

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

TRENARD CALDWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a defendant pled guilty to a violation of 18 U.S.C. §922(g) prior to Rehaif v. United States, 139 S.Ct. 2191 (2029), and it is undisputed that the plea was neither knowing nor voluntary because he was not told that knowledge-of-status is a crucial element of the offense, is such a plea entered in clear violation of the Due Process Clause reversible error *per se*, or must a defendant prove that he would not have pled had he been advised of the knowledge-of-status element?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Trenard Caldwell respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's decision *United States v. Caldwell* (11th Cir. Feb. 26, 2020), affirming Mr. Caldwell's conviction under 18 U.S.C. §922(g) is included in the Appendix at A-1.

The Eleventh Circuit's order in *United States v. Caldwell* (11th Cir. May 6, 2020), denying a panel rehearing is included in the Appendix at A-2.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Mr. Caldwell's conviction and sentence was entered on February 26, 2020. And the decision denying a panel rehearing was entered on May 6, 2020. This petition is timely filed pursuant to Supreme Court Rules and the additional period of time for filing a petition for writ of certiorari authorized as a result of the COVID-19 Pandemic per this Court's Order of March 19, 2020. (**ORDER LIST: 589 U.S.**)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amendment V:

No person shall be held to answer for a ...crime, unless on a presentment or indictment of a Grand Jury ...nor be deprived of life, liberty, or property, without due process of law...

U.S. Const. VI:

In all criminal prosecutions, the accused shall enjoy the right to a ...trial, by an impartial jury ...and to be informed of the nature and cause of the accusation...

18 U.S.C. § 922(g):

It shall be unlawful for any person –

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; ...

to ... possess in or affecting commerce, any firearm or ammunition ...

18 U.S.C. § 924. Penalties:

(a)(2) Whoever knowingly violates subsection ...**(g)** ...of section 922 shall be fined as . provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

Procedural History, Charges and Plea

On May 4, 2018, Mr. Caldwell was arrested on a Criminal Complaint and charged with Possession of a Firearm by a Convicted Felon; Identify Theft; and Possession of a Controlled Substance. On that same day, the Federal Public Defender was appointed to represent Mr. Caldwell.

On May 15, 2018 a federal grand jury returned a three (3) count Indictment against Mr. Caldwell. Count one (1) charged that from on or about October 24, 2016, through on or about May 4, 2018, in Broward County, in the Southern District of Florida, Mr. Caldwell, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did *knowingly possess a firearm and ammunition* in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1). (Emphasis added). Count two (2) charged him with Possession of Unauthorized Access Devices; and Count three (3) charged him with Aggravated Identity.

On May 18, 2018, Mr. Caldwell was arraigned and the Duty Magistrate entered a Paperless Standing Discovery Order.

On May 25, 2018, the District Court filed a Notice of Trial, setting Mr. Caldwell's trial for June 25, 2018; with Calendar Call on June 19, 2018.

On May 29, 2018, Attorney Scott David Rubinchik filed a Notice of Appearance for Mr. Caldwell.

On May 29, 2018, the Public Defender filed a Motion for Termination of Appointment; and that same day the District Court entered an Order granting the Motion for Termination of Appointment.

On June 1, 2018, the government filed its 1st Response to the Standing Discovery Order.

On June 8, 2018, Attorney Rubinchik filed a Motion to Continue Trial. That same day, the District Court entered an Order Denying without Prejudice the Motion to Continue Trial.

On June 12, 2018, a federal grand jury returned a five (5) count Superseding Indictment in the case. Count one (1) charged that from on or about October 24, 2016, through on or about May 4, 2018, in Broward County, in the Southern District of Florida, Mr. Caldwell, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did *knowingly possess a firearm and ammunition* in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1). (Emphasis added). Count two (2) charged him with Possession of Unauthorized Access Devices; Count three (3) charged him with Aggravated Identity Theft; Count four (4) charged him with Possession of a Controlled Substance with Intent to Distribute; and Count five (5) charged him with Possession of Unauthorized Access Device.

In Count one (1) of the Superseding Indictment, the grand jury notably did *not* charge that Mr. Caldwell *knew* that he had been previously convicted of a crime punishable by imprisonment for a term exceeding one year at the time of the firearm and ammunition possession.

On June 19, 2018, at Calendar Call, the District Court reset trial in the case for August 27, 2018, with Calendar Call reset for August 24, 2018.

On July 18, 2018, Attorney Richard Merlino filed a Stipulation for Substitution of Counsel. On that same date the District Court entered an Order granting the Substitution of Counsel, stating in said Order that “Said motion is Granted under the assumption that counsel will be ready to dispose of this case by plea or trial on August 27, 2018”.

On August 1, 2018, the government filed its 2nd Response to the Standing Discovery Order.

On August 8, 2018, Attorney Merlino filed a Motion to Continue Trial. In the Motion, Attorney Merlino stated that on August 3, 2018, he picked up the discovery which is voluminous and contained in a two (2) terabyte hard drive. Mr. Merlino further stated that the Court's indication that upon his substitution it was assumed that counsel would be ready for the final disposition of this matter, by plea or trial on August 27, 2018, was made prior to the filing of the voluminous supplemental discovery in this case; and that he needed approximately sixty (60) days in order to be ready for final disposition of this matter by plea or trial; and that proceeding within the current time requirements would deny counsel for the defendant the time reasonably necessary for effective preparation ...that counsel could not assess the need for pretrial motions without total review of the discovery, which is extensive and voluminous and cannot be done prior to the current Calendar Call of August 24, 2018 ...that Only after a thorough evaluation of all evidence and completion of any investigation can counsel fully advise his client as to his rights, options, and potential strategies.

That same day, August 8, 2018, the District Court denied the Motion to Continue Trial.

On August 17, 2018, the government filed a 3rd Response to the Standing Discovery Order.

On August 23, 2018, Mr. Caldwell, without the benefit of a written plea agreement or any concessions by the government, pled guilty to all five (5) Counts in the Superseding Indictment, as charged. At the plea colloquy, the District Court did *not* inform Mr. Caldwell that his conduct was not criminal unless he *knew* at the time of his firearm and ammunition possession that he had previously been convicted of a crime punishable by imprisonment for a term exceeding one

year, and that the government would have the burden of proving such knowledge if he exercised his right to go to trial.

On September 5, 2018, Mr. Caldwell filed a *Pro Se* Motion to Withdraw Guilty Plea; and to Withdraw counsel Richard A. Merlino.

On September 14, 2018, the District Court granted Motion to Dismiss Counsel; but denied, without prejudice, Caldwell's Motion to Withdraw Plea of Guilty. At that time, the District Court appointed the Office of the Federal Public Defender to represent Mr. Caldwell.

On September 28, 2018, the Federal Public Defender filed a Motion to Withdraw as Attorney for Mr. Caldwell due to a Conflict of Interest.

On October 5, 2018, the District Court granted the Public Defender Office Motion to Withdraw as attorney; and that same day the District Court appointed undersigned counsel to represent Mr. Caldwell.

On October 26, 2018, an Amended Motion to Withdraw Guilty Plea was filed by undersigned counsel on behalf of Appellant Caldwell, alleging that: a) close assistance of counsel was not available and b) that the plea was not knowing and voluntary; and included Mr. Caldwell assertions that he was not guilty of the charges. Attached to the Amended Motion to Withdraw Plea were two (2) affidavits of the two (2) adult males who owned the firearms found in the residence wherein Mr. Caldwell was arrested and which were also depicted in photographs and/or videos contained in the government's 2nd Response to the Standing Discovery Order contained in the 2 terabyte hard drive provided in the case; and these individuals attested that Mr. Caldwell never possessed or touched either of the firearms referenced above.

On November 2, 2018, an Evidentiary Hearing was held by the District Court, wherein both Mr. Caldwell and his prior counsel testified.

During his testimony, Mr. Caldwell professed his innocence to the firearm charge and asked the Judge to allow him the opportunity to withdraw his plea so that he could prove his innocence (Evid.Hearing: Pgs. 9-10); and is begging the Judge to allow him to take the plea back, so that he can show his innocence. (Evid.Hearing: Pgs.15-16).

On November 5, 2018, the District Court entered an Order Denying Motion to Withdraw Guilty Plea.

On November 12, 2018, Mr. Caldwell filed a Motion for Reconsideration of the Order Denying Motion to Withdraw Guilty Plea.

On November 15, 2018, the District Court entered an Order denying Motion for Reconsideration.

On November 30, 2018, the District Court sentenced Mr. Caldwell to a term of 137 months imprisonment as to Counts one (1); two (2); four (4) and five (5) of the Superseding Indictment, to run concurrent, followed by three (3) years of Supervised Release; and 24 months imprisonment on Count three (3) to run consecutive to the sentence imposed on the other counts, followed by one (1) year of Supervised Release to run concurrent.

On December 6, 2018, undersigned counsel filed a Notice of Appeal to the Eleventh Circuit Court of Appeals for Appellant.

On December 14, 2018, the Eleventh Circuit Court of Appeals appointed undersigned counsel to represent Mr. Caldwell on appeal.

This Court's Decision in *Rehaif*

On June 21, 2019, and prior to a decision on his direct appeal being rendered by the Eleventh Circuit Court of Appeals, this Court abrogated the law in the Eleventh Circuit – and every circuit – by its decision in ***Rehaif v. United States***, 139 S.Ct. 2191 (2019). It held, contrary

to the uniform view of every circuit prior to the decision, that the phrase “knowingly violates” in 18 U.S.C. §924(a)(2) applies to prosecutions under 18 U.S.C. §922(g), and requires proof beyond a reasonable doubt that the defendant not only “knew he possessed a firearm,” but that at the time of the firearm possession he also knew of his prohibited “status” – that is, he “knew he belonged to the relevant category of persons barred from possessing a firearm.” *Id.* at 2199-2200.

Justice Alito, joined by Justice Thomas, dissented. They described the decision as “overturn[ing] the long-established interpretation” of §922(g), which “has been used in thousands of cases for more than 30 years,” and suggested that as a result, a “great many convictions will be subject to challenge.” *Id.* at 2201 (Alito, J., dissenting).

Mr. Caldwell’s Supplemental Brief based on Rehaif prior to the Eleventh Circuit Ruling on the Initial Appeal

Several weeks after the decision in Rehaif, and prior to a decision on his direct appeal being rendered by the court below, Mr. Caldwell filed a Motion for Leave to File a Supplemental Brief with the Eleventh Circuit based on this Court’s decision in Rehaif. On September 16, 2019, the Eleventh Circuit Court of Appeals granted Mr. Caldwell’s Motion for leave to File a Supplemental Brief based on Rehaif. As a threshold matter, Mr. Caldwell argued that he had been illegally charged with and unknowingly convicted of a violation of §922(g)(1) in light of Rehaif’s clarification that the term “knowingly” in 18 U.S.C. §924(a)(2) applies not only to the “possession” element, but also to each of the “status” elements in §922(g). In that regard he argued *inter alia* that his plea was unknowing, unintelligent, and involuntary because he pled without an understanding of the nature of the charge, as clarified by Rehaif, which was contrary to prior circuit law. And indeed, since he was convicted without the notice and understanding fundamental to Due Process, he argued that pursuant to Boykin v. Alabama, 395 U.S. 238, 244 (1969) and Henderson v. Morgan, 426 U.S. 637, 244 (1969), his conviction must be reversed.

On the Rehaif issue, the government agreed in its Response that Mr. Caldwell's plea was not "knowingly and voluntarily made" since he indisputably was *not* told that any *mens rea* was required as to his status. The government argued that this constitutional defect was not reversible *per se*, but rather reviewable only for "plain error" because Mr. Caldwell "never challenged his guilty plea before the district court." While conceding that he could meet the first two prongs of plain error review because the constitutional error was "plain," the government claimed that he was not entitled to relief because he had not suggested that he might not have pleaded guilty in light of Rehaif. Therefore, he could not show that "the plain error affected his substantial rights."

In his Reply to the government's claim that Caldwell was not entitled to relief because he had not suggested that he might not have pleaded guilty in light of Rehaif, Caldwell argued that there in fact is record evidence that established that he would have insisted on going to trial in this matter if he were allowed to withdraw his guilty plea. The record evidence includes a *Pro Se* Motion to Withdraw his Guilty Plea filed by Mr. Caldwell thirteen (13) days after pleading guilty asserting that he was innocent of the charges; and that he wanted the District Court to allow him to take back his plea. [the Motion was filed before his PreSentence Investigation Report was prepared and two months before sentencing]. Thereafter, at an Evidentiary Hearing on the Motion to Withdraw his Guilty Plea, Mr. Caldwell testified that he wanted the Court to allow him to withdraw his guilty plea because he was innocent of the charges and that he wanted the District Court to give him the opportunity to prove to his innocence.

In his Reply to the government's Response, Mr. Caldwell citing Weaver v. Massachusetts, 137 S.Ct. 1899, 1905 (2017), argued that a concededly unknowing and involuntary plea was a "structural error" that "entitl[es] the defendant to automatic reversal

without any inquiry into prejudice.” He noted in that regard that the automatic reversal rule was applied to an involuntary guilty plea in **Henderson** as well.

Mr. Caldwell also argued, even *if* the plain error standard applied to his involuntary plea, the government still erred by relying upon cases involving technical Rule 11 violations rather than “core” Rule 11 concerns to claim that the “substantial rights” prong was not met in his case. In that regard, he cited several Eleventh Circuit cases which – he noted – were in line with this Court’s careful distinction between technical Rule 11 violations and constitutionally invalid guilty pleas in **United States v. Dominguez Benitez**, 542 U.S. 74 (2004).

In **Dominguez Benitez** (a Rule 11 case), Mr. Caldwell noted the Court had highlighted a “point of contrast with the constitutional question of whether a defendant’s guilty plea was knowing and voluntary.” *Id.* at 84, n.10. Indeed, Caldwell pointed out, where, as here, a defendant has established that his plea violated constitutional Due Process; the Court was clear in *Dominguez Benitez* that such a conviction cannot “be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.”

In the instant case, Mr. Caldwell’s guilty plea was not knowing and voluntary. Mr. Caldwell was prejudiced because his trial counsel never acted as an advocate on his behalf; his attorney only reviewed part of the discovery in the case; his attorney never investigated the case; never interviewed witnesses; never filed any motions to suppress the evidence; never filed a motion to suppress the car stops and subsequent searches; and never filed a Motion to challenge the search warrants and/or affidavits in support of the search warrants.

While represented by his prior counsel, Caldwell entered a guilty plea without receiving any benefit or concessions from the government in pleading guilty. Caldwell entered an open plea to all five (5) counts of the Superseding Indictment, without the benefit of a plea agreement;

and because he insisted on withdrawing his guilty plea and professing his innocence, Caldwell was denied Acceptance of Responsibility and was sentenced to the high end of the guideline range.

11th Circuit Court of Appeals Opinion rendered in this case

On February 26, 2020, without the benefit of oral argument, the Eleventh Circuit issued a decision affirming Mr. Caldwell's conviction – agreeing with the government on all issues and ignoring virtually all of Mr. Caldwell's initial and reply arguments. *United States v. Caldwell*, Non-published opinion in Case No.: 18-15087 (11th Cir. Feb. 26, 2020). As a threshold matter the appellate court found that Caldwell had been charged by a “defective indictment” that failed to allege that he knew he was a felon,” but found that he had “waived the defect in his indictment because his guilty plea waived all nonjurisdictional defects in his proceeding. Acknowledging that while Rehaif clarified that a defendant's knowledge of his status as a felon is an element of the offense of being a felon in possession of a firearm, the court below nevertheless stated that the omission of a *mens rea* element from an indictment does not divest the district court of jurisdiction to adjudicate a criminal case. The court stated:

We review new challenges to indictments for plain error. *United States v. Reed*, 941 F.3d 1018, 1020 (11th Cir. 2019). A defendant must prove that an error occurred, that was plain, and that affected his substantial rights. *Id.* at 1021. We may consult the whole record when considering the effect of an error on a defendant's substantial rights. *Id.* “[I]n a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.” *Rehaif*, 139 S. Ct. at 2200. Caldwell cannot show plain error occurred because he failed to show the error affected his substantial rights. The district court specifically asked Caldwell if he knew what a felony was and if he had previously pled guilty to a felony. Caldwell replied in the affirmative to both questions. Thus, Caldwell cannot establish an error occurred that affected his substantial rights because the record establishes that he knew of his status as a felon. *See Reed*, 941 F.3d at 1020-22.

In foot note 2 of its Non-Published Opinion, the Panel stated that: “Caldwell waived the defect in his indictment because his guilty plea waived all nonjurisdictional defects in his proceeding. *See United States v. Brown*, 752 F.3d 1344, 1347 (2014). He may obtain relief from his guilty plea only if he identifies a defect that Affected the power of the district court to enter its judgments. *See id.* at 1350-51. While *Rehaif* clarified that a defendant’s knowledge of his status as a felon is an element of the offense of being a felon in possession of a firearm, 139 S. Ct. at 2200, the omission of a mens rea element from an indictment does not divest the district court of subject matter jurisdiction to adjudicate a criminal case. See *Brown*, 752 F.3d at 1350-51, 1353-54. Caldwell’s indictment was defective because it failed to allege he knew he was a felon, but Caldwell waived that nonjurisdictional defect by pleading guilty.

Mr. Caldwell filed a petition for a panel rehearing contesting the panel’s determination that the superseding indictment defect was non-jurisdictional. The panel, however, refused to reconsider its ruling.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit’s holding that an unknowing and involuntary plea after Rehaif is *not* automatically reversible, directly conflicts with this Court’s precedents, as well as the Fourth Circuit’s decision in *United States v. Gary*

Given this Court’s decision in Rehaif v. United States, 139 S.Ct. 2191 (2019), and the fact that Mr. Caldwell was never advised that knowledge-of-status was a crucial element of a violation of 18 U.S.C. §922(g)(1), the government rightly conceded below that Mr. Caldwell’s plea was not “knowingly and voluntarily made.” What that means, unquestionably, is that Mr. Caldwell’s plea was secured in violation of the Due Process Clause. However, the government argued – and the Eleventh Circuit agreed – that a constitutionally invalid plea was not automatically reversible. Rather, the court below while acknowledging that Caldwell’s superseding indictment was defective because it failed to allege he knew he was a felon, nonetheless held, that “Caldwell waived the defect in his indictment because his guilty plea waived all nonjurisdictional defects in the proceedings; and that the omission of a *Mens Rea* element from the indictment does not divest the district court of subject matter jurisdiction to adjudicate a criminal case. *United States v. Caldwell*, No. 18-15087 (11th Cir. Feb. 26, 2020).

The Eleventh Circuit’s reasoning disregards and conflicts with this Court’s reasoning in Boykin v. Alabama, 395 U.S. 238, 244 (1969); Henderson v. Morgan, 426 U.S. 637, 647 (1976); and United States v. Dominguez Benitez, 542 U.S. 74, 84 n. 10 (2004). Moreover, in implicitly rejecting Mr. Caldwell’s argument in his Reply Brief that an invalid plea is a “structural” error and no proof of prejudice is necessary for that reason, the decision below directly conflicts with the Fourth Circuit’s decision in United States v. Gary, 954 F.3d 194, 198, 207 (4th Cir. 2020), *reh’g en banc denied*, __ F.3d __, 2020 WL 3767152 (4th Cir. July 7,

2020) (en banc) (finding that a constitutionally invalid plea is indeed a “structural” error, and it mandates reversal without a case-specific prejudice inquiry).

A. The Eleventh Circuit’s decision conflicts with this Court’s precedents holding that a constitutionally invalid plea is reversible *per se*

This Court has recognized repeatedly that where, as here, a defendant has pled guilty without the notice fundamental to Due Process, his conviction cannot stand. In Bovkin v. Alabama, 395 U.S. 238 (1969), the Court held that it is reversible error *per se* where the record does not disclose that a defendant voluntarily and understandingly entered a guilty plea. *Id.* at 244. In Henderson v. Morgan, 426 U.S. 637 (1976), the Court reaffirmed that the “first and most universally recognized requirement of due process” is that a guilty plea is not voluntary unless the defendant receives “real notice of the true nature of the charge against him.” Therefore, where as here, a defendant did not receive adequate notice of the offense to which he pleaded guilty, his conviction was entered without due process of law and must be reversed. *Id.* at 647.

The reversal in Henderson was automatic. Indeed, the Court was clear that a plea that does not evidence a defendant’s understanding of the charge against him “cannot support a judgment of guilt.” Even if “the prosecutor had overwhelming evidence of guilt available,” that could not cure or obviate this fundamental constitutional error. *Id.* at 644. And indeed, the Court found, even the defendant’s admission that he killed the victim could not “serve as a substitute for either a finding after trial, or a voluntary admission, that [he] had the requisite intent.” *Id.* at 646. It is clear from Henderson that the only harmless error inquiry in a guilty plea case asks whether the defendant was informed of the missing element of the offense through some other means. *Id.* at 646. Where, as here, that cannot be the case since the law at the time did not recognize a knowledge-of-status element, and as such reversal is automatic.

In denying Caldwell’s Rehaif challenge, the 11th Circuit cites with approval its’ decision in United States v. Reed, 941 F.3d 1018, 1020 (11th Cir. 2019). Before trial, Reed stipulated that, “at the time of the alleged crime, [he] previously had been convicted of a felony, that is, a crime punishable by imprisonment for a term in excess of one year” and that he “never has had his civil rights restored, including the right to keep and bear firearms and ammunitions. In affirming Reed’s conviction, the court stated that Reed cannot “show a reasonable probability that but for the error[s], the outcome of [his trial] would have been different” standard from Dominguez Benitez as the relevant and required prejudice inquiry here. The court below improperly treated a conceded constitutional error as no more than a technical Rule 11 violation. In doing so, the Eleventh Circuit not only ignored its own prior precedent, where it had consistently distinguished between technical and “core” Rule 11 concerns such as understanding the “nature of a charge.” Indeed, it had previously held, but ignored in Mr. Caldwell’s case, that where a defendant does not understand the nature of the charge to which he pled, reversal is *per se*. See United States v. Symington, 781 F.3d 1308, 1314 (11th Cir. 2015) (court’s failure to ensure that the defendant understood any of the “core concerns” of Rule 11 “requires automatic reversal of the conviction and the opportunity to plea anew”); United States v. Telemaque, 244 F.3d 1247, 1249-50 (11th Cir. 2001) (“Any failure to address one of Rule 11(c)’s three ‘core concerns,’ of which informing the defendant of the nature of the offense is one, is prejudicial plain error; vacating conviction).

The Eleventh Circuit also ignored this Court’s own careful distinction between technical Rule 11 violations and constitutionally invalid guilty pleas in United States v. Dominguez Benitez, 542 U.S. 74 (2004). There, the Court stated in no uncertain terms that where, as here, a defendant’s guilty plea “violated constitutional Due Process” because it was not “knowing and

voluntary,” the conviction cannot “be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.” *Id.* at 84, n. 10.

These precedents are clear that an unknowing and involuntary plea is prejudicial *per se*, and reversible *per se*. The Eleventh Circuit’s insistence that a defendant show case-specific prejudice from a constitutionally invalid plea conflicts with this Court’s clear holdings to the contrary in the above-referenced cases. The decision herein should not be allowed to stand.

B. The Eleventh Circuit’s decision directly conflicts with the Fourth Circuit’s holding in Gary that a constitutionally invalid plea amounts to structural error

In Gary, Chief Judge Gregory writing for an unanimous panel of the Fourth Circuit, held consistent with the above precedents, that a “constitutionally invalid plea ‘cannot reliably serve its function as a vehicle for determination of guilt or innocence... and no criminal punishment [based on such a plea]’ may be regarded as fundamentally fair.’” 954 F.3d at 207. For that reason, the Fourth Circuit concluded that the district court’s constitutional error in accepting a plea where the defendant did not understand the essential elements to which he pled was a “structural” error, and for that reason, no separate proof of prejudice was required. *Id.*

Mr. Caldwell argued below, just as the Fourth Circuit later found in Gary, that his constitutionally invalid plea after Rehaif was indeed a structural error. Although the Eleventh Circuit did not expressly address that argument, it implicitly rejected it by insisting that Mr. Caldwell’s guilty plea waived all nonjurisdictional defects in his proceeding knowledge-of-status element. Plainly, had Mr. Caldwell’s Rehaif challenge been heard by the Fourth Circuit, that court would have found his unknowing and involuntary plea to be a structural error, and reversed his conviction.

C. Although several circuits have now agreed with the Eleventh Circuit’s approach and disagreed with the Fourth’s, the circuit conflict is intractable and untenable. It should be resolved in this case.

Notably, the government filed a petition for rehearing en banc in *Gary*, but the Fourth Circuit denied rehearing en banc with no member of the Court requesting a poll. United States v. Gary, ___ F. 3d ___, 2020 WL 3767152 at *1 (4th Cir. July 7, 2020). Judge Wilkinson, joined by four other judges who concurred in that denial, wrote separately to explain that they had concurred in the denial of rehearing because they viewed the panel’s holding as “so incorrect and on an issue of such importance that [] the Supreme Court should consider it promptly.” *Id.* While Judge Wilkinson correctly noted in a footnote that “no other circuit” had yet treated a Rehaif error as “structural,” many of the cases he cited were trial cases, where there was no issue of an unknowing and involuntary plea, and the precedents of this Court cited above involving constitutionally invalid pleas did not apply.

Nonetheless, as of this writing, not only the Eleventh Circuit in the instant case, but the Fifth, Eighth, and Tenth Circuits as well have expressly rejected the suggestion that a constitutionally invalid plea is a structural error for which no proof of prejudice is required. *See United States v. Coleman*, ___ F.3d ___, 2020 WL 3039057 at *3 & n. 3 (9th Cir. June 8, 2020) (rejecting the Fourth Circuit’s reasoning in Gary; agreeing with the Fifth, Sixth, and Tenth Circuits that a constitutionally invalid plea after Rehaif is not a structural error; finding such an error does not defy harmless error analysis); *see also United States v. Trujillo*, ___ F.3d ___, 2020 WL 2745526, at *5 (10th Cir. May 27, 2020); United States v. Lavalais, 960 F.3d 180, 188 (5th Cir. 2020) (following United States v. Hicks, 958 F.3d 399 (5th Cir. 2020)).

This direct circuit conflict cannot persist. Now that the Fourth Circuit has denied rehearing en banc in Gary, the circuit divide is intractable. The instant case presents a perfect vehicle to resolve the conflict for an important reason.

If the Court chooses to resolve the circuit conflict in Gary itself or any of the other cases referenced above, Mr. Caldwell asks that his petition be held pending resolution of this common issue in such other case.

CONCLUSION

The decision below conflicts with precedents of this Court and other circuits. The Court should grant the writ to resolve these conflicts.

Respectfully submitted,

/s/ Jose' R.E. Batista
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Miami, Florida
September 21, 2020

APPENDIX

APPENDIX

Decision of the Eleventh Circuit Court of Appeals, <i>United States v. Caldwell</i> , No. 18-15087 (Feb. 26, 2020).....	App-1
Decision of the Eleventh Circuit Court of Appeals Denying Rehearing, <i>United States v. Caldwell</i> , No. 18-15087 (May 6, 2020).....	App-2
Superseding Indictment, <i>United States v. Caldwell</i> , No. 18-60127-cr-Dimitrouleas (s) (June 12, 2018)	App-3
Plea Colloquy Transcript, <i>United States v. Caldwell</i> , No. 18-60127-Cr-Dimitrouleas(s) (August 23, 2018)	App-4
Evidentiary Hearing Transcript, <i>United States v. Caldwell</i> , No. 18-60127-cr-Dimitrouleas(s) (November 2, 2018)	App-5
Judgment and Commitment Order, <i>United States v. Caldwell</i> , No. 18-60127-cr-Dimitrouleas(s) (December 3, 2018)	App-6

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-15087
Non-Argument Calendar

D.C. Docket No. 0:18-cr-60127-WPD-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

TRENARD CALDWELL,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 26, 2020)

Before GRANT, LUCK and BLACK, Circuit Judges.

PER CURIAM:

Trenard Caldwell appeals his convictions and 161-month total sentence for being a felon in possession of a firearm, possession of unauthorized access devices, aggravated identity theft, and possession of a detectable amount of methamphetamine with intent to distribute. Caldwell asserts five issues on appeal, which we address in turn. After review, we reverse and remand to allow the district court to modify Caldwell's sentence so it does not run afoul of the statutory maximum, but affirm as to all other issues.

I. DISCUSSION

A. Motion to Withdraw Guilty Plea

First, Caldwell contends the district court abused its discretion when it did not allow him to withdraw his guilty plea because he did not have close assistance of counsel when he entered the plea and his plea was not knowing and voluntary. After the district court accepts the plea and before sentencing, the defendant may withdraw a guilty plea if (1) the district court rejects the plea agreement, or (2) "the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(A)-(B). "There is no absolute right to withdraw a guilty plea." *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994). In determining if the defendant has met his burden, a district court may consider the totality of the circumstances surrounding the plea, including the following factors: "(1) whether close assistance of counsel was available; (2) whether the plea was knowing and

voluntary; (3) whether judicial resources would be conserved . . . ; and (4) whether the government would be prejudiced if the defendant were allowed to withdraw his plea.” *United States v. Buckles*, 843 F.2d 469, 472 (11th Cir. 1998) (citation omitted). The good faith, credibility, and weight of the defendant’s representations in support of the motion to withdraw are issues for the trial court to decide. *Id.*

The district court held a hearing on Caldwell’s motion to withdraw his guilty plea in which both Caldwell and his attorney testified. After hearing the testimony, the district court denied the motion, finding that when Caldwell pled guilty, he understood and confirmed that (1) he would not be allowed to withdraw his plea, (2) he did not have to follow his attorney’s advice, (3) he wanted to plead guilty and give up all defenses, (4) no threats or promises were made to him, and (5) he fully understood what he was doing and had no questions.

The district court did not abuse its discretion in denying Caldwell’s motion to withdraw his guilty plea because he failed to show that he did not have close assistance of counsel and the evidence supports that his plea was knowing and voluntary. *See United States v. McCarty*, 99 F.3d 383, 385 (11th Cir. 1996) (stating we will disturb the district court’s decision to deny a defendant’s motion to withdraw a guilty plea only when it constitutes an abuse of discretion).

The district court found Caldwell’s attorney, Richard Merlino, credible during the hearing on Caldwell’s motion. During that hearing, Merlino testified

that he had met with Caldwell four to six times and his investigator had met with Caldwell six to eight times in preparation for trial. Merlino testified that he reviewed the discovery with Caldwell and they had discussed that the Government had a “reasonable likelihood of conviction” if the case proceeded to trial.

In addition, both the district court’s plea colloquy and the testimony at the hearing on the motion to withdraw establish Caldwell knowingly and voluntarily entered his plea. *See Medlock*, 12 F.3d at 187 (stating there is a strong presumption that statements made during the plea colloquy are true). The district court confirmed Merlino explained the Sentencing Guidelines to Caldwell, that Caldwell agreed with the strategy of an open plea, and that Caldwell understood the maximum amount of prison time he could serve. Moreover, the district court confirmed that Caldwell’s plea was done freely and voluntarily and that he understood that he could not come back to the district court and argue that he did not understand, made a mistake, or that his lawyer provided him with bad advice. Caldwell failed to meet the heavy burden of showing the statements he made, under oath, during his change or plea hearing were false. *See United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) (explaining a defendant bears a heavy burden to show that his statements under oath were false). The final two *Buckles* factors also weigh against the withdrawal of the plea, and Caldwell concedes that whether judicial resources would be conserved weighs against him.

B. Ineffective Assistance of Counsel

Second, Caldwell asserts he received ineffective assistance of counsel. To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to establish either prong is fatal and makes it unnecessary to consider the other. *Id.* at 697. A counsel's performance is measured under an objective standard of reasonableness, and there is a strong presumption that counsel's conduct falls within the range of reasonable performance. *Id.* at 687, 690. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

As an initial matter, the record is sufficiently developed to permit this Court to consider Caldwell's ineffective assistance of counsel claim. *See United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002) (explaining while we generally do not consider claims of ineffective assistance of counsel raised on direct appeal, we will do so if the record is sufficiently developed). Caldwell raised the claim in his amended motion to withdraw his guilty plea, and the district court held an evidentiary hearing where Caldwell and Merlino testified regarding the issue.

Caldwell has failed to establish the district court erred when it denied his ineffective assistance of counsel claim. *See id.* (stating whether a criminal defendant's trial counsel was ineffective is a mixed question of law and fact, subject to *de novo* review). Merlino testified that he reviewed the discovery, went through the evidence with Caldwell, attempted to contact witnesses, and found he could not file a motion to suppress in good faith. In addition, Merlino testified he spoke with Caldwell about entering the guilty plea and the consequences of entering a guilty plea. Caldwell has failed to present evidence to show the likelihood of the district court allowing him to withdraw his guilty plea would have increased had Merlino taken different actions. *See Harrington v. Richter*, 562 U.S. 86, 112 (2011) (the petitioner must show the likelihood of a different result is substantial). Thus, Caldwell has failed to establish that Merlino acted deficiently or that Merlino's actions prejudiced his defense. *See Strickland*, 466 U.S. at 687.

C. Criminal History Calculation

Third, Caldwell argues the district court erred at sentencing when it assessed him a criminal history point for a previous grand theft of a motor vehicle conviction, because that conviction was part of the relevant conduct of his current charges. The district court is required to assess one criminal history point for each "prior sentence" of less than 60 days of imprisonment. U.S.S.G. § 4A1.1(c). The term "prior sentence" means "any sentence previously imposed upon adjudication

of guilt . . . for conduct not part of the instant offense.” U.S.S.G. § 4A1.2(a)(1). Relevant conduct includes “all acts and omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” U.S.S.G. § 1B1.3(a)(1)(A).

The district court did not clearly err when it assessed one criminal history point to Caldwell for the grand theft of a motor vehicle. *See United States v. Kinard*, 472 F.3d 1294, 1297 n.3 (11th Cir. 2006) (stating a district court’s factual findings are reviewed for clear error and its application of the Guidelines to those facts are reviewed *de novo*). The district court found the grand theft of the motor vehicle was not part of the relevant conduct of this case because it was a separate crime and it occurred on a separate date from the convictions in this case. In addition, the grand theft of the motor vehicle did not occur during the commission of the offenses in this case and was not done in order to avoid detection or responsibility for those offenses. Thus, under the Guidelines, it is not relevant conduct, and the district court did not clearly err when it assessed Caldwell one criminal history point. U.S.S.G. § 1B1.3(a)(1)(A).

D. Sentence Greater than Statutory Maximum

Fourth, Caldwell asserts the district court erred when it imposed a 161-month total sentence which was greater than the maximum statutory sentence

permitted. The district court sentenced Caldwell at the high end of his Guidelines range, 137 months' imprisonment on Counts 1, 2, 4, and 5, to run concurrently. The district court further sentenced Caldwell to 24 months' imprisonment on Count 3, to run consecutively. Caldwell contends the maximum prison sentence permitted by law on Counts 1, 2, and 5¹ is 120 months' imprisonment. *See* 18 U.S.C. § 924(a)(2) (Count 1); 18 U.S.C. § 1029(c)(1)(A)(i) (Counts 2 and 5).

The Government concedes that Caldwell correctly argues the district court erred when it imposed a 137-month sentence as to Counts 1, 2, and 5. The Government contends the district court should have structured the sentence by imposing concurrent terms of 120 months' imprisonment as to Counts 1, 2, and 5, and a 137-month sentence for Count 4, which carries a statutory maximum of 240 months. *See* 21 U.S.C. § 841(b)(1)(C).

We have held that Federal Rule of Criminal Procedure 36 "may not be used to make a substantive alteration to a criminal sentence." *United States v. Portillo*, 363 F.3d 1161, 1164 (11th Cir. 2004) (quotations omitted). In addition, we have held that Rule 36 permits courts to "correct an error in the record arising from [an] oversight. *Id.* at 1165.

¹ Caldwell's counts of conviction are as follows: Count 1—possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1); Count 2—possession of unauthorized access devices, in violation of 18 U.S.C. § 1029(a)(3); Count 3—aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1); Count 4—possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); and Count 5—possession of unauthorized access devices, in violation of 18 U.S.C. § 1029(a)(3).

The district court erred in how it structured Caldwell's sentence because it sentenced him to 137-months' imprisonment as to Counts 1, 2, and 5, when the statutory maximum sentence for those counts is 120 months' imprisonment. *See United States v. Mazarky*, 499 F.3d 1246, 1248 (11th Cir. 2007) (reviewing the legality of a sentence *de novo*). However, this error is one that can be corrected, pursuant to Rule 36, as the correction will not result in a substantive alteration to Caldwell's sentence. *See Portillo*, 363 F.3d at 1164-65. The district court could sentence Caldwell to 120-months' imprisonment as to Counts 1, 2, and 5 to run concurrently with a 137-month sentence as to Count 4, and an additional 24 months to run consecutively as to Count 3 for a total sentence of 161 months' imprisonment. Allowing the district court to enter a new judgment, pursuant to Rule 36, will allow the district court to correct an oversight in how it announced Caldwell's sentence, without making the sentence more onerous. *See id.*

E. Superseding Indictment

Fifth, Caldwell contends Count 1 of the Superseding Indictment illegally charged him with being a felon in possession of a firearm, in light of the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).² We review

² Caldwell waived the defect in his indictment because his guilty plea waived all nonjurisdictional defects in his proceeding. *See United States v. Brown*, 752 F.3d 1344, 1347 (11th Cir. 2014). He may obtain relief from his guilty plea only if he identifies a defect that affected the power of the district court to enter its judgments. *See id.* at 1350-51. While *Rehaif* clarified that a defendant's knowledge of his status as a felon is an element of the offense of being a felon in possession of a firearm, 139 S. Ct. at 2200, the omission of a mens rea element

new challenges to indictments for plain error. *United States v. Reed*, 941 F.3d 1018, 1020 (11th Cir. 2019). A defendant must prove that an error occurred, that was plain, and that affected his substantial rights. *Id.* at 1021. We may consult the whole record when considering the effect of an error on a defendant's substantial rights. *Id.* “[I]n a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.” *Rehaif*, 139 S. Ct. at 2200.

Caldwell cannot show plain error occurred because he failed to show the error affected his substantial rights. The district court specifically asked Caldwell if he knew what a felony was and if he had previously pled guilty to a felony. Caldwell replied in the affirmative to both questions. Thus, Caldwell cannot establish an error occurred that affected his substantial rights because the record establishes that he knew of his status as a felon. *See Reed*, 941 F.3d at 1020-22.

from an indictment does not divest the district court of subject matter jurisdiction to adjudicate a criminal case. *See Brown*, 752 F.3d at 1350-51, 1353-54. Caldwell's indictment was defective because it failed to allege he knew he was a felon, but Caldwell waived that nonjurisdictional defect by pleading guilty.

II. CONCLUSION

Accordingly, we reverse and remand to allow the district court to correct Caldwell's sentence pursuant to Rule 36, but affirm as to all other issues.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 06, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-15087-JJ
Case Style: USA v. Trenard Caldwell
District Court Docket No: 0:18-cr-60127-WPD-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for
information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tiffany A. Tucker, JJ/lt
Phone #: (404)335-6193

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-15087-JJ

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

TRENARD CALDWELL,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: GRANT, LUCK and BLACK, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Trenard Caldwell is DENIED.

ORD-41

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-60127-CR-DIMITROULEAS (s)

18 U.S.C. § 922(g)(1)
18 U.S.C. § 1029(a)(3)
18 U.S.C. § 1028A(a)(1)
21 U.S.C. § 841(a)(1)
18 U.S.C. § 924(d)(1)
18 U.S.C. § 982(a)(2)(B)

FILED BY	_____	D.C.
JUN 12 2018		
STEVEN M. LARIMORE CLERK U.S. DIST. CT. S.D. OF FLA. FT. LAUD		

UNITED STATES OF AMERICA

vs.

TRENARD CALDWELL,

Defendant.

SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNT 1

(Possession of a Firearm or Ammunition by a Convicted Felon)
18 U.S.C. § 922(g)(1)

From on or about October 24, 2016, through on or about May 4, 2018, in Broward County, in the Southern District of Florida, the defendant,

TRENARD CALDWELL,

having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1).

COUNT 2

(Possession of Unauthorized Access Devices)
18 U.S.C. § 1029(a)(3)

On or about May 4, 2018, in Broward County, in the Southern District of Florida, the

defendant,

TRENARD CALDWELL,

did knowingly, and with the intent to defraud, possess fifteen (15) or more unauthorized access devices, that is, bank account numbers, debit card numbers, credit card numbers, and social security numbers issued to other persons, said conduct affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 1029(a)(3) and 2.

COUNT 3
(Aggravated Identity Theft)
18 U.S.C. § 1028A(a)(1)

On or about May 4, 2018, in Broward County, in the Southern District of Florida, the defendant,

TRENARD CALDWELL,

during and in relation to a felony violation of Title 18, United States Code, Section 1029(a)(3), that is, knowingly, and with the intent to defraud, possessing fifteen (15) or more unauthorized access devices, that is, bank account numbers, debit card numbers, credit card numbers, and social security numbers issued to other persons, said conduct affecting interstate and foreign commerce, as charged in Count 2 of this Indictment, did knowingly transfer, possess, and use, without lawful authority, a means of identification of another person, that is, the name and social security number of "B.H.," in violation of Title 18, United States Code, Sections 1028A(a)(1) and 2.

COUNT 4
(Possession of a Controlled Substance with Intent to Distribute)
21 U.S.C. § 841(a)(1)

On or about May 4, 2018, in Broward County, in the Southern District of Florida, and

elsewhere, the defendant,

TRENARD CALDWELL,

did knowingly and intentionally possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

Pursuant to Title 21, United States Code, Section 841(b)(1)(C), it is further alleged that this violation involved a mixture and substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

COUNT 5
(Possession of Unauthorized Access Devices)
18 U.S.C. § 1029(a)(3)

On or about September 19, 2015, in Broward County, in the Southern District of Florida, the defendant,

TRENARD CALDWELL,

did knowingly, and with the intent to defraud, possess fifteen (15) or more unauthorized access devices, that is, bank account numbers, debit card numbers, credit card numbers, and social security numbers issued to other persons, said conduct affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 1029(a)(3) and 2.

FORFEITURE ALLEGATIONS

1. Upon conviction of a violation of Title 18, United States Code, Section 922(g)(1), as alleged in Count 1 of this Indictment, the defendant, **TRENARD CALDWELL**, shall forfeit to the United States, any firearm and ammunition involved in or used in such violation, pursuant to Title 18, United States Code, Section 924(d)(1).

2. The property which is subject to forfeiture includes, but is not limited to, one (1)

Glock 22 .40 caliber pistol bearing serial number WPD797 and thirty-eight (38) rounds of various .40 caliber ammunition.

3. Upon conviction of a violation of Title 18, United States Code, Section 1029, as alleged in Counts 2 and 5, of this Indictment, the defendant, **TRENARD CALDWELL**, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(2)(B), any property constituting, or derived from, proceeds the defendant obtained directly or indirectly, as the result of such violations; and pursuant to Title 18, United States Code, Section 1029(c)(1)(C), any personal property used or intended to be used to commit such violations.

4. Upon conviction of a violation of Title 21, United States Code, Section 841, as alleged in Count 4 of this Indictment, the defendant, **TRENARD CALDWELL**, shall forfeit to the United States any property constituting, or derived from, any proceeds which the defendant obtained, directly or indirectly, as the result of such violation and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the violation, pursuant to Title 21, United States Code, Section 853.

The property to be forfeited includes but is not limited to the following:

A. The amount of \$2,080.00 in United States currency seized on May 4, 2018.

5. If any of the property described above, as a result of any act or omission of the defendant:

- (a) cannot be located upon the exercise of due diligence;
- (b) has been transferred or sold to, or deposited with a third party;
- (c) has been placed beyond the jurisdiction of the Court;
- (d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be subdivided without difficulty;

the United States shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

All pursuant to Title 18, United States Code, Sections 924(d)(1), 982(a)(2)(B), and 1029(c)(1)(C), as incorporated by Title 28, United States Code, Section 2461(c), and the procedures set forth at Title 21, United States Code, Section 853.

A TRUE BILL

FDREPERSON

Thomas J. Malbin III
BENJAMIN B. GREENBERG
UNITED STATES ATTORNEY

ANITA WHITE
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

TRENARD CALDWELL,

Defendant.

CASE NO. 18-60127-CR-DIMITROULEAS (s)

CERTIFICATE OF TRIAL ATTORNEY*

/

Superseding Case Information:

Court Division: (Select One) New Defendant(s) Yes _____ No X _____
 Miami Key West
 FTL WPB FTP
 Number of New Defendants
 Total number of counts 5

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.
3. Interpreter: (Yes or No) No
 List language and/or dialect _____
4. This case will take 3-4 days for the parties to try.
5. Please check appropriate category and type of offense listed below:

(Check only one)	(Check only one)	
I 0 to 5 days	<input checked="" type="checkbox"/>	Petty
II 6 to 10 days	<input type="checkbox"/>	Minor
III 11 to 20 days	<input type="checkbox"/>	Misdem.
IV 21 to 60 days	<input type="checkbox"/>	Felony
V 61 days and over	<input type="checkbox"/>	<input checked="" type="checkbox"/>

6. Has this case been previously filed in this District Court? (Yes or No) No

If yes:

Judge: _____ Case No. _____

(Attach copy of dispositive order)

Has a complaint been filed in this matter? (Yes or No) Yes

If yes:

Magistrate Case No. 18-6222-Hunt

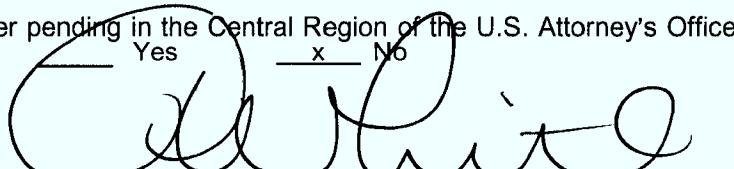
Related Miscellaneous numbers:

Defendant(s) in federal custody as of _____

May 4, 2018

Defendant(s) in state custody as of _____

District of _____

Is this a potential death penalty case? (Yes or No) No7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? _____ Yes No _____8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? _____ Yes No _____


ANITA G. WHITE
 ASSISTANT UNITED STATES ATTORNEY
 Florida Bar No. 537861

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: TRENARD CALDWELL

Case No: _____

Count #:1

Possession of a Firearm or Ammunition by a Convicted Felon

Title 18, United States Code, Section 922(g)(1)

***Max. Penalty:** 10 years' imprisonment, \$250,000 fine, 3 years' supervised release.

Counts #:2 and 5

Possession of Unauthorized Access Devices

Title 18, United States Code, Section 1029(a)(3)

***Max. Penalty:** 10 years' imprisonment, \$250,000 fine, 3 years' supervised release.

Count #: 3

Aggravated Identity Theft

Title 18, United States Code, Section 1028A(a)(1)

*** Max. Penalty:** Mandatory 2 years' imprisonment consecutive to any other term of imprisonment, 1 year supervised release, \$250,000 fine

Count #: 4

Possession of a Controlled Substance with Intent to Distribute

Title 21, United States Code, Section 841

***Max. Penalty:** 20 years' imprisonment, a lifetime term of supervised release with a minimum term of 3 years, \$1,000,000 fine

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-60127-CR-DIMITROULEAS

UNITED STATES OF AMERICA,

Fort Lauderdale, Florida

Plaintiff(s),

August 23, 2018

vs.

TRENARD CALDWELL,

Defendant(s).

CHANGE OF PLEA HEARING

BEFORE THE HONORABLE DI

UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF(S): Anita White, Esquire
United States Attorney's Office
500 East Broward Boulevard
Seventh Floor
Fort Lauderdale, Florida 33394

FOR THE DEFENDANT(S): Richard A. Merlino, Jr., Esquire
Voluck & Merlino, PL
101 Northeast Third Avenue
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1 Thereupon,

2 the following proceedings began at 2:02 p.m.:

3 THE COURT: Please be seated.

4 United States versus Trenard Caldwell. If counsel
5 would announce their appearances for the record.

6 MS. WHITE: Good afternoon, Your Honor, Anita White
7 for the United States. With me at counsel table is ATF Special
8 Agent Christie Shade.

9 MR. MERLINO: Good afternoon, Judge. Richard Merlino
10 on behalf of the defendant, Trenard Caldwell, who is seated at
11 counsel table to my right.

12 THE COURT: What is the status of Mr. Caldwell's case?

13 MR. MERLINO: We wish to change the plea today, Judge.
14 Defendant wishes to enter a plea of guilty to the superseding
15 indictment.

16 THE COURT: Is it a plea agreement or open plea?

17 MR. MERLINO: Open plea, Judge.

18 THE COURT: If we could swear in Mr. Caldwell.

19 MR. MERLINO: Judge, would you like us to move to the
20 lecturn?

21 THE COURT: Wherever he is comfortable. He can sit
22 down or stand up.

23 MR. MERLINO: Is that okay with you if he sits down?
24 No disrespect to the Court.

25 THE COURT: That's fine.

1 THE COURTROOM DEPUTY: Please stand and rate your
2 right hand.

3 TRENARD CALDWELL

4 Having been first duly sworn on oath, was examined and
5 testified as follows:

6 THE COURTROOM DEPUTY: Thank you. You may be seated.

7 THE COURT: Mr. Caldwell, do you understand that you
8 are now under oath and if you answer any of my questions
9 falsely, your answers may later be used against you in another
10 prosecution for perjury?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Is this what you want to do, plead guilty
13 to Count 1, possession of a firearm and ammunition by a
14 convicted felon; Counts 2 and 5, possession of unauthorized
15 access devices; Count 3, aggravated identity theft; and
16 Count 4, possession of methamphetamine with the intent to
17 deliver and throw yourself on the mercy of the Court?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: If you plead guilty, I'm going to
20 adjudicate you guilty which will make you a convicted felon and
21 cause you to lose certain civil rights like your right to vote,
22 your right to hold public office, your right to serve on a
23 jury, your right to possess a firearm, and some other rights.
24 Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: If you plead guilty, I'm going to defer
2 sentencing. I will order a presentence investigation report.
3 I will set sentencing for October 4.

4 MR. MERLINO: Judge, if I may?

5 THE COURT: It would be November, I guess, wouldn't
6 it?

7 MR. MERLINO: Yes. Thank you, Judge.

8 THE COURT: So I would set sentencing for November 1st
9 at 1:15 in the afternoon in this courtroom.

10 At that time I will listen to what you have to say,
11 your lawyer has to say, the prosecutor, and anybody else, and I
12 will give you what I think is a fair sentence. Do you
13 understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: You may not think the sentence is fair,
16 your lawyer may not think it's fair, the prosecutors may not
17 think it's fair, but I will think it's fair. Do you understand
18 that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Now, at the time of sentencing, we are
21 going to score up your sentencing guidelines and we are going
22 to come up with an advisory guideline range that congress
23 thinks I should consider in your case. Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Have you and your attorney talked about

1 how the sentencing guidelines might apply to your case?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Do you understand that I am not going to
4 be able to determine the advisory guideline range for your case
5 until after the presentence report has been completed and you
6 and the government have had an opportunity to challenge the
7 reported facts and the application of the guidelines
8 recommended by the probation officer?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And do you understand that the sentence
11 that I actually impose may be different from any estimate your
12 lawyer or anybody else may have given you?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And if I give you a higher sentence than
15 you were hoping for, that's the chance you take by your open
16 plea, and it would not be grounds to withdraw your guilty plea.
17 Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you also understand that after the
20 advisory guideline range has been determined, that I have the
21 authority in some circumstances to vary or depart from the
22 guidelines and impose a sentence that is either more severe or
23 less severe than the sentence called for by the guidelines?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: If I were to do an upward departure or

1 upward variance, that's the chance you take by your open plea,
2 and it would not be grounds to withdraw your guilty plea. Do
3 you understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you also understand that parole has
6 been abolished, and if you are sentenced to prison, you are not
7 going to be released on parole?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: The actual percentage of any sentence that
10 you do in custody is between you and the Bureau of Prisons.
11 Any good time or early release laws, if they are applicable to
12 your case, aren't part of these plea negotiations. Do you
13 understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Understanding all these things, is this
16 what you want to do, plead guilty to all five counts and throw
17 yourself on the mercy of the Court?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Now, some defendants plead guilty pursuant
20 to plea agreements where the government typically makes
21 recommendations that are persuasive but not controlling on me.
22 Do you understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Your lawyer has been to law school. He's
25 tried a lot of cases. He gives you the benefit of his legal

1 advice. But it's your life. You don't have to follow the
2 advice. Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And there may be strategy reasons for or
5 against your pleading open or trying to enter into a plea
6 agreement with the government. Do you understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And have you had enough time to think
9 about this and talk about it with your lawyer?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And do you agree with the strategy of
12 pleading open and not trying to enter into a plea agreement
13 with the government?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Now, as I indicated, at the time of
16 sentencing we are going to score up your sentencing guidelines
17 and we are going to come up with an advisory guideline range
18 that congress thinks I should consider in your case. Do you
19 understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: About 13 years ago the United States
22 Supreme Court decided a case called United States versus Booker
23 where they decided that the federal sentencing guidelines were
24 advisory, not mandatory. Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: That means I will consider the sentencing
2 guidelines I will consider the statutory factors in 18 United
3 States Code, Section 3553(a), but it's up to me to decide what
4 a reasonable and sufficient sentence. Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And that could be anywhere between 2 years
7 and 42 years in prison. Do you understand that?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: There's a 2-year mandatory minimum as to
10 Count 3. Count~1 carries a maximum of 10 years in prison.
11 Counts 2 and 5 carry a maximum of 10 years in prison. Count 4
12 carries a maximum of 20 years in prison. So theoretically, if
13 I ran all the maximums consecutive, I could give you anywhere
14 between 2 and 42 years in prison. Do you understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: And understanding all these things, is
17 that what you want to do, plead guilty and throw yourself on
18 the mercy of the Court?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Count~1 charges possession of a firearm
21 and ammunition by a convicted felon. And as I indicated, that
22 carries a maximum of 10 years in prison. Do you understand
23 that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Counts 2 and 5 charge possession of 15 or

1 more unauthorized access devices. Each of those carry a
2 maximum of 10 years in prison. Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Count 3 charges aggravated identity theft
5 which carries a maximum and minimum sentence of two years in
6 prison and it has to run consecutive or after any other
7 sentence that I give you. Do you understand that?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Count 4 charges possession of
10 methamphetamine with intent to distribute which carries a
11 maximum of 20 years in prison. Do you understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: As to Counts 1, 2, 3, and 5 I could impose
14 a fine of \$250,000. Do you understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: As to Count 4, I could impose a fine of a
17 million dollars. Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: As to Count 3, I could put you on a period
20 of one year supervised release when you got out of jail. As to
21 Counts 1, 2, 4, and 5, I could put you on a period of three
22 years of supervised release when you got out of jail. And if
23 you violated the supervised release, I could bring you back in
24 front of me. There wouldn't be a jury trial. And if I were
25 satisfied that you violated my court order, I could send you

1 back to prison for up to a year as to Count 3 and up to two
2 years as to Counts 1, 2, 4, and 5. Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: There would be a \$100 special assessment
5 due as to each count for a total of \$500. Do you understand
6 that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: I could order restitution. Do you
9 understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: There's also a forfeiture count in the
12 indictment. Is the government seeking to forfeit anything
13 other than the \$2,080?

14 MS. WHITE: And the firearm and ammunition, Your
15 Honor.

16 THE COURT: Okay. So if you plead guilty, the
17 government is going to forfeit the firearm, the ammunition, and
18 \$2,080. Do you understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And you would be giving up any complaint
21 that the forfeiture constituted a violation of the Eighth
22 Amendment to the United States Constitution as being an
23 excessive fine or forfeiture. Do you understand that

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Understanding all these things, is this

1 what you want to do, plead guilty and throw yourself on the
2 mercy of the Court?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Before accepting your plea of guilty, I
5 must determine whether or not your offer to plead guilty is
6 done freely and voluntarily with full knowledge of the various
7 rights that you give up by such a plea and also whether the
8 offer to plead guilty is done with a sufficient understanding
9 of the possible consequences of that plea.

10 If at any time you do not understand what I am saying,
11 I want you to stop me so that you can consult with your
12 attorney and receive an explanation or so that I can explain
13 anything you don't understand. Will you do that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Have you understood everything so far?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: How old are you?

18 THE DEFENDANT: 27.

19 THE COURT: How far have you gone in school?

20 THE DEFENDANT: I got my GED.

21 THE COURT: So you can read and write okay?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: In English?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: What type of work have you done most of

1 your life?

2 THE DEFENDANT: I sell cars.

3 THE COURT: Do you know what a felony is?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Have you ever pled guilty to a felony
6 before?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: So you have been in front a judge like me
9 and he's asked these types of questions before?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: That's what I'm doing today is I'm asking
12 you all these questions to satisfy myself that you are making
13 this decision freely and voluntarily here today. Do you
14 understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you have any history of mental illness?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Have you ever seen a psychiatrist?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: When was the last time?

21 THE DEFENDANT: About four years ago.

22 THE COURT: At that time did the doctor say that you
23 needed to be in a mental hospital?

24 THE DEFENDANT: No, sir.

25 THE COURT: Have you ever been in a mental hospital?

1 THE DEFENDANT: No, sir.

2 THE COURT: Whatever was bothering you four years ago,
3 is it still bothering you today?

4 THE DEFENDANT: No, sir.

5 THE COURT: You are okay to make this important
6 decision here today?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you agree with that, Mr. Merlino?

9 MR. MERLINO: I do, Judge.

10 THE COURT: You understand, Mr. Caldwell, your lawyer
11 could have argued that you were insane at the time of the
12 offense. If the jury had a reasonable doubt about that, I
13 would tell them they have to find you not guilty. But if you
14 plead guilty, you give up that insanity defense along with any
15 and all other defenses. Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Were you under the influence of drugs or
18 alcohol when this crime occurred?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Being under the influence of drugs or
21 alcohol could be a defense to some or all of these charges.
22 Your lawyer could argue to the jury that you were so high or
23 drunk that you couldn't perform a specific intent to commit
24 these crimes, and if the jury had a reasonable doubt about
25 that, I would tell them that they would have to find you not

1 guilty. But if you plead guilty, you give up that voluntary
2 intoxication defense along with any and all other defenses. Do
3 you understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you need any more time to discuss that
6 defense or any other defense with your lawyer?

7 THE DEFENDANT: No, sir.

8 THE COURT: Is this what you want to do, plead guilty
9 and give up any and all defenses?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Are you now under the influence of any
12 drugs or intoxicants that would affect your understanding of
13 these proceedings?

14 THE DEFENDANT: No, sir.

15 THE COURT: Have you taken any medicine at all today?

16 THE DEFENDANT: No, sir.

17 THE COURT: Can you hear me okay?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Understand me okay?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Is there anything wrong with you mentally
22 or physically which would prevent you from understanding this
23 proceeding?

24 THE DEFENDANT: No, sir.

25 THE COURT: Do you feel like you are in full

1 possession of your faculties at this time?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Now, you have heard the announcement of
4 the attorneys as to your open plea. Is that your understanding
5 of what you are doing here today?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Did you discuss that with Mr. Merlino?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Did your attorney or anyone else make any
10 promises to you in private other than what was announced here
11 in open court?

12 THE DEFENDANT: No, sir.

13 THE COURT: Did your attorney or anyone else threaten
14 you to force you to enter this guilty plea?

15 THE DEFENDANT: No, sir.

16 THE COURT: Are you satisfied with the advice of your
17 attorney?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Mr. Merlino has only been working on your
20 case for a short period of time. Do you understand that by
21 pleading guilty here today, you may not be giving him a chance
22 to finish any investigation that he might have otherwise wanted
23 to have contacted. Is that what you want to do, plead guilty
24 and finish up the case here today except for sentencing in
25 November?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Did you say it was okay with you for your
3 lawyer to make the announcement changing your plea from not
4 guilty to guilty?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Are you pleading guilty because you are
7 guilty of possession of a firearm and ammunition by a convicted
8 felon, two counts of possession of 15 or more unauthorized
9 access devices, aggravated identity theft, and possession of
10 methamphetamine with the intent to distribute?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Now, before entering this plea of guilty,
13 have you had enough time to discuss with your attorney the
14 nature of the charges, any possible defenses you might have,
15 and your chances of winning your case at trial?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Do you need any more time to discuss any
18 of those things or anything else with your lawyer?

19 THE DEFENDANT: No, sir.

20 THE COURT: Is this what you want to do, plead guilty
21 to the superseding indictment where the grand jury charges that
22 from on or about October 24th of 2016 through on or about
23 May 4th of this year in Broward County in the Southern District
24 of Florida that you, having been previously convicted of a
25 crime punishable by imprisonment for a term exceeding one year,

1 that you did knowingly possess a firearm and ammunition in and
2 affecting interstate and foreign commerce.

3 And in Count~2 they charge on May 4th of this year in
4 Broward County in the Southern District of Florida that you did
5 knowingly with the intent to defraud possess 15 or more
6 unauthorized access devices, that is, bank account numbers,
7 debit card numbers, credit card numbers, and social security
8 numbers issued to other persons and that that conduct affected
9 interstate and foreign commerce.

10 Count 5 charges you did the same thing, but it was on
11 September 19th of 2015.

12 Count 3 charges on May 4th of this year, in Broward
13 County, in the Southern District of Florida, during and in
14 relation to a felony, that is, Count 5, that you did knowingly
15 with the intent to defraud possess 15 or more unauthorized
16 access devices, that is, bank account numbers, debit card
17 numbers, credit card numbers, and social security numbers
18 issued to other persons, that conduct affecting interstate and
19 foreign commerce -- I'm sorry, as was charged in Count~2, not
20 Count 5, and that you did knowingly transfer, possess, and use
21 without lawful authority a means of identification of another
22 person, that is, the name and social security number of BH.

23 And in Count 4, they charge on the same date, May 4th
24 of this year, in Broward County, in the Southern District of
25 Florida that you did knowingly and intentionally possess with

1 the intent to distribute a controlled substance, that is, a
2 mixture or substance containing a detectable amount of
3 methamphetamine in salts, isomers, or salts of its isomers.

4 Is that what you want to do, plead guilty to those
5 five charges?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Do you understand that the maximum
8 possible punishment is ten years in prison as to Counts 1, 2,
9 4, and 5, two years in prison as to Count 3?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And that there is a mandatory minimum of
12 two years as to Count 3 that has to run consecutive or after
13 the other four counts, do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: By your open plea, you are hoping that I
16 am going to give you a break in the case, is that correct?

17 THE DEFENDANT: Oh, yes, sir.

18 THE COURT: When you plead guilty, you give up certain
19 constitutional rights. You give up your right to a trial by
20 jury and the right to the assistance of a lawyer during that
21 trial. Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you understand that you give up your
24 right to persist in your not guilty plea?

25 THE DEFENDANT: Can you repeat that.

1 THE COURT: Sure. Do you understand that you give up
2 your right to persist or stick with your not guilty plea?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you understand that you give up your
5 right to require the government to prove your guilt beyond and
6 to the exclusion of every reasonable doubt?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: You have the right to counsel, if
9 necessary the right to appointed counsel, at trial and at every
10 other stage of the proceedings. Do you understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you understand that you give up your
13 right to confront, that is, to see, hear, and cross-examine the
14 government witnesses?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you understand that you give up your
17 right to compel, that is, to require the attendance of
18 witnesses to come to court and to testify in your defense?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you understand that you give up your
21 right to refuse to testify, that is, you give up your right to
22 remain silent, which is also sometimes called the right against
23 self incrimination?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: That means if you went to trial, you would

1 have had the right on your own part to decline to testify
2 unless you voluntarily elected to do so in your own defense.
3 Do you understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And if you decided not to testify at a
6 trial or if you decided not to call any witnesses or if you
7 decided not to put on any evidence, those facts couldn't have
8 been used against you at a trial. Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you also understand that you give up
11 your right to appeal any matter relating to your case including
12 any judgment and sentence which the Court may impose except as
13 to the validity of the sentence?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: That means if you went to trial and got
16 convicted, you could have taken an appeal saying the jury
17 wasn't fair or I wasn't fair, but when you plead guilty, you
18 give up that right to appeal. Do you understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And do you understand that if you are not
21 a natural born American citizen, that by pleading guilty to a
22 crime, it can affect your citizenship rights and it can lead to
23 deportation or removal?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: And where were you born?

1 THE DEFENDANT: Fort Lauderdale, Florida.

2 THE COURT: And understanding all these rights, is
3 this what you want to do, give up all these rights and enter
4 this guilty plea here today?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you understand that you are making that
7 decision today to give up all these rights. You can't come
8 back tomorrow, next week, or next year and say, Judge, I made a
9 mistake, I didn't know what was going on on August 23, my
10 lawyer wasn't ready, my lawyer was no good, or any one of a
11 number of other reasons. Are you making a decision today that
12 you are willing to live by?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Will the government summarize the facts as
15 to Mr. Caldwell's case.

16 MS. WHITE: If this case had proceeded to trial, the
17 United States would have presented testimony that on
18 September 19th of 2015, during a traffic stop, Trenard Caldwell
19 was found in a stolen car. He had two cellular phones in his
20 possession at that time which were seized and searched pursuant
21 to a state search warrant.

22 Within those phones were a significant amount of
23 personal identifying information including credit and debit
24 card and social security numbers of other individuals.

25 The secrete service contacted a number of those

1 individuals who advised that they wanted to pursue charges. In
2 the first phone collected, there are several pictures of the
3 defendant. He identifies himself in a text message as TC.

4 And on September 13 of 2015 Caldwell sent an
5 unidentified individual a screen shot containing the address
6 and credit card number of an individual with the initials MR.
7 He also sent several similar screen shots to other individuals
8 with the credit card numbers of approximately five other
9 people.

10 On August 11, 2015, the phone indicates that he
11 engaged in the text message exchange with another individual
12 negotiating the purchase price for a credit card embosser.
13 That person sends Caldwell a picture of a credit card embosser.

14 In the phone's images were also a screen shot created
15 on April 17, 2015 containing 11 FIA Card Services credit card
16 numbers and the corresponding customers' names. The phone's
17 web history included 800 visits to rescator.cm and 60 visits to
18 unicccshop.ru, sites on which you can purchase credit card
19 details in bulk.

20 The phone's data also included emails to and from the
21 defendant's email address, johndoe822@gmail.com.

22 And those emails contained an exchange between
23 Caldwell and a Chinese website concerning the purchase of fake
24 IDs in which Caldwell advises he wants to make a big order and
25 receives a price list, instructions on what information to

1 provide for the IDs, and they discuss shipping methods.

2 On January 3, 2017, Fort Lauderdale Police Department
3 again pulled Caldwell over in a stolen Porsche. The keys to
4 that vehicle were in Caldwell's possession as well as two
5 cellular phones which were seized and later searched pursuant
6 to a search warrant. Both state and federal search warrants
7 were obtained for those phones.

8 Within the phones were a number of photographs of
9 Caldwell in possession of what appeared to be firearms. In one
10 photograph, which the phone's metadata indicated was taken on
11 October 24, 2016, there were two firearms, a holster, and a
12 large amount of cash on a tile floor.

13 That photograph was presented to an ATF special agent
14 who is an expert in firearms identification. That agent opined
15 that due to several features of the larger firearm, there was
16 probable cause to believe it depicted a genuine Zastava,
17 Z-A-S-T-A-V-A, PAP pistol manufactured in Serbia. He also
18 advised that the second item depicted could be a real Glock
19 pistol, but there wasn't enough detail in the photograph to
20 make a definite identification.

21 A search warrant was also obtained for Caldwell's
22 Instagram account. That account was registered under the same
23 email address johndoe822@gmail.com. And between October 28,
24 2016 and September 3, 2017, Caldwell posted several photographs
25 of himself on Instagram in either actual possession or sitting

1 beside what appeared to be the Glock pistol and the Zastava PAP
2 pistol.

3 On May 21, 2017, he posted a photo of himself on
4 Instagram holding a large sum of money. In his Instagram
5 biography and in several captions for posts he inserted
6 electric plug emojis indicating that he is the plug. And the
7 plug is a slang term for the source of illegal narcotics.

8 Prior to October 2016, Caldwell had been convicted in
9 Broward County, case Nos. 10-13728C10A of aggravated assault
10 with a firearm and in 10-21560CF10B of burglary of a dwelling.
11 Both are felony offenses carrying a punishment of more than one
12 year in prison.

13 Caldwell is currently on probation for grand theft
14 stemming from his January 2017 arrest.

15 On April 11 of 2018, ATF special agents and Broward
16 Sheriff's Office deputies helped state probation conduct an
17 administrative search of Caldwell's listed address in
18 Fort Lauderdale, Florida. As law enforcement left that
19 address, a black Chevrolet Camaro drove past. A traffic stop
20 was conducted on the black Chevrolet Camaro, and deputies made
21 contact with the female driver.

22 She was issued a traffic citation, and the vehicle was
23 towed. Inside of that vehicle, a bank card bearing the name
24 Trenard Caldwell was located in the center console, and an FPL
25 bill for 205 Northwest 33rd Ave in Lauderhill was located on

1 the passenger seat.

2 That bill which was for March of 2018 was in the name
3 of an individual with initials JS. Agents learned that the FPL
4 account had been opened over the phone in February of 2017 and
5 that the account was opened in the name of JS using that
6 person's name, date of birth, and social security number.

7 Agents learned that JS was an 80-year-old resident of
8 an assisted living facility in Martin County, Florida who
9 passed away February of 2017.

10 The landlord of that Lauderhill address provided a
11 copy of the lease which contained the number that Caldwell had
12 provided to probation and his email address, although the lease
13 was in the name of someone with initials JJ.

14 ATF agents contacted JJ who advised his wallet had
15 been stolen in Boynton Beach and it contained his driver's
16 license and social security number. He advised he did not know
17 Trenard Caldwell and had never given anyone permission to use
18 his information to obtain a lease in Broward County.

19 A federal search warrant was obtained for the property
20 in Lauderhill, Florida. On May 4, 2018, the warrant was
21 executed. The defendant and his brother Gregory Caldwell were
22 found inside. The home had three bedrooms. Two appeared to
23 contain items belonging to Caldwell.

24 In one of those bedrooms, law enforcement located a
25 Glock 22 .40 caliber pistol with an extended magazine

1 underneath an air mattress. The firearm was fully loaded. An
2 ATF nexus expert would testify that the pistol and ammunition
3 were manufactured outside the state of Florida.

4 Also inside that room were paperwork for prescriptions
5 containing the name and address of Trenard Caldwell, a laptop,
6 thumb drive, five cellular phones, four credit cards in the
7 name of someone with the initials JH, and an additional
8 notebook containing the names of websites that sell personal
9 identifying information along with the corresponding user names
10 as passwords.

11 Also in that notebook were the names of 11 individuals
12 with their date of births, social security numbers, addresses,
13 email addresses, and phone number. The notebook was dusted for
14 prints, and Caldwell's prints were identified by a latent print
15 examiner.

16 A full page of that notebook contained the personal
17 identifying information of someone with initials BH, and his
18 job, city of Tampa Police Officer was written next to his name.
19 Also listed were his date of birth, social, address, prior
20 addresses, his driver's license number, and all of his
21 registered vehicles.

22 He was contacted by the secret service and confirmed
23 that all of that information was correct, that he did not know
24 Trenard Caldwell and had not given him permission to obtain or
25 use his personal identifying information.

1 The laptop found in the bedroom had a USB or thumb
2 drive attached that contained TLO or comprehensive reports for
3 several individuals which contained information such as their
4 social security number, the names of their family members, all
5 of their residences prior and current, and their credit
6 history.

7 The second bedroom contained a pair of shorts that had
8 the defendant's wallet and a cellular phone in the pocket. The
9 phone was later searched and contained several photographs of
10 Caldwell in possession of three different firearms including
11 the Glock pistol. It also contained two videos of Caldwell in
12 possession of the Glock pistol. All of those photographs and
13 videos were taken in 2017 according to the phone's metadata.

14 There were two scooters outside of the home leaning
15 against the side of the home. In the seat of one, officers
16 located a box of Federal brand ammunition. In the seat of the
17 other, they found two bags of a crystal-like substance that
18 field-tested positive for methamphetamine and two digital
19 scales. Broward Sheriff's Office crime lab tested those and
20 determined that one of the bags contained 27.9 grams of a
21 mixture of Dybutylone and methamphetamine.

22 Among the other items found in the common area of the
23 home were a number of empty plastic baggies commonly used to
24 package narcotics, digital scales, and \$2,080 in cash.

25 In the black Camaro parked, outside officers found a

1 Citibank statement in Caldwell's name and a composition book
2 that contained the names, dates of birth, credit card numbers,
3 and social security numbers of seven other individuals.

4 There was an additional notebook found in the living
5 room of the home which was dusted for prints and a latent
6 examiner determined they were Caldwell's. This also contained
7 a list of names, dates of birth, and social security numbers.

8 There was also a Texas driver's license and a social
9 security card for a woman with the initials SKP in the living
10 area and a small card-sized envelope with the name Mark written
11 on one side and a social security number and the name Josh
12 written on the other side with a social security number.
13 Inside were four credit cards and IDs with either the name Mark
14 or Joshua as the first name, and they all contained the same
15 photograph of an unidentified black male.

16 Lastly, there were four total laptops and 30 cell
17 phones seized from the home. One of those laptops contained
18 the MSR605 program which is used with a magnetic stripe card
19 reader or writer encoder to encode the magnetic strips of
20 credit cards.

21 THE COURT: When was he convicted of aggravated
22 assault and burglary?

23 MS. WHITE: I believe they are 2010 case numbers, so
24 it was either 2010 or 2011.

25 THE COURT: And what was the sentence?

1 THE DEFENDANT: Two years community control followed
2 by three years probation.

3 THE COURT: And was Mr. Caldwell adjudicated guilty of
4 those crimes?

5 MS. WHITE: In the aggravated assault case, he was
6 eventually adjudicated and served eight months in jail.

7 In the burglary case, he was adjudicated and received
8 community control and probation.

9 THE COURT: So when were the adjudications?

10 MS. WHITE: I don't have the convictions with me, Your
11 Honor, but they were prior to 2016.

12 MR. MERLINO: Judge, if I may, I confirmed one at
13 least by May 21, 2014.

14 THE COURT: Mr. Merlino, do you take any exception or
15 objection to the facts as summarized?

16 MR. MERLINO: No, Judge.

17 THE COURT: Do you stipulate that the had the case
18 gone to trial, I would have sent Mr. Caldwell's case to the
19 jury?

20 MR. MERLINO: For the purpose of the plea, yes, sir.

21 THE COURT: Do you stipulate that Ms. White's factual
22 recitation contains the essential elements of the crimes?

23 MR. MERLINO: Yes, sir.

24 THE COURT: Mr. Caldwell, do you now admit to
25 committing the acts as set forth in the charge to which you

1 have pled guilty?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And do you understand if you went to
4 trial, the government would have had to have proven even
5 essential element of the crimes beyond a reasonable doubt?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Do you understand what the elements of the
8 crimes are?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: For example, as to Count 4, the government
11 would have had to have proven that you knowingly possessed
12 methamphetamine, that you intended to distribute the
13 methamphetamine. Do you understand the elements of Count 4?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: As to Counts 2 and 5, the government would
16 have had to have proven that you knowingly possessed 15 or more
17 unauthorized access devices and that you acted with the intent
18 to defraud and deceive and that your conduct affected
19 interstate or foreign commerce. Do you understand the elements
20 of Counts 2 and 5?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: As to Count 3, the government would have
23 had to have proven that you knowingly transferred, possessed,
24 or used another person's means of identification without lawful
25 authority during and in relation to the possession of

1 unauthorized access devices as alleged in Count~2. Do you
2 understand the elements as to Count 3?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: As to Count~1, the government would have
5 had to have proven that you knowingly possessed a firearm and
6 ammunition in or affecting interstate or foreign commerce and
7 before possessing the firearm you had been convicted of a
8 felony, that is, a crime punishable by imprisonment for more
9 than one year. Do you understand the elements of Count~1,
10 possession of a firearm and ammunition by a convicted felon?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you also understand that when you plead
13 guilty, you give up any and all defenses to this case?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: For example, your lawyer could have argued
16 that any one or all of the three stops were illegal stops and
17 filed a motion to suppress, or he could have argued that the
18 search warrants, any or all of them, were illegally issued and
19 filed a motion to suppress, or he could have argued that the
20 Glock 22 wasn't yours and the photographs of the guns and the
21 videos of the guns were all taken before you got convicted of a
22 felony, or he could have argued that the car was illegally
23 searched, or he could have argued that your prints were put on
24 the notebooks before any personal identification information
25 was written in the notebooks, or he could have argued that the

1 ammunition and the methamphetamine and the scooter wasn't yours
2 and you didn't know about it, or there may have been other
3 defenses to this case. But if you plead guilty, you give up
4 any and all defenses. Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And is that what you want to do?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Now, I guess the secret service was
9 involved this case. Is that correct?

10 MS. WHITE: Yes.

11 THE COURT: My son is a secret service agent assigned
12 to the New York field office. Although, he doesn't do credit
13 card fraud, he has done counterfeit fraud and he does personal
14 protection investigations.

15 Mr. Merlino, do you want to talk to Mr. Caldwell and
16 see if he has any problem with me staying on his case with the
17 fact that my son is a secret service agent?

18 MR. MERLINO: If I could just take a moment, Judge.

19 THE COURT: Okay.

20 MR. MERLINO: Judge, I reviewed that issue with him,
21 and he has no objection and he wishes to go forward.

22 THE COURT: Is that correct, Mr. Caldwell?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: You have had enough time to think about
25 that and talk about it with your lawyer?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And you want me to stay on the case rather
3 than asking him to ask me to assign it to a different judge?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: All right. There being no exception or
6 objection to the facts as summarized, there having been a
7 stipulated factual basis, I find the facts which the government
8 is prepared to prove are sufficient to constitute the crimes of
9 possession of a firearm and ammunition by a convicted felon,
10 two counts of possession of 15 or more unauthorized access
11 devices, aggravated identity theft, and possession with the
12 intent to distribute methamphetamine.

13 Let the record reflect that I find the defendant alert
14 and intelligent. I further find that the defendant is freely,
15 voluntarily, and intelligently entered his plea of guilty based
16 upon the open plea announced here earlier with no promises or
17 threats and without any mental impediment of any kind.

18 I further find that the defendant has had the advice
19 and counsel of a competent lawyer with whom he says he is
20 satisfied.

21 And having found the facts to be sufficient to accept
22 such a plea, I will ask you one more time, Mr. Caldwell, if it
23 is still your desire to plead guilty as previously announced?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Mr. Merlino, are you satisfied that

1 Mr. Caldwell understands the charges and the consequences of
2 his plea?

3 MR. MERLINO: I do, Judge. Through our numerous
4 meetings and going over the volume of evidence through
5 discovery here, I believe he does, Judge.

6 THE COURT: Mr. Caldwell, do you fully understand what
7 is going on at this proceeding?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you have any questions to ask me about
10 what has gone on in your case so far today?

11 THE DEFENDANT: No, sir.

12 THE COURT: I find that you, Trenard Caldwell,
13 understand the nature of the charges against you and appreciate
14 the consequences of pleading guilty, that you understand that
15 by pleading guilty, that you waive each and every one of the
16 rights of a defendant that I've already mentioned to you and
17 that you have knowingly, intelligently, and voluntarily waived
18 these rights, and the Court hereby accepts your guilty plea.

19 At this time I am going to adjudicate you guilty,
20 defer sentencing, order a presentence investigation report, set
21 sentencing for November 1, at 1:15 in the afternoon in this
22 courtroom.

23 Someone from the probation department will be coming
24 up to the jail to interview you. I need you to be open and
25 honest with them so that I can find out as much as I can about

1 you so that I can make a fair decision in November.

2 Is there anything else we need to discuss on
3 Mr. Caldwell's case, Ms. White?

4 MS. WHITE: No, Your Honor.

5 THE COURT: Mr. Merlino?

6 MR. MERLINO: No, sir.

7 THE COURT: Anything else you want to say,
8 Mr. Caldwell?

9 THE DEFENDANT: No, sir.

10 THE COURT: We will see everybody back November 1 at
11 1:15.

12 MR. MERLINO: Thank you, sir.

13 THE COURT: We will be in recess.

14 (Thereupon, the hearing concluded at 2:42 p.m.)

15 - - -

16 C E R T I F I C A T E

17

18 I hereby certify that the foregoing is an
19 accurate transcription of the proceedings in the
20 above-entitled matter.

21

22

23 10/9/18 s/ Tammy Nestor
24 Tammy Nestor, RMR, CRR
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25 Fort Lauderdale, Florida 33301
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
CASE NO. 18-60127-CR-WPD

UNITED STATES OF AMERICA, .
Plaintiff, . Fort Lauderdale, Florida
v. . November 2, 2018
TRENARD CALDWELL, . 1:31 p.m.
Defendant. .
.

- - - - -
Transcript of Evidentiary and Motion Hearing had
before the Honorable William P. Dimitrouleas,
United States District Judge.
- - - - -

APPEARANCES:

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- - - - -
Proceedings recorded by mechanical stenography, transcript
produced by computer.

FRANCINE C. SALOPEK, OFFICIAL COURT REPORTER
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FRIDAY, NOVEMBER 2, 2018, 1:31 P.M.

(The Judge entered the courtroom)

THE COURT: Please be seated.

United States vs. Trenard Caldwell.

5 If counsel would announce their appearances for the
6 record.

7 MS. WHITE: Good afternoon your Honor. Anita White
8 for the United States.

9 **MR. BATISTA:** Good afternoon, your Honor. Jose
10 Batista on behalf of Mr. Caldwell, who's present before the
11 Court.

12 **THE COURT:** All right. Mr. Caldwell is before the
13 Court. He filed a motion to withdraw his plea and an amended
14 motion to withdraw his plea. We're here for an evidentiary
15 hearing.

16 Both sides ready to proceed?

17 MS. WHITE: Yes, your Honor.

18 **MR. BATISTA:** Your Honor, could you give me five
19 minutes?

20 | THE COURT: Sure.

21 | MR. BATISTA: If you don't mind? Thank you.

24 MR. BATISTA: Yes, your Honor, we're ready.

25 THE COURT: All right. You may call your first

1 witness.

2 **MR. BATISTA:** I will call Mr. Caldwell.

3 **THE COURT:** All right. He can just stand there.

4 Can we swear in Mr. Caldwell?

5 **MR. BATISTA:** And I ask, Ms. Merlino (*sic*), when you
6 got a witness who's gonna be testifying on behalf of the
7 government, if they could step out of the courtroom, please.

8 **THE COURT:** All right. The rule's invoked. Counsel
9 are instructed to inform their respective witnesses of the
10 invocation of the rule and the ramifications of a violation
11 thereof.

12 **THE COURT REPORTER:** Please raise your right hand.

13 (*TRENARD CALDWELL, DEFENDANT HEREIN, WAS SWORN*)

14 **DIRECT EXAMINATION**

15 BY MR. BATISTA:

16 Q. Can you tell the Court your name, please.

17 A. Trenard Caldwell.

18 **MR. BATISTA:** Your Honor, can he sit or -- can he
19 sit --

20 **THE COURT:** He can have a seat, sure.

21 BY MR. BATISTA:

22 Q. Have a seat.

23 **MR. BATISTA:** And since I'm so used to the podium, if
24 I could use the podium?

25 **THE COURT:** Sure.

FRANCINE C. SALOPEK, OFFICIAL COURT REPORTER
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1 **MR. BATISTA:** Thank you, your Honor.

2 BY MR. BATISTA:

3 Q. Mr. Caldwell, how old are you?

4 A. Twenty-seven.

5 Q. What type of formal education do you have?

6 A. GED.

7 Q. Mr. Caldwell, sometime in the month of June of 2018, you
8 retained the services of an attorney to represent you in this
9 case before Judge Dimitrouleas?

10 A. Yes, sir.

11 Q. And is that attorney Richard Merlino?

12 A. Yes, sir.

13 Q. I had -- as your attorney, I have reviewed with you my
14 amended motion for your -- to withdraw your guilty plea that
15 you entered before Judge Dimitrouleas.

16 A. Yes, sir.

17 Q. And in that plea agreement -- I mean -- excuse me -- in
18 that motion, I make reference to different events that
19 transpired on different days.

20 A. Yes, sir.

21 Q. And the information that I included in there as far as your
22 relationship with your attorney and how many times he visited
23 you was information that you provided to me?

24 A. Yes, sir.

25 Q. And when you've (sic) first retained Mr. Merlino, was it

1 your intention to have him represent you to plead guilty or to
2 go to trial?

3 A. To go to trial.

4 Q. And on how many occasions did Mr. Merlino visit you while
5 you were detained prior to you entering a guilty plea?

6 A. Like, two times.

7 Q. Besides Mr. Merlino, did someone on his behalf, an
8 investigator on his behalf also visit you?

9 A. Yes. Multiple times.

10 Q. And do you remember approximately how many times the
11 investigator visited you?

12 A. Like, three or four times.

13 Q. Okay. On the occasions that Mr. Merlino visited you prior
14 to you entering a guilty plea, did Mr. Merlino review with you
15 any discovery in this case?

16 A. No, sir. Only the private investigator.

17 Q. And the private investigator, on how many occasions did he
18 review discovery with you?

19 A. One time.

20 Q. And in reviewing the discovery, was a laptop involved?

21 A. Yes, sir.

22 Q. And for how long will you say you were with the
23 investigator when he reviewed the discovery with you in the
24 laptop?

25 A. The laptop, it was, like, five, ten minutes. But he was

1 there, like, 30, 40 minutes.

2 Q. Okay. At any time that you met with Mr. -- Attorney
3 Merlino prior to you entering a guilty plea, did he take copies
4 of the discovery, of pictures, anything to do with the case to
5 review with you the evidence?

6 A. No, I had my own copies from Rubinchik. I had my own
7 copies from Rubinchik, and I sent him copies.

8 Q. And you sent whom copies?

9 A. Mr. Merlino.

10 Q. Okay. Did Mr. Merlino at any time review with you the
11 evidence against you?

12 A. Yes, he reviewed evidence, but he didn't review all the
13 evidence. He only reviewed the evidence that he was, like,
14 best of his interests.

15 Q. Well, I don't understand when you say -- the last
16 statement. What do you mean by the "best of his interests"?

17 A. He didn't review any evidence that was best for me and him
18 to go to trial. He only reviewed, like, certain things. And
19 it wasn't much.

20 Q. You indicated that Mr. Merlino visited you on two occasions
21 prior to you entering the guilty plea, correct?

22 A. Yes, sir.

23 Q. The second time was only a couple days before you entered
24 the guilty plea?

25 A. Yes. He supposed to came (*sic*) that week on, I think, 20th

1 or 21st, but he kept fabricating to me, and he came on the
2 22nd, and got me a court date on the 23rd, without my
3 knowledge, to enter a guilty plea.

4 Q. When you met with Mr. Merlin a few days before you entered
5 the guilty plea, what, if anything, did you discuss with him?

6 A. I told him I want to challenge the warrants, uhm,
7 suppression, and challenge the jurisdiction. And he'd say it
8 was too late, because trial was Monday, it was too late to put
9 anything in. And the trial was Monday.

10 Q. Did -- but when you met him the first time, did you discuss
11 with him the fact that there were different search warrants in
12 this case and the different searches were done?

13 A. Yes. I indicated to him, and he say everything looks fine
14 and okay, up until the 22nd of August.

15 Q. Okay. But when you first met with him, did you have any
16 conversations with him as far as whether or not he would be
17 willing to file motions to suppress or challenge either the
18 searches --

19 A. Yeah.

20 Q. -- the car stops, or the affidavits in support of the
21 search warrants?

22 A. Yes. Him and the private investigator, because the private
23 investigator was relaying the message to him, because he barely
24 was coming to see me. Then when he did come see me, we was
25 talking about challenge the warrants and challenge the

1 jurisdiction, and everything else. Then I don't know what
2 happened after that.

3 Q. Okay. So, the day before you enter a guilty plea,
4 Mr. Merlino visited you, correct?

5 A. Yes, sir.

6 Q. At that time, did you indicate to him your intentions of
7 entering a guilty plea?

8 A. No. I was telling him, "Let's go to trial." But he
9 coerced me -- on the 22nd and on the 23rd, when he came down to
10 visit me down in the holding cell, he coerced me to take a
11 guilty plea.

12 Q. Well, on the day before you took the guilty plea, did he
13 discuss with you the evidence or why he wanted you to take a
14 guilty plea?

15 A. No, sir. Only thing he said, the judge was gonna hammer me
16 if I don't take the guilty plea, and that Anita White was gonna
17 supersede me if I don't take the guilty plea.

18 And I say I need to have a talk to my family and
19 stuff, before I would put myself into this. But the next day,
20 that morning, like two in the morning, three in the morning, I
21 found out I had a court date on the 23rd for a guilty plea, but
22 I thought I was going to court on the 24th and 27th to go to
23 trial.

24 Q. And prior to you visiting -- coming before the judge on the
25 day that you entered the guilty plea, did you speak -- see

1 Mr. Merlino?

2 A. Yes. We seen each other the same day.

3 Q. Where at?

4 A. Down in the bullpen.

5 Q. The "bullpen," you mean the lockup?

6 A. Yes, in the lockup.

7 Q. Okay. And at that time, what, if anything, did you discuss
8 with him?

9 A. Challenges and warrants, challenge the jurisdiction, I want
10 to go to trial. And he had a little -- he had a piece of
11 paper, like -- it probably still in his notes -- to coerce me
12 what to say. Then he was telling me that the judge -- if I ask
13 the judge to challenge the warrants, the judge gonna get up and
14 walk off the bullpen, and he gonna hammer me if I go to trial.

15 Q. Okay. So, why -- what -- but then you came before the
16 judge, and Judge Dimitrouleas took, like, 40 minutes or more in
17 explaining to you that -- your different rights --

18 A. Yeah.

19 Q. -- that you will be entering (*sic*) if you were to plead
20 guilty.

21 A. Uhm --

22 Q. One second. You remember that, right?

23 A. Yes, I remember that.

24 Q. Okay. And why, then, didn't you tell Judge Dimitrouleas,
25 "Judge, this lawyer is trying to force me or coerce me into

1 pleaing (*sic*), and I want to go to trial"?

2 A. 'Cause after what he told -- told me down in the bullpen,
3 told me that Judge Dimitrouleas was gonna walk off, I didn't --
4 I thought he wasn't gonna fight for me, and I wanted to go to
5 trial, which I still want to go to trial, 'cause I know I'm
6 innocent, and I want to prove my innocent (*sic*).

7 Mr. Merlino, only thing he did was just take my money,
8 and then when it was time to go to trial, he come to me with a
9 plea, which I didn't want to take, which I was forced and
10 coerced to take.

11 And he had it in his notes what Judge Dimitrouleas was
12 gonna say, which I should have stepped up as a man and say, "He
13 coerced me, I didn't want to take this," but at the same time,
14 I was scared that he wasn't gonna fight for me 'cause the
15 things he did and the things he said to me.

16 Q. And when you said that he had a piece of paper with
17 something written on it, what do you mean?

18 A. He had a paper, like -- acting like he was
19 Judge Dimitrouleas and saying different things, uhm, which
20 Dimitrouleas did ask me, which I should have been honest and
21 told him "no, sir" with certain things. He had a piece of
22 paper like he was Judge Dimitrouleas, and it was like, uhm,
23 "You know you're giving all your rights up, right?"

24 "Yes."

25 And I was telling him I want to go to trial, but he

1 was steady going through on a piece of paper, and he had his
2 friend there trying to coerce me, too, to take a plea.

3 Q. Okay. So, in other words, what he was reading you from
4 were questions that he anticipated that the judge would ask you
5 for the change of plea?

6 A. Yes, sir.

7 Q. And the responses there, was it responses that he
8 expected -- or suggested you answer to those questions?

9 A. Yes, yes. He wanted me to answer to the questions just
10 like that, just how Judge Dimitrouleas said, he wanted me to
11 answer "yes" to everything. And every time Dimitrouleas --
12 Judge Dimitrouleas says something, he'll tap my -- like, tap my
13 leg and say, like -- that way, I was talking like what he was
14 gonna say.

15 Q. So, when you entered the guilty plea, you were sitting at
16 the table or you were up here at the podium?

17 A. I was sitting at the table where I'm at now.

18 Q. And Mr. Merlino was sitting next to you?

19 A. Yes, sir.

20 Q. And you indicated that on different questions that the
21 judge asked, Mr. Merlino would tap you on your leg?

22 A. Yes, sir.

23 Q. And what did you interpret that tap to mean?

24 A. Uhm, just go with the flow that he coerced me to do.

25 Q. "Go with the flow," indicating what?

1 A. Uhm --

2 Q. To answer the questions the way he wanted you to answer?

3 A. Yeah, the way he wanted me to answer. And I will take a
4 polygraph test to prove that I'm innocent and I'm right.

5 Q. Well, would you be willing to take a polygraph test to show
6 that what you're telling the Court as to what transpired
7 between you and Attorney Merlino as far as the change of plea
8 and why you changed your mind to enter a guilty plea, that --
9 will you be willing to take a polygraph on that?

10 A. Yes, sir.

11 And then I was asking him, like, to call my witnesses
12 or whatnot. And he didn't never give my witnesses a call. So,
13 it's like -- the only thing, he was sending his private
14 investigators telling me to come to brief with them and give up
15 people that I don't know anything about.

16 Q. Well, let me ask you a question. The judge --

17 Judge Dimitrouleas in that plea colloquy, because -- which I
18 have here, and I reviewed it with you --

19 A. Yes, sir.

20 Q. -- specifically explained to you, Look, by entering a plea,
21 you give up the opportunity for the attorney to do an
22 investigation, speak -- locate and speak to witnesses, file
23 motions to suppress.

24 A. Yes, sir.

25 Q. Do you remember all that?

1 A. Yes, sir.

2 Q. And you answered "yes" --

3 A. Yes.

4 Q. -- that you understood that.

5 A. Because it wasn't in his best interests.

6 Q. First answer. You say "yes," correct?

7 A. Yes, sir, I definitely did.

8 And I'm sorry about that, Mr. Dimitrouleas (*sic*). I
9 apologize for taking up your time that day, too.

10 Q. And at the end -- and, additionally, Judge Dimitrouleas
11 asked you if you were satisfied with the services of Attorney
12 Merlino.

13 A. Yes.

14 Q. Is that correct?

15 A. Yes.

16 Q. And you answered "yes."

17 A. Yes. And I have an explanation to that, because he --

18 Q. Well, tell the judge, why did you answer "yes"?

19 A. He know I was gonna file a 2255 on him. So, if I said no,
20 it would have been looking like he was an insufficient
21 counselor towards you and the prosecutor. So, he told me to
22 say "yes" to everything, he coerced me to say that, or else I
23 would have filed a 2255 on him, and he didn't want that. Now,
24 why after today, I took a plea, I hurry up immediately and put
25 in a motion to withdraw plea and motion to withdraw counsel,

1 'cause I know he was not in my best interests.

2 **MR. BATISTA:** Your Honor, if I may, I realized that I
3 made two typos in my motion as to -- to withdraw the plea. One
4 was on page 3, and I put: "On June 3rd, the Court granted a
5 defense request to continue" -- it was on July -- I mean on
6 June 19th -- I put "June 19th," but it was "July 19th." It was
7 a typo on my part.

8 And in paragraph 14: "And this Court to set for
9 change of plea for" -- I put "October." It was "August 23rd."
10 So, that was a scrivener's error on my part.

11 **THE COURT:** Okay.

12 **MR. BATISTA:** It doesn't affect the contents of the
13 motion to withdraw.

14 **THE COURT:** The second one was page 6, did you say?

15 **MR. BATISTA:** No, your Honor. They're both on the
16 same page, your Honor. If I may -- if you just give me a
17 second, please.

18 On page 3 --

19 **THE COURT:** Right.

20 **MR. BATISTA:** -- paragraph 9, instead of "June 19th,"
21 it should be "July."

22 **THE COURT:** Okay.

23 **MR. BATISTA:** And on paragraph 14, instead of
24 "October 23rd," it should be "August 23rd."

25 **THE COURT:** Okay. That seems right.

1 A. And I have one more statement.

2 Then, uhm, when Mr. Merlino did come see me, he say he
3 was, like, one of the top five lawyers out of Broward County
4 that the judges recommend him to come see, like, in Key West
5 and different counties and states. And he say he was the --
6 one of the five of them.

7 So, he say he was always prepared for trial, he
8 prepared for trial. He say he was ready for trial in two
9 weeks. I don't know what him and Anita White was talking about
10 to make him switch his mind or whatnot, but I don't think
11 that's fair. And he told me out of his mouth, he say, Oh, the
12 judges pick me and, like, four other lawyers out of Broward
13 County, throughout the tri-county states (*sic*) to hurry up and
14 do trial cases.

15 Q. And why is it that you want the judge to allow you to
16 withdraw your guilty plea?

17 A. 'Cause I know I'm innocent. And, uhm, I didn't do
18 anything. And judge -- no, I mean, Mr. Merlino, he taking
19 money out of my family (*sic*) mouth and my kids' mouth, and if
20 that's the case, I could have went with a public defender. And
21 it was around school time. And he coerced me to do things that
22 I didn't want to do or whatnot.

23 Like I say, he had a sheet of paper in his notebook --
24 and he probably still have it, if he didn't forget to take it
25 out -- that he coerced me to do these things, which I really

1 wanted to go to trial since May 4th. And as -- on the record,
2 May 4th I say I wanted to go to trial, and I still had
3 intentions to go to trial, but he came on the 22nd to try to
4 come change a plea (*sic*).

5 Then he said he was gonna give Mr. -- he gonna give
6 Judge Dimitrouleas a call to set me a court date for the 23rd,
7 which I didn't want him to. I didn't know he did it for real.
8 I thought I was gonna be going to court on the 24th and the
9 27th still. 24th was gonna be calendar call, 27th was gonna be
10 trial. And it seemed like he show weakness of going to trial
11 to protect my life. And that's the reason why I want -- I'm
12 begging the judge to take my plea back, so I can show my
13 innocence.

14 **MR. BATISTA:** Judge, I have no further questions.

15 **THE COURT:** Cross-examination.

16 **MS. WHITE:** May I sit, Judge?

17 **THE COURT:** Sure.

18 **MS. WHITE:** So I can see him.

19 **CROSS-EXAMINATION**

20 BY MS. WHITE:

21 Q. Mr. Caldwell --

22 A. Yes, ma'am.

23 Q. -- this isn't the first time you've pled guilty to a
24 felony, is it?

25 A. No, ma'am.

1 Q. How many times have you sat with the judge and gone through
2 a plea colloquy?

3 A. This my first time like this one. The federal -- federal
4 judge is different from state court. And this my first time
5 ever hearing something like this. Like what Dimitrouleas said
6 on the 23rd, that's my first time ever hearing that. Other
7 than that, the other plea columns (*sic*) be, like, initial and
8 sign, and that's it.

9 Q. Okay. So, previously have you filled out forms indicating
10 that you were giving up your rights to go to trial, correct?

11 A. Yes.

12 Q. And you understood that you were giving up the rights to
13 trial or to any type of defense when you filled out those
14 forms, right?

15 A. No, ma'am, because when they say I was going on probation,
16 I was just initialing and signing without reading, and that was
17 my mistake.

18 Q. Okay. So, you're saying that the plea colloquy that
19 Judge Dimitrouleas did with you was the most thorough that
20 anyone has ever done.

21 A. Yes.

22 Q. And he laid out each of your rights, and you understood
23 what he was saying, right?

24 A. Yes, but it was Merlino, he coerced me into these things or
25 whatnot.

1 Q. So, you're testifying today that even though you understood
2 what the judge was telling you, and you understood what rights
3 you were giving up, you lied to him and said you wanted to do
4 it, but you didn't.

5 A. Yes, but -- yes.

6 Q. Now --

7 A. But at the same time, Richard Merlino lied -- fabricated to
8 me, too. And he promised me, like, he was gonna challenge
9 warrants and jurisdiction, but he never did do it. But he
10 coerced me. As my lawyer, I thought, like, for him coercing
11 me -- coercing me, like -- like, he told me that
12 Dimitrouleas -- Judge Dimitrouleas was gonna hammer me, so I
13 didn't want to get hammered anyway.

14 Q. Mr. Merlino wasn't your first lawyer on this case, was
15 it (*sic*)?

16 A. No.

17 Q. You actually had the public defender initially.

18 A. Yes.

19 Q. And you went through a plea colloquy -- or a colloquy with
20 the magistrate judge to get the public defender, didn't you?

21 A. Yes.

22 Q. And you told the magistrate judge that you didn't have any
23 assets, right?

24 A. I said not do I know of.

25 Q. And you told him you didn't have any money to hire a

1 lawyer.

2 A. Yes.

3 Q. But you actually own a house. You have a house in your
4 name, don't you?

5 A. Which I didn't know. My mom, she buy houses in Georgia and
6 different places. And since I'm the only one had kids, she --
7 I think she put my name on the house so if anything happen to
8 her, my kids can have something, because she love her
9 grandkids.

10 Q. Okay. So, you know that when the search warrant was
11 executed on your house --

12 A. That's not my house.

13 Q. -- where you were living, the place where you were staying
14 on May 4th of 2018, you know when the search warrant was
15 executed, they obtained your computers, right?

16 A. That's not my computers.

17 Q. Is your email address John Doe?

18 A. No.

19 Q. So, the computers that had that email address on it and a
20 copy of the paperwork conveying you that house, none of that
21 belonged to you.

22 A. No. And I don't -- I don't remember anything with John Doe
23 with a laptop email in there.

24 Q. Okay.

25 **MR. BATISTA:** Your Honor, just one clarification. I

1 understood that the prosecutor said "conveying you that house."
2 Is she referring to the house where he was arrested or the
3 house --

4 **MS. WHITE:** The deed.

5 **MR. BATISTA:** -- that belonged -- that's under his
6 mom's name? Which one?

7 **MS. WHITE:** The deed to the house that was in his
8 name.

9 A. And what house you said that was in? Because my mom's --
10 from my knowledge, my mom did never receive the deed. So --
11 and we can have the, uhm, people who she bought the house from
12 can come testify, because my mom, she did never receive the
13 deeds or nothing.

14 Q. So, if the deed was on one of the computers that was seized
15 from the house you were staying in on May 4th of 2018, you
16 don't know how it got there.

17 A. No. And when I read the affidavit, you guys said the deed
18 was on a piece of paper inside the house. You didn't say -- it
19 was never in a laptop.

20 Q. It was also inside the house. There was a copy of the deed
21 inside the house with you.

22 A. No, no.

23 Q. Okay. So, you got the public defender.

24 A. Yes.

25 Q. And you decided to hire your own private attorney.

1 A. My family.

2 **MR. BATISTA:** Your Honor, if I may, I believe the
3 government filed a motion to have the public defender
4 discharged from the case because of the house.

5 **THE DEFENDANT:** Yes.

6 **THE COURT:** She's cross-examining. You can examine on
7 redirect.

8 **MR. BATISTA:** No problem.

9 BY MS. WHITE:

10 Q. So, without the Court ever determining whether you deserved
11 to have the public defender or not, you went ahead and hired a
12 private lawyer.

13 A. No, my family. And Michael Spivack came to me, he say,
14 uhm, You guys say I have money hidden, and how you guys gonna
15 say I have money hidden, and you all did never take any money
16 or anything.

17 Q. Okay. So, you hired a -- you or your family hired a
18 private attorney.

19 A. My family.

20 Q. And that would be Scott Rubinchik.

21 A. Yes.

22 Q. And for some reason, you were not satisfied with his
23 representation, correct?

24 A. Yes.

25 Q. So, you hired Mr. Merlino.

1 A. Yes.

2 Q. So, you know that if you're not satisfied with an
3 attorney's representation, you can get a new attorney.

4 A. Yes.

5 Q. Didn't you hire -- after you hired Mr. Merlin, you said
6 that he came to visit you twice.

7 A. Yes.

8 Q. You actually saw him in person at least three times before
9 you pled guilty, correct?

10 A. Yes, at least like two, three times. I think the third
11 time -- yeah, the third time he came on the 22nd.

12 Q. Those in-person visits weren't the only time you spoke with
13 him, though, were they?

14 A. No. I was calling him on the jail phone calls, calling his
15 secretary, tell him I want to challenge the warrants, and she
16 say she gonna tell him, 'cause he was in and out of town,
17 vacation. And he say he was gonna challenge the warrants -- if
18 you hear the phone call, he say he gonna challenge the
19 warrants, put motions to suppress, and challenge the
20 jurisdiction, which he fabricated to me when he came on the
21 22nd, when he know what he promised me wasn't gonna get done.
22 Because the 23rd was around the corner, and you come on the
23 22nd, you know you weren't gonna file any motions or challenge
24 any warrants.

25 Q. So, the answer to my question is "yes"?

1 A. Can you repeat that -- your question?

2 Q. The question was: When you saw him in person, that wasn't
3 the only time that you spoke to him.

4 A. Ah, no.

5 Q. Okay.

6 A. So, it wasn't the only time speaking to him.

7 Q. Okay. So, you have spoken to him on other occasions
8 besides those three in-person visits.

9 A. Yes, ma'am.

10 Q. And you indicated that his investigator also came to see
11 you a number of times. How many did you say?

12 A. Like, four -- like, at least three, four, five times.

13 Q. Okay. Now, you said that the investigator only showed you
14 the evidence for a few minutes.

15 A. Yes. Like, two videos that -- trying to scare me up, like,
16 two videos that they say apossibly (*sic*) be guns, but which it
17 wasn't, on the two videos. That's it.

18 Q. Okay. You said he showed you two videos that showed you in
19 the proximity of guns?

20 A. No. He say it could be guns. I know they not guns. So,
21 he tried to scare me up -- like, after, like, the third time,
22 when he came with the laptop, he tried to scare me up to take a
23 plea. And he kept coming to me, asking me, uhm, could he say
24 Mr. Merlino spoke with you to do a three -- a 501K (*sic*), and I
25 think that's telling on somebody or something like that.

1 I tell him, No, I'm not telling on anyone, because I
2 don't -- I don't hang with people like that. I only hang with
3 people who have good jobs --

4 Q. Let's get back to the question that I asked you.

5 A. Okay. Um-hum.

6 Q. He showed you two videos --

7 A. Yes.

8 Q. -- that you say were -- they showed you in the proximity of
9 what appeared to be a gun or a firearm.

10 A. Yes. But it wasn't.

11 Q. Okay. And what did you do the rest of the four times that
12 he was there?

13 A. He kept coming and say, Everything's okay, everything's
14 still the same. He say he don't know how Anita White want to
15 go to trial; you're gonna lose. And I could take a polygraph
16 test on that.

17 He say, Everything is okay, we ready to go to trial,
18 we ready to go to trial. Until the third time, he came with a
19 laptop, and he was telling me, like, we was gonna challenge the
20 warrants, challenge the jurisdictions, or whatnot.

21 And I had my papers, 'cause I was on the line doing my
22 own homework inside the cell. So, I was showing him, like,
23 what the ATF agent was, like, fabricating on me and how we
24 gonna do this, do that.

25 And he say okay.

1 But most of the time, Mr. Merlino, he was out of town,
2 so he supposed to relay the message to Mr. Merlino.

3 Q. Okay. So, you -- two times the investigator came out to
4 see you just to say everything's okay, everything's okay, and
5 then the third time he showed you some evidence.

6 A. Yes. He showed me, like, two pieces of things that weren't
7 in my best interests.

8 Q. What do you mean it "wasn't in your best interests"?

9 A. Like --

10 Q. If he's showing you the evidence, what do you mean he's
11 showing you things that aren't in your best interests?

12 A. It wasn't no evidence. It was something, like, trying to
13 scare me up far as I don't go to trial or whatnot, 'cause I
14 don't know what you and him was talking about or whatnot. But
15 he was showing me two things for I don't go to trial, but I
16 still wanted to go to trial or whatnot, 'cause I know I'm
17 innocent, and I want to prove my innocent (*sic*) to this Court.

18 Q. Did the investigator tell you he was showing those things
19 to you so you wouldn't go to trial?

20 A. No, but how he was breaking it down to me, he was, like,
21 trying to basically, like, tell me, Oh, you gonna get hammered.
22 Like, if you go to trial, you get found guilty on this, I'm
23 gonna get hammered.

24 Q. Okay. Now, when Mr. Merlino came to see you, did he show
25 you any of the evidence?

1 A. No, ma'am. No, ma'am.

2 Q. Did you discuss the evidence?

3 A. Yes, ma'am.

4 Q. Okay. Let's talk about what you discussed.

5 Did you discuss what items the police found in the
6 house you were located in on May 4th of 2018?

7 A. Yes, we discussed that.

8 Q. Okay. Did you discuss the notebooks with personal
9 identifying information that were found in the house?

10 A. Yes.

11 Q. Did you discuss the counterfeit credit cards that were
12 found in the house?

13 A. Yes.

14 Q. Did you discuss the counterfeit drivers' licenses that were
15 found in the house?

16 A. I don't know anything about the counterfeit, but on the
17 affidavit, what they trying to charge me with, yes, we
18 discussed that.

19 Q. Okay. So, you discussed those items that the police said
20 they found in the house.

21 A. Yes. And he was willing to challenge the warrants. That
22 why we discussed those things, 'cause he was willing to
23 challenge the warrant, challenge the jurisdiction, and motion
24 to suppress.

25 Q. Okay.

1 A. That why we was going over those things that the government
2 trying to charge me with.

3 Q. We'll get back to the warrant part in a second.

4 A. Okay.

5 Q. He also talked to you about your fingerprints. Did either
6 the investigator or Mr. Merlino talk to you about your
7 fingerprints having been found on the notebooks?

8 A. Only the investigator, and the investigator is not my
9 lawyer. And I told him that we can redo the fingerprints,
10 because every time something come up, it's Mr. Caldwell
11 fingerprints, and I don't stay in that house or own that house.
12 So, why are my fingerprints on -- only my fingerprints on
13 things? And I tell him, Okay, he go back to the lab and get
14 more fingerprints off.

15 He said, Yeah.

16 He did never do it.

17 I told him, can he call my witnesses, and I gave him
18 numerous numbers. He didn't never call my witnesses. Only
19 thing he said my witnesses is scared, is frightened. But how
20 you know they scared if you did never speak with them? That
21 mean you or the ATF agent was relaying messages to him, 'cause
22 if he didn't never speak to them -- like, two of my witnesses
23 back there, sitting back there, and they did never speak with
24 Richard Merlino, but he come to me and say, Oh, yeah, the
25 witness is scared or whatnot. And the ATF agents harassed my

1 witnesses. But how you know if my witness is scared if you
2 didn't never speak with them, and I gave you the information?

3 Q. So, you discussed with the investigator the fingerprints
4 that were found -- the fingerprint report, right?

5 A. Yes.

6 Q. And you had a copy of the fingerprint report.

7 A. No, ma'am. No, ma'am.

8 Q. You said that you had a copy of the discovery from
9 Mr. Rubinchik.

10 A. The affidavit.

11 Q. Okay.

12 A. But the discovery that Scott Rubinchik had sent me, it
13 didn't have anything like what Richard Merlino and the private
14 investigator had. It was nothing like that.

15 Q. Okay.

16 A. It was additional stuff after -- whatever Scott Rubinchik
17 sent me, it was, like, a little package, but when the private
18 investigator came, the package got even bigger.

19 Q. Okay. So, you discussed all those things with the
20 investigator and with Mr. Merlino, and you took them telling
21 you about the evidence as them trying to scare you into not
22 going to trial.

23 A. Yes. Like that the last week. And every time I call -- I
24 call -- I sent my family down there on numerous of time to talk
25 to them, Richard Merlino never in the office, never in the

1 office, to talk to them about suppression -- the motion to
2 suppress, to challenge the warrants, and everything. He was
3 going out of town fighting cases or whatnot, and he say when he
4 get back, he gonna -- he promise me he gonna file these motions
5 or whatnot to help me out, but he didn't never do it.

6 Q. Well, let me ask you about what you discussed with him
7 about the motions.

8 You did talk to him about filing motions to suppress
9 the search -- searches.

10 A. Yes.

11 Q. And what did he tell you your likelihood of success would
12 be?

13 A. He say everything would get thrown out or whatnot. That
14 after the -- he say everything be looking good, everything get
15 thrown out, because they violated my amendment rights, or
16 whatnot.

17 Then after that, like, later on that line, like I say,
18 he must have talked to you and him -- you must have -- he must
19 have talked to the ATF agent or you, and then when, uhm --

20 Q. I'm not asking you to guess. I'm asking you what he told
21 you.

22 A. Oh, I'm not guessing. I'm not guessing.

23 Q. What did he tell you?

24 A. He say everything will be okay. He'll challenge the
25 warrants or whatnot. Everything should fall in place.

1 Then a week later -- like, two weeks later or a couple
2 of weeks later, he say Judge Dimitrouleas don't never grant
3 motions. That what he told me. He say he didn't never see
4 Judge Dimitrouleas grant motions. He don't grant motions. But
5 prior -- before that, you (*sic*) say everything -- everything
6 will be okay, he'll grant this motion, grant this motion,
7 because my -- my Fourth Amendment was violated and things like
8 that.

9 Q. Did he tell you how he thought your Fourth Amendment rights
10 had been violated?

11 A. Yes.

12 Q. What did he say?

13 A. We was talking about the case previous, like in 2015, when
14 the police, uhm, took a cell phone from out of the truck
15 that -- we got charged with -- I got charged with trespassing,
16 my friend got charged with grand theft, and our charges got
17 dropped. And by our charges getting dismissed, the City of
18 Fort Lauderdale had my property inside the investigation room,
19 and they went through it without -- for no reason. And that
20 was violating my Fourth Amendments (*sic*). And that's how the
21 investigation led to another, it led to another, led to
22 another.

23 Q. Did you go over the search warrants that were obtained for
24 your cell phone?

25 A. Yes. Because that was -- was what Scott Rubinchik sent me

1 too. He sent me that. I went over it myself, and then I told
2 him little basics, 'cause, you know, nobody know your case
3 better than myself. So, I would tell him little things what
4 happened, how they violated this, how they violated that.

5 Then I would tell him to put in a motion for fruit of
6 the poisonous tree.

7 Only thing he say, he learned that in the first year
8 of law school.

9 I said, Okay, let's attack it. And after that, it
10 was, like, everything went from up the hill to down the hill.

11 Q. Let me ask you about the meeting on August the 22nd.

12 A. Um-hum.

13 Q. During that meeting, you discussed the possibility of you
14 entering a guilty plea, correct?

15 A. No. He discussed that. I wanted to go to trial.

16 Q. Okay. And you told him that you were not going to enter a
17 guilty plea?

18 A. Yes. I told him I want to go to trial. I don't want to
19 enter a guilty plea.

20 Q. So, how do you end up going over with him the questions
21 that Judge Dimitrouleas would ask you during a change of plea
22 hearing?

23 A. 'Cause we was in a bullpen. He came down there to the
24 bullpen, and he coerced me -- he had a paper down to the
25 holding cell downstairs in this very building, and he went over

1 that like that, in a quick second (*snapping fingers*).

2 Q. And so, you went over the answers to questions
3 Judge Dimitrouleas might ask you during a guilty plea -- or
4 change of plea hearing, but you didn't want to change your
5 plea.

6 A. I wanted to go to trial. And the reason why I took the
7 plea, because I -- I felt like Dimitrouleas wasn't gonna give
8 me another chance to go to trial, and I didn't want to go to
9 trial with Richard Merlino, because I know he wasn't in my best
10 interests after the 22nd.

11 Before the 22nd, because you supposed to file -- a
12 lawyer supposed to file at least like 16 motion. He didn't
13 file any motion. But you come on the 22nd to tell me, oh, that
14 he wanted to take a plea, not me, he wanted to take a plea, so
15 I knew something weren't right. Because if I'm going to trial,
16 a motion supposed to -- a motion supposed to been in, you don't
17 come to the last minute on the 22nd and try to put motions in,
18 'cause now you fighting against time. And the motions probably
19 be wrong you put in if you do try to rush to try to put motions
20 in.

21 Q. Did Mr. Merlino ever tell you why he thought taking a
22 guilty plea would be in your best interests?

23 A. Yes, he did say that.

24 Q. And what were the reasons he gave you?

25 A. He say, uhm, 'cause you were superseding me.

1 I say, Okay, she already charge me with things, she
2 can supersede. And I say, If I'm taking a guilty plea, why
3 these five charges still over my head? I have witnesses to
4 prove that these charges not for me or whatnot.

5 He said, Oh, the reason why you have the five charges
6 is 'cause she said, You take this, she won't supersede you.

7 I said, I want to go to trial. She can supersede me,
8 'cause I'm already -- they already trying to charge me with
9 things, and what can be worse?

10 Q. Okay. So, one of the things he told you was that there
11 would be a superseding indictment charging you with additional
12 crimes if you didn't go to trial (*sic*), right?

13 A. Yes.

14 Q. What other things did he tell you?

15 A. And that was about it.

16 Q. Did he tell you that you might get a lesser sentence if you
17 pled guilty instead of going to trial?

18 A. No. Because -- no, he didn't say -- he didn't say none of
19 that. The only thing he say, Dimitrouleas was gonna, uhm, open
20 plea or whatnot.

21 I said, I don't want an open plea, because I want to
22 go to trial. Because if the prosecutor is trying to give me
23 something and charge me with stuff, why they can't come with a
24 plea deal or whatnot, if you trying to give (*sic*) me to plea
25 out to something.

1 Q. Well, if you told Mr. Merlino over and over and over again
2 over again that you didn't want to take a plea and plead
3 guilty, why wouldn't you say that when you got to court?

4 A. Because the 22nd and 23rd -- 22nd, 23rd, he came 22nd, 23rd
5 here, I kept telling him. And if I don't take the guilty
6 plea -- if I don't take the guilty plea, I know it wouldn't be
7 in his best interests for me and him to go to trial.

8 You didn't even, like, put in the motions I tell you
9 to put in or whatnot, so how I'm gonna put my life in your
10 hands and then go to trial if you didn't do two simple things I
11 asked you to do? So, I feel like I couldn't go to trial with
12 him.

13 Q. Did you fire him that morning?

14 A. No, ma'am. I fire him later on down -- like, a couple of
15 days later. And I tried to tell him -- I tried to tell him the
16 next day -- oh, he came the very -- the next day on a like --
17 and he came the very next day to the jailhouse on a legal call,
18 not attorney visit call, on a legal call, trying to clear up
19 his behalf or whatnot, him and a private investigator, on a
20 legal call. Like, if my family come visit me, that's how me
21 and him was talking the next day. And if you can get that
22 recording, you can see and hear that I'm telling him that I
23 want to go to trial, I want to take my plea back, I want to go
24 to trial. Then he say if I take the plea back, I'm gonna have
25 to get off your case or then Dimitrouleas still was gonna put

1 him on my case. That what he told me.

2 Q. Okay. Now, did you write the original motion to withdraw
3 your plea?

4 A. I got help.

5 Q. You indicated that nobody knows your case better than you,
6 right?

7 A. Yes.

8 Q. During the plea hearing, when I was telling the judge what
9 the facts were that showed that you were guilty of those
10 charges --

11 A. No, you didn't -- you weren't showing I was guilty of the
12 charges, but you can keep going.

13 Q. When I was telling the judge what the facts were, or giving
14 the judge a factual basis --

15 A. Um-hum.

16 Q. -- you never said, "That's not true" or "That's not what
17 happened," did you?

18 A. No, ma'am, 'cause he coerced me, like, don't say nothing,
19 just say every -- to agree to everything with Dimitrouleas.

20 And I have, like, three, four people in the same unit
21 as me going through the same problem with Dimitrouleas (*sic*),
22 going through the same problem.

23 **MR. BATISTA:** Richard Merlino.

24 A. I mean with Richard Merlino, going through the same
25 problem, the same exact problem.

1 Q. When --

2 **MS. WHITE:** You know what? Judge, I have no further
3 questions. I have no further questions.

4 **THE COURT:** Redirect?

5 **MR. BATISTA:** Briefly, your Honor.

6 **REDIRECT EXAMINATION**

7 BY MR. BATISTA:

8 Q. Mr. Caldwell, when you indicated that you were reviewing
9 paperwork with Mr. -- Attorney Merlino involving the search of
10 the house wherein you were arrested, are you talking about the
11 document that has a list of what items was (*sic*) seized and in
12 which part of the house they were seized?

13 A. Can you repeat that, please?

14 Q. Yes.

15 When the government was asking you before questions as
16 to what documents you -- or evidence you were reviewing with
17 Mr. Merlino in reference to the search that took place at the
18 house where you were arrested, are you talking about different
19 pages, different documents that you were reviewing with him?

20 A. Yes.

21 Q. Or -- okay.

22 Did you also review with him the lists of the
23 different items that were located in that house?

24 A. Yes.

25 Q. Okay. And when you reviewed that list, which was part of

1 the discovery, as to the items seized and where, did you
2 indicate to Mr. Merlino where in that house you had stayed that
3 night?

4 A. Yes.

5 Q. And that particular return -- excuse me -- page, did you
6 discuss with him, "Look, this document reflects that that
7 firearm was seized in a room not where I was staying"?

8 A. Yes. I told him that then.

9 This what he told me. He grabbed a piece of paper, a
10 pen, but I'm gonna act like this the pen, he grabbed the piece
11 of pen (*sic*), he say, "This is possession." He say, "This is
12 possession. This is not possession." So, he said we had a
13 good fight on that, too. So, uhm, the firearm, he said, "You
14 can't get charged with possession, 'cause possession is this
15 right here." Then he say -- he put it over there, that's not
16 possession.

17 Q. Okay. So, if he said that to you, then why -- the
18 following day, why did you enter a plea before the judge --

19 A. Because he coerce --

20 Q. Excuse me.

21 A. Okay.

22 Q. -- when Judge Dimitrouleas was very detailed and explained
23 to you what possession was?

24 A. I didn't -- I don't recall he being detailed with saying
25 what possession was. I didn't know what construction (*sic*)

1 possession was or anything until, like, I was doing my
2 research.

3 Q. Okay. I don't think the judge instructed you on
4 constructive possession on the change of plea. But he did
5 discuss with you that the government will have to prove --
6 bring in witnesses, in order to convict you of the charge,
7 showing that you were, you know, in possession of the docket --
8 of the firearm, the bullets, the drugs that was found in the
9 scooter.

10 And he even indicated to you that your lawyer could
11 even challenge all those things, and if he -- and if the
12 evidence did not prove those things, that he would instruct the
13 jury to return their not guilty verdict. Do you remember that?

14 A. Yes, I remember.

15 Q. Okay. So, if you knew that you were not involved with the
16 drugs in the scooter, why did you enter a guilty plea to the
17 drugs in the scooter?

18 A. Mr. Merlino, I say he coerced me, like -- and it wasn't in
19 the best interests, 'cause I was telling him the same thing.
20 It was drugs in the backyard. Why I'm getting charged with
21 anything? If there's other convicted felons in the house, I'm
22 the only one going to jail. So, I was telling him challenge
23 different things.

24 **MR. BATISTA:** No further questions, Judge.

25 **THE COURT:** Next witness.

1 **MR. BATISTA:** No, we don't have any other witnesses,
2 Judge.

3 **THE COURT:** Ms. White.

4 **MS. WHITE:** The United States would call Richard
5 Merlino.

6 **MR. MERLINO:** Witness stand, Judge?

7 **ROOM CLERK:** Please raise your right hand.

8 *(RICHARD MERLINO, GOVERNMENT'S WITNESS, WAS SWORN)*

9 **ROOM CLERK:** Thank you. You may be seated.

10 Please state your name and spell your name for the
11 record.

12 **THE WITNESS:** My name is Richard Merlino,
13 R-I-C-H-A-R-D, middle name, Anthony, M-E-R-L-I-N-O, Merlino.

14 **DIRECT EXAMINATION**

15 BY MS. WHITE:

16 Q. Good afternoon, Mr. Merlino.

17 A. Good afternoon.

18 Q. Sir, how long have you been a lawyer?

19 A. Twenty-five years.

20 Q. And how long have you practiced criminal law in the state
21 of Florida?

22 A. Twenty-five years.

23 Q. Were you hired to represent Trenard Caldwell in the instant
24 case?

25 A. I was, in mid July of 2018.

1 Q. And did you receive discovery in this case?

2 A. I did. I received the initial discovery that was provided
3 to prior counsel. I believe his name was Mr. Rubinchik. After
4 several calls, we offered to go to his office to pick it up.

5 It was not provided, in my estimation, in a timely
6 fashion. I believe I got you involved in that. Eventually he
7 dropped it off at my office after I threatened to do a motion
8 to compel. That was provided to Mr. Caldwell, again, from me.

9 And, also, I believe there was a supplemental -- after
10 the superseding indictment, there was supplemental discovery
11 that I received from your office, at the beginning of August,
12 that consisted of -- and you had asked originally for a
13 one-terabyte hard drive. In an abundance of caution, having
14 experienced that before, when I know it's gonna be voluminous
15 discovery, I went out and bought a two-terabyte hard drive, and
16 I believe we had communication that you were glad I -- you were
17 happy that I did that, because it would have exceeded the
18 initial storage capacity.

19 I provided that to you, and I believe three, four days
20 later, you had it available for me to pick up.

21 Q. And did you review the discovery that was provided to you?

22 A. I did. I have a submission letter. The pertinent
23 information, the reports, pertinent photos, stills, I mailed to
24 Mr. Caldwell in custody at the Conte facility.

25 I also indicated in that letter specifically that

1 there was a voluminous amount of recordings, video, and that we
2 would be getting permission from the Conte jail facility to
3 take my laptop in for audio and video presentation and review.

4 Again, this being the supplemental discovery
5 submission received after the superseding indictment on the
6 hard drive.

7 Q. Okay.

8 A. I did get permission from Conte facility to bring in the
9 laptop. And it was brought in on several occasions and -- with
10 the electronic storage information, videos, stills, what have
11 you, and reviewed with Mr. Caldwell.

12 Q. Okay. So, you indicated that the discovery was provided to
13 you digitally, but you actually printed it out and sent copies
14 of some of the pertinent information to Mr. Caldwell.

15 A. Some of which, yes. And I have an enclosure letter that
16 was produced by my paralegal, Barbara Parman, P-A-R-M-A-N.

17 I also got an investigator by the name of Robert
18 Buckley, B-U-C-K-L-E-Y, with WCS Investigations involved here,
19 based upon initial meetings with Mr. Caldwell, as well as his
20 sister. I believe her name is Shanika (phonetic). I think her
21 last name is also Caldwell. There were a lot of, for lack of a
22 better description, generality, leads to be followed up on.

23 **THE WITNESS:** And before we go any further with
24 certain details, Judge, I would respectfully request that there
25 be an inquiry of waiving the attorney-client privilege of

1 Mr. Caldwell affirmatively. Some of the -- where I see this
2 going may touch upon certain conversations and communications
3 with regard to the evidence, the weight of the evidence.

4 Eventually --

5 **THE COURT:** Mr. Caldwell's already testified about
6 those conversations.

7 Do you understand, Mr. Caldwell, that if you want to
8 say Mr. Merlino was no good, then he has a right to say what
9 you told him?

10 **THE DEFENDANT:** Yes.

11 **THE COURT:** And that's okay with you.

12 **THE DEFENDANT:** Yes, sir.

13 **THE COURT:** Okay. You may proceed.

14 **MS. WHITE:** Okay.

15 BY MS. WHITE:

16 Q. Let me just break that testimony down a bit.

17 A. Sure.

18 Q. Could you start by telling the judge what was sent to
19 Mr. Caldwell via mail?

20 A. May I refresh my memory? I have the -- all of the contact
21 letters sent from -- all the correspondence and contact letters
22 and enclosure letters I have here. If I may go through them?

23 Q. If that will refresh your memory.

24 A. It will.

25 **THE WITNESS:** Judge, may I?

1 **THE COURT:** Go ahead.

2 **THE DEFENDANT:** Can I speak?

3 *(Discussion had off the record between counsel and*
4 *client)*

5 A. You just want the letters sent directly to Mr. Caldwell,
6 not the facility, with reference to getting permission for
7 certain things to happen with review of that material, correct?

8 Q. Right. Just what was sent to him for now.

9 A. Yes.

10 On July 27th of 2018, there's a letter that's entitled
11 "legal mail" -- it's signed by Barbara Parman, my paralegal,
12 board-certified Florida paralegal, I recognize her signature --
13 directed to the Joseph V. Conte, C-O-N-T-E, facility located at
14 1351 Northwest 27th Avenue, Pompano Beach, Florida, 33069, with
15 regard to the United States vs. Trenard Caldwell, Case
16 Number 18-CR-60127-WPD-1. Also with reference to a violation
17 of probation case that I was handling. I was retained
18 privately for two matters. There was a violation of probation
19 case in state court. Information was also sent to him with
20 regard to that matter, State vs. -- excuse me -- State of
21 Florida vs. Trenard Caldwell, indication of (VOP), indicating
22 violation of probation, Case Number 17-003912-CF-10A.

23 "Dear Trenard: Per my conversation with your
24 sister, enclosed please find the documents that were
25 dropped off at our office. I have made copies of

1 them for our file. These are the originals that were
2 dropped off on your behalf.

3 "With kind personal regards, I am, sincerely,
4 Barbara Parman."

5 There are more. And that was dated July 27, 2018.
6 Should I go in chronology?

7 Q. Okay. Were there additional items mailed --

8 A. Yes.

9 Q. -- to the defendant?

10 A. Yes.

11 Q. What is the next mailing that went out to him?

12 A. The next one was August 2nd of 2018, again, entitled "legal
13 mail," addressed to Trenard Caldwell, his inmate number,
14 901800254, Joseph V. Conte, C-O-N-T-E, facility, again, the
15 same address as I indicated before, regarding the same two
16 headings, again, U.S. vs. Trenard Caldwell, this particular
17 case number, as well as the VOP pending in state court.

18 "Dear Trenard: Enclosed please find a copy of
19 the discovery that we received from the government on
20 your pending case. Keep in mind that a majority of
21 the discovery is on hard drive, inclusive of
22 photographs. The attorney and the investigator are
23 going to coordinate a date and time to come to visit
24 you and bring a laptop to review what is on the hard
25 drive.

1 "In the meantime, please do not hesitate to
2 contact our office if you have any questions. You
3 may call collect, as we have an account set up with
4 Securus."

5 That's a -- if you have no money in your commissary --
6 I've been an accountholder with Securus, previously known as
7 T-Netix, for a decade, which allows my clients, without
8 face-to-face jail visits, to call my office, without having
9 money in commissary, to have communications. And beyond
10 in-person communications here, I mean jail visits per se
11 between me and my investigator. I don't think there were any
12 other third parties involved on the, quote/unquote, team.
13 There were probably daily phone contact, not only with
14 Mr. Caldwell, using a variety of means to contact, not only
15 directly on his account with my firm using Securus, but also --
16 and, also, one of those designated numbers is my cell phone.

17 There was also indication of him -- because he knew
18 that jail calls were being listened to. He knew that from
19 our --

20 **MR. BATISTA:** Objection. That's speculation on the
21 attorney's part.

22 **THE COURT:** Sustain.

23 BY MS. WHITE:

24 Q. Okay. What -- did Mr. Caldwell contact you by phone?

25 A. Excuse me?

1 Q. Did Mr. Caldwell contact you by phone?

2 A. The contacts, if you were to call to the stand my
3 investigator, my paralegal, and I can speak for myself, was
4 multiple times per day on a weekly basis. Being on this case I
5 think just over six weeks, there was almost daily contact
6 multiple times, not only directly on the Securus line, but
7 through third-party inmates on their accounts, so that --
8 because I discussed this with him directly, and what was told
9 in return, when I indicated you cannot do that, was he did not
10 want you listening to his jail calls.

11 Q. So, let me just --

12 A. And --

13 Q. -- break down what you're saying there.

14 A. Sure.

15 Q. Is he calling you from other people's accounts --

16 A. Yes.

17 Q. -- so that if I went to look for his calls, they
18 wouldn't -- the calls with you would not be there?

19 A. Yes.

20 Q. Okay.

21 A. Also, we were receiving third-party calls where he would
22 contact -- and they happened to be, coincidentally, a variety
23 of females who would call with him on the line, and then they
24 would do a party call to my office, my cell phone, and this
25 happened at all hours of the night, and my paralegal as well as

1 my investigator.

2 Q. Okay. So, during the course of your representation
3 to (sic) him, you mailed him documents related to his case, and
4 you were available to him by phone.

5 A. Correct.

6 Can I finish reading that letter? I'm sorry, I went
7 off on a tangent.

8 Q. Just -- you don't necessarily need to read the entire
9 letter, but did --

10 A. Okay.

11 Q. -- that letter indicate anything additional that was sent
12 to him?

13 A. It does. It indicates -- "a majority of the discovery is
14 on a hard drive, inclusive of photographs."

15 Well, the first sentence: "Enclosed please find a
16 copy of the discovery that we received from the government on
17 your pending case." So, not only was it your typical cover
18 letter, but I had gone in and pulled out what I believed to be
19 pertinent reports, photographs, what have you, sent them
20 directly, so that there would be some preparation in
21 anticipation of the meeting when I brought the laptop in.

22 Q. Okay. And did you go into the jail and meet with
23 Mr. Caldwell personally?

24 A. Yes.

25 Q. On how many occasions?

1 A. And anticipating that question, because this case was six
2 weeks old, I pulled my -- I keep an old-fashioned book
3 schedule. I looked at that. I looked at my Google schedule
4 online, spoke to my paralegal, looked at my handwritten notes.
5 And I also looked at -- and I called the jail facility to try
6 to get those in anticipation -- you had called me on Wednesday
7 to tell me about this hearing -- trying to get those records.
8 But they could not give them to me in time.

9 I have six jail visits that are documented, to the
10 best of my recollection. I would have said probably four to
11 six times in person. Two of which were definitely with the
12 computer, in reviewing that. And I know my investigator, after
13 speaking to him with regard to this hearing, had indicated that
14 he had seen him at least, from what he told me, six to eight
15 times. He also, independently of my review with the computer
16 of discovery, reviewed it -- reviewed discovery as well.

17 **MR. BATISTA:** Objection, Judge, as to anything that
18 the investigator told him.

19 **THE COURT:** Sustain.

20 **MS. WHITE:** Well, since this is --

21 A. And I have those dates, if I may.

22 **MS. WHITE:** I would say this is -- this isn't a trial.
23 I would think that the evidence would be a little relaxed here,
24 because he's relying on his investigator and his assistant as
25 part of the team. So, he should --

1 **THE COURT:** He can testify to records, but not to what
2 the investigator told him.

3 A. I have the visits here that I had documented in both my
4 scheduling systems, my notes. Keep in mind, I don't always
5 take notes at some meetings. I'm just generalizing when I say
6 that.

7 And, also, when you go to a facility, unlike FDC where
8 you have to announce, the local county jails -- right now, I
9 have six defendants in custody at Conte. And when I go -- and
10 it's a commitment to drive there, to get processed through
11 security -- I generally pull more than one. And I can't tell
12 you what happens behind the glass. If I give them a list of
13 who I'm there to see, at the initial stage, when I first give
14 my identification, after going through security, sometimes
15 they'll list one and not the six -- or the remaining five, two,
16 whatever the case may be.

17 When I go upstairs, it's de novo. I have another
18 deputy I need to see before I go into the visitation room, and
19 they say, "Who are you here to see?" And then I give them the
20 list there as well. I can't tell you what they do on their
21 computer, but I can tell you in the time, sometimes it -- I
22 give them one name or what have you, I can't tell you what they
23 put into the computer. So --

24 Q. But you personally went to visit Mr. Caldwell in custody
25 six times, and you took note of that.

1 A. Based upon -- using this as my recollection -- off the top
2 of my head, I can't give you a fixed number. So, I'm
3 refreshing my memory by utilizing what I had indicated, all my
4 notes, my investigator, his recollection, my paralegal, as well
5 as what I have in my schedule. My schedule indicates that I
6 saw him July 20th --

7 **MR. BATISTA:** Judge, I would object. Either he has
8 independent recollection or not.

9 **THE COURT:** He said he refreshed his recollection.
10 You can cross-examine on it.

11 A. July 20th, July 8th -- excuse me, no -- July 20th,
12 August 14th, August 17th, August 20th, August 27th, and
13 September 4th, a couple of which -- I believe the last one or
14 two -- were at FDC. He was moved from Conte to FDC toward the
15 end of my tenure.

16 Q. Okay. Now, on two of those occasions, you indicated that
17 you took a computer with you.

18 A. At least with me. More times, based upon my investigator's
19 involvement.

20 Q. And do you have to go through any type of process to take a
21 computer into the jail with you?

22 A. You do. You have to seek permission, and I have not only
23 my letter asking for permission -- and generally with the Conte
24 facility, when you send a letter, and it's approved -- and I
25 have the approval stamp -- it's good for 30 days.

1 Q. Okay. And why did you take the computer in with you?

2 A. To review the electronic data and discovery.

3 Q. And did that include several photographs and videos?

4 A. Yes.

5 Q. And could you describe for the Court the evidence that you
6 went over with the defendant?

7 A. Photographs, videos, reports. We were able to, with the
8 videos, you know, take stills of those, blow them up, with
9 reference to the allegations, the elements of what were
10 contained in the indictments, specifically with regard to
11 possession. And the -- whether or not, in fact, you could
12 discern whether or not it was a firearm in fact. And that --
13 it's the sum and substance. We dealt with the drug charges
14 here, electronic access devices. It was also identity theft
15 issues here and drugs.

16 Q. When you were discussing the evidence with him, as a
17 general practice, do you talk to him about the strength of the
18 government's case?

19 A. Absolutely.

20 Q. Okay. And what was your advice or conversation with him
21 regarding the strength of the government's case?

22 A. At what point in time?

23 Q. Prior to his entering a change of plea.

24 A. At that point in time, I believed you had a reasonable
25 likelihood of conviction if this were to proceed to trial,

1 based upon, again, a review of the facts contained in the
2 discovery, looking at the indictment, the charges and the
3 elements that you would have to prove beyond and to the
4 exclusion of every reasonable doubt.

5 Q. And what specific evidence did you go over with him to show
6 him -- or to explain this advice?

7 A. All the police reports, the videos, the stills, the
8 photographs.

9 Q. When you say the stills and the photographs, give the Court
10 an explanation of what you were seeing.

11 A. One, in fact, with reference to the Glock that was
12 contained in not only the indictment as well as the forfeiture
13 count, there was a Glock. And it was pretty alarming, because
14 it was inside a vehicle, if I remember. It seemed to be, if I
15 remember, that the vehicle was moving. I can't remember if you
16 could see outside the windows. But eventually an individual,
17 who appeared to be my client, was holding -- and I'm familiar
18 with firearms -- a Glock. I know it was a .40 caliber from the
19 discovery, in fact, but you couldn't really tell with reference
20 to that video. And he was pointing it at the person who was
21 taking the video.

22 Q. Okay. And was there anything distinctive about the
23 firearm?

24 A. (No response)

25 Q. From that video.

1 A. I believe it had a laser, laser light.

2 Q. What other pieces of evidence did you discuss with him in
3 coming to that assessment that the case appeared very strong?

4 A. What other information?

5 Q. Yes.

6 A. Well, I -- we always kept in mind that there was a
7 violation of probation case. And we had to look at in the
8 totality of the circumstances, after reviewing the discovery,
9 as I just indicated, his prior criminal history, whether or not
10 at one time he qualified for a career offender or not. After a
11 review of the priors, I did not believe that he would qualify.
12 We reviewed that.

13 I also, given the combination of charges, went over
14 sentencing guidelines with him.

15 I also, out of the retainer, employed a now-retired
16 federal probation officer to look at the discovery in the case,
17 his prior criminal history, uhm, and anything pertinent that I
18 had from the initial detention hearing. I think I may have had
19 that report; I'm not certain on that. Her name is Cindy
20 Thomas. She lives in Alabama now. And I had sent this to her
21 to review, and she gave me her breakdown, what she believed the
22 guidelines would be under various scenarios. And not only did
23 I provide him with my scenario, but I provided him with her
24 version and scenario, which were really one and the same,
25 and -- just to bolster my opinion of what he would be facing if

1 he went to trial and, God forbid, lost or were to be found
2 guilty as charged on any of those particular counts.

3 Q. Okay. As far as the evidence, did you go over with him
4 what the police said they had found in the residence where he
5 was found on May 4th of 2018?

6 A. I believe so, yes.

7 Q. Okay. And did you go over with him the fingerprint
8 evidence in the case?

9 A. Yes.

10 Q. And there were reports that his fingerprints were found on
11 personal identifying information in that home?

12 A. Yes, as was outlined also and reiterated and stipulated to
13 in the factual proffer.

14 Q. Okay. Now, could you talk about how it evolved that the
15 defendant decided to enter a plea of guilty in this case?

16 A. When I first met him, he was adamant he wanted to go to
17 trial. At that point in time, I was only going on what he was
18 telling me. I hadn't received the discovery, let alone the
19 bulk of the discovery that came out, I believe, on August 1st,
20 but I received probably the first week in August. And that was
21 fine.

22 He had indicated what his position was in the case
23 with regard to possession. We went over the difference between
24 constructive possession and actual possession. And then from
25 there, as we -- as we went through the discovery, myself, the

1 investigator, both of us together, toward the end, there was
2 one individual -- keep in mind, there's --

3 **THE WITNESS:** Again, Judge, I may get into things here
4 that could be detrimental to him, and I want to make certain
5 that the attorney-client privilege is waived.

6 **THE COURT:** It's been waived.

7 **THE WITNESS:** Okay.

8 A. Aside from the phone calls, the various ways, the jail
9 visits, weekly, at least three times, Shanika, who was
10 designated the point person for his family and contact, and who
11 had awareness of what the allegations were and some of the
12 alleged witnesses, she was charged with the responsibility --
13 and I told Trenard Caldwell this, my investigator was present
14 at these meetings -- that she was to bring us any and all
15 people that he was indicating could possibly help him out.

16 Names were given. Generally, the names were just
17 first names, not last names. Sometimes they were just street
18 names, and I couldn't get the name at all. And I wanted
19 contact information, phone numbers, where can I find them, even
20 if it wasn't a particular residence. Just help me and my
21 investigator out.

22 The only one that came through was a Mr. Payne. At
23 that time, if I recall, I had a conversation with you, and you
24 indicated that you were listening to jail calls, and that ATF
25 was mentioned. And I -- come to find out through my

1 investigation that there was a phone call, allegedly with a
2 Mr. Payne. And that ATF had been seen -- were talking to
3 Mr. Payne. And Mr. Payne was at that juncture not willing to
4 talk to my investigator.

5 Further, Shanika never provided -- and I invited them
6 to come to my office. The only time she came to my office with
7 a person that I wasn't familiar with was right after
8 Mr. Caldwell decided to change his plea. And that person
9 didn't identify himself, just indicated that he had done time,
10 and that he had pro se won a case on appeal and was indicating
11 that Trenard is not going to plead and cooperate.

12 And at that juncture, after reviewing the evidence,
13 Mr. Caldwell had indicated that he wanted to plea (*sic*) and be
14 debriefed. And there was a moment of hesitation in the debrief
15 because of the move from Conte to FDC.

16 Q. Now, was this after -- when you're saying "a moment of
17 hesitation," was this after he had pled guilty or before?

18 A. That was after he pled guilty.

19 **MR. BATISTA:** So, your Honor, I object. It's
20 irrelevant to this issue.

21 **THE COURT:** Overrule.

22 BY MS. WHITE:

23 Q. So, prior to pleading guilty, the defendant indicated to
24 you that he wanted to plead and he wanted to cooperate.

25 A. Yes.

1 Q. Okay.

2 A. And there were conversations between you and I with regard
3 to that.

4 Q. Now, did you meet with the defendant to prepare him for his
5 plea hearing?

6 A. I did.

7 Q. Okay. And why do you do that?

8 A. To make sure they're familiar with the colloquy. Even if
9 they're convicted felons, I go through the colloquy with them.

10 Q. And when you went through the colloquy with Mr. Caldwell,
11 did he tell you he did not want to plead guilty, he wanted to
12 go to trial?

13 A. No. The only time that I realized that was after I
14 received a pro -- I think it was filed, I received it initially
15 through PACER -- a pro se motion to withdraw his guilty plea.

16 I confronted him with that. And on that occasion, I
17 did visit him at Conte with my investigator. In fact, it was
18 such in haste that they didn't have any rooms available, so I
19 saw him between the glass, which, typically, you have in-person
20 contact. And I showed it to him. He had never seen it before,
21 I could tell, nor did he read it or know the substance.

22 And I advised him, but at that time, he was
23 indicating, independent of knowing or being familiar with that
24 document, that he had changed his mind. And then he was moved,
25 I believe, to FDC shortly thereafter.

1 Q. Okay. So, the first time you had any indication that he
2 did not want to plead guilty was after he had already pled
3 guilty.

4 A. Yes.

5 Q. During the plea colloquy in court, did Mr. Caldwell express
6 any reservation to you about entering his guilty plea?

7 A. During the plea colloquy?

8 Q. Correct.

9 A. No, I do not recall. The only time he hesitated with
10 reference to anything was after some people entered the
11 courtroom while he was present for the initial motion to
12 withdraw the guilty plea and motion to withdraw me as attorney
13 of record.

14 Q. During the plea colloquy, did he ever indicate to you that
15 the facts I had recited were incorrect or that he had any
16 objection to them?

17 A. No. He had -- if we were to proceed to trial, he had
18 wanted me to, you know, raise certain defenses. But I went
19 over that with him. And after reviewing the totality of the
20 discovery, the circumstances, and, you know, what we would
21 possibly do on cross-examination or presentation, that he
22 believed that there was a reasonable likelihood of conviction,
23 and it was in his best interests at the end of the day to enter
24 a plea at that point in time with the prospect of cooperation.

25 Q. And he expressed that to you.

1 A. Yes.

2 Q. Just briefly to talk about the defenses, what defenses did
3 you discuss with him?

4 A. Well, with challenging straight up, let's talk about the
5 fingerprints. You know, the latents, how they were compared,
6 typical protocol in a latent print, an individual who actually
7 took the samples, as well as the one who examined them and gave
8 an ultimate opinion; challenge the possession with regard to --
9 along the lines of what now Mr. Payne is finally coming forth
10 to say, that that wasn't his, wasn't actually in his
11 possession. The drugs found I believe in a scooter were not
12 his. Basically removing him from knowledge or culpability with
13 regard to the allegations.

14 Q. Did you discuss motions to suppress in this case?

15 A. At the beginning, we did. After review of the discovery,
16 the warrants, the affidavits in support thereof, in good faith,
17 I could not at that juncture bring a motion to suppress, based
18 upon what he was indicating he wanted to see or do. That was
19 after review of all of the discovery.

20 Q. Okay.

21 A. And prior to coming to the conclusion that he wanted to
22 change his plea in this case.

23 Q. And the items that were searched in this case included a
24 number of electronic devices, cellular phones, computers, and a
25 home. Were there search warrants for all of those items?

1 A. Not for all those items.

2 Q. Which were -- which items that were searched did not have
3 search warrants attached on them?

4 A. The home did. The -- there was -- initially, there was a
5 car, the Porsche, that wasn't there. That was a stop. So
6 that's why I would answer it that way.

7 Q. Okay.

8 A. I mean everything else, there was.

9 Q. Okay. So, you're referring to the initial --

10 A. In one of the -- going back to what --

11 Q. -- 2017 stop.

12 A. One of the defenses was that that didn't happen, that --
13 you know, that Porsche stop with the alleged possession of a
14 stolen vehicle did not happen. So, I don't believe there was
15 one search warrant there. It was search incident.

16 Q. Okay. But it was in your professional opinion that there
17 was not a good-faith basis upon which to bring a motion to
18 suppress in this case.

19 A. Yes, after review of the discovery. And there were, I
20 think, two reciprocal -- excuse me -- two supplemental
21 discovery submissions after review of all of it.

22 Q. If Mr. Caldwell had told you he didn't want to take a plea,
23 would you have prepared this case for trial?

24 A. Absolutely. Absolutely. And he knew that I had to push
25 all things aside. After receiving your August 1st submission,

1 two-terabyte hard drive, I asked the Court for a continuance.
2 The judge had indicated that coming on at this late juncture,
3 you better be ready, which is what I'm familiar with, having
4 been before this Court before in federal court as well as state
5 court as a prosecutor and a defense attorney. And it's not
6 much different in any other federal criminal courtroom.

7 Judge Bloom appointed me on the case, high seas
8 trafficking, and I had to be ready in two weeks. I indicated
9 I'd do so, and we were. And we did well with that, in my
10 estimation. And there was never an ineffective assistance
11 raised in any way, shape, or form, a 2255.

12 Q. Did you ever express to him that you would not try this
13 case?

14 A. Absolutely not.

15 Q. Did you ever express to him that he had to take a plea?

16 A. No.

17 Q. Or enter a guilty plea?

18 A. No, it's his choice. My niche within criminal law is a lot
19 of my cases come to me from other criminal defense attorneys
20 that just don't go to trial. I don't -- there's certain ones
21 that I will trust in the workup to that, because I don't want
22 to start from scratch at a late juncture where a judge is
23 running out of patience to try a case. But I love trying cases
24 rather than sitting at my desk.

25 **THE WITNESS:** May I have a tissue?

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1 A. So, no, if he wanted to try the case, we would have tried
2 the case.

3 **MS. WHITE:** I have no further questions.

4 **THE COURT:** Cross-examination.

5 **MR. BATISTA:** Your Honor, can I approach the witness
6 to see if he can lend me his -- let me review the calendar book
7 that he was reference (*sic*)?

8 **THE WITNESS:** It's my secretary/paralegal's notes from
9 that calendar book. The calendar book is sitting on her desk
10 right now across the street.

11 **THE COURT:** You can look at whatever he referred to.

12 **MR. BATISTA:** Excuse me?

13 **THE COURT:** You can look at whatever he referred to.

14 **MR. BATISTA:** Thank you, sir.

15 **CROSS-EXAMINATION**

16 BY MR. BATISTA:

17 Q. Let me ask you a question.

18 A. Yes, sir.

19 Q. Good afternoon.

20 We just met today, correct, this afternoon?

21 A. I think I've met you before at CJA conferences, but we
22 never worked on a case together as codefendant counsel.

23 Q. Okay. Do you have like a -- do you use a weekly minder --
24 a weekly reminder, like a calendar book, to --

25 A. I have two ways of scheduling. Old-fashioned, big red

1 book, the big one, that's from the old days at the state
2 attorney's office, I started using one of those, and Google
3 calendar.

4 Q. Okay. And do you -- this year were you still using the
5 old-fashioned --

6 A. Both, always.

7 Q. Okay. And where is that one?

8 A. Where's what?

9 Q. The red one.

10 A. It's sitting on my paralegal's desk across the street.

11 Q. Okay. And this information that's jotted here as to the
12 dates and time, that's something that your paralegal or
13 assistant would have taken from your red book?

14 A. That's what I asked her to do. I -- Ms. White called me --
15 or I think texted me, actually, at 3:30 on Wednesday with
16 regard to this hearing. I was at Gun Club this morning, on a
17 new CJA appointment, for about three-and-a-half hours with my
18 investigator. And when I left that meeting, on my way down, I
19 said to my paralegal, Do me a favor, since the jail can't get
20 me those visitation records -- and all I had for FDC was my
21 announcement letters, which are protocol down there -- do me a
22 favor, go through Google and the red book and write down not
23 only the visitations with Mr. Caldwell in custody, but also
24 scheduled visitations with his family or any related witnesses.

25 Keep in mind, it was a running joke in my office,

1 because I'm literally across the street in the 101 Tower, first
2 floor suite, my window is on 3rd Avenue, and his sister,
3 Shanika, used to walk up and knock on my window sometimes,
4 while I was sitting there, to come in and meet with me. So,
5 those weren't scheduled. So, there were more visits with
6 regard to his case than appears there. And keep in mind, I was
7 on this case for six weeks.

8 Q. Okay. Besides Mr. Caldwell, in the month of July and
9 August, how many other federal criminal defendants were you
10 representing at that time?

11 A. I'd have to look. I -- I have a very healthy practice. I
12 don't venture to guess.

13 I would say between five and ten. You said federal
14 or --

15 Q. Federal.

16 A. Federal.

17 Q. Yes.

18 A. I can't venture to guess. I don't want to say anything
19 that --

20 Q. Okay. How about state?

21 A. How about what?

22 Q. State criminal defense.

23 A. I have probably 40 pending cases, state cases.

24 Q. And were any of those cases scheduled for trial during the
25 first three weeks of August 2018, cases from --

1 A. Scheduled for? Yes, I'm certain. They were scheduled all
2 the time. In state court, you know the protocol, calendar
3 call, trial is set, or there may be special sets. I don't
4 recall -- well, I know for a fact I did not go to trial in that
5 time period, as far as I remember.

6 Q. Okay. You indicated that you first received the compact
7 disk with the discovery around the first week -- towards the
8 end of the first week of August, correct?

9 A. Notification of its presence, the provision of the
10 two-terabyte hard drive to Ms. White, and it coming back, I
11 think there was a four-day turnaround. Again, that's off the
12 top of my head.

13 Q. Right. But my question to you --

14 A. Yes, to answer your question, the first week in August.

15 Q. Okay. And towards the end of the first week in August,
16 correct?

17 A. I think so, yes.

18 Q. Okay. And it was -- the contents of the hard drive
19 consisted approximately of two terabytes, correct?

20 A. From my understanding, yes.

21 Q. Okay. When was the first time that you personally started
22 looking at that discovery in the terabyte?

23 A. Within a few days thereafter, I believe.

24 Q. Okay. When? How many days after?

25 A. I can't be exact. I work on cases -- most of the time I

1 review things it's after hours, because my day is filled with
2 court appearances and visitation and in-office appointments.

3 So, it was probably in the evening or on a weekend.

4 Q. Okay. And what -- do you remember which -- what in that
5 discovery package that you first started looking at?

6 A. What the first thing was?

7 Q. In the hard drive, yeah, what was the first thing you
8 looked at?

9 A. Photographs, I think was the first thing that caught my
10 attention.

11 Q. Okay. And where in the hard drive were you able to look at
12 those photographs, do you remember?

13 A. I don't remember off the top of my head. I have the
14 printout of the contents of it with the specific locations. I
15 asked for that, when I was reviewing it, from my -- one of my
16 paralegals, John -- Johnny Buckley. Do you want me to turn to
17 that?

18 Q. No.

19 So, you have a printout indicating --

20 A. Yes.

21 Q. -- what different items were contained in the --

22 A. (*Indicating*)

23 Q. -- hard drive?

24 A. I do, right here.

25 Q. And is that something that was generated by your office or

1 by the government?

2 A. No, this is off -- this would be on the disk itself. This
3 was not a schedule or a table of contents independently created
4 by me.

5 Q. How many videotapes would you say were contained in that
6 hard drive?

7 A. Off the top of my head....

8 Q. Don't look at the document. I'm asking you. Do you
9 remember?

10 A. How many videotapes?

11 Q. Yeah.

12 A. One, two, three....

13 Q. When I say "videotape," it's not videotapes -- videos.

14 A. Moving pictures.

15 Q. Yes. How many would you say were contained in that hard
16 drive? Don't -- if you remember.

17 A. I don't remember the exact number. I know it was more than
18 one. I think it was under ten.

19 Q. Under ten?

20 A. I believe.

21 Q. Are you sure?

22 A. That's what I believe. With reference to Mr. Caldwell.
23 There were other videos that had to do with his friends.

24 Q. So, of the -- in these two hard drives, your recollection
25 is that there were approximately ten or under ten --

1 A. Yes, that we focused on in order to prove --

2 Q. -- excuse me -- videos of Mr. Caldwell.

3 A. In my estimation, the ones that we focused on that would
4 lend support factually to provide the basis with the government
5 proving the elements of the -- contained in the indictment.

6 Q. That's not my question. My question is: How many
7 videotapes do you see of -- videos -- excuse me -- that you see
8 of Mr. Caldwell?

9 A. I don't recall off the top of my head. I could refresh my
10 recollection by looking at the table of contents. I have a
11 number of cases. And, today, the trafficking case I'm on also
12 is a two-terabyte case, and I review a lot of discovery. So,
13 I'm not gonna provide you with a number that I may be mistaken
14 on.

15 Q. Well, let me ask you a question. As part of your practice,
16 when you are reviewing discovery for a particular client --

17 A. Yes, sir.

18 Q. -- do you take notes down and indicate, you know, from what
19 hour to what hour, or how many hours you review that particular
20 day, part of that --

21 A. In a CJA case, yes. I don't bill -- on private cases, I
22 don't bill on an hourly basis. It's a flat fee. So, no, I
23 don't take -- I don't have a diary of time or accounting in
24 that measure, unless it's a CJA case or a state case.

25 Q. So, what -- when you are retained to handle a private case,

1 you indicated you do it at a flat fee?

2 A. Yeah. And what I mean by "state case," on --

3 Q. I didn't say state case.

4 A. Okay.

5 Q. I said when you are retained to handle a criminal case, you
6 do it on a flat fee?

7 A. I do.

8 Q. Okay. So, in this case, when were you retained to
9 represent Mr. Caldwell?

10 A. Where?

11 Q. When?

12 A. May I look at the fee agreement? I believe it was
13 July 12th of 2018. The fee agreement would indicate.

14 Q. Okay. And at that time, did you know that this case
15 entailed discovery contained in two terabytes?

16 A. Then? No. I was just given information from Mr. Caldwell
17 and his family. Mr. -- I believe his name is Rubinchik was not
18 returning my calls. I did not get to get briefed on this with
19 him, but Ms. White was very informative of what would be coming
20 my way.

21 Q. Right. But what I'm asking you is: At the time --

22 A. You're talking about retention.

23 Q. Yes.

24 At the time that you agree on a flat fee to represent
25 this gentleman, did you know the amount of discovery involved

1 in this case?

2 A. No.

3 Q. So, if -- so, is that your norm, that you get --

4 A. I saw the initial indictment.

5 Q. Let me finish.

6 A. Sure.

7 Q. Is that your norm that you charge a flat fee on each case
8 regardless of how much time, you know, the case might take for
9 you to --

10 A. I've been doing this for 25 years. In the type of practice
11 that I have, that we have uniquely, most of my clients don't
12 receive mail, let alone will pay a bill. So, it is generally a
13 flat fee. With 25 years of doing this, I could get a good
14 estimation of the hours that will be involved in a case.

15 I knew what the allegations were. I had spoken to
16 Ms. White. I had also looked at the initial indictment before
17 the superseding indictment. I knew what the allegations were
18 and had an idea of the work that was entailed. And I've never
19 saw -- I was part of two bar grievance committees, and I don't
20 believe in tiering or a contingency being in any fee. I think
21 it's in violation of Florida Bar rules to make there an
22 additional fee based on motion setting or trial. It's one fee
23 beginning to end. And I did not get paid in full in this case.
24 Q. Did you review all the -- all of the contents of that hard
25 drive?

1 A. I believe so, yes. Unless there was some ability to not
2 access remote corners, but looking at this and refreshing my
3 memory when I was just out in the hallway, from what I remember
4 looking at the dates, which really bring that into focus, based
5 upon the reports I had reviewed -- I haven't looked at the
6 discovery in probably six or seven weeks prior to the decision
7 to do a change of plea -- I believe so. And in review with my
8 investigator as well.

9 Q. How many hours would you say you took to review the
10 discovery?

11 A. In totality?

12 Q. Yes.

13 A. God.

14 Q. Twenty, 30?

15 A. No, I would say more than that.

16 Q. Forty?

17 A. I don't keep hours. I don't want to guess.

18 Q. Let me ask you something. How --

19 A. At least -- at least 40 hours.

20 Q. How --

21 A. But that's sometimes reviewing things more than once.

22 Q. How were you able to open up any of the different items
23 depicted in that hard drive? How do you go about opening --

24 A. I was able --

25 Q. -- being able to see it?

1 A. I was given pass codes by the government.

2 Q. Okay. And where there videos --

3 A. What's that?

4 Q. Where there were videos -- or, no, the contents of the cell
5 phone, how were you able to gain access to see what was
6 contained in that cell phone?

7 A. Utilize a --

8 Q. In the hard drive. How? How were you able to open it?

9 A. Utilize a pass code, and I entered that.

10 Q. So, on each one of those phones whose data is contained in
11 that hard drive, you were able to get access through a pass
12 code?

13 A. Based on my recollection, yes. And going over the evidence
14 that supported the counts, I believe, two and five, I
15 believe -- I believe we didn't have any trouble doing that.
16 And most of the time, my investigator, in these meetings, would
17 come into my office with it, I'd ask him to -- because he had
18 possession of it for the great majority of the time, that being
19 the discovery and the computer -- would come in, and when we
20 would review things, he would also go over it with me as well.
21 And I believe we touched upon every single one of them, besides
22 my independent review.

23 Q. Do you remember whether or not you had to utilize an
24 application to open any of these files?

25 A. I'd have to ask John Buckley. Again, if you want me to

1 bring him across the street. He is one of my paralegals --

2 Q. No, no, I'm asking you if you remember, you, yourself,
3 having to use any application to open any of these files?

4 A. Yes, I believe so, but --

5 **THE COURT:** One at a time, please.

6 A. Yes.

7 Q. What application was it? Do you remember?

8 A. I don't remember it off the top of my head.

9 Q. And how quickly would that application open that particular
10 file?

11 A. It was quickly. I can't give you --

12 Q. Right. Seconds? A minute?

13 A. No, I believe seconds -- under a minute. I mean, we had no
14 problem surfing between the various items.

15 Q. And so each one of those -- strike that.

16 Describe to me how was the discovery indexed for you
17 when you received it from the government?

18 A. Date and the amount of -- and actually time, as well, and
19 the amount of storage that it encapsulated, from what I
20 remember.

21 Q. What I'm saying is, how many phones were there -- you know,
22 data from different phones -- were there in that particular
23 hard drive?

24 A. Over 15.

25 Q. Excuse me?

1 A. I don't remember off the top of my head, but I believe over
2 15.

3 Q. Fifteen?

4 A. Um-hum.

5 Q. And of those 15, how many -- or over 15, how many had
6 information of Mr. Caldwell?

7 A. I don't remember off the top of my head. I didn't know
8 that I had to do a review of the discovery prior to this. It's
9 been about six weeks, seven weeks since I reviewed it. But,
10 uhm, I don't recall how many exactly had -- with reference to
11 him.

12 Q. What time -- you know, what time period in the month of
13 August of this year were you ready to go to trial?

14 A. At what --

15 Q. On Mr. Caldwell's case?

16 A. Say that again.

17 Q. At what point in time in the month of August of this
18 year --

19 A. It would have been before the calendar call.

20 Q. Excuse me.

21 A. The 27th, I believe.

22 Q. Excuse me. Let me finish.

23 At what point in time in August of this year were you
24 ready to go to trial on Mr. Caldwell's case?

25 A. It would have been before the calendar call, the 27th.

1 That's the landmark in my mind.

2 Q. You sure the calendar call was the 27th?

3 A. Again --

4 Q. As opposed to the 24th? Which is a Friday, and trial was
5 scheduled on the 27th?

6 A. Well, that's what I had in mind, the 27th. The number 27
7 in August stands out in my mind. There was a date, and it
8 would have been the point in time that we would have been
9 ready, of course.

10 Q. And during that same time period, you were also involved in
11 preparing for other cases that you were handling, correct?

12 A. I always do. It's part of the practice.

13 Q. Okay.

14 A. You have to wear many hats.

15 Q. Do you know whether or not during that time period --
16 excuse me -- in the month of August, did you have any pending
17 criminal cases that -- federal -- that you had -- besides
18 Mr. Caldwell's -- that you had to get ready for?

19 A. Not off the top of my head, no. I mean I'm always getting
20 ready on them. They're -- the ones that are pending, discovery
21 is usually supplemental discovery. And along the lines of what
22 we've gone through today, it's a continuous process on every
23 case. And it's -- for lack of a better description, it's --
24 it's proactive juggling.

25 Q. On the occasions that you visited Mr. Caldwell at the

1 institution here in Pompano --

2 A. Conte.

3 Q. Okay. Conte, yes.

4 Do you visit him at Conte just to visit him or also to
5 visit other inmates that you were representing during that time
6 period?

7 A. Both. I believe there were times only him, but both.

8 Q. Do you remember on which occasion you visited strictly
9 to -- Conte --

10 A. Not off the top of my head.

11 Q. -- to see Mr. Caldwell?

12 A. Not off the top of my head. It's usually multiple, I would
13 say.

14 Q. Okay. Well --

15 A. In fact, the last time I saw him which is closest in
16 memory, I saw him with another individual. I think it was an
17 individual by the name of Cadet (*phonetic*) down at FDC.

18 Q. And --

19 A. Not together, of course.

20 Q. -- prior to the entry of the guilty plea in this case, do
21 you have independent recollection as to when was it that you
22 visited Mr. Caldwell?

23 A. Can I look at my list? It would be --

24 Q. No, no, no, I'm asking you first.

25 A. Probably the day before, in preparation of the plea and the

1 colloquy, the review that (sic), and make sure there was no
2 second-guessing, because last thing any attorney wants is to
3 step up to the lectern at a change of plea and get hit out of
4 left field with some change of, you know, plan or issue or
5 question. So, you want to cover all that before you walk in.

6 And I try to get there early, in anticipation of the
7 same thing, before the change of plea. So, I usually pull
8 them, whether it's a federal case or a state case -- I'll see
9 them in the box in the state case. In the federal case, I like
10 to get to the courthouse a little early to pull them in the
11 marshal's hold and talk to them there as well.

12 Q. Right.

13 Well, I'm asking, before the day of the change of
14 plea, do you have independent recollection as to when it was
15 that you saw Mr. Caldwell for purposes of discussing a change
16 of plea?

17 A. I believe it was -- well, it was before that. But the last
18 time I saw him, to answer your question, was right before the
19 change of plea, the day before.

20 Q. The day before.

21 A. And the day of.

22 Q. Okay. So, you have independent recollection, as you sit
23 right now, that the day before the change of plea, you visited
24 Mr. Caldwell.

25 A. Right. And I believe my investigator was with me, yes.

1 Q. Okay. So, is my -- because you are saying about the
2 investigator. What I'm asking is: Do you have --

3 A. I'm remembering.

4 Q. Okay. Do you have independent recollection that you saw
5 Mr. Caldwell the day before the change of plea to discuss the
6 change of plea?

7 A. Yes. I believe it was the day before. If not, it was
8 shortly there -- there -- beforehand, but I think it was the
9 actual day before in -- because I try to do that in every case.
10 It's part of my practice.

11 Q. Right.

12 A. It's not the day before we discuss it for the first time,
13 or we review a plea agreement for the first time, or we make a
14 decision to enter a change of plea the first time. That's done
15 before we ask the in-court or the JA to set it for a change of
16 plea. However, preparation to review the colloquy, facts and
17 circumstances, change of mind, questions, any -- any issue, I
18 try to get that knocked out right before we enter court.

19 Q. Well, did you receive a factual proffer from the
20 government?

21 A. No. This was a plea open to the Court.

22 Q. One second.

23 But did you receive the factual proffer, I mean the
24 facts of the case from the government before you visited
25 Mr. Caldwell to discuss the plea?

1 A. No. It was a plea open. From what I remember in this
2 case, there was not even a rough copy or a draft that we
3 decided not to enter into for whatever strategic reason. I
4 don't believe we had a plea agreement or a factual basis in
5 this case.

6 Q. My --

7 A. We were -- go ahead.

8 Q. I'm not talking about plea agreement. I'm talking about,
9 you know, the factual proffer for the change of plea.

10 A. Yes. I don't believe so in this case, no. I believe she
11 read that at the time of the change of plea.

12 Q. Okay. So --

13 A. But they were facts and circumstances that we had gone over
14 in discovery.

15 Q. So, what was it that you discussed with Mr. Caldwell a few
16 days before the change of plea?

17 A. Be specific. Are we now going back to talk about making a
18 decision to go to trial or not, or right before the change of
19 plea?

20 Q. Talking about the day or so before the change of plea.

21 A. The plea colloquy. I like to take them through the plea
22 colloquy so they're familiar with the language and what the
23 Court is seeking, such as waiving constitutional rights, the
24 right to go to trial, have the government prove the case and
25 the elements contained in the indictment in this matter beyond

1 and to the exclusion of every reasonable doubt, call witnesses,
2 cross-examine government witnesses, present evidence -- I go
3 through the whole thing -- under the influence, psychiatric
4 history, immigration, in state cases, Jimmy Ryce issues,
5 anything that would, God forbid, suspend a driver's license in
6 state cases. Anything and everything that could be an issue or
7 a potential outcome yet again, but have them familiar with the
8 Court's colloquy.

9 Q. On how many separate occasions, if you have -- if you
10 remember, would you say you review -- you physically reviewed
11 the discovery?

12 A. Me alone with Mr. Caldwell?

13 Q. No, no, you, yourself, prior, you know --

14 A. How many times did I sit down and go through it and look at
15 it and read it?

16 Q. Yes, sir.

17 A. How many times? God. Twenty? More?

18 Q. And what was the maximum number of hours that you would sit
19 to look at the discovery on --

20 A. It depends on what I was doing that day.

21 Q. If I may.

22 A. Yeah.

23 Q. The maximum number of hours that you sat, yourself, to look
24 at the discovery involving Mr. Caldwell on your own before the
25 change of plea?

1 A. Probably on a weekend. That's when I get most of my time.
2 It could have been five to ten hours on a weekend. Usually at
3 my house, sitting at the dining room table.

4 Q. Do you remember -- you filed a motion to continue in this
5 case, right?

6 A. I did.

7 Q. And do you remember well what you said in that motion to
8 continue?

9 A. Absolutely. It's a motion that I utilize, in this case,
10 specifically that indicates we would need more time to prepare.

11 Q. Okay. And, additionally -- but one of the reason (*sic*) is
12 because of the bulk of the discovery.

13 A. Absolutely. And it also would allow more time for, God
14 forbid, these witnesses that we were promised to come in. It
15 allows more time for Mr. Caldwell to wrap his mind around his
16 options. And it was made pretty clear when the judge denied it
17 that this case was gonna be a front-burner case, that it was
18 gonna be a priority, and that we needed to prepare for trial.
19 And then going through the discovery, as I indicated before,
20 the options were, again, presented. And I weighed in and
21 indicated, as I testified with Ms. White, of what my beliefs
22 were in light of the weight of the evidence, and it was his
23 decision ultimately.

24 Q. Do you remember that there was one affidavit in support of
25 a search warrant that indicated that as to the phones -- excuse

1 me -- as it related to the Cayenne, the Porsche Cayenne? Do
2 you remember that?

3 A. No.

4 Q. A vehicle being a Porsche Cayenne?

5 A. Yeah, I do remember, but I don't believe there was a
6 search -- there was a search incident to a lawful arrest on
7 that one. That's what confused me with Ms. White's
8 questioning.

9 Q. Okay. But --

10 A. But I don't believe there was a warrant, from what I
11 remember.

12 Q. But do you remember that it was -- subsequent to that
13 vehicle being searched, do you remember an affidavit indicating
14 that law enforcement saw --

15 A. Oh, that they mentioned it, yes.

16 Q. May I finish, please?

17 That law enforcement saw Mr. Caldwell driving the
18 Cayenne --

19 A. I don't remember the word "driving," but I remember the
20 Cayenne being mentioned in an affidavit to support a warrant,
21 yes.

22 Q. Okay. And if part of the language in support of that
23 search warrant indicated that law enforcement saw Mr. Caldwell
24 driving that Cayenne --

25 A. I can't remember, again, if it was driving. I remember

1 that he was in the Cayenne. I can't remember the position of
2 him, if he was driving or not, off the top of my head.

3 Q. Right. But just listen to my question, please.

4 A. Sure.

5 Q. My question to you is: If in the affidavit, he made
6 reference that one -- law enforcement saw or observed
7 Mr. Caldwell driving that Cayenne on the day, you know --

8 A. Okay.

9 Q. -- that he was stopped --

10 A. Right.

11 Q. -- and cell phones --

12 A. Right.

13 Q. -- were seized from him -- didn't Mr. Caldwell tell you
14 that at no time was he driving that car -- that vehicle? And
15 that, in fact --

16 A. He went beyond that.

17 Q. Excuse me?

18 A. He went beyond that.

19 Q. Right.

20 A. When I initially met with him, he said that that didn't
21 happen at all.

22 Q. Exactly.

23 A. Exactly.

24 Q. And that he had witnesses to that effect.

25 A. Right.

1 Q. Did you speak to those witnesses?

2 A. I went over that with you before. The only one that was
3 given to me with any clarity on a name was Mr. Payne.

4 Mr. Payne was not willing to talk to my investigator. This
5 other individual, Dugan -- Keenan, whatever -- the one that --

6 Q. Jimmy Keenan.

7 A. Yes. That name was never provided. Street names, first
8 names were provided. I had asked his sister to bring these
9 people in. The ones she brought in had nothing really to do
10 with the case, was not a material witness. So, there was no
11 support there.

12 But I remember him saying -- to answer your question,
13 yes, I remember him indicating that that -- it didn't happen in
14 any way that was described by the police officers or the
15 agents.

16 Q. And if it didn't happen -- if it was a misstatement or a
17 lie in an affidavit in support of a search warrant, don't you
18 think that's something, you know, pertinent to look into to see
19 if a motion to suppress is warranted?

20 A. That feeling or that response from Mr. Caldwell was when I
21 first met him, before I received the bulk of the discovery. At
22 a time after that, there was no indication that he wanted to
23 utilize that in the totality of the circumstances, that that in
24 and of itself would undermine the entire case, and he felt that
25 it was in his best interests to plea (*sic*) and debrief.

1 Q. Okay. And let me ask you -- so, you indicated you've been
2 a criminal defense attorney for over 20 years?

3 A. Yes. And my clients sometimes say one thing when I first
4 meet them, and when discovery comes out, they say another
5 thing.

6 Q. Sir, sir, sir, I'm not asking you any questions -- if you
7 don't mind --

8 A. That's what happened here.

9 Q. You know, one thing is, you know, a federal agent answering
10 without question, but if you don't mind, if you could wait for
11 me to ask the question and then you can answer.

12 A. If you'd allow me to answer the prior question.

13 Q. Okay. Sure.

14 A. But go ahead.

15 Q. How many -- in your experience as a federal -- doing
16 federal criminal defense work, you have represented individuals
17 who have cooperated?

18 A. Yes.

19 Q. Okay. And prior to meeting with the government, do you
20 provide them with a proffer of what type of evidence that
21 particular client might be willing, you know, to discuss or
22 have for the government or the agents to review?

23 A. I do.

24 Q. Okay. And in this case, did you provide the government
25 with a proffer of what Mr. Caldwell could provide?

1 A. Yes, but not in writing. And the initial -- if you want me
2 to start at the beginning of that series of conversations, I'll
3 go into detail.

4 Q. No, no. I'm asking you: Did you provide the government --

5 A. Yes.

6 Q. -- with anything in writing?

7 A. Nothing in writing.

8 Q. Do you remember the first time, I believe it was in 2015,
9 Mr. Caldwell was arrested in connection with a gentleman named,
10 I believe, Robert? And it was a stolen vehicle? And the
11 driver was Robert? Do you remember that or no? In the
12 discovery.

13 A. Not off the top of my head, no. In 2015?

14 Q. Yeah, I believe it was in 2015.

15 A. I'd have to refresh my recollection, no.

16 Q. The first case that he was put on -- that he was arrested
17 for in state court, and then they dismissed the charges,
18 like --

19 A. I don't remember that off the top of my head. I do have,
20 and it's contained -- I think my investigator's still in
21 possession of it -- his priors -- I think I even have the
22 certified priors, but I have the dispositions and whatnot. And
23 it would probably be indicated in there. But -- however, in
24 discovery, I don't remember that off the top of my head. I'd
25 have to refresh my recollection.

1 Q. Okay. Let me ask you something. Mr. Caldwell indicated to
2 you that the agents first became interested in him after his
3 phones were seized in state court -- in the state court
4 proceeding, and that law enforcement came -- kept his phone.
5 Did he discuss that?

6 A. Can you repeat the question?

7 Q. Yes.

8 Did Mr. Caldwell at any time tell you that there was
9 an occasion several years back where he was a passenger in a
10 car, and that car was stopped by law enforcement, and they
11 determined that it was a stolen vehicle, and the tag was false,
12 and it came back to somebody who had not given permission for
13 they (*sic*) to be used?

14 A. How long ago?

15 Q. Several years back.

16 A. I don't remember that, no.

17 Q. Okay. Well --

18 A. In what context? Maybe that will help me refresh my
19 recollection.

20 Q. Right. That when Mr. Caldwell was trying to discuss with
21 you the fact of trying to see how you can challenge the initial
22 search of a phone, his phone, try to see if you could have, you
23 know, fruit of the poisonous tree --

24 A. I don't recall that conversation or an example such as that
25 being provided to me. I don't -- I don't recall.

1 Q. Do you remember seeing and reading any state court search
2 warrants in connection with Mr. Caldwell as it applies to this
3 particular investigation here?

4 A. State court. Yes, one was executed by a state court judge,
5 from what I remember.

6 Q. Executed or signed?

7 A. Excuse me?

8 Q. You said "executed."

9 A. I meant signature.

10 Q. Signed.

11 A. From what I remember, yeah. I remember there being a state
12 court search warrant that I reviewed.

13 Q. Okay. Did you see -- did you review it to see if you could
14 challenge it? If there was a legal basis to challenge that
15 search?

16 A. Did I review it, yes. Did I consider that, based upon what
17 I saw? That's always a check in what we do in our minds as
18 criminal defense attorneys.

19 Q. Right.

20 A. Going beyond that, whether or not I believe there to be
21 reasonable likelihood of success or a good-faith basis to do
22 so, no.

23 Q. Okay. But if a search warrant is defective because -- for
24 example, where they swear in -- in the search warrant, where
25 they swear in, and they make reference to not the person who's

1 signing but somebody else, that would be defective, right?

2 A. That would be a ground you could raise. But, again,
3 there's case law that indicates that a scrivener's error, wrong
4 address, wrong indication -- bless you -- of a witness may not
5 in and of itself be the basis to undermine the validity of a
6 search warrant, based upon my last research on that specific
7 issue.

8 Q. Okay. But do you remember one of the state search
9 warrants, the body of it is such, talking about Mr. Caldwell,
10 and then it makes reference to some other individual in the
11 body of that affidavit in support of the search warrant?

12 A. I don't remember off the top of my head the name in
13 particularly *(sic)*. I remember discussing that with
14 Mr. Caldwell, but that was early -- early on. So, I can't give
15 you the details of what that was. If you want me to refresh my
16 recollection, I'll take a look at it.

17 Q. Right. But what I'm saying is, but when you review that
18 and discuss it with Mr. Caldwell, did you do research to see if
19 it was appropriate to file a motion to suppress?

20 A. I do --

21 Q. Not to suppress, but to challenge the affidavit.

22 A. Yes. Based upon the facts and current case law, yes.
23 That's what I do.

24 Q. No, I know that's what you do, but what I'm asking you: Do
25 you have independent recollection that you did that in this

1 case?

2 A. I believe I did that in this case, yes. And,
3 coincidentally, I've had that issue come up quite often lately
4 with regard to warrants. So, the case law that I've been
5 reviewing and that I continually see if there's new case law on
6 the subject was reviewed within the last six months, if I
7 recall.

8 Q. Okay. You indicated that you visited Mr. Caldwell
9 approximately seven times?

10 A. No, I think I said six, based upon --

11 Q. Excuse me, six times.

12 A. Yes.

13 Q. Sorry about that. Okay.

14 A. Independent recollection, it was more than what you
15 indicated in your motion. I know that for certain.

16 Q. Okay. Well, let me ask you --

17 A. And, again, communication, which is the bar rule, and
18 especially being on a case six weeks, that's why I have direct
19 telephonic service with inmates for that purpose, to keep an
20 open line of communication in fulfilling my obligations as an
21 attorney.

22 Q. Okay. You indicated that you visited him on the 14th of
23 August.

24 A. I have to -- I have to look at --

25 Q. Well, I mean those are one of the dates --

1 A. Off the top of my head, I can't remember that particular
2 date circumstances, unless I have something to refresh my
3 memory.

4 Q. Right. But I'm reading from this. Would this refresh your
5 memory?

6 A. That was put down by my paralegal after I asked her to
7 write down what was in my scheduling diary, as well as what was
8 in the Google schedule.

9 Q. Right. But my question to you is -- I'm gonna be asking
10 you specific questions about those visits.

11 A. Okay.

12 Q. Does this document in any way assist you in refreshing your
13 recollection?

14 A. Based upon what I asked my assistant to do, it -- from my
15 independent recollection, that seems about right of the number
16 of times I visited him. Keep in mind, I'm in these jails
17 usually on a daily basis, bouncing between, for instance,
18 Conte, Paul Ryan, North Broward Bureau. This morning it was
19 Gun Club. So, it's hard for me, unless I look at my notes and
20 the particular case, or in some instances, when I pull people,
21 I'll go see one individual and say, "While I'm here, let me see
22 Mr. Caldwell," and I won't even have his file, but I know
23 what's going on in his case, bring him up to date, put him at
24 ease, answer his questions, or bring up something that was
25 brought to my attention from his sister or a phone call, or to

1 remind him not to call me on third-party calls, or talk to
2 other people on the calls, because the government is listening.
3 That happens.

4 So, to answer your question about the 14th, I don't
5 have independent recollection of that particular meeting, the
6 sum and substance of it. I just know that that was in my book.

7 Q. Okay. Do you have any independent recollection of your
8 visit and meeting with Mr. Caldwell on the 17th of August?

9 A. Same answer.

10 Q. How about on the 20th of August?

11 A. Same answer.

12 Q. The 27th of August?

13 A. Same answer.

14 Q. And you indicated that in your office, you have some type
15 of --

16 A. Securus.

17 Q. No, no, book -- calendar book, and in that calendar book,
18 physical book, would indicate what -- how long you were with
19 him and what you discussed that day?

20 A. No, absolutely not. It's just scheduling. A date that I
21 target at seeing someone or meetings in my office or court
22 hearings or motions, everything. It's an attorney's calendar.

23 Q. Okay. On the -- can -- as you sit there, can you tell the
24 judge how many hours was it that you interviewed him on the
25 14th of August?

1 A. I can't -- no, I have no independent recollection of that.

2 Q. And how about the 17th, the 20th, or --

3 A. Again, if this were a CJA case or a JAC case, I would have
4 to be keeping specific hours. On privately retained cases, I
5 have the luxury of not having to do that for billing purposes.
6 And one of the reasons I never went into the civil sector was
7 because I -- I couldn't wrap my mind around billing and their
8 billing practices and their exaggerated billing practices, in
9 my opinion. So, no, I don't keep specific times, no.

10 I told you, sometimes I pull people without even
11 having their file, just to sit with them and talk to them about
12 their case. And in a lot of instances, I don't need to bring a
13 report that we refer to, you know, a dozen or more times. Or
14 circumstances that are occurring in the case, or judicial
15 proceedings that are approaching. I could do that without a
16 file.

17 Q. Okay. On the two occasions that you believe you visited
18 Mr. Caldwell with a computer at the Conte jail, for how many --

19 A. That was just me and my investigator. My investigator went
20 there more than that --

21 Q. Sir, sir --

22 A. -- with the computer.

23 Q. -- my question is about you.

24 A. Okay. At a minimum, two times. I remember being there
25 physically with the Toshiba laptop -- or Samsung -- no, Toshiba

1 laptop that I have.

2 Q. Right. Okay.

3 My question to you is: How long were you, on each of
4 those visits, reviewing the discovery, you know, on the laptop
5 with Mr. Caldwell? As you sit there, do you have independent
6 recollection for how long it was?

7 A. I believe it was more than an hour, if I recall.

8 Q. Well, how long?

9 A. Excuse me?

10 Q. How long?

11 A. Me, personally?

12 Q. Yeah.

13 A. I don't know specifically. I would say between an hour and
14 two hours, reviewing -- again, the discovery in its totality
15 would have been gone over and played with the investigator. I
16 would pull out bullet points, so to speak, that I believed
17 would support the claims of the government and their elements
18 in their indictment and highlight those, or refer to things
19 that Mr. Caldwell had raised in the past that he wanted to
20 review. So, it --

21 Q. So, you indicated --

22 A. I would streamline the visits to what we believed to be
23 pertinent information or damning evidence, material evidence,
24 or potentially evidence that we could challenge. And I'm
25 speaking in generalities, yes.

1 **THE COURT:** Why don't we do this. Mr. Batista, you
2 ask a question. Mr. Merlino, you answer the question. And
3 then you ask another question, Mr. Batista. Okay? Because
4 we're getting overlapping, people talking at the same time.

5 **MR. BATISTA:** I'm sorry.

6 **THE COURT:** And it's not fair to my court reporter.

7 **MR. BATISTA:** Yes, your Honor. I'm sorry.

8 **THE COURT REPORTER:** Mr. Batista, if you could move
9 the tip of the mic.

10 **MR. BATISTA:** Like that? Okay.

11 BY MR. BATISTA:

12 Q. You indicated that on one of them, it would have been over
13 an hour and a half, two hours?

14 A. I believe so.

15 Q. How about on the other one, where --

16 A. Probably the same, probably the same.

17 Q. Please let me finish, that way the judge doesn't admonish
18 me.

19 On the second occasion, do you remember that you went
20 there, and it was, you know, a laptop to review the
21 discovery -- do you remember for how long you were with
22 Mr. Caldwell reviewing discovery?

23 A. I believe it was the same amount of time.

24 Q. About an hour and a half, two hours?

25 A. Yes.

1 Q. In this case, Mr. Caldwell entered an open plea.

2 A. Yes. From what I recall, yes.

3 Q. How many times have you as a defense attorney, where there
4 are potential sentencing issues or range -- sentencing range,
5 although it's advisory, but nevertheless... have you entered --
6 allowed a client to enter an open plea?

7 A. Federal or state?

8 Q. Federal, during the last three years.

9 A. Under five times.

10 Q. Under five times.

11 A. Yeah, not very often.

12 Q. Okay. In this case, did you, you know, try to get the best
13 plea possible for -- I mean -- strike that.

14 As a defense attorney, if the client's gonna be
15 entering a plea, you try to get the best plea possible,
16 correct?

17 A. Yes.

18 Q. And sometimes it could be that charges -- or counts are
19 dropped, correct?

20 A. Correct.

21 Q. Other times it could be because you get the government to
22 agree to a sentencing range, correct?

23 A. Correct.

24 Q. Or not to oppose the lower end of the guideline sentence.

25 A. Correct. Or stipulate to other mitigating circumstances,

1 yes.

2 Q. In this case, you didn't get none of that for Mr. Caldwell,
3 correct?

4 A. It was going to be contingent upon a debrief that the
5 scheduling, because of the move from Conte to FDC, could not
6 occur before the change of plea. Mr. Caldwell in that visit,
7 or part of that visit the day before, was still indicating he
8 wanted to go through with that debrief. And the sentence and
9 the benefit he would get from that sentence would be contingent
10 upon, in the government's estimation, of how useful that
11 substantial assistance would be.

12 Q. Yeah, but I'm not talking about substantial assistance.
13 I'm talking about, you know, a straight out plea --

14 A. Well, no, the other thing is this, that was considered in
15 this case: Ms. White had indicated to me that if he did not --
16 I think I was given a date and a time I had to respond to her,
17 I think it was at three p.m. on a particular date just
18 before -- I don't remember the point in time, but Ms. White
19 indicated that if he didn't indicate he wanted to enter a
20 change of plea, she would be superseding the indictment with
21 newly discovered evidence, based -- that was based in the
22 supplemental discovery that was received following the first
23 week of July's large amount -- or the two-terabyte hard drive
24 amount of evidence. And that was a consideration that weighed
25 heavily upon Mr. Caldwell.

1 Q. But what I'm asking you is: Did you attempt to get some
2 type of agreement from the prosecutor as to the low end or to
3 drop some of the charges?

4 A. Not to -- from our conversations, that was not happening.
5 Ms. White was adamant that it would be a guideline sentence.
6 She wanted to see if any benefit would -- there would be --
7 would be contingent upon any substantial assistance that would
8 be in this case. And, again, it would be in her estimation of
9 what that was.

10 Q. Right. But a 5K or Rule 35 --

11 A. Possibly.

12 Q. -- excuse me -- that's something different than trying to
13 get a prosecutor to agree to dismiss some charges, which would
14 not affect the guideline range.

15 A. Right.

16 Q. Okay? Or to agree to the low end of the guidelines.

17 A. Right.

18 Q. And my question to you is: Did you attempt to convince her
19 to agree to drop some charges or to agree to the lower end of
20 the guidelines?

21 A. I don't remember phrasing it like that, but if I remember
22 Ms. White's position -- and she was adamant -- that that was
23 not going to happen. So, yes, that was -- I don't know what
24 the exact verbiage was, but, of course, in every case, we try
25 to get the best scenario as far as -- even just negotiations,

1 to bring something to the client to weigh in on the
2 decision-making process of the options.

3 Ms. White, again, was indicating that the only way she
4 could do something for him if substantial assistance was
5 achieved.

6 Q. Did you ask her if she would give you permission to speak
7 to her supervisor and see if you can convince the supervisor to
8 a better -- you know, to a better plea, as opposed to eating
9 the whole indictment?

10 A. No. I didn't think she was doing anything improper. So, I
11 would not -- having done that job before, I wouldn't go over
12 her head unless I felt that there was a good basis to do so.
13 And I didn't feel that it existed in this case.

14 And I had gone over -- as I indicated before, I
15 retained the services of a sentencing expert who used to work
16 for the U.S. department of probation, and I went over with him
17 ad nauseam the scenarios of sentencing guidelines in this case.

18 Q. Yeah, but I'm not asking you about sentencing guidelines.
19 I'm asking to try to see how you can get some type of
20 concession that would be favorable to Mr. Caldwell from the
21 federal government.

22 A. We tried.

23 Q. So, after you reviewed whatever amount of discovery you
24 reviewed, you made the determination that motions to suppress
25 were not appropriate in the case?

1 A. I could not file in a good-faith basis. I just filed a, to
2 give you an example -- if I may elaborate -- a motion to
3 suppress, coincidentally, in this courtroom. Upon my
4 investigator's review of witness testimony, Ms. White and I,
5 coincidentally, were out in the hallway speaking to a potential
6 witness, and new information came our way, that was not
7 reviewed, when my investigator found a potential witness that
8 we believed would support our motion to suppress.

9 Q. In this case or a different case?

10 A. In a different case. I'm just saying my manner of
11 practice.

12 Q. Sir --

13 A. So, to answer you, no, I did not --

14 Q. -- I'm asking you questions about this case. I'm not
15 asking you about any other case right now.

16 A. I didn't believe there was a good-faith basis to do so.

17 And, again --

18 Q. Let me ask you something.

19 A. Can I finish answering?

20 Another thing that weighed heavily on that issue was
21 good-faith basis, but, also, we had a deadline, that
22 Mr. Caldwell was aware of, that Ms. White had given us, after
23 review of all the discovery, to determine whether or not we
24 were going to avoid the possibility of there being a
25 superseding indictment, a second superseding indictment.

1 Q. Right. But the superseding indictment charged two separate
2 counts of possession of accessory (*sic*) devices, correct?

3 A. I think they were Counts 2 and 5, if I remember.

4 Q. Okay. And, basically, each indicated there was 15 or more.

5 A. I believe so, from what I remember.

6 Q. Okay. So, that particular count -- having that count
7 dropped or pleading to it would not affect the guideline range,
8 correct?

9 A. It was a factor we were going to discuss after the initial
10 debrief and possibility of future debriefs in light of what
11 Mr. Caldwell was indicating he could come to the table with.

12 Q. No, but my question to you is: For purposes of trying to
13 see if you could get concession from the government.

14 A. Right.

15 Q. You realize that it was basically -- obviously different
16 days, but it was the same type of charge.

17 A. Exactly.

18 Q. And you realize --

19 A. We asked for mitigation, and it was not coming from
20 Ms. White. I had indicated that.

21 Q. So, in other words, she was not willing to concede anything
22 for purposes of --

23 A. Not going outside the guidelines, no, at that juncture.

24 And I believe, and I could be wrong, but I believe she wasn't
25 even going to recommend at that juncture, even with a change of

1 plea, without a debrief, the low end, based upon what she had
2 in her possession through supplemental discovery that she was
3 going to utilize, allegedly, for a second superseding
4 indictment.

5 Q. Okay. And what was -- what were your potential strategies
6 that you discussed with Mr. Caldwell for purposes of defending
7 him in this case?

8 A. Well, drugs -- starting off with possession, okay?
9 Constructive versus actual; whether or not those were his guns;
10 whether or not, as depicted in the video, those were actual
11 guns and how an ATF expert could indicate that they actually
12 were; the drugs, I believe, were not in his actual physical
13 presence, if I recall, it was a scooter; the fingerprints -- as
14 I had gone over with Ms. White -- the fingerprints, the latents
15 on those IDs --

16 Q. Okay. Well, let me ask you, as part of --

17 A. And, again, the Porsche issue, as we mentioned before. I'm
18 answering your question.

19 Q. Okay. As far as the drugs in the scooter, what evidence
20 did you see in the discovery to convince you that the
21 government could, you know, convince a jury that he was guilty
22 of that charge? In the discovery, what evidence was there?

23 A. I believe he had access, and there was surveillance that
24 showed him in possession of that scooter. And the
25 methamphetamine, I believe it was, I think there was trace on

1 the -- if I remember this case, on the items that the
2 fingerprints were drawn from.

3 Q. Okay. But you know that fingerprints -- they can be
4 identified as to what person left those fingerprints, but --

5 A. Right.

6 Q. -- there's no science to indicate when that fingerprint was
7 left there, correct?

8 A. And that would be utilized upon cross-examination of the
9 person who collected the evidence. And, furthermore, chain of
10 custody, and eventually the expert who compared the latents and
11 the process and the protocol that they utilized.

12 Q. And was there any fingerprints as to the gun that was
13 seized in the house that came back to Mr. Caldwell?

14 A. I don't believe there was in that case. I don't. I've
15 dealt with that just on a recent case, and I don't want to
16 confuse the two, because DNA did come back after a subsequent
17 swab. But I don't believe there was prints or DNA, from my
18 recollection, in this case.

19 Q. In order to review the discovery in this case, did you have
20 to put aside your obligations in other cases?

21 A. What do you mean by that?

22 Q. Did you have to set aside doing -- working on any other
23 criminal case in order to concentrate on reviewing the
24 discovery in this case?

25 A. I put more hours into this case than other cases that would

1 not go to trial until a time after, at that time, the 27th of
2 August. Yes, they did not suffer. It's just a matter of
3 managing your time and prioritizing, which is what we have to
4 do in our practice.

5 Q. So, it is your testimony that the person who came up with
6 the idea of entering a guilty plea was Mr. Caldwell as opposed
7 to you?

8 A. I -- no. I gave him my opinion. I always weigh in, and I
9 tell them, first and foremost -- and I even use this silly
10 example, within legal bounds -- I drive the bus, you tell me
11 where to go. I'll try the case if you want to. However,
12 here's my opinion, and here's why this is my opinion.

13 Q. Okay. And on which meeting with Mr. Caldwell was it that
14 you told him your opinion that you thought it was in his best
15 interests to enter a plea to the indictment?

16 A. I believe it was a week or so before the actual change of
17 plea, when we first started making decisions in this matter.
18 And I can't remember when that three p.m. deadline was. That
19 would refresh my memory. I didn't write that down. But I
20 remember three p.m. for some reason sticking out in my head.
21 Ms. White indicating on a particular date, three p.m., she
22 needed to hear from me. And I did everything in my power to
23 see Mr. Caldwell before that time to review, again, everything
24 and to indicate what Ms. White was telling us would possibly
25 happen if he did not change his plea, which is typical in this

1 world.

2 Q. And your testimony is that it was Mr. Caldwell's -- strike
3 that.

4 Your testimony is that the first person to discuss
5 about possible cooperation was Mr. Caldwell?

6 A. No. No, I brought it up, probably at our initial meeting,
7 going over options and how we could possibly mitigate the
8 circumstances, defend the case. Probably before I even
9 received discovery. And I will ask them, and if I -- I read
10 their body language in their response. I always suggest that
11 that that is one of many options, if it's relevant to a
12 particular matter. So, I probably brought it up in reviewing
13 in general what his options would be in either defending the
14 case or mitigating the case and moving forward as a potential
15 way of dealing with this matter and his unfortunate
16 circumstance.

17 Q. And you also, from reviewing the discovery, you realized
18 that there were many adult black males who frequented that
19 house.

20 A. There were -- there were several. I don't know many, but,
21 yes, there were. And I know that from my independent
22 investigation through the investigator as well as Mr. Caldwell
23 and his sister.

24 Q. And as well as the videos, correct?

25 A. Yes.

1 Q. Because there were videos showing --

2 A. Yes.

3 Q. -- Mr. Caldwell and other --

4 A. There were other individuals, yes.

5 Q. -- excuse me -- and other individuals --

6 A. Yeah.

7 Q. -- playing games or playing football, you know, some type
8 of game with -- on a screen on the wall. Do you remember
9 seeing that or no?

10 A. I don't remember them playing --

11 Q. Football.

12 A. -- video games.

13 Q. Video games with football?

14 A. I remember them being on a couch in the living room. Oh,
15 one of the -- well -- we were also looking into who owned that
16 place, rented that place, and to remove from Mr. Caldwell any
17 standing as far as responsibility in that house, of what that
18 house would contain, or who would frequent that house.

19 Q. Okay.

20 A. But in answering that question, I don't remember what
21 particular video game. I don't remember off the top of my
22 head. But I remember there were scenes similar to that.

23 Q. Did your investigator go to the company that rented that
24 house -- rented out that house to ask, you know, who was the
25 person who had rented that house?

1 A. I think the person was dead. I think he did.

2 Q. No. The person, the actual physical person that went to
3 the house to rent it?

4 A. I believe that person was either, based upon my
5 recollection, not with us any longer -- I think it was -- was
6 dead or a fictitious individual. For some reason, I remember
7 my investigator -- and this was at the very beginning of the
8 case, probably in July, that that was what I recall, that that
9 person did not exist.

10 Q. I'm not asking you that. What I'm asking you is --

11 A. Yes, he did -- I believe he did that, based upon my
12 conversations with him, as early as July.

13 Q. Okay. And did that lady from that realty company identify
14 Mr. Caldwell as the person who rented that house?

15 A. I don't believe so, no.

16 **MR. BATISTA:** Your Honor, if you just give me a
17 minute? I believe I'm -- just give me a minute just to ask my
18 client something?

19 **THE COURT:** Okay.

20 **MR. BATISTA:** Please.

21 *(Discussion had off the record between counsel and*
22 *client)*

23 BY MR. BATISTA:

24 Q. Do you remember as well or not on the 27th of August, you
25 had a motion to suppress hearing scheduled on another matter

1 that you were handling?

2 A. I don't remember off the top of my head. I'd have to look
3 at that book or check my phone, and I could answer that
4 question.

5 Q. Okay. Well, do you remember as to whether or not for the
6 week of August 27th, did you have any other criminal matters
7 requiring you -- your presence in any courthouse aside from the
8 courtroom of Judge Dimitrouleas in this case?

9 A. I'd have to look at my book or my phone, which I have right
10 here, and I can answer that question. I quite often do.

11 **MR. BATISTA:** Judge, can he be allowed to look at his
12 phone?

13 **THE COURT:** Okay.

14 BY MR. BATISTA:

15 Q. Please.

16 A. Thank you.

17 August 27, 2018?

18 Q. Yes, sir.

19 A. I got to turn it on. It's off.

20 The 27th. To be certain, August 27th, 2018?

21 Q. Yeah, that week. Do you have --

22 A. No, I have nothing on that particular date that would
23 conflict, or anything else scheduled on August 27th, 2018.

24 Q. Okay. And did -- does your phone there reflect that you
25 had this matter scheduled for that day?

1 A. Hold on one second. I'll tell you right now.

2 Google calendar... no, it doesn't.

3 Q. Okay. And how about on the 14th of August, does your phone
4 reflect that you went to Conte jail facility?

5 A. This actually is my calendar. This is not the Google
6 calendar. So, if I may, this is my personal calendar.

7 Q. What's the difference between one and the other?

8 A. My -- I keep a separate Google calendar that coincides with
9 my office, and then I keep a private -- a private calendar as
10 well.

11 Can I go -- I'm gonna go to the other one.

12 I'm getting no service in here. You can see my phone,
13 if you want.

14 Q. Okay.

15 A. It's -- you want to approach and see? I have no service.
16 I can't connect.

17 Q. Well, there's nothing I can do with that.

18 A. Actually, for whatever reason, I think it has to do with
19 the connectivity. I'm even hitting on the dates that I have
20 things scheduled, which is denoted by a dot, and it's
21 impossible, knowing my schedule, that for the month I had
22 nothing on the schedule. That's -- that's not happening.
23 That's -- so, if you want, to do this properly, bifurcate --
24 you don't even need a subpoena, you can subpoena my book, my
25 Google calendar, my paralegal, my investigator, and they'll

1 corroborate it.

2 **THE DEFENDANT:** Or -- or --

3 BY MR. BATISTA:

4 Q. Let me ask you a question. You indicated -- I'm almost
5 finished -- you indicated that on multiple occasions,
6 Mr. Caldwell will call your office with another individual on
7 the line.

8 A. Yes. Usually -- I'd say all the time, a female. It was
9 funny, because he told us not to tell -- the names escape me --
10 not to tell those females that the others were connecting with
11 us.

12 Q. Okay. And what would he discuss with you when he had a
13 third party listening in?

14 A. I would not allow him to talk about the case in any way,
15 shape, or form. I always told him, and my staff is advised to
16 tell him, that he's not supposed to do so. He can get in
17 trouble at the jail.

18 Two, if it is his line or his account that they're
19 listening, or even if it is a third party, potentially they
20 could -- they could listen in on it. So, nothing of substance
21 other than scheduling, next visits, things of that nature.

22 Q. Did he ever --

23 A. Securus -- I'm sorry, I'm not done -- I'm answering your
24 question -- Securus calls that came directly from him from the
25 jail, we would go into detail. And not only me but my

1 paralegal and my investigator.

2 Q. Right. I'm asking phone calls with a third person on the
3 line.

4 A. Yeah.

5 Q. Okay. Did he at any time discuss with you that he needed
6 to see you --

7 A. Yes.

8 Q. -- or if you had filed any motions?

9 A. Yes. Yes.

10 Q. And what were you -- what was your response --

11 A. The filing --

12 Q. Let me finish.

13 A. Sure.

14 Q. When he discussed with you, with a third party on the line,
15 whether or not you had filed any motions, what was your
16 response?

17 A. What motions we talking about? I filed a motion to
18 continue, which he was panicking about, because the case was
19 set for trial. We had just received two terabytes of
20 information. So, if that's what you're referring to, yes. As
21 far as motions -- motions to suppress?

22 Q. Yeah, I'm talking about motions to suppress.

23 A. I don't remember having that conversation with him, when
24 motions would be filed.

25 **THE DEFENDANT:** All the time.

1 **MR. BATISTA:** Shh.

2 BY MR. BATISTA:

3 Q. Did -- on how many occasions that you visited Mr. Caldwell
4 did he tell you that he wanted you to file motions to suppress?

5 A. We discussed motions to suppress, but I don't remember him
6 saying file one. And if he did bring it up, we went over the
7 basis of why I could not do so in good faith numerous times.
8 So, if that's what you're referring to, that would have been my
9 response at the time he started mentioning specifically motions
10 to suppress.

11 And, again, that came at a time at the very end, after
12 the change of plea, when it didn't make any legal sense to do
13 so, and he was, in my estimation, being counseled or -- either
14 by an in-house jailhouse attorney or outside pressure. And I
15 believe when we had the motion to withdraw the change -- excuse
16 me -- the guilty plea, motion to have me withdrawn, I had asked
17 for the proceedings to be sealed for the same reasons that I
18 was worried about with attorney-client, but more so with the
19 potential of him performing substantial assistance, and at that
20 juncture, my office being contacted by outside sources,
21 reiterating that he was not going to plea or -- or debrief,
22 especially.

23 Q. You indicated that the day before he entered a change of
24 plea that you review with him all the different questions and
25 how the plea colloquy would go, correct?

1 A. Yes, sir.

2 Q. And it was detailed.

3 A. Yes, sir.

4 Q. Because you've had other matters before Judge Dimitrouleas,
5 correct?

6 A. Every judge. It doesn't matter county court judge or a
7 federal judge, yes.

8 Q. No, no, I'm talking about Judge Dimitrouleas. You have had
9 other plea proceedings, correct?

10 A. Yes.

11 Q. And your -- from your experience, you realize that
12 Judge Dimitrouleas is one of the most thorough judges in a plea
13 colloquy.

14 A. Yes, yes. And if I know a particular judge's colloquy, and
15 if it differentiates from the general colloquy, I will go over
16 that with the client.

17 Q. Okay. So, is it your position that once you went over that
18 plea colloquy with Mr. Caldwell the day before the change of
19 plea, it was because he had already told you that he wanted to
20 enter a plea?

21 A. Yes. From my recollection, yes.

22 Q. Okay. So, when you --

23 A. Otherwise, we wouldn't be having that conversation.

24 Q. Okay. So, when you left there that day -- "there" meaning
25 the visit at Conte -- you knew he was gonna be entering a plea,

1 so you made arrangements to have -- to advise the Court to set
2 it down for change of plea, correct?

3 A. That was done prior to my last visit going over the plea
4 colloquy. We had already crossed that bridge. He had already
5 made that determination. I already had conversations with
6 Ms. White about resolving this case along the lines that you --
7 I'm answering your question -- along the lines of mitigation,
8 situation, substantial assistance, debriefs, scheduling of
9 same. He had already done that. And when I call an in-court
10 or a JA or ask a judge in court to set something for a change
11 of plea -- of course, things happen in cases, but my client has
12 already made that determination based upon counsel.

13 Q. Yes, sir. But what I'm asking you is: So, your testimony
14 is that once Mr. Caldwell in person told you that he was gonna
15 be entering a guilty plea, that then and there you called
16 the -- once you left the jail, you call to the judge's chambers
17 or courtroom deputy to set the matter for change of plea?

18 A. Not instantaneously. It probably goes something -- it
19 depends on the time of the day I'd visit him, but I usually
20 have my assistant do that. I'll let her know, text or email --
21 not email, but text or in person, "Please call the in-court and
22 set it down for a change of plea."

23 Q. Okay.

24 A. And I usually, at that time, as a courtesy -- and in this
25 case, I think I did because of a deadline -- I let Ms. White

1 know immediately.

2 Q. Right. Okay.

3 And once you did that, you, yourself, or somebody from
4 your office contacted the judge's chambers for a change --

5 A. Yeah, it wasn't me. In this case, I know it wasn't me
6 directly.

7 Q. Okay.

8 A. I usually never have contact directly with the judge's
9 chambers.

10 Q. Okay. And that decision was done based upon your
11 face-to-face meeting with Mr. Caldwell, correct?

12 A. For me to make that call? Yes.

13 Q. Yes.

14 A. Leaving the jail that day to make that call, it was a
15 change of plea in place, yes.

16 Q. Okay. And that would have been the week before, you said,
17 right?

18 A. Within that week before. It wasn't the day before when I
19 prepped him for a colloquy.

20 Q. Right.

21 A. It would have been before then.

22 Q. Okay. So, your documents here reflect that on the 17th of
23 August, you visited him.

24 A. Okay.

25 Q. Then it reflects that on the 20th of August, you visited

1 him. But it does not reflect that you visited him on the 22nd,
2 which would have been the day before. And your testimony a
3 minute ago was that you went to visit him at Conte facility the
4 day before the entry of --

5 A. I believed it to be the day before. It was right before
6 the change of plea.

7 Q. No, no, but that's not what you said a minute ago. Before,
8 you said that the day before the change of plea, you went to
9 visit him at Conte.

10 A. Okay. I believed it to be right before. You even
11 indicated in your motion of what, allegedly, the sum and
12 substance was of my review of the colloquy. So that
13 conversation occurred. It always occurs.

14 Q. I understand --

15 A. He would not get through a colloquy, especially with this
16 Court, without preparation on what questions would be asked.

17 Q. Right.

18 A. He'd be blindsided.

19 Q. Right. And that's why you went the day before. That's
20 what your testimony was a minute ago.

21 A. Then I was wrong. It was before. Let's just put it that
22 way. It couldn't have been after, obviously. It couldn't have
23 been the day of. He was prepared.

24 Q. Okay.

25 A. And Mr. Caldwell even indicated that, because he reiterated

1 that to you, and you put it in your motion.

2 Q. Okay. And you saw him on the day of the change of plea,
3 right?

4 **MS. WHITE:** Objection. Asked and answered.

5 A. Of course. I was here.

6 **THE COURT:** Sustain.

7 BY MR. BATISTA:

8 Q. Prior to coming to the courtroom, you --

9 A. I can't remember if I pulled him at the marshal's hold or
10 not. I can't remember. I sometimes do for last-minute
11 questions, concerns, change of heart. I've had guys change
12 their mind the day of. And I like to give the Court and the
13 government the heads up before I walk in that they've changed
14 their mind. That's why I like to try to get to them in the
15 marshal's hold. But I don't remember in this case if I saw him
16 in the marshal's hold before the change of plea.

17 Q. Okay.

18 **MR. BATISTA:** No further questions, your Honor.

19 **THE COURT:** Check with Mr. Caldwell, because he was
20 raising his hand at one point.

21 *(Discussion had off the record between counsel and*
22 *client)*

23 **MR. BATISTA:** No further questions, your Honor.

24 **THE COURT:** Redirect?

25 **MS. WHITE:** No, your Honor.

1 **MR. BATISTA:** May I give --

2 **THE COURT:** Yeah, give it back to Mr. Merlino.

3 **THE WITNESS:** Thanks.

4 **THE COURT:** Any objection to my asking Mr. Merlino a
5 question or two?

6 **MR. BATISTA:** No, your Honor.

7 **MS. WHITE:** No, sir.

8 **THE COURT:** During the change of plea, did you tap
9 Mr. Caldwell on his leg?

10 **THE WITNESS:** I don't remember tapping him on his leg.
11 I remember tapping him on his leg during the motion to withdraw
12 the guilty plea and the -- withdraw me as his attorney. When a
13 crowd of people walked in, and I didn't know who it was
14 specifically, he wouldn't listen to me or talk to me when you
15 allowed me time to speak to him. He was looking over my
16 shoulder and communicating with someone in the audience, and I
17 admonished him for that.

18 **THE COURT:** During the change of plea, do you remember
19 tapping him on his leg to indicate to him to remember to answer
20 the questions correctly?

21 **THE WITNESS:** No, that makes no -- no.

22 **THE COURT:** Any further questions for Mr. Merlino?

23 **THE DEFENDANT:** Yes.

24 **MS. WHITE:** No.

25 **MR. BATISTA:** Your Honor, one second.

1 **THE COURT:** Okay.

2 *(Discussion had off the record between counsel and*
3 *client)*

4 **MR. BATISTA:** No questions, your Honor.

5 **THE COURT:** Thank you, sir. You may step down.
6 You're excused.

7 **THE WITNESS:** Thank you.

8 *(Witness excused)*

9 **THE COURT:** Let's take a ten-minute recess for the
10 court reporter.

11 **ROOM CLERK:** All rise.

12 *(The Judge exited the courtroom)*

13 *(Recess taken at 4:02 p.m. until 4:11 p.m.)*

14 *(The Judge entered the courtroom)*

15 **THE COURT:** All right. We're back on the record.

16 Counsel are present. Mr. Caldwell is present.

17 **THE DEFENDANT:** Yes, sir.

18 **THE COURT:** Does the government have any other
19 witnesses?

20 **MS. WHITE:** No, your Honor.

21 **THE COURT:** Any rebuttal, Mr. Batista?

22 **MR. BATISTA:** Your Honor, I do have a matter that I'd
23 like to bring to the Court's attention, if possible.

24 **THE COURT:** Okay.

25 **MR. BATISTA:** Your Honor, I specifically asked this

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1 witness, you know, if he -- you know, how he obtained access to
2 the -- to be able to see the contents of that hard drive. He
3 indicated that he had a password, and he just pushed (*sic*) it,
4 and it will automatically, you know, give him access to
5 whatever document -- you know, phone data or videos or whatever
6 in there. And I just want -- as an officer of the Court, I can
7 tell you the government provided me a hard drive, he said.
8 No -- excuse me -- I provided the government with a hard drive,
9 and they were kind enough to upload that information for me.

10 Judge, in order to open it, you have to use what is
11 called Reader, some type of application reader. Judge, in my
12 computer in my office, my partner's computer in his office, as
13 well as the hard drive, it takes minutes, sometimes up to ten,
14 15 minutes before the discovery will open up.

15 **THE COURT:** Ms. White, do you agree that that's what
16 it takes to open it up?

17 **MS. WHITE:** No, your Honor. I also look at the
18 discovery on this case from a hard drive. I had to talk
19 counsel through how to access the cell phone data a few days
20 ago, and it took his reader a while to open, which occasionally
21 it takes my reader a while to open, depending on whether I'm on
22 wi-fi, whether I'm hooked into the ethernet. But most of the
23 time, I'm able to access it immediately.

24 **THE COURT:** All right. So, the fact that it took a
25 long time for your computers to open it up and access it

1 doesn't necessarily mean that it took a long time for
2 Mr. Merlino's to.

3 **MR. BATISTA:** Yes, but he said that it was a password,
4 and there's no password to open the contents of that hard
5 drive.

6 **THE COURT:** Ms. White?

7 **MS. WHITE:** The -- now I have to remember -- I don't
8 believe that the hard drive itself has a password. There are
9 files on the hard drive that are encrypted that require a
10 password, which counsel also called me to ask for a week or two
11 ago.

12 **THE COURT:** All right. So, I'll accept the fact that
13 Mr. Merlino may have lied or been mistaken about having to have
14 a password to open up the hard drive.

15 **MR. BATISTA:** That'll be fine, Judge.

16 **THE COURT:** So, do you have any other witnesses you
17 want to call, Mr. Batista?

18 **THE DEFENDANT:** I just want to ask him something.

19 **MR. BATISTA:** Your Honor, can I just have a second?

20 **THE COURT:** Sure.

21 *(Discussion had off the record between counsel and*
22 *client)*

23 **MR. BATISTA:** No, your Honor, we have no other
24 witness.

25 **THE COURT:** Because Mr. Caldwell mentioned something

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1 about him having two witnesses here today.

2 **THE DEFENDANT:** Yes.

3 **MR. BATISTA:** Well, he had one of the witnesses, but
4 we have the affidavit we submitted, and we rely on the contents
5 of the affidavit. It's notarized, and we rely on that.

6 **THE COURT:** That's fine, as long as Mr. Caldwell
7 agrees with your strategy of not calling the witnesses.

8 **MR. BATISTA:** One second, Judge.

9 **THE COURT:** Okay.

10 *(Discussion had off the record between counsel and*
11 *client)*

12 **MR. BATISTA:** Your Honor, no, after this -- after
13 speaking to Mr. Caldwell, we'll rest.

14 **THE COURT:** You agree with that strategy,
15 Mr. Caldwell?

16 **THE DEFENDANT:** Yes, sir.

17 **THE COURT:** Argument, Mr. Batista?

18 **MR. BATISTA:** Yes, your Honor.

19 Judge, we have filed a motion to withdraw guilty plea
20 pursuant to Federal Rule of Criminal Procedure 11(d)(2)
21 capital A, hyphen -- I mean, yes, capital B.

22 Your Honor, that rule states that after the district
23 court has accepted a defendant's guilty plea and before
24 sentencing, the defendant may withdraw a guilty plea only if,
25 one, the district court rejects the plea agreement, which is

1 not the case here; or, two, the defendant can show a fair and
2 just reason for requesting the withdrawal. There is no
3 absolute right to withdraw a guilty plea prior to imposition of
4 a sentence, and the decision to allow withdrawal is left
5 strictly to the sound discretion of the Court.

6 The defendant has the burden of showing a fair and
7 just reason for withdrawal of his plea. And in determining
8 whether the defendant has met this burden, the district court
9 may consider the totality of the circumstances surrounding the
10 plea. The factors analyzed include whether close assistance of
11 counsel was available; two, whether the plea was knowing and
12 voluntary; three, whether judicial resources would be
13 conserved; and, four, whether the government would be
14 prejudiced if the defendant were allowed to withdraw his plea.

15 There is a big discrepancy in the testimony as to how
16 many times the attorney Merlino visited with my client. My
17 client indicates that he visited him on two occasions. And
18 Mr. Merlino says that he visited him on six occasions.
19 Obviously, the records at the Conte correctional facility can
20 be subpoenaed, and then that would reflect whether or not what
21 the attorney Merlino is saying is true.

22 But, Judge, my client indicates that he was basically
23 coerced into entering a guilty plea. And Mr. Merlino says, no,
24 that's not true, that didn't happen.

25 But, Judge, I've been an attorney now for 38 years.

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1 And hardly ever, when it's multiple counts, have I ever, to my
2 recollection, ever, you know, had my client plead guilty to the
3 indictment -- to each count in the indictment on an open plea
4 with no types of protection for the defendant.

5 Judge, before deciding whether to plead guilty, a
6 defendant is entitled to "the effective assistance of competent
7 counsel." And that's citing *Strickland vs. Washington*. In
8 *Padilla vs. Kentucky*, the Court stated that "to satisfy
9 *Strickland's* two-prong inquiry" as to whether a defendant
10 received effective assistance of counsel, it has to be
11 established that "counsel's representation must fall below an
12 objective standard of reasonableness"; and, two, there must be
13 "a reasonable probability that but for counsel's unprofessional
14 errors, the result of the proceeding would have been
15 different."

16 The first, constitutional deficiency, is necessarily
17 linked to the legal community's practice and expectations. We
18 submit, your Honor, that the legal community's practices and
19 expectations is for an attorney to thoroughly review all of the
20 evidence with the client.

21 Judge, obviously, you've been practicing a little
22 while longer, you have more experience than I, but two
23 terabytes of discovery, involving five cell phones that the
24 government claims are -- were in the possession of my client --
25 I believe that they seized a total, like, 17 cell phones was

1 seized. The discovery, the items in those discov -- in --
2 contained in the data that's retrieved from those cell phones
3 is so voluminous that it is very doubtful -- I mean common
4 sense doesn't convince a person that in two -- an hour and a
5 half, two hours of looking at -- on two separate occasions
6 looking at videos, that that person -- that attorney has, you
7 know, reviewed all the discovery with a client.

8 And that -- and if I may, the obligation is with the
9 attorney, the responsibility is of the attorney, not to an
10 investigator. My client says that the investigator went there
11 on one occasion and reviewed discovery -- part of the discovery
12 with him for a short period of time.

13 But -- so, obviously, the gentleman obviously -- the
14 Court saw Mr. Merlino's responses. I'm not the one here to
15 make a credibility determination as to who's telling the truth,
16 who's not telling the truth. But when my client, although he's
17 not the most eloquent individual, was asked questions by the
18 government or by myself, I found that he was direct in his
19 response, maybe not as articulate as other individuals.
20 Whereas Mr. Merlino, most of my questions to him, he was just,
21 you know, adding on and responding to something that was not
22 even responsive to the question that was being asked of him.

23 And maybe I was too forceful in the way I talk.
24 Unfortunately, that's my personality. And it has nothing to do
25 with the individual personally. It has to do with what we're

1 here for. In other words, whether or not he rendered effective
2 assistance of counsel to this gentleman here. And if he did,
3 then that would be the end of the question. But we submit to
4 the Court that he did not. And he falls behind -- below what
5 is required and expected of an attorney -- a criminal defense
6 attorney in any court in this country.

7 Then in, uhm, *Buckles* -- I believe that's how you
8 pronounce it -- the name of the case is spelled B-U-C-K-L-E-S.
9 It's an Eleventh Circuit district court case from 1988, which
10 the government also cites in their response. And it's factors
11 to be analyzed in determining whether or not a motion to
12 withdraw a guilty plea should be granted. And one of the main
13 points there is whether there was -- close assistance of
14 counsel was available.

15 Judge, close assistance of counsel, we submit to the
16 Court, was not available in this case. If the Court were to
17 look at the motion to continue filed by this attorney several
18 weeks before the trial was set, he specifically made reference
19 why he needed 60 days for -- the matter to be adjourned for
20 60 days, because it was, you know, virtually impossible for him
21 to be able to review -- properly review that two -- the
22 discovery material contained in two terabytes. And he makes
23 reference to it.

24 And then, he's explaining to the Court -- if you could
25 just give me a second, please.

1 So, that --

2 "Counsel cannot assess the need for pretrial
3 motions without total review of the (sic) discovery,
4 which is extensive and voluminous, prior to calendar
5 call or trial. Only after a thorough evaluation of
6 all evidence and completion of any investigation can
7 counsel fully advise his client as to his rights,
8 options, and potential strategies."

9 Additionally, he writes:

10 "A 60-day continuance would allow counsel the
11 time to accomplish these purposes, all of which are
12 necessary to provide the defendant effective
13 assistance of counsel and promote justice."

14 Then he goes on to state in his motion:

15 "Without the requested continuance, the defense
16 will be unable to adequately prepare the case,
17 conduct a complete investigation, effectively advise
18 the defendant, or file appropriate motions, if
19 necessary. Without the exclusion of a period of time
20 from the speedy trial calculations, counsel will be
21 unable to provide effective assistance of counsel,
22 and the defendant's right to be effectively
23 represented in these proceedings will be seriously
24 damaged. Such a situation will be a miscarriage of
25 justice."

1 And he goes on to indicate that when he -- when the
2 Court entered an order allowing him to substitute in as
3 counsel, that when the Court -- the Court indicated in the
4 order that the Court was not inclined to grant any further
5 continuance in the matter, that it was once -- after that is
6 when he got the discovery, and he realized how voluminous it
7 was. And that's part of his motion in trying to persuade or
8 convince the Court to grant a continuance.

9 And I submit to the Court, when he filed that motion,
10 that's exactly what was going on. He was not preparing, you
11 know, or coming here preparing, mad that his professionalism is
12 being questioned as an attorney. And I submit to the Court,
13 that has a big bearing as to whether or not he rendered
14 effective assistance of counsel.

15 And the Supreme Court indicates that at the time of a
16 change of plea, that the defendant is entitled to the effective
17 assistance of competent counsel.

18 Judge, we're not asking the Court to dismiss the case,
19 because even if we were able to persuade the Court to grant
20 this motion and exercise your discretion and allow him to
21 withdraw his plea, the government has all these witnesses that
22 they claim that they have, and all this proof that they claim
23 that they have which will prove my client guilty beyond a
24 reasonable doubt. Well, my client wants his opportunity to be
25 able to have a trial before a jury of his peers and let the

1 chips fall where they may. We're not here to waste the Court's
2 time.

3 **THE DEFENDANT:** *(Shaking head negatively)*

4 **MR. BATISTA:** When a man -- when a person -- a
5 defendant enters a guilty plea and indicates, Look, I was
6 coerced, it didn't happen -- I asked him specifically, the
7 witness Merlino, when was it that you discussed the change of
8 plea? He indicates that it was the week before. I would
9 imagine that the Court's jacket would reflect when the change
10 of plea was set. And I believe, if I'm not mistaken, that it
11 was set from one date to the other, which was -- on the 22nd,
12 it was asked to be placed on the Court's calendar for change of
13 plea the following day, which was the 23rd, because the 25th --
14 24th was a Friday, which would be the -- what do you call it --
15 calendar call from this Court for trials to begin on the 27th.

16 And if that's the case, the notes that he had is *(sic)*
17 not consistent with that, because the notes are the -- he has
18 does not even reflect that he visited my client at the Conte
19 facility the day before the change of plea. Yeah, that could
20 be a memory issue, that could be relapse *(sic)*, but that is
21 important. Because it goes to what my client indicates --
22 testified to, that it happened the day before and what
23 happened.

24 And then he -- also, Mr. Merlino does not even recall,
25 you know, visiting or interviewing my client in the lockup here

1 in this building earlier on the day of the change of plea. My
2 client specifically has -- recalls that situation.

3 Almost finished. If you could just give me a few
4 minutes.

5 We have two affidavits attached to this motion in
6 reference to the firearm by two different individuals. And if
7 I may, you know, from different witnesses that I have spoken
8 to -- I have spoken to many witnesses already, not knowing
9 exactly what could happen today, but I've spoken to many
10 individuals. And law enforcement is harassing a lot of these
11 potential defense witnesses. As a matter of fact, the
12 government had one of them indicted yesterday or the day
13 before.

14 **THE COURT:** Who got indicted?

15 **MR. BATISTA:** Mr. Payne was indicted.

16 **THE COURT:** For what?

17 **MR. BATISTA:** For -- if I'm not mistaken, I believe
18 that he is alleged for being like a straw buyer of firearms,
19 something along that line, like -- the allegation in the
20 complaint or the indictment was that he had --

21 **THE COURT:** The gun involved in this case or something
22 else?

23 **MR. BATISTA:** I don't know, because the -- I tried to
24 come to the bond hearing earlier today to see what was gonna be
25 discussed or at least have a good idea --

1 **THE COURT:** Is it a sealed indictment?

2 **MS. WHITE:** No, your Honor. The indictment has been
3 unsealed. It's four counts of making a false statement to a
4 firearms dealer. One of the guns involved was this gun.

5 **THE COURT:** Is this gun?

6 **MS. WHITE:** Yes, one of them.

7 **MR. BATISTA:** And as for this gun, we have -- the
8 affidavits in this case specifically reference this gun, not
9 only by that gentleman but by another -- the other defendant's
10 witness who signed the other affidavit, that my client did not
11 possess or touch that firearm.

12 **THE COURT:** I'm trying to remember. Did Mr. Payne say
13 it was his gun?

14 **MS. WHITE:** Yes, your Honor.

15 **THE COURT:** Okay.

16 **MR. BATISTA:** Yes, your Honor.

17 **THE COURT:** Okay.

18 **MR. BATISTA:** So, the attorney Merlino indicates that
19 he had difficulty contacting witnesses. Judge -- and he has an
20 investigator -- on my own, you know, for the information that
21 my client gave me, I was able to contact four or five different
22 witnesses, from one night to the other. And he was -- Judge, I
23 submit to the Court, maybe I'm wrong, but when he settled for a
24 flat fee to represent a gentleman in federal court, without
25 knowing that the -- the bulk of evidence involved -- and he

1 indicated it was a flat fee for this case, as well as for a
2 violation of probation -- I submit to you that at that time, he
3 had buyer's remorse of, you know, asking for the -- you know,
4 an amount of money that is not consistent, you know, for legal
5 representation, that is not consistent --

6 **THE COURT:** I mean, there was no testimony as to how
7 much the fee was. The only thing I heard was he didn't get
8 paid everything.

9 **MR. BATISTA:** Excuse me, your Honor?

10 **THE COURT:** There was no testimony as to how much the
11 fee was.

12 **MR. BATISTA:** Right.

13 **THE COURT:** I just heard testimony that he didn't get
14 paid everything he was supposed to get paid.

15 **MR. BATISTA:** Right. Exactly. Well -- and I'm
16 suggesting to the Court that that might be a reason why, you
17 know, that -- the -- he convinced my client to enter a guilty
18 plea. I think that's a reasonable or plausible explanation of
19 this.

20 But, again, Judge, it is a discretionary matter on
21 your part, and we submit to the Court, Judge, that we have
22 shown that it is -- in fairness my client (*sic*), the Court
23 should grant this motion and allow my client to withdraw his
24 guilty plea and set this matter for trial before a jury.

25 **THE COURT:** Before I hear from Ms. White, I just want

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1 to go over one more time what I talked about with Mr. Caldwell
2 at the end of his change of plea, and that was that I mentioned
3 that my son's a Secret Service agent, and the Secret Service
4 was involved in this case. And I asked Mr. Caldwell whether he
5 had any problem with me being on the case. He talked to
6 Mr. Merlino and said that he didn't have a problem. And I want
7 him to have an opportunity to talk to you, Mr. Batista, to see
8 if that position has changed.

9 **MR. BATISTA:** Can you just give me a minute?

10 **THE COURT:** Sure.

11 *(Discussion had off the record between counsel and*
12 *client)*

13 **MR. BATISTA:** Your Honor, you can colloquy him. He
14 would like to, you know, have you as the judge.

15 **THE COURT:** You had enough time to think about this
16 and talk about it with Mr. Batista, Mr. Caldwell?

17 **THE DEFENDANT:** Yes, sir.

18 **THE COURT:** And do you agree with the strategy of not
19 asking me to get off the case because my son's a Secret Service
20 agent and the Secret Service agents were involved a little bit
21 in your case?

22 **THE DEFENDANT:** Yes, sir.

23 **THE COURT:** All right. Let me hear from Ms. White.

24 **MS. WHITE:** Judge, I filed a response to the
25 defendant's amended motion, and most of the arguments I would

1 make are in that response.

2 The defense in this case says that there's a fair and
3 just reason to overturn this change of plea -- or withdraw the
4 defendant's guilty plea, but, really, it just comes down to the
5 defendant changing his mind.

6 In defendant's initial motion, which he wrote and
7 signed himself, he indicates that --

8 **THE COURT:** He said that someone else wrote it for
9 him.

10 **MS. WHITE:** Well, he said he had help now.

11 **THE COURT:** Right.

12 **MS. WHITE:** But he signed it himself.

13 **THE COURT:** Okay.

14 **MS. WHITE:** It's his signature before it was
15 submitted.

16 And he indicates that he accepted the plea,
17 reluctantly, but that he accepted the plea. Which is very
18 different than coming here today and saying he had no idea that
19 the change of plea was even scheduled, and he just showed up
20 and was forced or coerced into giving answers that were untrue.

21 There actually has been really no evidence of
22 coercion. Defendant has said that word quite a number of
23 times, that he was coerced, he was coerced --

24 **THE COURT:** Well, he said that Mr. Merlin threatened
25 him that if he filed a motion to suppress, that I would storm

1 off the bench, and I would give him a long sentence. Why
2 wouldn't that be something, if I believe Mr. Caldwell, that
3 could have been construed as a threat?

4 **THE DEFENDANT:** And I'll take --

5 **MS. WHITE:** It could be construed as a threat, but
6 your Honor did a very thorough colloquy with the defendant.
7 And he had an opportunity at that time to say that he was
8 feeling some pressure or coercion. And --

9 **THE COURT:** Well, I mean it's clear that Mr. Caldwell
10 has lied in court. The question is: Did he lie on August the
11 23rd during the change of plea, because he felt pressured that
12 he had to do it, or is he lying now? So, it's going to be up
13 to me to decide the credibility of Mr. Caldwell and the
14 credibility of Mr. Merlino.

15 **MS. WHITE:** And I would say the evidence suggests that
16 he's lying now. Because this is not somebody who this is their
17 first time involved in the criminal justice system. This is
18 not someone who has not dealt with judges and attorneys
19 previously. This is someone who had an attorney that he was
20 not happy with and got rid of that attorney and hired another
21 attorney. So, this is someone who has taken proactive steps to
22 move his case forward and do what he thought was right for
23 himself.

24 And it's not as if there were not reasons that were --
25 additional reasons that were given for him accepting a guilty

1 plea. He also admitted that Mr. Merlino did talk to him about
2 the potential of a superseding indictment, adding additional
3 charges. He talked to him about the possibility of -- I'm
4 sorry, I just completely lost my train of thought. He talked
5 to him about the evidence and the strength of the evidence.
6 And one of the things that he says in the motion is that the
7 government's evidence was overwhelming. And that was a reason
8 that he should move forward with the plea. They talked about
9 things that are --

10 **THE COURT:** But what Mr. Caldwell's arguing now is
11 that the evidence isn't overwhelming, that Mr. Merlino was
12 lying to him about the strength of the case.

13 **MS. WHITE:** Well, the defendant has said that -- I
14 don't know -- he hasn't really contested anything that is
15 there. He's just saying that the gun is not his, that he
16 doesn't own the gun. He's referring to pictures, and the
17 affidavits refer to pictures in the complaint of a gun sitting
18 next to two people or sitting by him, and there's people coming
19 forward saying, "Well, that's mine, I own it." That doesn't
20 negate possession.

21 You have Mr. Merlino testifying about videos he
22 watched in which the defendant had what appeared to be a Glock
23 with a laser sight on it in his hand. That was used as a basis
24 for Mr. Merlino to come up with his opinion that it would be
25 best for the defendant to enter a guilty plea.

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1 **THE COURT:** So, Mr. Payne files an affidavit that's
2 filed as part of a 2255 saying that it's his gun, inferring
3 that he's never seen Mr. Caldwell with a gun, and supporting a
4 position that Mr. Caldwell is innocent of the charge. And the
5 timing of the case is the U.S. attorney indicts him for that
6 gun? Why doesn't that lend itself to a suspicion that the
7 government is trying to intimidate or inhibit the defense
8 witness in the 2255?

9 **MS. WHITE:** The defendant -- or Derrick Payne was
10 indicted on Tuesday. His indictment was approved on the
11 previous Thursday, December 25th (sic)? His affidavit wasn't
12 submitted to the Court until Friday, after his indictment had
13 already been approved by my supervisors.

14 I would have had no idea that the defense was going to
15 bring an affidavit --

16 **THE COURT:** So, before you were aware of Mr. Payne's
17 affidavit, you had already gotten the approval to present his
18 case to the grand jury.

19 **MS. WHITE:** The indictment was already signed off on
20 by Mr. Mulvihill the day before this affidavit was presented.

21 **MR. BATISTA:** Judge, if I may, I filed that affidavit
22 on the 26th of October.

23 **THE COURT:** Right. And she's saying that on the 25th,
24 she got approval to present Mr. Payne's case to the grand jury,
25 is what Ms. White's saying.

1 **MS. WHITE:** Correct. And the file had been opened for
2 months prior to that. So, we did not somehow rush to the
3 courthouse to indict him after receiving an affidavit. It
4 would have been almost impossible for me to do so, especially
5 since the filing came late on Friday afternoon.

6 **THE COURT:** All right. Well, that answers my
7 question.

8 **MS. WHITE:** So, the two things are completely
9 unrelated. I had no idea that any affidavits would be filed in
10 connection with this case.

11 Uhm --

12 **THE COURT:** Talk to me about the search warrants for
13 the phones in the Porsche.

14 **MS. WHITE:** If your Honor would just indulge me for a
15 moment. There's so much to this case that I have to refresh my
16 memory from the complaint to see if -- there were two stops in
17 this case -- one in 2015, one in 2017.

18 **THE COURT:** Well, which stop had a cell phone that had
19 pictures of him sitting next to or near the Glock that was
20 recovered from the house on -- was it May the 4th?

21 **THE DEFENDANT:** Yes, sir.

22 **MS. WHITE:** The pictures came -- well, there were
23 three sets of cell phones. There was a cell phone seized in
24 2015, a cell phone seized at a stop in 2017, and then all of
25 the phones that were seized on May 4th.

1 **THE COURT:** All right. And on May 4th, a Glock was
2 found in the house.

3 **MS. WHITE:** Yes. And that --

4 **THE COURT:** And there's a video or a picture of
5 someone who the government thinks they can identify as
6 Mr. Caldwell either holding or next to a gun that's very
7 similar to the Glock that was seized?

8 **MS. WHITE:** The Glock that was seized is pictured in a
9 photograph from the 2017 phone and in additional pictures that
10 were retrieved from phones from May 4th of 2018 -- on May 4th
11 of 2018.

12 **THE COURT:** Okay. And -- I mean the complaint had
13 some photographs in it, if I can find the complaint.

14 **MS. WHITE:** Yes.

15 Does your Honor have it?

16 **THE COURT:** Yeah, I do.

17 So, on page 3 of the complaint, there's some pictures
18 of some money and a couple of guns. I guess that was the stuff
19 that was found on May the 4th, is that correct?

20 **MS. WHITE:** No. That was the picture that was from
21 the 2017 phone.

22 **THE COURT:** Well, paragraph 8 on page 2 says the
23 photograph below taken on October 24th of 2016 was retrieved
24 from the Samsung phone and provided to an ATF expert.

25 **MS. WHITE:** Yes. So, the phone that was seized from

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1 him at the traffic stop in 2017 had that picture in it, and it
2 was dated.

3 **THE COURT:** The Samsung phone is the one that was
4 retrieved in 2017?

5 **MS. WHITE:** Yes.

6 **THE COURT:** And this picture was in the Samsung phone?

7 **MS. WHITE:** Yes.

8 **THE COURT:** And which one of the two guns is the
9 Zastava PAP pistol?

10 **MS. WHITE:** The gun on the right.

11 **THE COURT:** The one that kind of looks like an Uzi.

12 **MS. WHITE:** Yes. And that is also one of the guns
13 that Derrick Payne is charged with.

14 **THE COURT:** Okay. So, the 2017 stop -- tell me about
15 the search warrant on the 2017 stop, where this October 24th,
16 2016, photograph would have been in a phone, and it contained a
17 picture of the Zastava PAP pistol.

18 **MS. WHITE:** There was a state search warrant that was
19 obtained at the time that -- because, obviously, it was a state
20 traffic stop and a state investigation into identity theft.
21 So, the state did a search warrant on that phone.

22 There was also a federal search warrant. Once we
23 learned of the phone and wanted to seize it ourselves, a
24 federal search warrant was also obtained for that phone.

25 **THE COURT:** All right. And then on page 4 of the

1 complaint, there's a picture -- is that supposed to be
2 Mr. Caldwell?

3 **MS. WHITE:** Yes.

4 **THE COURT:** And is there supposed to be a gun on his
5 lap?

6 **MS. WHITE:** Unfortunately, because you don't have the
7 color pictures, it's very difficult to see, but there is. If
8 you -- underneath his hand, you can see the extended magazine.

9 **THE COURT:** Underneath his right hand?

10 **MS. WHITE:** I actually have a color photo that was
11 with -- in the -- I have a color photo, if it would --

12 **THE COURT:** All right. Well, pass up the color photo.
13 Let me look at it.

14 **MS. WHITE:** Let's see.

15 **MR. BATISTA:** Judge, when you're looking -- just for
16 you to know, as to the photograph depicting money on the ground
17 with a firearm in the other one, Mr. Payne in his affidavit
18 indicates that that's his -- he took his picture, that's part
19 of a -- what do you call it -- a rap video that was being done,
20 and that those are his firearms.

21 **THE COURT:** Right.

22 **MR. BATISTA:** And that he sent the photo -- that
23 picture he sent to my client by Instagram.

24 **THE COURT:** Right.

25 So, are you going to show me the picture -- the color

1 picture on page 4?

2 **MS. WHITE:** Judge, I was going to try to show it to
3 you, but I don't have it printed out.

4 **THE COURT:** Okay.

5 **MS. WHITE:** But I have it on the computer. It just --
6 it would take a while for me to boot it up.

7 But Judge Hunt was viewing this photo in color and
8 was -- and that's why it was included.

9 **THE COURT:** So....

10 **MS. WHITE:** So, that picture --

11 **THE COURT:** It's an Instagram --

12 **MS. WHITE:** Is two places.

13 **THE COURT:** It's an Instagram picture that was found
14 where?

15 **MS. WHITE:** On Instagram. The first place that the
16 agents saw it was on Instagram. We later found, when we were
17 searching the defendant's phone, that same picture in his
18 phone.

19 **THE COURT:** All right. And you're saying that if
20 there's a color picture, that you can see the gun on his lap
21 that looks like the --

22 **MS. WHITE:** Yes.

23 **THE COURT:** -- the Zastava PAP pistol?

24 **MS. WHITE:** Not the pistol, the Glock. It's black.
25 That's why it's hard to see in this --

1 **THE COURT:** So, it looks like the Glock that's the
2 picture on the left on page 3?

3 **MS. WHITE:** Correct.

4 **THE COURT:** All right. And the next one is --

5 **MR. BATISTA:** Your Honor, could I just interrupt you
6 one second on that one?

7 **THE COURT:** Okay.

8 **MR. BATISTA:** But the expert -- firearms expert
9 indicated that he cannot tell whether or not that is a Glock on
10 that picture there on the ground. And the government provided
11 that in the discovery.

12 **THE COURT:** I'm looking at whether or not
13 Mr. Merlino's advice to Mr. Caldwell to plead guilty, because
14 it was a strong case, is a valid -- was a valid piece of
15 advice.

16 So, the next one is page 5. There's another picture.
17 And I assume the government is going to contend that -- which
18 of the two people is Mr. Caldwell?

19 **MS. WHITE:** In the foreground.

20 **THE COURT:** All right.

21 And where's the gun in this picture?

22 **MS. WHITE:** To his -- to the left of the picture.
23 Sitting on the sofa.

24 **THE COURT:** And which gun is this supposed to be, the
25 Zastava?

1 **MS. WHITE:** Yes.

2 **THE COURT:** And where did you get this picture at?

3 **MS. WHITE:** This picture was initially -- this picture
4 was found on Instagram, on the defendant's Instagram account.

5 **THE COURT:** And did you need a search warrant for
6 that, or you just --

7 **MS. WHITE:** Yes, so we got a -- well, the picture was
8 initially seen when the account was opened to the public, but a
9 search warrant was obtained, and we do have the records.

10 **THE COURT:** But the Zastava pistol wasn't found on
11 May 4th, was it?

12 **MS. WHITE:** It was never found.

13 **THE COURT:** Right. So, the only one that was really
14 found on May 4th is the Glock. And so far, the only place that
15 I've seen the Glock is on page 3, right?

16 **MS. WHITE:** Page 3 and 4.

17 **THE COURT:** Right. Page 4, also, that's right. The
18 color photo, you say it's there.

19 **MS. WHITE:** But this is almost -- I mean I have to try
20 the entire case at this point to show your Honor the remainder.
21 What was in the complaint was a small portion of the evidence.
22 There are numerous photos of the defendant, as I indicated in
23 the proffer, with him holding the gun, gun in his waistband.
24 He -- as Mr. Merlino indicated, there's a video of him with the
25 gun in hand, pointing it at the camera, with the laser sight on

1 it.

2 **THE COURT:** The Glock video.

3 **MS. WHITE:** The Glock. And the Glock that was found
4 was outfitted with an extended magazine and that Rifle Master
5 laser sight.

6 **THE COURT:** So, the video was obtained how?

7 **MS. WHITE:** The video came from the defendant's phone
8 that was found in the house on May 4th of 2018. And the search
9 warrant extended to the home and any electronic devices
10 therein.

11 **THE COURT:** So, let me ask Mr. Batista, what would
12 have been the basis to file a motion to suppress the video
13 found on the phone during the search warrant that was executed
14 on May the 4th?

15 **MR. BATISTA:** Because, your Honor, part of the
16 rationale is that if a motion to suppress had been filed as to
17 the first seizure of my client's phone several years back, that
18 everything else -- all the investigation and everything comes
19 as a result of that. And then the --

20 **THE COURT:** Do you have an affidavit from the May 4th
21 search warrant that caused the video to be found in the phone
22 that was seized?

23 **MS. WHITE:** Judge, I did not bring the entire file
24 with me. It's a -- boxes.

25 The affidavit from May 4th was not based on the 2015

1 stop. All that was found in 2015 was access devices.

2 The genesis, as is indicated in the complaint, of the
3 firearms portion of this case started through Instagram and the
4 agent viewing Instagram and seeing the defendant with the gun
5 on Instagram. So, whatever had happened with the 2015 stop, or
6 even the 2017 stop, the Instagram videos that were publicly
7 available would have allowed us to proceed.

8 The search warrant for the home -- and I can -- no, I
9 don't have anyone to get it now -- I can present -- provide
10 that to the Court or provide the Court with the case number, if
11 the Court can access it.

12 **THE COURT:** I don't know how to access it.

13 **MS. WHITE:** The search warrant for the home was based
14 on the defendant committing access device fraud and opening up
15 an FPL account and renting the home in other people's names.

16 **THE COURT:** And did they talk about the stuff that was
17 found in 2015 and 2017?

18 **MS. WHITE:** I don't recall. I honestly don't recall.

19 **THE COURT:** I think I need to see the affidavit.

20 **MR. BATISTA:** But, your Honor, there's no allegation
21 in the affidavit that my client had rented that house.

22 **THE COURT:** Well, I need to see the affidavit. You
23 don't have a copy of the affidavit, do you, Mr. Batista?

24 **MR. BATISTA:** For which one, Judge?

25 **THE COURT:** The May 4th, 2018, search warrant.

1 **MR. BATISTA:** I think I do. Let me see.

2 No, I have one dated 3-19-18.

3 **MS. WHITE:** That's for the Instagram account.

4 **THE COURT:** So, just supplement the record by like
5 Monday at noon with that affidavit. I mean, either way, I'm
6 going to defer ruling on the motion to suppress.

7 **MR. BATISTA:** Is this it?

8 **MS. WHITE:** Yeah, that's it.

9 **MR. BATISTA:** Judge, I believe I have it.

10 **THE COURT:** All right.

11 **MR. BATISTA:** Okay? If I may --

12 **THE COURT:** Then pass it up.

13 **MR. BATISTA:** -- you will see that it makes reference
14 to the Porsche being stopped.

15 **THE COURT:** All right. Let me see it.

16 **MR. BATISTA:** May I approach?

17 **THE COURT:** Yeah.

18 **THE DEFENDANT:** And I wasn't never stopped in a
19 Porsche.

20 **MR. BATISTA:** Shh.

21 *(Discussion had off the record between counsel and*
22 *client)*

23 *(Pause)*

24 **THE COURT:** Okay. I've read it. Let me hand it back
25 to Mr. Batista.

1 As I was about to say, I'm going to defer ruling on
2 the motion to suppress. If I grant the motion to suppress,
3 then I'll set a new trial date -- not motion to suppress -- I'm
4 going to defer ruling on the motion to withdraw plea. If I
5 grant the motion to withdraw plea, then I'll set a new trial
6 date. If I deny the motion to withdraw the plea, then we'll
7 have the sentencing next Friday.

8 Is there any other argument or any other things we
9 need to discuss?

10 **MS. WHITE:** Judge, the sentencing next Friday, I had
11 filed a motion of -- or notice of unavailability. I am leaving
12 the country on Thursday morning and will not be here.

13 **THE COURT:** So, when are you coming back?

14 **MS. WHITE:** The 27th.

15 **THE COURT:** Do you want to change the date till
16 Wednesday, the 21st -- no, Wednesday, the 7th?

17 **MS. WHITE:** Yes. I'll be here on Wednesday.

18 **THE COURT:** Let me see what I've got on Wednesday, the
19 7th.

20 **MS. WHITE:** If this is actually going to be a
21 sentencing -- I had spoken to Mr. Batista, I don't know if he
22 would be ready on Wednesday or not.

23 **THE COURT:** Well, that was what would happen on
24 Wednesday. If I grant the motion to withdraw the plea, then
25 I'm just going to set a trial date, you know, when -- after you

1 get back, I guess. If I deny the motion to withdraw the plea,
2 then that would be the sentencing on Wednesday.

3 **MS. WHITE:** That's fine with me. I had -- he had
4 asked me, when we spoke about me bringing this up with your
5 Honor, that it may be pushed out into the future. But if he's
6 prepared, then that's fine. I'm ready.

7 **THE COURT:** So, if I deny the motion to withdraw the
8 plea, are you going to be ready for sentencing on Wednesday, or
9 do you want me to put the sentencing on a different date,
10 Mr. Batista?

11 **MR. BATISTA:** Your Honor, I would prefer if you could
12 set it for a different date. Because I've been concentrating
13 on the motion, and that's taken a lot of my time.

14 **THE COURT:** All right. So, we'll cancel the hearing
15 for Friday, the 9th. And you're gonna be back the 27th,
16 Ms. White?

17 **MS. WHITE:** I will be back in -- coming back into the
18 country on the 27th. I'll be back in the courthouse on the
19 28th.

20 **THE COURT:** All right. So, we'll set the sentencing
21 for Friday, November 30th, at 1:45 in the afternoon. If I
22 grant the motion to withdraw the plea, then that will get
23 canceled. If I deny the motion to withdraw the plea, then
24 we'll see everybody back Friday, November 30th, at 1:45.

25 Is there anything else we need to discuss?

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1 **MR. BATISTA:** No, your Honor.

2 **MS. WHITE:** Uhm, I guess not.

3 **THE COURT:** Is there a conflict on the 30th?

4 **MS. WHITE:** No, no, I hadn't actually followed through
5 with the remainder of my arguments, but --

6 **THE COURT:** Well, finish your argument.

7 **MS. WHITE:** It's kind of broken up now.

8 The only thing that I wanted to point out to the Court
9 was, in Mr. Merlino's testimony, there are a number of items
10 that he talked about discussing with the defendant, including
11 the video, including the fingerprints that were found on the
12 access devices, the PII that was found in the home. There
13 were -- wasn't just that one photograph of a gun next to the
14 defendant that is the evidence in this case. And I pointed out
15 in my motion that the defendant was not contesting his guilt on
16 the remainder. He hasn't filed affidavits indicating anything
17 else about the drugs, indicating anything about the access
18 devices.

19 **THE COURT:** But as you conceded in your response, the
20 firearms charges are driving the sentencing in this case. So,
21 if it wasn't voluntary on the firearms charges, then how could
22 it be voluntary on anything else?

23 **MS. WHITE:** But that's the argument, is that now that
24 the PSI -- well, not necessarily that the PSI has come out, but
25 that is the count that he has to contest, because that's --

1 that is what is hurting him, or that is what is driving the
2 sentence. And he -- if he had evidence of his innocence on all
3 of these counts, it seemed like he would bring it forward now.

4 **THE COURT:** Why does he have to have innocence on all
5 the counts? If he has innocence on one account (*sic*), why
6 isn't that enough to destroy the voluntariness of the plea?

7 **MS. WHITE:** Why would he not --

8 **THE COURT:** In other words, it wasn't a situation
9 where he pled to five different indictments.

10 **MS. WHITE:** Correct.

11 **THE COURT:** He pled to one indictment -- one
12 superseding indictment that had a bunch different counts in it.
13 And if the plea wasn't voluntary as to one, if he was coerced
14 or forced into the overall plea because of one, I don't think I
15 allow him to withdraw the plea as to one and then keep him --
16 hold his feet to the fire on the other ones. It was an open
17 plea on all counts.

18 **MS. WHITE:** Correct.

19 However, as the defendant is saying -- the Court can
20 take into account that the defendant's saying, I'm innocent,
21 and here's this evidence that I am innocent, so I would never
22 have voluntarily entered into this plea. There's no evidence
23 on those other counts, which also -- I mean aggravated identity
24 theft carries a two-year minimum mandatory sentence. So, it's
25 not walking off with probation. If he had been presented with

1 all of this evidence, and had explanations for that -- for why
2 he pled guilty to those other counts, the Court can consider
3 it.

4 The --

5 **THE COURT:** Well, I think that goes -- your argument
6 goes to the weight I should give his testimony.

7 **MS. WHITE:** Exactly.

8 **THE COURT:** If I believe that he was coerced or forced
9 into the plea, then I think the remedy is to allow him to
10 withdraw his plea on all counts and go to trial. If I don't
11 believe him, then I'll sentence him.

12 **MS. WHITE:** But I think that -- that's what I was
13 trying to say, is that the Court should take that into account,
14 take the explanations and the other evidence that was explained
15 to him during his consultation with counsel into account.

16 And, lastly, I would just say that the -- Mr. Merlino
17 also testified that he had never heard or -- that it was only
18 after the discussions about the debriefing and there being
19 people calling his office saying that the defendant was not
20 going to debrief, that there was this motion to withdraw plea.
21 He had -- if your Honor recalls the testimony, he said that he
22 received calls from unknown individuals indicating that the
23 defendant was not going to plea (*sic*), and he was not going to
24 debrief.

25 **THE COURT:** Well, I think Mr. Merlino's testimony was,

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1 the motivation for an open plea, the motivation for not going
2 to trial and taking an open plea was the possibility of being
3 debriefed and getting some consideration from the government.

4 **MS. WHITE:** Correct. And after he received those
5 anonymous calls, then the defendant took his plea back.

6 **THE COURT:** Well -- and, again, that goes to the
7 weight to give the two witnesses's testimony.

8 Anything further, Mr. Batista?

9 **MR. BATISTA:** Yes, your Honor.

10 Your Honor, my client in the motion stated that he's
11 innocent. He didn't just, you know, say, oh, the firearms,
12 that he was innocent of the charges. And he testified, and he
13 indicated to the Court that he's innocent of the charges, and
14 that's why he would like to get his plea back.

15 And after this experience that I had now, which I had
16 many years back with a witness, where, you know, by
17 coincidence, a witness -- a potential defense witness, you
18 know, is indicted, okay?

19 And if I may, just for the record, and as an officer
20 of the Court, my client and I, over the phone, him calling me,
21 we made reference to the names of the individuals that -- and
22 the phone numbers for me to reach out to these individuals way
23 before the indictment was returned against Mr. Payne.

24 **THE COURT:** So, Ms. White, before you got approval
25 on -- I guess it was October the 25th to indict Mr. Payne, had

1 you gotten information from the jail that there had been
2 conversations intercepted between Mr. Caldwell and Mr. Batista
3 implicating -- or indicating that Mr. Payne was going to be a
4 defense witness?

5 **MS. WHITE:** Absolutely not. Absolutely not.

6 **THE COURT:** Anything further?

7 **MR. BATISTA:** No, your Honor.

8 **THE COURT:** All right. Thanks for coming in. I'll
9 try to get an order out as soon as we can.

10 **THE DEFENDANT:** Thank you, your Honor.

11 **MR. BATISTA:** Thank you, your Honor.

12 **ROOM CLERK:** All rise.

13 *(The Judge exited the courtroom)*

14 *(Proceedings concluded at 5:10 p.m.)*

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C E R T I F I C A T E

20 I certify that the foregoing is a correct transcript from
21 the record of proceedings in the above-entitled matter.

22

23

24 _____
24 /S/ Francine C. Salopek
24 Francine C. Salopek, RMR-CRR
24 Official Court Reporter

25 _____
25 1-18-19
25 Date

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UNITED STATES DISTRICT COURT
Southern District of Florida
Fort Lauderdale Division

UNITED STATES OF AMERICA

v.

TRENARD CALDWELL

JUDGMENT IN A CRIMINAL CASE

Case Number: **18-60127-CR-DIMITROULEAS**
 USM Number: **18576-104**

Counsel For Defendant: Jose Batista, Esq.
 Counsel For The United States: Anita White, AUSA
 Court Reporter: Francine Salopek

The defendant pleaded guilty to count(s) One through Five of Superseding Indictment.

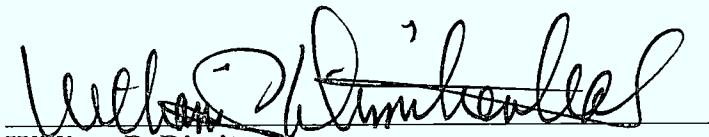
The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 USC 922(g)(1)	Possession of a firearm by a convicted felon	05/04/2018	1s
18 USC 1029(a)(3)	Possession of unauthorized access devices	05/04/2018	2s
18 USC 1028A(a)(1)	Aggravated identity theft	05/04/2018	3s
21 USC 841(a)(1)	Possession of a detectable amount of Methamphetamine with intent to distribute	05/04/2018	4s
18 USC 1029(a)(3)	Possession of unauthorized access devices	09/19/2015	5s

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **11/30/2018**


 William P. Dimitrouleas
 United States District Judge

Date: Nov. 30, 2018

DEFENDANT: TRENARD CALDWELL
CASE NUMBER: 18-60127-CR-DIMITROULEAS
IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **161 months consisting of 137 months as to each of Counts 1s, 2s,4 and 5s to run concurrent to each other and 24 months as to Counts 3s to run consecutive to Counts 1s, 2s,4s, and 5s.**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: TRENARD CALDWELL
CASE NUMBER: 18-60127-CR-DIMITROULEAS
SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years as to each of Counts 1s, 2s, 4s, and 5s and 1 year as to Count 3s. All Counts to run concurrent.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: TRENARD CALDWELL

CASE NUMBER: 18-60127-CR-DIMITROULEAS

SPECIAL CONDITIONS OF SUPERVISION

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: **TRENARD CALDWELL**
 CASE NUMBER: **18-60127-CR-DIMITROULEAS**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$500.00	\$0.00	\$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>NAME OF PAYEE</u>	<u>TOTAL LOSS*</u>	<u>RESTITUTION ORDERED</u>
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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: TRENARD CALDWELL
CASE NUMBER: 18-60127-CR-DIMITROULEAS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

F. Special instructions regarding the payment of criminal monetary penalties:
The assessment is to be paid during the term of supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT
DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)		

**The defendant shall forfeit the defendant's interest in the following property to the United States:
\$2,080.00 in United States currency seized on May 4, 2018.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.