
00:12:52 15 exhibits as attached to the Government's response about what
00:12:55 16 we were requesting and how the Government responded.

00:13:00 17 The Government relies on case law to argue that this is
00:13:03 18 not newly-discovered evidence that actually tends to suggest
00:13:09 19 it is. In the Government's response, it argues that
00:13:15 20 newly-discovered evidence is information that a defendant
00:13:19 21 knew about and had access to.

00:13:25 22 Your Honor, I submit to you that mentioning it in a
00:13:28 23 Complaint, two lines also in his Complaint, without ever
00:13:33 24 providing corroborating information about it, by denying
00:13:39 25 Mr. Hernandez access to it after his plea, he has not been

00:13:44 1 provided access to this information. There are still a lot
 00:13:48 2 of questions unanswered in Mr. Hernandez' mind.

00:13:52 3 These cases that all say the same thing, that the
 00:13:55 4 Government has cited, they tell the Court that it is not
 00:14:00 5 newly-discovered evidence if the defendant knew about it and
 00:14:03 6 had access to it before he made the decision to plead guilty.
 00:14:08 7 That is part of what we are frustrated with here, Your Honor,
 00:14:11 8 is we don't have access to it and we can't get access to it.
 00:14:16 9 That, in Mr. Hernandez' mind, would have made a difference in
 00:14:21 10 his decision to plead guilty. One of the cases, *Showalter*,
 00:14:27 11 states that where a defendant is aware that a witness
 00:14:29 12 potentially may testify favorably at trial, but instead
 00:14:34 13 chooses to plead guilty, he can't later characterize that
 00:14:37 14 witness' evidence as newly-discovered. That case is
 00:14:42 15 inapposite here, Your Honor.

00:14:43 16 We were never told by the Government who the CI was. We
 00:14:46 17 were never provided information about what the CI's full
 00:14:50 18 cooperation was. We were never provided with a criminal
 00:14:52 19 history of the CI, even if they wanted to redirect the names
 00:14:58 20 so it was clear to Mr. Hernandez how far back this criminal
 00:15:01 21 history went. Whether or not there were crimes of
 00:15:04 22 dishonesty, for example, we don't have any of that
 00:15:08 23 information. We still don't today. The case is not very
 00:15:12 24 helpful to this Court's analysis.

00:15:15 25 There is also this request for the DEA investigation,

00:15:22 1 Your Honor. It appears that the Government is arguing that
00:15:33 2 we can't credibly explain how records of the investigation
00:15:38 3 would have any bearing on the charges in this case. As set
00:15:44 4 out in our motion, Your Honor, if a DEA investigation has
00:15:51 5 been going on for a year and a half with no charges filed,
00:15:55 6 that is directly related to this investigation, the fact no
00:16:01 7 charges are filed, and the reasoning for why no charges are
00:16:04 8 filed are important to the defense. That would suggest they
00:16:09 9 either didn't have enough evidence or that they had
00:16:12 10 sufficient problems with bringing charges against
00:16:17 11 Mr. Hernandez.

00:16:20 12 Given the fact we have a very narrow, small investigation
00:16:23 13 reliant on one CI in order to bring these current charges
00:16:28 14 against Mr. Hernandez, the fact there was a prior
00:16:31 15 investigation that did not lead to charges, I submit is
00:16:36 16 potentially exculpatory information under Brady. Until we
00:16:41 17 know what that information is, we can't evaluate whether it
00:16:47 18 is, in fact, exculpatory or not. I submit to this Court that
00:16:52 19 it does suggest it is potentially exculpatory when a year and
00:16:57 20 a half long investigation does not result in charges in my
00:17:01 21 client's case.

00:17:03 22 Mr. Hernandez' decision to plead was based on what he knew
00:17:11 23 of at the time and what he was told by his attorney. That
00:17:15 24 information has changed. That information is now
00:17:21 25 newly-discovered evidence that weighs in Mr. Hernandez'

00:17:26 1 decision to withdraw his guilty plea. A waiver cannot be
00:17:32 2 deemed intelligent and voluntary if it is entered without
00:17:36 3 knowledge of the material information withheld by the
00:17:40 4 prosecution. That is the holding of *Sanchez vs.*
00:17:44 5 *United States*, Ninth Circuit case from 1995. We submit that
00:17:49 6 is the case here, Your Honor.

00:17:58 7 Unless the Court has any other questions for me or
00:18:00 8 Mr. Hernandez, I believe that concludes my presentation.

00:18:03 9 THE COURT: Thank you.

00:18:12 10 MR. VELAMOOR: Thank you, Your Honor. Your Honor,
00:18:16 11 the lodestar for whether a plea should be accepted, as the
00:18:22 12 Court is aware, is voluntariness. Does the defendant have
00:18:26 13 the information that he needs in order to assess the
00:18:32 14 Government's case against him as compared with the benefits
00:18:36 15 conferred by the plea agreement.

00:18:39 16 In addition to that, Your Honor, one of the things that
00:18:43 17 happens in plea colloquies at extensive length, which is set
00:18:49 18 out in plea agreements at extensive length, is, is the
00:18:52 19 defendant aware of what information he does not yet have, but
00:18:57 20 will obtain in the lead-up to trial and which he can use in
00:19:01 21 his defense at trial. One example of that is impeachment
00:19:06 22 information, which is why our plea agreements include a
00:19:09 23 sentence about how the defendant is waiving the right to
00:19:13 24 cross-examine witnesses at trial, with all of the material
00:19:16 25 that would be produced with respect to their impeachment and

00:19:21 1 to present to the jury reasons why they are not credible.
00:19:25 2
00:19:28 3 In this particular case, not only was that right discussed
00:19:33 4 in the plea agreement, but it was covered in Mr. Hernandez'
plea colloquy.

00:19:34 5 What the -- the key phrase from the argument we just heard
00:19:39 6 was "fresh set of eyes." That tells us a lot about what this
00:19:45 7 motion is all about. This motion isn't about whether
00:19:49 8 Mr. Colin Fieman, in the Federal Public Defender's Office,
00:19:54 9 had the ability to evaluate the case against Mr. Hernandez,
00:19:58 10 to consider the discovery, or even to consider the fact that
00:20:03 11 the confidential source had an extensive criminal history and
00:20:08 12 was doing work for the Government in exchange for benefits,
00:20:13 13 even though those facts had not been disclosed in the search
00:20:17 14 warrant affidavit.

00:20:17 15 All of that information was available both to Mr. Colin
00:20:21 16 Fieman and to Mr. Hernandez' prior attorney of record,
00:20:26 17 George Trejo. The question here is not whether those
00:20:31 18 attorneys has access to that information and could evaluate
00:20:34 19 it, or whether there was anything newly-discovered about it,
00:20:38 20 but, rather, whether Mr. Hernandez' new counsel, with a
00:20:42 21 quote, "fresh set of eyes," can consider a different set of
00:20:47 22 litigation outcomes that could have resulted from paths that
00:20:51 23 Mr. Fieman chose not to pursue.

00:20:54 24 There was a very good reason, Your Honor, why Mr. Fieman
00:20:58 25 did not pursue that challenge. It is that contrary to the

00:21:04 1 claims we just heard, the confidential source was not a
00:21:08 2 central piece of the search warrant affidavit. The search
00:21:11 3 warrant affidavit refers to extensive in-person law
00:21:18 4 enforcement surveillance of the defendant, watching him
00:21:21 5 engage in hand-to-hand transactions over the course of weeks
00:21:24 6 between July and August 2015. Even the confidential sources
00:21:30 7 transactions were surveilled. The confidential source was
00:21:33 8 questioned immediately after and before the transaction. He
00:21:37 9 was searched. The contraband he purchased was inventoried
00:21:42 10 right away by agents.

00:21:44 11 Again, Mr. Fieman had the ability to evaluate whether it
00:21:48 12 was worth bringing a challenge to the search warrant
00:21:51 13 affidavit simply on the basis of the fact that the
00:21:54 14 confidential source had a criminal history that wasn't
00:21:57 15 disclosed therein, and he certainly likely came to the
00:22:01 16 conclusion that any such challenge would be very unlikely to
00:22:05 17 succeed, given the fact the confidential source was not a
00:22:08 18 central part of that affidavit.

00:22:11 19 This is about a fresh set of eyes, a different way of
00:22:14 20 evaluating that litigation outcome, not chosen by Mr. Fieman.

00:22:19 21 What we just heard was that the information about the
00:22:25 22 confidential source's criminal history was disclosed. It was
00:22:30 23 disclosed at the beginning of the case in the Complaint. The
00:22:34 24 details of that criminal history, which would constitute the
00:22:38 25 sort of material the Government discloses on the eve of

00:22:41 1 trial, or in the weeks leading up to trial as impeachment
00:22:45 2 material in the event that the witness were to testify, that
00:22:49 3 is what Mr. Hernandez did not purportedly have immediate
00:22:54 4 access, although he certainly could have asked for it or
00:22:58 5 searched for it as he has done over the last few months.

00:23:02 6 Even that information, Your Honor, Mr. Hernandez was
00:23:05 7 informed at the plea colloquy and the plea agreement that he
00:23:08 8 was losing the ability to cross-examine witnesses like the
00:23:11 9 confidential source. Nor was the Government required to
00:23:15 10 disclose it under the *United States vs. Ruiz* Supreme Court
00:23:18 11 case that talks about how a defendant is not entitled to
00:23:23 12 confidential source discovery before entering into a plea.

00:23:27 13 At the bottom, the information here was clearly disclosed
00:23:36 14 well ahead of time. There is nothing newly-discovered about
00:23:39 15 it. Ninth Circuit case law is clear, and the case law in
00:23:42 16 other circuits that even if information was -- if information
00:23:48 17 was either known about or within the access of the defendant
00:23:52 18 at the time that he enters this plea, it is not newly
00:23:55 19 discovered. It does not give rise to a fair and just reason
00:23:59 20 for the defendant to withdraw his plea.

00:24:02 21 Even if this information was newly-discovered, the
00:24:07 22 defendant still can't show that a reasonable person in this
00:24:10 23 position would have foregone the considerable benefits the
00:24:18 24 plea provided. Here, counsel mentioned Mr. Hernandez would
00:24:22 25 be exposed to a 15-year mandatory minimum. That is true, and

00:24:25 1 it actually could have been enhanced to a 25-year mandatory
00:24:28 2 minimum.

00:24:29 3 The defendant was informed of all of that in the plea
00:24:32 4 agreement and the plea colloquy. That is one of the reasons
00:24:35 5 why he was advised and he chose to plead guilty at that time
00:24:38 6 while represented by Mr. Fieman.

00:24:40 7 Finally, Your Honor, with respect to the DEA report we
00:24:44 8 heard a little bit about, the Government has reviewed that
00:24:47 9 report, or the DEA investigation file. We have reviewed the
00:24:51 10 DEA investigation file. There is nothing exculpatory or
00:24:54 11 discoverable in the file, nor is it reasonable to make the
00:25:00 12 argument that unrelated investigations into a defendant that
00:25:05 13 predate the investigation at issue in a particular case, and
00:25:08 14 which did not result in the filing of charges, would somehow
00:25:12 15 be automatically discoverable or constitute the basis to
00:25:16 16 withdraw a guilty plea.

00:25:18 17 In closing, it has been nine months since the defendant
00:25:21 18 entered his plea. He had excellent representation at the
00:25:25 19 time. At the time he entered his plea, he had been in
00:25:27 20 possession of the material that he now calls newly-discovered
00:25:31 21 for almost a year. He had been in possession of discovery
00:25:37 22 for months before he was charged or brought into federal
00:25:40 23 court. In the circumstances, Your Honor, we don't think this
00:25:43 24 really comes close to meeting the fair and just reason
00:25:46 25 standard.

00:25:47 1 THE COURT: Thank you, Mr. Velamoor.

00:25:51 2 Response.

00:25:53 3 MS. GAUSE: As this Court is aware, veracity issues

00:26:04 4 with a CI or Brady issues can completely change a case.

00:26:11 5 Getting this information could have all sorts of consequences

00:26:17 6 to Mr. Hernandez' case. It can even result in dismissal in

00:26:22 7 rare circumstances. It certainly can result in more

00:26:26 8 favorable plea offers if it is disclosed. It wasn't

00:26:30 9 disclosed. I submit it should have been disclosed. It

00:26:34 10 should not have only been disclosed to defense, the fact that

00:26:37 11 the CI had a criminal history should have been disclosed to

00:26:40 12 the judge who signed the search warrant. It was completely

00:26:43 13 omitted from the affidavit. That is grounds in of itself to

00:26:50 14 raise an issue, a pretrial motion, and should have been --

00:26:55 15 the information should have been provided by the Government.

00:26:59 16 The Government can't keep treating this like a game of

00:27:02 17 chicken where they won't give impeachment material, they

00:27:07 18 won't provide material until you get to the eve of trial. It

00:27:11 19 forces defendants to forego plea options so they can get all

00:27:16 20 of the discovery associated with their case so they can be

00:27:19 21 fully informed about how to proceed. That is what is

00:27:23 22 happening commonly. That is what happened in Mr. Hernandez'

00:27:27 23 case.

00:27:27 24 There is information he should have received ahead of time

00:27:30 25 that was withheld from him, that he now knows of, that makes

00:27:35 1 a difference in his decision to plead guilty. That's what he
00:27:38 2 is telling the Court today.

00:27:40 3 It is an incorrect statement that there was much evidence
00:27:43 4 of hand-to-hand transactions with my client. That is
00:27:47 5 completely not true. All of the transactions with the CI
00:27:50 6 happened with a third person. Not with my client. That is a
00:27:55 7 misstatement of the facts. I do think it is important for
00:27:59 8 the Court to know that Mr. Fieman was only on the case for a
00:28:03 9 couple of months before he advised Mr. Hernandez to take this
00:28:08 10 plea offer, and did not request any of this information in
00:28:12 11 those two months.

00:28:14 12 The Government has said, well, what would a reasonable
00:28:17 13 person do with the information, and would that have made a
00:28:21 14 difference. Your Honor, I submit to you the person that
00:28:23 15 matters here is Mr. Hernandez. Mr. Hernandez is saying to
00:28:27 16 this Court: I now know something new. It is making a
00:28:31 17 difference for me. I want to withdraw my plea.

00:28:34 18 We are asking the Court to allow him to do so.

00:28:40 19 MR. VELAMOOR: May I speak on one issue?

00:28:44 20 Your Honor, with respect to the question of whether the
00:28:48 21 Government should disclose every detail, or the vast majority
00:28:53 22 of details about a confidential source well before trial,
00:28:57 23 even before that source has been identified as a witness, the
00:29:00 24 Government has litigated that issue at all levels of our
00:29:04 25 court system, all the way up to the Supreme Court. It is

00:29:08 1 definitively decided, and this case is a reason why the
00:29:12 2 Government -- courts have concluded that the Government
00:29:15 3 doesn't need to disclose the entirety of a confidential
00:29:18 4 source file before a defendant enters into a plea. We don't
00:29:23 5 want to end up with situations where the defendant that can
00:29:26 6 do his own investigation, or wait until trial in order to
00:29:29 7 obtain the information, is asking for that sort of
00:29:32 8 information well in advance of trial.

00:29:38 9 THE COURT: You have the right to close the debate.

00:29:45 10 MS. GAUSE: I have nothing further.

00:29:47 11 THE COURT: Although this is not couched in terms of
00:29:53 12 ineffective assistance, it really is an argument that
00:30:03 13 Mr. Fieman should have requested this information that
00:30:11 14 Ms. Gause speaks to before counseling the defendant to enter
00:30:20 15 into the plea agreement.

00:30:27 16 What Mr. Fieman did at that time is within the -- within
00:30:37 17 effective assistance of counsel. Plea agreements inherently
00:30:48 18 waive a whole lot of things. They waive the opportunity to
00:30:58 19 get more information than what the defendant has at the time
00:31:05 20 of the plea. Confidential informants, you know, it would be
00:31:14 21 easier on us if the Government would open their files. I
00:31:21 22 think judges everywhere think that would be the best plan is
00:31:25 23 if the Government opened their files, and then we wouldn't
00:31:31 24 have these discovery issues.

00:31:34 25 Confidential informants need to be protected. There is a

00:31:38 1 lot of law in that. It is appropriate for them to hold back
00:31:42 2 some information in order to protect confidential informants.

00:31:52 3 It was no secret this confidential informant had a
00:31:56 4 history, but at the time of the plea, the deal was that there
00:32:04 5 was not going to be further investigation into the nature of
00:32:08 6 that confidential informant or his or her criminal history.
00:32:18 7 I just think that is not the kind of new information that
00:32:23 8 would justify withdrawing the plea.

00:32:28 9 The same thing is true with regard to earlier
00:32:33 10 investigation information. I note in the plea agreement that
00:32:38 11 there is reference to, I think, ten previous investigations
00:32:48 12 and arrests that did not result in convictions. At what
00:32:56 13 point does the Government have to disclose all that
00:33:04 14 information? Where would it end if the Government had to
00:33:10 15 disclose information about prior investigations? That just
00:33:19 16 doesn't make a lot of sense to me.

00:33:23 17 I think the defendant, in these circumstances, at this
00:33:27 18 late date, has given up, by his plea agreement, the right to
00:33:36 19 the Government's information about other earlier
00:33:39 20 investigations, and I think it is not discoverable in any
00:33:48 21 event because it is not clearly relevant to the issues at
00:33:57 22 hand.

00:34:00 23 I think this is a situation where lawyers differ.
00:34:05 24 Ms. Gause comes in, has a different view than Mr. Fieman did.
00:34:16 25 While both views are reasonable, her fresh eyes don't get to

00:34:23 1 cancel decisions made by other lawyers, or by the defendant,
00:34:31 2 who I think was fully advised and fully involved in the plea
00:34:44 3 negotiations and in the entry of the plea and the plea
00:34:48 4 colloquy.

00:34:49 5 The motion to withdraw the guilty plea is denied.

00:35:00 6 Let's turn our attention to sentencing. In preparation
00:35:08 7 for this sentencing proceeding, I have received and read the
00:35:16 8 presentence report and sentencing recommendation. I have
00:35:22 9 received and read the Government's memorandum and the
00:35:26 10 defendant's memorandum. I have received a number of letters
00:35:30 11 of support filed by Ms. Gause. I have read all of those.

00:35:47 12 The probation office has determined that the base offense
00:35:53 13 level here is 34. They add 2 for drug premises, and deducted
00:36:08 14 3 for acceptance of responsibility, netting a 33 offense
00:36:14 15 level.

00:36:15 16 The defense believes that there should not be a premises
00:36:19 17 liability or premises addition, and therefore comes up with a
00:36:27 18 base offense level of 34 with minus 3 for acceptance, and a
00:36:33 19 31 point offense level.

00:36:44 20 Mr. Hernandez' criminal history amounts to -- he has 21,
00:36:51 21 equals a level 6. That results, under the probation office's
00:37:02 22 workup, to a 235 to 293 month range. Under the defendant's
00:37:14 23 workup, it amounts to a 188 to 235 month offense level.

00:37:25 24 I guess the only issue is the premises addition. Do you
00:37:33 25 want to be heard on that?