A P P E N D I X 6

Opening Brief Portion

I. ISSUE PRESENTED

Did Mr. Hernandez give a "fair and just reason" to withdraw his guilty plea, where he was not advised about steps to obtain discovery about the confidential informant to support an attack on the search warrants that yielded the evidence against him?

II. STATEMENT OF THE CASE

A. Jurisdiction, Timeliness, and Bail Status

George Hernandez appeals his convictions and sentence after his guilty pleas to two counts of an indictment. The district court sentenced him on October 20, 2017, and he filed a notice of appeal on October 27, 2017. (ER 3-5, 1) The district court had jurisdiction under 18 U.S.C. §3231, and this Court has jurisdiction under 28 U.S.C. §1291. Mr. Hernandez is in custody serving an 11-year sentence, with an anticipated Bureau of Prisons release date of July 2, 2026.

B. Nature of the Case, Course of Proceedings, and Disposition Below

Mr. Hernandez appeals the denial of his motion to withdraw his guilty plea. He was indicted on the following charges: in Counts 1 and 3, two mandatory-minimum-sentence controlled substance offenses under 21 U.S.C. §841(a)(1), (b)(1)(A)-(B); in Counts 2, 4, 7, and 8, four counts of being a felon in possession of a firearm under 18 U.S.C. §922(g)(1); in Counts 5 and 6, two counts of possessing a firearm in furtherance of a federally-prosecutable controlled substance offense under 18 U.S.C. §924(c)(1); in Counts 9 and 10, two non-mandatory-minimum-sentence controlled substance offenses under 21 U.S.C. §841(a)(1), (b)(1)(C); and a forfeiture count under 21 U.S.C. §953. (ER 86-93)

On January 10, 2017, Mr. Hernandez pleaded guilty in a written agreement to Count 1, stipulating that he possessed with intent to distribute more than 50 grams of

methamphetamine, and Count 6, possession of a firearm in furtherance of drug trafficking. (ER 69-72) *See* 21 U.S.C. §841(a)(1), (b)(1)(A)-(B), 18 U.S.C. §924(c)(1). In April new counsel moved to substitute into the case, which the district court granted on April 27. (CR 43; ER 48) On October 6, 2017, counsel moved to withdraw Mr. Hernandez' plea. (ER 43-47) On October 17, 2017, the district court denied the motion and imposed on Mr. Hernandez a sentence of six years on Count 1 and five years on Count 5, running consecutively, for a total of 11 years. (ER 28-33) On October 27, 2017, Mr. Hernandez filed a notice of appeal. (ER 1)

III. STATEMENT OF FACTS

According to a Tacoma police officer assigned to a Drug Enforcement Administration ("DEA") task force, in March 2014 a confidential informant ("CI") told law enforcement that someone named George was offering to sell him or her drugs. More than a year later in July 2015, having helped the police identify Mr. Hernandez as "George," the informant helped investigate him. (ER 96-97) On July 13 and August 6, law enforcement surveilled the CI as he made two drug purchases. In the first, the CI made contact with another person to facilitate the buy, but only the CI could claim Mr. Hernandez actually sold the drugs. The police, who watched Mr. Hernandez, knew he had left his own apartment, and made a stop, but they later saw only his car at the location. The CI actually exchanged money for drugs with the third person. (ER 97-98) In the August transaction, the police saw the third person and Mr. Hernandez meet before the CI again traded money for drugs with that person. (ER 99)

Also in July, law enforcement saw a man visit Mr. Hernandez' address, leave, and then stop at several banks; they believed the man had delivered drugs to Mr.

Hernandez and picked up money, which he then took to the banks. That month law enforcement saw Mr. Hernandez interact with others in a way suggestive of his carrying out hand-to-hand drug deals, and saw one instance of him seeming to drive his car so as to avoid being followed. However, the complaint mentioned no drugs or money seized in any of these "suspected" transactions. (ER 98-99)

After the August CI-courier meeting, law enforcement obtained search warrants for addresses and vehicles connected to Mr. Hernandez. On August 11, 2015 they executed the warrants, arrested him, seized drugs, money, and firearms in the searches, and obtained an inculpating statement from him. Mr. Hernandez was then charged with drug offenses in state court. (PSR ¶62) While the case was pending there, he was charged in another matter. (PSR ¶46) Within a month later, on the same date in November 2015, the state drug charges were dismissed and the complaint in this matter was filed, charging offenses based on the search warrant evidence. (PSR ¶64; ER 95-101)

Mr. Hernandez was represented by his retained counsel, Trejo, for a year after the federal complaint was filed. (ER 44) In November 2016, he asked the district court to relieve his retained counsel and for appointed counsel, and the court appointed counsel from the Federal Public Defender's office. (ER 82-84) In January 2017, Mr. Hernandez signed a written agreement agreeing to plead guilty to Count 1, stipulating to possession of over 50 grams of methamphetamine with intent to distribute, and Count 6, possession of a firearm in furtherance of a drug trafficking offense, under 21 U.S.C. §841(a)(1) and 18 U.S.C. §924(c)(1) respectively. (ER 66-67, 69-79) The agreement contained a joint sentencing recommendation of 132 months, or 11 years, (ER 75) consistent with a six-year term on the drug count and a consecutive five years on the firearm count. Mr. Hernandez agreed that his guilty plea waived "all rights to appeal his conviction and any pretrial rulings of the court."

He also agreed to waive the right "to challenge, on direct appeal, the sentence imposed" if "the court impose[d] a custodial sentence…within or below the Sentencing Guidelines range (or the statutory mandatory minimum, if greater…)." (ER 77)

In April 2017, about three months after the guilty plea, Mr. Hernandez retained new counsel, Gause, whose motion to substitute in was granted by the district court. (ER 48) In September 2017, about five months after Gause entered the case, she wrote the government to request additional discovery on (1) "the full Drug Enforcement Administration investigation into Mr. Hernandez in early 2014; (2) " GPS tracking information; (3) a broad range of witness criminal history and impeachment material, including those of the CI; and (4) officer-witness notes. (ER 39-42) The government declined, saying the 2014 investigation reports were not properly subject to disclosure; no GPS tracking information existed, having been overwritten; and the witness impeachment and officer notes were only relevant to a trial, which – because of the guilty plea – would not be held. (ER 37-38)

The defense then moved to withdraw Mr. Hernandez' guilty plea. Its motion asserted that neither of Mr. Hernandez' first two attorneys "attempt[ed] to research or discovery [sic] who the confidential informant was," while Mr. Hernandez' appointed attorney "did not seek to confirm the informant's identity." (ER 44) It cited information unknown to Mr. Hernandez when he pleaded guilty – "publicly accessible information" about the "suspected informant" that gave "indicators that he was cooperating as an informant from 2009 to 2011 and beyond." (ER 44-45)

At the motion hearing, Gause focused on a possible attack on the search warrant: "but for the search warrant affidavit we don't have a search, but for the search, we don't have an indictment against Mr. Hernandez." (ER 13) She reiterated that "[w]e were never told by the Government who the CI was." She read

from the federal complaint, which said only that it should be "assumed" that the CI was working for "payment" and that he (or she) had "multiple felony convictions, including drug trafficking and possession crimes." (ER 14) She contended the motion to withdraw should be granted because Mr. Hernandez received "no information that supplement[ed]" these minimal facts about the CI in the complaint, though she did not argue ineffectiveness of either of her predecessors. (ER 15-16) "[I]f a defendant has all of his information coming from his attorney and his attorney doesn't even suggest to him that those might be possible things that the defense could do to get into information and to go down those paths, he is not operating with a full knowledge of what his options are." (ER 16)

Gause noted that her own efforts had unearthed new evidence unknown to Mr. Hernandez when he pleaded guilty: "a bunch of" criminal history for the suspected but not-confirmed CI, including a case with a lengthy delay in a sentencing proceeding, "which oftentimes suggests" cooperation. (ER 14) She ultimately contended that without knowing who the CI was, and without proper investigation of his or her background, Mr. Hernandez' guilty plea was not knowing and intelligent. (ER 19) Counsel also argued both in her motion and at the hearing that the information from the investigation occurring in 2014, during which no charges were filed against Mr. Hernandez, was producible under *Brady v. Maryland*, 373 U.S. 83 (1963), and had been wrongfully withheld. (ER 46-47, 18)

The district court orally ruled, despite counsel's saying she was not raising the issue, that appointed counsel had provided "effective assistance of counsel" in representing Mr. Hernandez in the guilty plea. It reasoned:

> Plea agreements inherently waive a whole lot of things. They waive the opportunity to get more information than what the defendant has at the time of the plea.
> …

> It was no secret this confidential informant had a history, but at the time of the plea, the deal was that there was not going to be further investigation into the nature of that confidential informant or his or her criminal history. I just think that is not the kind of new information that would justify withdrawing the plea.
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> The same thing is true with regard to earlier investigation information.…Where would it end if the Government had to disclose information about prior investigations? That just doesn't make a lot of sense to me. …I think the defendant, in these circumstances, at this late date, has given up, by his plea agreement, the right to the Government's information about other earlier investigations, and I think it is not discoverable in any event because it is not clearly relevant to the issues at hand.
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> I think this is a situation where lawyers differ. [New counsel] Ms. Gause comes in, has a different view than [appointed counsel] Mr. Fieman did. While both views are reasonable, her fresh eyes don't get to cancel decisions made by other lawyers, or by the defendant, who I think was fully advised and fully involved in the plea negotiations and in the entry of the plea and the plea colloquy.
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> The motion to withdraw the guilty plea is denied.

(ER 26-28) The district court then sentenced Mr. Hernandez in accordance with the plea agreement. (ER 32-33) He appealed. (ER 1-2)

IV. ARGUMENT

BECAUSE MR. HENANDEZ DID NOT GET CORRECT, ADEQUATE ADVICE ABOUT CHALLENGING THE SEARCH WARRANT BY SEEKING MATERIAL INFORMATION ABOUT THE CI THAT MAY HAVE BEEN OMITTED FROM THE AFFIDAVIT, THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION TO WITHDRAW HIS GUILTY PLEA.

A. Reviewability and standard of review

Mr. Hernandez moved to withdraw his plea before sentencing, asserting a "fair and just reason," as required by Fed R. Crim. Pro. 11(d)(2)(B). (ER 43-44) This Court reviews the denial of such a motion for abuse of discretion, and any underlying findings of fact for clear error. *United States v. McTiernan*, 546 F.3d 110, 1166 (9th Cir. 2008).

The determination of whether evidence must be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963), and its non-production invalidates a guilty plea, warranting the grant of a motion to withdraw it, is reviewed *de novo*. *United States v. Nagra*, 147 F.3d 875, 881 (9th Cir. 1998).

B. Mr. Hernandez proffered a fair and just reason for withdrawing his guilty plea based on his not having been advised about investigation that may have supported a motion to confirm the CI's identity, to support a motion to suppress the evidence seized under the search warrants.

The proper inquiry on a pre-sentence motion to withdraw a guilty plea, even if the plea is otherwise valid under Fed. R. Crim. Proc. 11, is whether the defendant meets his burden of showing a "fair and just reason" for withdrawal. "[E]ach case must be reviewed in the context in which the motion arose" in applying the standard, which is generous and must be applied liberally. *McTiernan, supra*, 546 F.3d at

1167, *citing United States v. Davis*, 428 F.3d 802, 806 (9th Cir. 2005). Here, the district court abused its discretion when it denied the motion to withdraw because the record showed Mr. Hernandez was not, in fact, "fully advised and fully involved in the plea negotiations," and the circumstances involved more than a difference of opinion among lawyers. The ground for the motion was a "reason for withdrawing the plea that did not exist when [he] entered his plea," *Davis*, *supra*, 428 F.3d. at 805 – advice Mr. Hernandez asserted he should have gotten, but did not.

In context, this case is like *McTiernan*, where this Court reversed the denial of a motion to withdraw a guilty plea, also made before sentencing. There, the primary evidence came from a wiretap, the suppression of which would have been crucial to the defense, and such a motion may have lain under laws prohibiting wiretaps conducted for illegal purposes. *McTiernan*, *supra*, 546 F.3d at 1167-1168. In this case, the evidence against Mr. Hernandez came from a search warrant which, Mr. Hernandez' counsel contended, "relied entirely on this informant's information and participation to support probable cause[;]" the CI was "a critical part of the government's case." (ER 45) She was right. The record shows there was no evidence, independent of the word of the CI, that Mr. Hernandez – rather than the person with whom the CI ultimately met – was behind the drug transactions that the police witnessed. The police apparently did not audio- or video-record the buys. They apparently never seized contraband from Mr. Hernandez when they saw him interacting with others in a way they thought suggested drug sales. They reported him driving in a way they considered suspicious just once.

For Mr. Hernandez, then, adequate advice was needed on the filing of a motion to disclose the CI's identity and background, to provide grounds for a motion to suppress the fruits of the search warrant. He recognizes that the Supreme Court has held that a guilty plea may be voluntary and intelligent without disclosures of

impeachment evidence, but it was not his object to get impeachment and evaluate it to decide whether to go to trial. Instead, because evidence that the CI was hoping for help from the government in a pending case was not in the search warrant affidavit, its omission could have supported an attack on the affidavit under *Franks v. Delaware*, 438 U.S. 154 (1978). A sufficient showing of such an omission would have overcome the high hurdle of the good-faith exception and supported suppression of the evidence seized under the warrant. *United States v. Leon*, 468 U.S. 897, 923 (1984).

First, if the search warrant affiant knew the CI was hoping for favorable treatment in a pending case, but left it out of the search warrant affidavit, that omission could well have been reckless. This Court does not require "clear proof," only "substantial evidence," of recklessness at the motions stage. *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1111 (9th Cir. 2005), *as amended*, 437 F.3d 854 (9th Cir. 2006). In *Gonzalez*, this Court affirmed a district court finding that an affiant with such a "key role" recklessly included false information about the necessity for a wiretap was recklessly included in the application. *Id*. The analysis in this case would be the same as to an omission about the CI's hope for favorable treatment in a pending case and his enhanced motive to fabricate. Based on the federal complaint, it appears that Tacoma police assigned to the DEA task force handled the CI, and the search warrant itself was obtained in state court. Here, Tacoma officers who would have been part of getting the state court search warrant stood in the place of the agents in *Gonzalez*. Given their "key role" in the investigation, the district court could well have "conclude[d] that [they] knew or should have known" about any pending matter in which the CI hoped for government assistance in disposition. *Id.*

Secondly, such an omission would also have been material. It was the CI who identified Mr. Hernandez, and it was the CI who said – even though Mr.

Hernandez was not actually present at the drug-money exchanges described in the affidavit – that he was the drug source. Materiality could have been found in an omission about the CI's motive to fabricate because there was no "substantial evidence supporting… probable cause independent of the information provided by [this] informant [to] compensate for his "low credibility." *See United States v. Bennett*, 219 F.3d 1117, 1125 (9th Cir. 2000). In *Bennett* there was evidence of probable cause separate from the CI's information, since agents recorded audio and visual surveillance, and the CI wore a body wire, all of which "independently verified" the defendant's involvement in drug transactions. *Id.* There was no comparable evidence here.

To establish a fair and just reason for withdrawal, Mr. Hernandez did not have to assert innocence, claim that his guilty plea was invalid under Rule 11, or even assert with certainty that he would not have pleaded guilty. *United States v. Garcia*, 401 F.3d 1008, 1011-1012 (9th Cir. 2005). He had only to show that "proper advice 'could have at least plausibly motivated a reasonable person in [his] position not to have pled guilty had he known about'" the possibility of filing a motion to confirm the CI's identity, and how it could have supported a suppression motion attacking the warrants. *McTiernan, supra*, 546 F.3d at 1168, *quoting Garcia, supra*. His circumstances meet this standard. He presented evidence supportive of a motion to confirm the CI's identity and to get evidence that the CI hoped for police favors beyond the monetary payment mentioned in the affidavit, evidence he said neither of his earlier counsel conveyed to him before he pleaded guilty: specifically, new counsel Gause unearthed not merely details of the suspected CI's prior criminal history, but evidence of extensive continuances in one case, an indicator that the CI may have been hoping for favorable treatment in a pending case – all unmentioned in the affidavit. The government would have had

to confirm the CI's identity and whether, if the person Gause found was in fact the CI, he was expecting more than just a financial benefit from his cooperation. Mr. Hernandez' motion to withdraw simply contended that neither of his earlier counsel got this information or, if they did, neither conveyed it to him; so he could not make an intelligent decision on whether to file the motion or plead guilty. This was enough.

Nor did Mr. Hernandez allege that he would have prevailed on a discovery motion and any follow-up suppression motions, but he did not have to. His claim of having received erroneous or inadequate legal advice constituted a fair and just reason for a pre-sentence plea withdrawal without a showing of prejudice. *See McTiernan*, *supra*, 546 F.3d at 1167, *citing Davis*, *supra*, 428 F.3d at 806. He sufficiently and plausibly contended that advice about evidence of possible falsity in the warrant affidavit, and how it could have supported discovery and suppression motions, might have affected his plea decision under a reasonable-person standard. *Franks* refused to prohibit *all* questioning of the veracity of a search warrant affiant. The value of a search warrant affidavit in establishing probable cause "would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." *Franks*, *supra*, 468 U.S. at 168. That Mr. Hernandez alleged he was not fully and adequately advised about a challenge to the search warrant on this ground is surely a "fair and just reason" for granting his motion to withdraw.

Ultimately, the claim for withdrawal Mr. Hernandez makes is at least as strong as that shown by the defendant in *McTiernan.* Indeed, the circumstances here are very similar. In *McTiernan* the defendant's lawyer told him "there was no basis" for a motion to suppress the wiretaps, but the record did not show this advice

to have been supported by any investigation to warrant this conclusion. *McTiernan*, *supra*, 546 F.3d at 1167-1168. The lack of evidence to this effect prompted this Court to remand for a full hearing to determine if a "fair and just reason" for withdrawal of the plea existed there. *Id.* The record here is similarly bare of evidence demonstrating that Mr. Hernandez received correct, adequate advice about challenging the search warrant and the evidence seized under it. This Court should, similarly, remand for a full evidentiary hearing on this question. If Mr. Hernandez can establish that his earlier attorneys also omitted to investigate, or advise him that information about the CI was omitted from the warrant affidavit, his motion to withdraw should be granted.

C. Mr. Hernandez proffered a fair and just reason for withdrawing his plea based on the non-production of documents explaining why he was not prosecuted for over one year after an early-2014 investigation following the CI's report of contact with him.

Mr. Hernandez contended that nondisclosure of evidence about why a 2014 investigation of him yielded no charges, after the CI drew law enforcement attention to him, was a fair and just reason for granting his motion to withdraw. He contended that the evidence should have been disclosed before his plea under Fed. R. Crim. Pro. 16(a)(1)(E)(i), which requires production of items "material to preparing the defense." Importantly here, this Court has held that a government's disclosure obligation under Rule 16 includes "discovery related to the constitutionality of a search or seizure." *United States v. Soto-Zuniga*, 837 F.3d 992, 1000-1001 (9th Cir. 2016).

The district court was incorrect when it concluded that the unusually long delay in the investigation of Mr. Hernandez was "not clearly relevant to the issues at hand." (ER 27) To be material under Rule 16, discovery documents do not

themselves have to be exculpatory. They may be material if there is a strong indication that they will have an important role in uncovering admissible evidence, *Soto-Zuniga*, *supra*, 837 F.3d at 768, or help a defendant narrow his defenses, *United States v. Hernandez-Meza*, 730 F.3d 760, 768 (9th Cir. 2013). The evidence Mr. Hernandez sought met this standard for disclosure under Rule 16. His reasons for seeking it was not to bolster a trial claim for impeachment, or to help him evaluate the strength of the government's case at trial. This distinguishes his case from *United States v. Ruiz*, 536 U.S. 622, 629-630 (2002) (holding that non-production of impeachment evidence is not a fair and just reason permitting withdrawal of a guilty plea).

Rather, Mr. Hernandez' case is distinguishable because he would have used the disclosed evidence to support a possible dispositive, pretrial motion to suppress evidence seized pursuant to search warrants that relied on the CI for probable cause. The reasons for the delay in prosecuting Mr. Hernandez during 2014, even after the CI told the police about "George," bore on whether the police used this period to facilitate the CI's cooperation through promises of leniency. That evidence may have helped to uncover information that should have been included in the affidavit but was not, and to determine whether law enforcement knew that information. All of this would have mattered to the materiality of any *Franks* omission in the affidavit that would have supported a motion to suppress. The lack of disclosure violated *Brady* and provided an additional fair and just reason that Mr. Hernandez should have been permitted to withdraw his guilty plea.