

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

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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON AT SEATTLE
5

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

12 VERBATIM REPORT OF PROCEEDINGS
13 BEFORE THE HONORABLE ROBERT J. BRYAN
14 UNITED STATES DISTRICT JUDGE
15

16 APPEARANCES:
17
18

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MORNING SESSION
OCTOBER 20, 2017

THE COURT: This is 16-5358, United States versus George Hernandez. We set this morning for sentencing.

Before we can deal with that, we must deal with a question raised by the defendant's motion to withdraw his guilty plea. The defendant is present in court with his attorney, Ms. Gause. Mr. Dion is here for the Government.

MR. DION: And Mr. Velamoor.

THE COURT: Yes, Mr. Velamoor.

Let's first turn our attention to the motion to withdraw the guilty plea. I have read the motion and the supporting papers, and the opposition and the exhibits attached to the opposition.

Ms. Gause.

MS. GAUSE: Good morning, Your Honor. Mr. Hernandez does wish to withdraw his plea of guilty.

THE COURT: Wait a minute. Wait a minute. I am not hearing you very well.

MS. GAUSE: Is this better, Your Honor?

Mr. Hernandez does wish to withdraw his plea of guilty this morning. He wishes to do so after carefully considering all of the risks, including the fact that he is facing a potential 15 year mandatory minimum if he is successful in 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.

1 I understand there is a privilege there for informants.

2 However, there is no information that supplements these two
3 sentences in the Complaint anywhere in the discovery.

4 There is no information about how many convictions, how
5 recent the convictions were, or whether he had a pending
6 conviction at the time that he provided information about my
7 client.

8 There is no evidence of a CI agreement, how much the CI is
9 paid, when the CI is paid. And these are all -- this is all
10 very relevant information, in particular to Mr. Hernandez'
11 case where all of the information against Mr. Hernandez is
12 provided by the CI. The one CI. That CI's information and
13 cooperation provides the sole basis to search
14 Mr. Hernandez' -- the locations they associated with
15 Mr. Hernandez and his vehicles.

16 There wasn't a wiretap. There weren't other sources of
17 information. It was this one CI, which is why the
18 information concerning his veracity or credibility is so
19 crucial to Mr. Hernandez' case.

20 The Government has argued that the defendant never filed
21 any pretrial motions before he pled guilty. He never
22 requested some of this discovery, and that is because it was
23 mentioned in the Complaint that was enough for the defendant
24 to be fully informed and aware of the information prior to
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 In this particular case, not only was that right discussed
00:19:28 3 in the plea agreement, but it was covered in Mr. Hernandez'
00:19:33 4 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

claims we just heard, the confidential source was not a central piece of the search warrant affidavit. The search warrant affidavit refers to extensive in-person law enforcement surveillance of the defendant, watching him engage in hand-to-hand transactions over the course of weeks between July and August 2015. Even the confidential sources transactions were surveilled. The confidential source was questioned immediately after and before the transaction. He was searched. The contraband he purchased was inventoried right away by agents.

Again, Mr. Fieman had the ability to evaluate whether it was worth bringing a challenge to the search warrant affidavit simply on the basis of the fact that the confidential source had a criminal history that wasn't disclosed therein, and he certainly likely came to the conclusion that any such challenge would be very unlikely to succeed, given the fact the confidential source was not a central part of that affidavit.

This is about a fresh set of eyes, a different way of evaluating that litigation outcome, not chosen by Mr. Fieman.

What we just heard was that the information about the confidential source's criminal history was disclosed. It was disclosed at the beginning of the case in the Complaint. The details of that criminal history, which would constitute the 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

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

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

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

18 We are asking the Court to allow him to do so.

19 MR. VELAM00R: May I speak on one issue?

20 Your Honor, with respect to the question of whether the
21 Government should disclose every detail, or the vast majority
22 of details about a confidential source well before trial,
23 even before that source has been identified as a witness, the
24 Government has litigated that issue at all levels of our
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

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

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

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

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

23 I think this is a situation where lawyers differ.
24 Ms. Gause comes in, has a different view than Mr. Fieman did.
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?