

No. _____

**In the
Supreme Court of the United States of America**

Yency Nuñez,

Petitioner,

v.

United States of America,

Respondent.

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

Appendix to Petition for Writ of Certiorari

Volume II

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Table of Contents to Appendix

Volume I

Eleventh Circuit’s Opinion Denying Direct Appeal (26 May 2021)	A-1
Eleventh Circuit Order Denying Rehearing <i>En Banc</i> (29 July 2021)	A-11
District Court’s Order Denying § 2255 Motion (22 May 2020)	A-12
Magistrate Judge’s Report Re: § 2255 Motion (8 Jul 2019)	A-16
Eleventh Circuit’s Order Dismissing Interlocutory Appeal (7 May 2019)	A-35
Eleventh Circuit Order Denying Rehearing <i>En Banc</i> (6 Aug 2019)	A-38
District Court’s Order Denying Double Jeopardy Motion (4 Dec 2018)	A-39
Magistrate Judge’s Report Re: Double Jeopardy Motion (7 Nov 2018)	A-41
Eleventh Circuit’s Order Dismissing Mandamus Petition (3 Dec 2018)	A-58
Judgment of Conviction (2 Feb 2016)	A-59
Factual Proffer Supporting Guilty Plea (26 Jan 2016)	A-65

Volume II

Transcript of Evidentiary Hearing Re: MDLEA Jurisdiction (27 Jun 2019) ..	A-67
Transcript of Hearing on § 2255 Motion (20 Dec 2017)	A-107

1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF FLORIDA
 3 CASE NO. 17-CV-20440-MARTINEZ/GOODMAN

4 YENCY NUNEZ,) Page 1-40
 5 Plaintiff,)
 6 vs.) Miami, Florida
 7 UNITED STATES OF AMERICA,) June 27, 2019
 8 Defendant.) 10:00 A.M.

9 TRANSCRIPT OF EVIDENTIARY HEARING
 10 BEFORE MAGISTRATE JUDGE JONATHAN GOODMAN

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1 INDEX OF WITNESS

2 Christopher Duntan:

3 Direct Examination.....Page 10

4 Cross-Examination.....Page 23

5 Redirect Examination.....Page 29

6 EXHIBITS ADMITTED

7
8 Government's Exhibit No. 1.....Page 2

9 Government's Exhibit No. 2.....Page 21

10 Government's Exhibit Nos. 3, 4, and 5.....Page 15

1 THE DEPUTY CLERK: Calling case number
2 17-20440-CV-Martinez, Yency Nunez vs. United States of
3 America.

4 THE COURT: Good morning, folks. Please be seated.
5 Make yourself comfortable.

6 Let's start off, please, first with appearances.
7 Beginning with the United States.

8 MS. BOTERO: Good morning, Your Honor. Monique
9 Botero and Sean Cronin on behalf of the United States of
10 America.

11 THE COURT: Thank you.

12 MR. CRONIN: Good morning, Your Honor.

13 THE COURT: Good morning. For the defense.

14 MR. BASCUAS: Good morning, Your Honor. Ricardo
15 Bascuas on behalf of Mr. Nunez, who's present before the
16 Court.

17 THE COURT: Thank you. Mr. Nunez, how are the
18 headphones working for you this morning?

19 BY THE DEFENDANT: Perfect.

20 THE COURT: Good. Let me know right away if you're
21 having any difficulty hearing or understanding. All right?

22 BY THE DEFENDANT: Okay.

23 THE COURT: So, folks, we're here for an
24 evidentiary hearing on the issue of jurisdiction; whether the
25 court had or has jurisdiction under the MDLEA; the Maritime

1 Drug Law Enforcement Act.

2 And before we get into the actual evidence, I have
3 one or two status-report-type questions to ask.

4 The first is: I notice, Mr. Bascuas, that you had
5 filed with the Eleventh Circuit something called Yency
6 Nunez's time-sensitive motion to recall the mandate. And I
7 think that was filed probably about two weeks ago.

8 MR. BASCUAS: Yes, Your Honor.

9 THE COURT: What's happening with that?

10 MR. BASCUAS: Your Honor, I spoke with the Eleventh
11 Circuit clerk yesterday. The court reconstrued that motion
12 as a motion for reconsideration; which is weird because they
13 had previously reconstrued my petition for rehearing as a
14 motion for reconsideration. And I was told that the court
15 would get to the motion when the court gets to the motion.

16 And so what I assume that means is that they're
17 just going to ignore it, which is not the first time that
18 happens to me. And so there's not -- I don't really see any
19 basis for waiting or putting it off; unless the Court would
20 prefer to. I do have a couple of preliminary matters other
21 than that.

22 But, in other words, the Court has jurisdiction.
23 If it's the Court's pleasure to go forward, I don't have a
24 good reason not to; the Eleventh Circuit not having ruled.

25 THE COURT: Thank you. The other question I have

1 is: I noticed also, approximately two weeks ago, in this
2 court you filed a motion for clarification from the
3 government on the point of the scheduled hearing, and I don't
4 think that the government's response to that motion is due
5 until today. I think that's the deadline.

6 I checked this morning. I didn't see any written
7 response on the docket. But as long as we're here, Ms.
8 Botero or Mr. Cronin, what is the government's response to
9 that motion?

10 MS. BOTERO: Your Honor, the government's response
11 is that it has been ordered by the district court in this
12 case. And specifically, if you go to docket document entry
13 37, the district court stated that: This case is recommitted
14 -- meaning the Yency Nunez case -- to the Magistrate Judge
15 with respectful request that the matter be scheduled for
16 evidentiary hearing on the MDLEA subject matter
17 jurisdictional issue at his earliest opportunity, with both
18 sides afforded an opportunity to present evidence upon the
19 issue.

20 So the point of the hearing, Your Honor, is what
21 the district court has ordered.

22 THE COURT: Thank you. Mr. Bascuas, before we
23 start taking evidence as part of the evidentiary hearing, you
24 said you had some additional comments to make or some issues
25 you wanted to flag. So I'm happy to hear those.

1 MR. BASCUAS: Thank you, Your Honor. So what the
2 government just read is the district court's order. And the
3 district court believed that jurisdiction for this
4 evidentiary hearing existed under United States vs. Iguaran.

5 The United States disagrees with the district
6 court. The United States' position, both in the Eleventh
7 Circuit and lately here, has been that this hearing is the
8 habeas hearing that 28 U.S.C. 2255 expressly contemplates.

9 In other words, the United States believes this is
10 a hearing where the validity of the habeas petition gets
11 decided under 2255.

12 Judge Martinez in his order did not say that.
13 Judge Martinez's order has never identified statutory basis
14 for jurisdiction. The reason the United States shifted
15 positions on that is because they realized that there is
16 binding Eleventh Circuit precedent holding that jurisdiction
17 can only be established by statute.

18 So we have a conflict between what the district
19 court believes it's doing and what the United States believes
20 it's doing.

21 And I want to be very -- I want this record,
22 because this is going to go back to the Eleventh Circuit, so
23 I want this record to be very clear about what the court
24 believes its basis for jurisdiction is; given that the court
25 and the United States disagree.

1 THE COURT: Mr. Bascuas, I understand. So the
2 record is clear, from my perspective --

3 I'm sorry, Ms. Botero. You were standing, so that
4 suggests to me you have something to say.

5 MS. BOTERO: I do, Your Honor.

6 THE COURT: And I will certainly hear from you
7 before I comment.

8 MS. BOTERO: Your Honor, again I'd like to direct
9 your attention to Docket Entry 37, page 5 of 6. This is the
10 district court's order on the report and recommendation.

11 Under the portion that says ordered and adjudged,
12 paragraph 4, I will read from the order where it says: This
13 matter is recommitted to the Magistrate Judge with directions
14 to expand the record, pursuant to Rule 7 of the rules
15 governing 2255 proceedings for the United States District
16 Court by conducting an evidentiary hearing on the issue of
17 threshold MDLEA subject matter jurisdiction.

18 The Magistrate Judge is further respectfully
19 requested to then -- continuing on page 6 -- determine
20 whether the government has carried its burden of establishing
21 that the vessel in which the defendant was apprehended was
22 subject to the jurisdiction of the United States, and submit
23 a supplemental report and recommendation accordingly upon the
24 merits of the defendant's 2255 petition.

25 So defense counsel is incorrect. The court

1 specifically stated that it is an expansion of the 2255
2 proceedings, and specifically stated Rule 7.

3 MR. BASCUAS: Your Honor, for the record, I believe
4 that quote is taken out of context. The order clearly states
5 that jurisdiction is premised by the United States vs.
6 Iguaran. I filed a motion for reconsideration, stating that
7 jurisdiction must be predicated on the statute, which the
8 district court then denied DE 39.

9 So the district court has never said that this
10 hearing -- the district court has never expressly and clearly
11 and unequivocally said that this is the 2255 hearing. That's
12 been the United States' position, as counsel said.

13 And so before we start, because every federal court
14 is obligated to examine the basis for its jurisdiction, I
15 would just ask the Court put on the record what it believes
16 the basis for jurisdiction is and then the record for appeal
17 will be clear.

18 THE COURT: Thank you for those comments, Mr.
19 Bascuas. I think the record is clear for purposes of
20 preserving all of your arguments as to jurisdiction.

21 You have raised your points, both here in writing
22 in the trial court, and in writing in the appellate court,
23 and amplified again this morning orally, so I think you have
24 -- to use the expression -- covered all your bases. I think
25 that your view is clear. I can't imagine any conceivable

1 argument that you would have waived. I think you have
2 touched all the bases and pushed all the buttons,
3 jurisdictional or otherwise.

4 So we're going to move forward pursuant to Judge
5 Martinez's order directing me to have an evidentiary hearing.
6 But as I have indicated, you have preserved all of those
7 arguments.

8 So let's hear from the government. And call your
9 first witness, please.

10 MS. BOTERO: Yes, Your Honor. At this time the
11 government calls United States Coast Guard Lieutenant
12 Christopher Dunton to the stand.

13 THE COURT: Thank you.

14 MS. BOTERO: Your Honor, as he is approaching the
15 witness stand, I would like you to know that I provided you,
16 your clerk, the court reporter, the interpreter, as well as
17 defense counsel, copies of the exhibits which I'm going to
18 place into evidence now.

19 THE COURT: Well, thank you very much. And that
20 certainly is worthy of a gold star status. Thank you for
21 looking out for all of our best interests.

22 I assume you also provided a courtesy copy to Mr.
23 Bascuas.

24 MS. BOTERO: Of course, Your Honor.

25 THE COURT: All right. Terrific. Thank you.

1 THE DEPUTY CLERK: Please raise your right hand.

2 (Witness duly sworn)

3 THE WITNESS: I do.

4 THE DEPUTY CLERK: Before you take your seat,
5 please state your name for the record and spell it slowly.

6 THE WITNESS: My name is Christopher Dunton. It is
7 spelled C-h-r-i-s-t-o-p-h-e-r, D-u-n-t-o-n.

8 THE DEPUTY CLERK: Thank you.

9 THE COURT: You may begin, Ms. Botero.

10 CHRISTOPHER DUNTON, GOVERNMENT'S WITNESS, SWORN

11 DIRECT EXAMINATION

12 BY MS. BOTERO:

13 Q. Good morning.

14 A. Good morning.

15 Q. If you could please tell the court your occupation.

16 A. I am a command duty officer in the United States Coast
17 Guard for the Seventh Coast Guard District in Miami, Florida.

18 Q. What are your normal duties and responsibilities in that
19 position?

20 A. As command duty officer, I am charged with the oversight
21 function and the responsibility for the prosecution of law
22 enforcement in search and rescue cases in the Coast Guard
23 Seventh District.

24 Q. Is one of your collateral duties as a custodian of
25 records for official Coast Guard documentation and records?

1 A. It is.

2 Q. How long have you been with the Coast Guard?

3 A. I've been with the Coast Guard for three years.

4 Q. How long have you held the position that you just
5 described now?

6 A. I've been in the current position for one year.

7 Q. In regards to criminal prosecutions or maritime
8 interdictions, what role do you have in those?

9 A. In maritime interdictions --

10 Q. Yes.

11 A. -- I am the command duty officer, so I perform the
12 oversight function, I manage the interdiction, and ensure the
13 legal process is followed.

14 Q. As part of your duties and responsibilities, were you
15 asked to research a specific MISLE, which is spelled capital
16 M-I-S-L-E, case?

17 A. I was.

18 Q. Could you explain to the court what a MISLE case is or
19 what the MISLE system is?

20 A. Yes, ma'am. So the MISLE system is the Coast Guard's
21 way that we track our law enforcement interdictions and our
22 actions, as well as our search and rescue task and actions.

23 Q. Within a MISLE case report, are there documents that are
24 obtained throughout the course of the interdiction and, of
25 course, search and rescue operation?

1 A. Yes, there are.

2 Q. And are those maintained within the Coast Guard systems
3 for -- as, you know, a lengthy period of time; indefinitely?

4 A. Yes, ma'am.

5 Q. Were you specifically asked to research a MISLE ID No.
6 572824 that related to the motor vessel Andrea I?

7 A. I was.

8 Q. And were you able to obtain those records within the
9 MISLE system?

10 A. Yes, I was.

11 Q. How large was, approximately, that case report?

12 A. The case report encompassed over a hundred pages,
13 approximately.

14 Q. In reviewing the documentation, were you able to
15 determine the date of the interdiction or incident for the
16 Andrea One?

17 A. I was.

18 Q. Okay. And what was that date?

19 A. That was 14 October 2011.

20 MS. BOTERO: Your Honor, may I approach?

21 THE COURT: Yes.

22 BY MS. BOTERO:

23 Q. I'm showing you Government's Exhibit 3, Government's
24 Exhibit 4, and Government's Exhibit 5.

25 Let's start with Government's Exhibit 3. Do you

1 recognize this?

2 A. Yes, ma'am.

3 Q. And how do you recognize it?

4 A. That's a situation report pulled from the MISLE system.

5 Q. And is it a record that is kept in the normal course of
6 the United States Coast Guard's business?

7 A. It is.

8 Q. And is this a fair and accurate copy of that document?

9 A. Yes, ma'am, it is.

10 Q. I'm now showing you Government's Exhibit 4. Do you
11 recognize this?

12 A. I do.

13 Q. And how do you recognize it?

14 A. This is the Form Bravo which is issued from the
15 Panamanian government to the United States Coast Guard.

16 Q. And was this a document that was maintained within the
17 United States Coast Guard records; specifically, that MISLE
18 number we discussed?

19 A. Yes, ma'am.

20 Q. And this is a fair and accurate copy of that document?

21 A. It is.

22 Q. I'm now moving on to Government's Exhibit 5. Do you
23 recognize this?

24 A. I do.

25 Q. And how do you recognize it?

1 A. This is the English translation of the original document
2 issued by Panama, the Form Bravo.

3 Q. And is this a record that is kept in the normal course
4 of the United States Coast Guard's business?

5 A. Yes, ma'am.

6 Q. And is this a fair and accurate copy of that document?

7 A. Yes, ma'am, it is.

8 MS. BOTERO: At this time, Your Honor, the
9 government would like to move Government's Exhibit 3, 4, and
10 5 into evidence.

11 THE COURT: Any objection?

12 MR. BASCUAS: Objection to the translation, Your
13 Honor. I don't know that it's certified. I don't know that
14 it's admissible because it's not a certified translation.

15 THE COURT: Ms. Botero.

16 MS. BOTERO: Your Honor, my response is that that
17 record, the translation was not something the government
18 made; it is within the report -- within the MISLE report,
19 which is kept in the normal course of business, so it comes
20 in as a record within that record, regularly-conducted
21 business.

22 THE COURT: Admitted over the defense objection.
23 Any other objections, Mr. Bascuas?

24 MR. BASCUAS: Not at this time, Your Honor.

25 THE COURT: Thank you very much. So Government

1 Exhibits 3, 4, and 5 are now admitted. Please proceed.

2 (Government Exhibits 3, 4, and 5 were received)

3 MS. BOTERO: Your Honor, may I -- just so that I
4 can look at the documents with him -- may I just stand here
5 for a moment to go through my questions? Do you have a
6 handheld mic if you prefer?

7 THE COURT: So those are two questions.

8 MS. BOTERO: Sorry.

9 THE COURT: So we'll take them one step at a time.
10 I always try to make sure that our court reporter is
11 adequately taken care of.

12 If the court reporter can hear you from where you
13 are, that's fine. If the court reporter prefers that you use
14 a handheld mic, we have one available. So let's find out the
15 answer.

16 Would you like the prosecutor to use the handheld
17 mic, or is it adequate right now?

18 THE COURT REPORTER: Adequate, Judge.

19 THE COURT: I'm sorry?

20 THE COURT REPORTER: Adequate now, Judge.

21 THE COURT: All right. If for some reason there is
22 a problem, just speak up, and we'll switch to the handheld
23 mic. Please don't be shy. All right?

24 THE COURT REPORTER: Yes, Judge.

25 THE COURT: Okay. Thank you.

1 MS. BOTERO: Thank you, Your Honor.

2 BY MS. BOTERO:

3 Q. So let's -- I'd like to direct your attention first to
4 Government's Exhibit 3. You refer to this as a what?

5 A. That's a situation report.

6 Q. And what is a situation report?

7 A. A situation report is the summary of all case details.

8 Q. And what is the situation report regarding in this
9 Government's Exhibit 3?

10 A. In Government's Exhibit 3 the situation report details
11 the case prosecution for the motor vessel Andrea One.

12 Q. And what was the date of interdiction on that vessel?

13 A. The date of interdiction was 14 October 2011.

14 Q. I'd like to direct your attention to the bottom of the
15 page, of the first page of this document, where there is a
16 summary of actions taken in order to interdict the vessel.

17 Could you please summarize for us, since you have
18 read this, what that says.

19 A. The summary of the situation report is that the United
20 States Coast Guard interdicted the motor vessel Andrea I
21 within Panamanian territorial seas. And under the Panamanian
22 and U.S. bilateral agreement, Panamanian authorities granted
23 their law enforcement authority upon the United States Coast
24 Guard to interdict, stop, board, and search the motor vessel
25 Andrea I.

1 MR. BASCUAS: Your Honor, I'm going to object to
2 the witness characterizing the exhibits. I think it violates
3 the best evidence rule. The exhibits speak for themselves.
4 They are what they are.

5 He is the custodian. He doesn't have any personal
6 knowledge, so I don't think that we need to hear his
7 summaries.

8 THE COURT: Overruled.

9 BY MS. BOTERO:

10 Q. I'd like to direct your attention to page 2 of
11 Government's Exhibit 3.

12 There is a list of individuals on that document.
13 What role did those individuals have?

14 A. The role that those individuals had were they were
15 aboard the motor vessel Andrea One.

16 MR. BASCUAS: Your Honor, I'd like a continuing
17 objection to the witness testifying for information that he
18 lacks personal knowledge about.

19 THE COURT: So, Mr. Bascuas, I'm construing the
20 witness' testimony with the understanding that he personally
21 wasn't on the vessel; and he is simply helping out the Court
22 by summarizing what is in these documents. All right?

23 MR. BASCUAS: I understand, Your Honor. But I need
24 to preserve this for appellate review.

25 This is a Crawford objection to all of his

1 testimony.

2 THE COURT: Understood. So that objection is
3 preserved but is also overruled. Please continue.

4 BY MS. BOTERO:

5 Q. Within this document is there a statement of if cocaine
6 was located on the motor vehicle -- I'm sorry, the motor
7 vessel Andrea One?

8 A. There is.

9 Q. And what does the document say? How much cocaine was
10 found?

11 A. The document says that they recovered 200 kilos of
12 cocaine.

13 Q. Moving on to Government's Exhibit 4, are you familiar
14 with this form?

15 A. I am.

16 Q. And what is it?

17 A. This is a Form Bravo. It's issued from the Panamanian
18 government. And what this form does is it allows the U.S. to
19 enact the bilateral agreement between the Panamanian
20 government and the U.S. government.

21 Q. And do you speak Spanish?

22 A. I do not.

23 Q. Okay. So you do not know what Government's Exhibit 4
24 actually says?

25 A. No, ma'am.

1 Q. However, you are familiar with the format of the form
2 because you have seen it previously; is that correct?

3 A. Yes, ma'am.

4 Q. And moving on to Government's Exhibit 5, what is
5 Government's Exhibit 5?

6 A. That is the Coast Guard translation of the Form Bravo.

7 Q. How are these translations, based on your training and
8 experience and working these cases, made?

9 A. They are done through the Coast Guard Intelligence
10 Center, the headquarters level, with an official Spanish
11 translator.

12 Q. And so what does form -- this Form Bravo, specifically
13 Government's Exhibit 5, state?

14 A. That form officially states that the Panamanian
15 government authorizes a stop, board, and search and a waiver
16 of jurisdiction of the motor vessel Andrea One to the United
17 States government.

18 Q. There is a list of individuals that are both on
19 Government's Exhibit 4 and Government's Exhibit 5 in a chart
20 or a box; is that correct?

21 A. That is correct.

22 Q. And what exactly does the form state about those
23 individuals; at least in Government's Exhibit 5, since you
24 can read the English version?

25 A. The form states that the Panamanian government

1 relinquishes their jurisdiction over these individuals.

2 Q. To be clear, does the name Yency Nunez appear on any of
3 these documents?

4 A. No, ma'am.

5 Q. Now, going back to Government's Exhibit 3, page 2, and
6 again looking at Government's Exhibit 4 and 5, the list of
7 names, are all those names the same?

8 A. Yes, ma'am.

9 MS. BOTERO: Your Honor, at this time the
10 government seeks to introduce Government's Exhibit 1, which
11 is the factual proffer of the defendant, Yency Nunez, and
12 request that it be taken into evidence under judicial notice.

13 THE COURT: Mr. Bascuas, is there any objection?

14 MR. BASCUAS: No objection.

15 THE COURT: Thank you. Without objection,
16 Exhibit 1 is in evidence.

17 (Government Exhibit 1 was received)

18 MS. BOTERO: And, Your Honor, the government now
19 moves Government's Exhibit 2, which is the certification from
20 the MDLEA from the Department of State. It is a
21 self-authenticating document.

22 I have the original here, Your Honor, with the
23 seals and the ribbons, if you would like to see the original.

24 THE COURT: Any objection, Mr. Bascuas, to the
25 introduction of Government Exhibit 2?

1 MR. BASCUAS: Your Honor, the Crawford objection.
2 I object on the basis of Crawford, on the basis of hearsay.
3 Other than that --

4 I don't object on authentication grounds, but I
5 object on the basis of Crawford and on the basis of hearsay.

6 MS. BOTERO: Your Honor, under hearsay it comes in
7 under government -- under Rule 803 (a)(2) as a public record;
8 even if it was prepared for the purpose of prosecution. It
9 does not violate Crawford.

10 THE COURT: The objection is overruled, and
11 Exhibit 2 is in evidence.

12 (Government Exhibit 2 was received)

13 MS. BOTERO: If I may approach the witness again,
14 Your Honor?

15 THE COURT: Yes.

16 BY MS. BOTERO:

17 Q. Lieutenant Dunton, we spoke about the Coast Guard
18 interdiction on October 14, 2011. There is a new piece of
19 evidence in. This is Government's Exhibit 1; it's now in
20 evidence.

21 I'm just going to ask that you read the last
22 paragraph of Government's Exhibit 1.

23 A. Yes, ma'am. On October 14, 2011, the Coast Guard Cutter
24 Gallatin observed the vessel Andrea I and made contact. Upon
25 searching the vessel, the United States Coast Guard seized

1 approximately 402 kilograms of cocaine from the bilge access
2 space.

3 After the seizure, Colombia law enforcement
4 continued intercepting calls from the coconspirators in this
5 case.

6 In a call on October 17, 2011, Nunez was
7 intercepted speaking to a coconspirator. In that call,
8 Hernandez Epiyeu informed Nunez that something serious
9 happened and that they inspected the car, which was code for
10 the vessel.

11 Q. I'd also like to direct your attention to another piece
12 of evidence, which is Government's Exhibit 2. And this is a
13 certification from the State Department.

14 If you could please read the title for us.

15 A. Certification for the Maritime Drug Law Enforcement Act
16 case involving the motor vessel Andrea I Bolivia Federal Drug
17 Identification No. 2011131476.

18 Q. And I'd like to direct your attention to the very last
19 subparagraph of No. 4, which is on page 3 of that document.
20 It starts with the subsection d.

21 If you could read that for us, please.

22 A. Accordingly, the government of the United States
23 determined the vessel was subject to the jurisdiction of the
24 United States pursuant to 46 U.S.C. 70502(c)(1)(E).

25 Q. And, again, what vessel -- and you can look again on

1 page 1, under subsection (4)(A) -- what vessel is discussed
2 in the certification? What was the date of interdiction?

3 A. The vessel discussed was the motor vessel Andrea I, and
4 14 October 2011.

5 Q. Thank you.

6 MS. BOTERO: Your Honor, the government has no
7 further questions for this witness.

8 THE COURT: Cross-examination, Mr. Bascuas.

9 MR. BASCUAS: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. BASCUAS:

12 Q. Good morning, lieutenant.

13 A. Good morning, sir.

14 Q. Lieutenant, there was another -- sorry. This microphone
15 is being wonky.

16 There was another time that we convened for a
17 hearing in this matter, and we couldn't go forward that day.
18 Were you the witness that day?

19 A. No, sir, I was not.

20 Q. Okay. So when did you first receive these documents
21 that you're the custodian of records for and from whom?

22 A. The documents I received --

23 Are you asking about when I was asked to officially
24 take on this as the witness or?

25 Q. I just want to know who gave you these exhibits.

1 A. The U.S. Attorney's Office did.

2 Q. So you received all these documents from the
3 prosecution?

4 A. That is correct.

5 Q. Not from the Coast Guard?

6 A. These documents specifically that have been referenced
7 come from the U.S. Attorney's Office.

8 Q. Okay. So you didn't -- just to make the record clear --
9 I realize it may be a little repetitive.

10 You did not go to the Coast Guard and do a search
11 and bring these documents to the prosecution; they brought
12 these documents to you?

13 A. That is correct.

14 Q. Okay. Turning your attention to the Panamanian report.

15 THE COURT: Just use an exhibit number, if you
16 would, please.

17 MR. BASCUAS: Yes, Your Honor. I believe that's
18 Exhibit 5. And I would ask the prosecutor to correct me if I
19 get these numbers wrong.

20 THE COURT: 5 is the English translation.

21 MR. BASCUAS: Yes.

22 BY MR. BASCUAS:

23 Q. Is it correct that this information from Panama was
24 received on October 25, 2011?

25 A. Not to the best of my knowledge.

1 Q. Well, let's take a look at Exhibit 4. If you look at
2 Exhibit 4, at the top there is a fax number that's fax
3 stamped October 25, 2011. At the bottom it's also stamped
4 October 25, 2011.

5 MS. BOTERO: Your Honor, may I just give the
6 witness a copy of the document?

7 MR. BASCUAS: Oh, I'm sorry. I thought he had kept
8 the exhibits.

9 MS. BOTERO: No, I brought them back.

10 MR. BASCUAS: Sorry. You're going to need these,
11 lieutenant. I apologize. I thought you had them. He can't
12 be crossed without documents.

13 MS. BOTERO: Normally you walk them up.

14 MR. BASCUAS: I haven't done this in 20 years.

15 BY MR. BASCUAS:

16 Q. So, lieutenant, if you would please look at the page
17 stamped 008.

18 So that says -- it's dated in Spanish, but it looks
19 like Panama 25 October 2011.

20 A. In the top right-hand corner it does say that, yes.

21 Q. And in the middle of the document above the stamp, right
22 in the middle?

23 A. In the middle paragraph? Is that what you're
24 referencing?

25 MR. BASCUAS: Can I approach the witness, Your

1 Honor?

2 THE COURT: Yes.

3 BY MR. BASCUAS:

4 Q. I'm sorry. 008, this page.

5 A. Okay.

6 Q. So that says October 25, 2011; correct?

7 A. It does, correct.

8 Q. So this certification from Panama occurred 11 days after
9 the Andrea I was intercepted on October 14, 2011?

10 A. That is correct.

11 Q. Okay. And just to make the record clear, you never saw
12 the Andrea I? You weren't on the high seas that day? You
13 were not present for the arrest; correct?

14 A. No.

15 Q. So is today the first day you have any involvement with
16 this case?

17 A. No. I've been researching this case for the U.S.
18 Attorney's Office.

19 Q. Okay. But in 2011, were you with the Coast Guard?

20 A. I was with the Marine Corps.

21 Q. Okay. So it's safe to say that you were nowhere near
22 the Andrea One, and you had no involvement with it until --

23 MS. BOTERO: Objection, Your Honor. Compound
24 question.

25 THE COURT: Excuse me. There is an objection. I

1 need to rule. Please rephrase your question.

2 MR. BASCUAS: Yes, Your Honor.

3 THE COURT: It was compound.

4 BY MR. BASCUAS:

5 Q. How long would you say you've been researching this case
6 for the U.S. Attorney's Office?

7 A. For the past month.

8 Q. Thank you. And before that, you had no involvement with
9 it?

10 A. No.

11 Q. So let's talk about the translation.

12 You don't have any personal knowledge about who
13 made it; correct?

14 A. Yes, I know about the formal process to translate
15 documents.

16 Q. Right, right, right. I understand that you know about
17 the process.

18 But you weren't there when this document was
19 translated?

20 A. No.

21 Q. So what about this document tells you that it was made
22 by the Coast Guard and not by the Republic of Panama, for
23 example, or somebody else?

24 A. In order for this to be entered into our MISLE, it has
25 to go through our National Coordination Center, which is our

1 intelligence center, and they have official translators in
2 paid positions that do this translation and send it back to
3 us via official communique.

4 Q. Do you know what the qualifications of those
5 interpreters are?

6 A. Yes, I do.

7 Q. What are they?

8 A. They have to pass a written and verbal test, and they're
9 designated in writing and they are paid for that function.

10 Q. Do they -- are there formal education requirements?

11 A. The formal education requirements, I can't speak to. I
12 know that there is the written and verbal tests.

13 Q. Are they Coast Guard officers?

14 A. They are.

15 Q. So are they Coast Guard --

16 So any Coast Guard officer who is bilingual, can
17 apply to take this test? Is that how it works?

18 A. Yes.

19 Q. But nothing about the document tells you the Coast Guard
20 did it; it's just your knowledge of how things normally work
21 that tells you?

22 A. The document, in order to be admitted into a MISLE case,
23 it must be done in the formal manner.

24 Q. I understand that. But you said you got this from the
25 U.S. Attorney's Office; not from the Coast Guard.

1 So is there anything about this document that
2 you're looking at that says the Coast Guard made it and not
3 Panama?

4 A. When I went back into our MISLE application, that is the
5 document that is in there.

6 Q. Okay. Do you know the identity of the officer who
7 translated it?

8 A. I do not.

9 Q. Do you know if there is a way to discover the name of
10 the officer who translated it?

11 A. I'm sure if you could go into MISLE and research who was
12 on duty that day, you would be able to tell.

13 Q. But you haven't done that?

14 A. I did not.

15 Q. And just to confirm, according to the documents you
16 reviewed, was Yency Nunez on board the Andrea One at anytime?

17 A. No, sir, he was not.

18 MR. BASCUAS: Thank you, Your Honor. No further
19 questions.

20 THE COURT: Any redirect, Ms. Botero?

21 MS. BOTERO: Yes, Your Honor. Thanks.

22 REDIRECT EXAMINATION

23 BY MS. BOTERO:

24 Q. Lieutenant Dunton, you explained that as part of your
25 duties and responsibilities, that you assist in District

1 Seven when there is an interdiction, a maritime drug
2 interdiction; correct?

3 A. Yes, ma'am.

4 Q. So I want to respond -- have you explain this process of
5 the United States Attorney's Office giving you documents. I
6 think I need to go back to talking about how a case is
7 interdicted first. So since you are familiar with that,
8 that's where I want to head back to.

9 A. Yes, ma'am.

10 Q. When a case is presented to the U.S. Attorney's Office
11 for prosecution after there has been a maritime drug
12 interdiction, what is given to the U.S. Attorney's Office for
13 that prosecution from the Coast Guard?

14 A. The United States Coast Guard submits a case package,
15 which contains a situation report, MISLE timeline entries,
16 official documentation, translations, as well as any other
17 pertinent documents.

18 Q. Okay. So to be clear, the original case against Yency
19 Nunez, or the individuals who were on the Andrea One who were
20 prosecuted here in the Southern District of Florida, you were
21 not a part of that case originally back in 2011 and future
22 dates; correct?

23 A. Correct.

24 Q. But you're aware, through your training and experience,
25 that the government is provided with a MISLE package and the

1 case package as part of the normal prosecution?

2 A. Yes, ma'am.

3 Q. So, again, going back to your -- the government's
4 request to have a custodian of records in this case, in Yency
5 Nunez's case, we had previously met; correct?

6 A. Yes, ma'am.

7 Q. And as part of our meeting, I provided you certain
8 documents that were what I believe to be from a specific
9 MISLE report and a case package related to the Andrea One.

10 What did I ask you to do once I gave you those
11 documents?

12 A. When you handed me the documents, you asked me to go
13 back into the MISLE case and to verify that these documents
14 were derived from the MISLE case.

15 Q. And that those documents were, in fact, kept in the
16 normal course of U.S. Coast Guard business; correct?

17 A. Yes, ma'am, they are.

18 Q. And did I ask also for you to verify when they were
19 entered?

20 A. Yes, ma'am, you did.

21 Q. And when were they entered?

22 A. They were entered on 14 October 2011.

23 Q. Additionally, did you find that any of these documents
24 that I had provided you in any of our meetings were not
25 contained within the MISLE report -- I'm sorry.

1 Government's Exhibit 3, 4, and 5, those specific
2 three, were any of those not contained within the MISLE
3 report?

4 A. No, ma'am, they all were.

5 Q. And they were all generated at approximately what date?

6 A. They were generated on the 16th of October 2011.

7 MS. BOTERO: Okay. Just one moment, Your Honor.
8 The government has nothing further, Your Honor.

9 THE COURT: Thank you very much. Sir, you may step
10 down.

11 (Witness excused)

12 MS. BOTERO: Your Honor, may I just retrieve the
13 documents as well?

14 THE COURT: Yes.

15 MS. BOTERO: Thank you.

16 THE COURT: Any additional evidence, Ms. Botero?

17 MS. BOTERO: No, Your Honor. The government rests.

18 THE COURT: Mr. Bascuas.

19 MR. BASCUAS: We have no witnesses to call, Your
20 Honor.

21 THE COURT: And no evidence?

22 MR. BASCUAS: And no evidence.

23 THE COURT: All right. Fair enough. So it sounds
24 to me as though the evidentiary hearing is concluded. Does
25 anybody disagree?

1 MS. BOTERO: Except for argument, Your Honor, yes
2 we agree, in terms of the actual evidence being presented.

3 THE COURT: Understood. I'm happy to listen to
4 argument, and I'll hear from the government first.

5 MS. BOTERO: Thank you, Your Honor. Your Honor,
6 this case -- this evidentiary hearing is very focused on one
7 issue, and that's the issue of jurisdiction. And
8 jurisdiction lies, as Your Honor knows, for these maritime
9 drug law enforcement cases under Title 46.

10 And specifically under Title 46, I would like to
11 direct your attention to Section 70502 -- hold on for a
12 second -- 70502. I'm going to first start a little bit
13 backwards.

14 70502 (c)(2)(B): It is within the statutes
15 promulgated by Congress that jurisdiction: Is proved
16 conclusively by a certification of the Secretary of State or
17 the Secretary's designee.

18 Your Honor, the government could have come in here
19 today and could have presented to you Government's Exhibit 2
20 -- which is self-authenticating, which is a certification
21 from the Department of State -- and we could have prevailed
22 in the argument for jurisdiction. That in and of itself is
23 sufficient. That is what the Eleventh Circuit has found,
24 that is what other circuits have found, and that is what's
25 specifically within the statute.

1 However, we wanted to explain to the Court in even
2 further detail about the communications that happened between
3 the United States Coast Guard, the United States government,
4 and the Republic of Panama; so additionally we presented to
5 Your Honor Government's Exhibits 3, 4, and 5.

6 And there, Your Honor, under Title 46,
7 Section 70502, subsection (c)(1)(e), it states that: If the
8 vessel is in the territorial waters of a foreign nation, if
9 the foreign nation consents to the enforcement of the United
10 States law by the United States, jurisdiction lies with the
11 United States.

12 So, Your Honor, based on what is represented within
13 the certification, as well as Government's Exhibits 3, 4, and
14 5, the government has proved jurisdiction over the motor
15 vessel Andrea I.

16 Your Honor, it is clear, there is no question, that
17 Yency Nunez was not on the Andrea I. There is no question
18 about that. He was charged and prosecuted under the theory
19 that he was one of the land-based organizers of putting
20 narcotics onto this vessel. Based on his factual proffer, he
21 agreed that he was a conspirator on the Andrea I.

22 Based on the jurisdiction, which has now been
23 proven, based on the evidence that has been presented in
24 court today, jurisdiction lies -- U.S. jurisdiction lies
25 against the Andrea I. Therefore, jurisdiction is proper

1 against Yency Nunez, and the government believes that we have
2 met our burden.

3 THE COURT: Thank you. Mr. Bascuas, do you have
4 any comments that you'd like to make?

5 MR. BASCUAS: Yes, Your Honor, and what I'll a
6 little exaggeratedly call a motion.

7 So nothing that Miss Botero just stated is really
8 debatable. The government could have proven jurisdiction,
9 but it needed to do that years ago; not today. So that's one
10 issue.

11 The other issue, of course, is while the government
12 is -- was happy to quote from Judge Martinez's order twice
13 this morning, that order clearly says that what this Court
14 needed to do -- if we're going to be literal about this --
15 was to get testimony about the vessel from which Mr. Nunez
16 was arrested. That's what DE 37 says. And as you heard, Mr.
17 Nunez was not on the vessel.

18 Moreover, Mr. Nunez has a very substantial Apprendi
19 argument that the statute that Ms. Botero just referenced --
20 which was enacted I want to say two years ago, but I forget
21 the exact number -- so let me just say at least a year before
22 Apprendi was decided, is unconstitutional under Apprendi.

23 So what I would propose, Your Honor, is that we
24 submit memoranda on this, and maybe set a date for argument,
25 just so that Mr. Nunez isn't taken from the jurisdiction

1 until I can consult with him if I need to while he's here in
2 FDC. And that could be in three weeks or a month or six
3 weeks, whatever the Court pleases. But I think that would
4 enable us to develop the record for appellate review in an
5 orderly way.

6 MS. BOTERO: Your Honor, the government believes
7 there's no need for any further briefing or argument. This
8 issue is something that if he -- if defense felt it should
9 have been raised, should have been raised long ago.

10 We are here for the sole and singular purpose of
11 whether, based on this evidence, you find jurisdiction over
12 this case; not these issues of Apprendi or violations of this
13 or violations of that.

14 You have a very narrow, focused tasking by the
15 district court, and we should stick to that; and whatever
16 further arguments or appellate issues Mr. Bascuas wants to
17 raise, should be raised in the appellate court.

18 THE COURT: Mr. Bascuas, I'm in a little bit of a
19 different situation than the evidentiary hearing that took
20 place in the Iguaran matter. In that case I believe it was
21 Judge Gayles -- I think it was Judge Gayles who handled that
22 evidentiary hearing on remand. Judge Gayles, as we know, is
23 an Article Three District Court Judge and lifetime tenure;
24 and, therefore, he can simply enter an order.

25 I am not in that position. I'm a federal

1 magistrate judge; and, therefore, I will not be entering an
2 order on this evidentiary hearing. Instead, I will be
3 issuing a report and recommendation.

4 And under that procedure, after I enter my report
5 and recommendations, there is an objections period. So if
6 after I enter my report and recommendations you have
7 objections, including those that you just articulated --
8 whether they be Apprendi, hearsay, jurisdiction, whatever
9 arguments, factual or legal, you would like to advance, you
10 can do that in the actual objection.

11 So you will be able to preserve those arguments,
12 and I'll read them and evaluate them. And who knows? Maybe
13 I'll agree or maybe I won't, but you will have that
14 opportunity.

15 So I don't think we have a need for an additional
16 briefing and then an additional hearing. As wonderful as it
17 is to see you, I know you need to get ready soon for next
18 semester and you probably have a lot of work on your plate,
19 and I think one additional memoranda -- if you so choose to
20 submit it, any objections -- would give you all the
21 opportunity that you need.

22 Anything further from either side this morning?

23 MR. BASCUAS: Could we do anything to keep Mr.
24 Nunez here for a couple of weeks?

25 THE COURT: I don't think that Mr. Nunez will be

1 transported back to whatever facility the Bureau of Prisons
2 has designated until this hearing is over, but I'm not sure.
3 I am not an expert on prisoner transport issues. Ms. Botero,
4 what are your thoughts about that?

5 MS. BOTERO: If he has no future court hearings
6 scheduled, then he would be transferred anywhere from 30 to
7 45 days or longer, but 30 to 45 days. They have, you know,
8 as always, an overcrowding issue with the FDC, and so they
9 won't keep people here if they don't believe they're
10 necessary to stay here.

11 THE COURT: Right. So, Mr. Bascuas, I assume that
12 the reason for your request is that you want the opportunity
13 to consult with Mr. Nunez about the report and
14 recommendations and to talk with him about what arguments you
15 may or may be advancing, what objections you may or may not
16 be making.

17 MR. BASCUAS: Correct, Your Honor.

18 THE COURT: So why don't we do this: Why don't we
19 schedule this for a hearing in approximately 45 days. Maybe,
20 Tammy, you can look on the calendar and tell me what date and
21 time is available. And then later on we can decide whether
22 or not to actually have the hearing.

23 When we issue the hearing notice, I'll say that the
24 defendant's presence is required; and then later on if the
25 hearing gets canceled -- it may or may not -- but by that

1 time, you will have the opportunity to consult with your
2 client.

3 MR. BASCUAS: Thank you, Your Honor. I appreciate
4 that.

5 THE COURT: What are we looking at, Tammy, about
6 45 days from now, more or less? What are you suggesting,
7 Katie?

8 THE LAW CLERK: August 13th is open.

9 THE COURT: August 13th?

10 MS. BOTERO: I'm not going to be here, Your Honor,
11 but Mr. Cronin said he can stand in for me if we end up
12 having the hearing.

13 THE COURT: Right.

14 MS. BOTERO: I understand. I'm just letting you
15 know.

16 THE COURT: You'll probably be off on some
17 fantastic vacation.

18 MS. BOTERO: Right. I hope so.

19 THE COURT: All right. Well, good. You deserve
20 it, I'm sure. So that date was August 13th?

21 THE DEPUTY CLERK: Yes.

22 THE COURT: All right. So August 13th, 10:00 A.M.
23 hearing. Mr. Nunez's presence is required. And by that time
24 the report and recommendations will be issued.

25 Your objections, if you are going to object -- and

1 who knows what the ultimate report and recommendations is
2 going to be, maybe the government will object, who knows --
3 but that will be fleshed out before that. All right.
4 Anything further from either side?

5 MS. BOTERO: No, Your Honor.

6 MR. BASCUAS: No, Your Honor. Thank you, Your
7 Honor.

8 THE DEPUTY CLERK: That's a status conference?

9 THE COURT: Yes, status conference on Nunez.
10 Nothing further?

11 MR. BASCUAS: Nothing further.

12 THE COURT: All right. We will go off the record.
13 Thank you.

14 C E R T I F I C A T E

15 I certify that the foregoing is a correct transcript
16 from the record of proceedings in the above-entitled matter.

17
18 June 15, 2020

/s/ Vernita Allen-Williams

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 MIAMI DIVISION
CASE NO. 17-20440-CIVIL-MARTINEZ

4 YENCY NUNEZ, Miami, Florida
5 Plaintiff, December 20, 2017
6 vs. 2:59 p.m.
7 UNITED STATES OF AMERICA ,
8 Defendant. Pages 1 to 83

9
10 MISCELLANEOUS HEARING
11 BEFORE THE HONORABLE JONATHAN GOODMAN,
12 UNITED STATES MAGISTRATE JUDGE
(TRANSCRIBED FROM THE DIGITAL AUDIO RECORDING)

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1 THE COURTROOM DEPUTY: Calling Case 17-20440-
2 Civil-Martinez, Nuñez versus United States of America.

3 THE COURT: Good afternoon, folks. Please be seated.
4 Make yourself comfortable.

5 So I'm a little bit tempted to say happy Friday to
6 everybody, except it's not Friday. It kind of seems like
7 Friday, but it's not.

8 Folks ask me: Judge, do things slow down during
9 Christmas week?

10 And the answer is: No. Not for me. I had a mediation
11 at 9:30 this morning. I've got a hearing with you folks today.
12 I have hearings tomorrow at 9:30, 3:30 and 6:30. So we're busy
13 this week.

14 Let's start off with appearances, first for the United
15 States.

16 MR. YERA: Good afternoon, your Honor. E. J. Yera on
17 behalf of the United States of America, assistant US attorney.

18 And with me:

19 MS. BOTERO: Monique Botero on behalf of the United
20 States of America.

21 THE COURT: Thank you very much.

22 And I see also sitting a couple rows behind you, of
23 course, is the well-known AUSA Ann Schultz.

24 And, Ms. Schultz, are you going to join the
25 Government's team or are you going to hide back there in the

1 third row?

2 MS. SCHULTZ: Your Honor, I'm a spectator today.

3 THE COURT: Okay. Very good. Very good.

4 For the defense?

5 MR. BASCUAS: Ricardo Bascuas for Mr. Nuñez, your
6 Honor.

7 THE COURT: Okay. And I see you've got a bunch of
8 folks behind you. And I'm going to go out on a limb, take a
9 guess that these might be some law students.

10 MR. BASCUAS: These are students from the federal
11 appellate clinic at the University of Miami School of Law.

12 THE COURT: Very nice. Okay. Well, welcome, all of
13 you.

14 Okay, folks. So we're here for an oral argument. And
15 I'm going to listen to everything that you folks have to tell
16 me. I may interrupt from time to time with a question. Don't
17 read anything into that. It doesn't mean anything other than
18 I'm 62 years old. I don't get thoughts very often. So if I
19 get a thought, I need to act on it immediately.

20 But before we begin, I just have one question
21 concerning sort of clarification of the record or maybe
22 clarification of an argument.

23 So, Mr. Bascuas, in your reply, which is ECF No. 12 --
24 I'll give you a second to get there. You've got it right
25 there? Good. So Page 2, toward the bottom, you make certain

1 arguments about Mr. Nuñez's presentence investigation report;
2 and you offer four reasons why in your view the Government's
3 argument fails.

4 And here's where my question lies. You say, first,
5 "The Government admits that Mr. Nuñez's PSI did not state a
6 necessary jurisdictional fact, i.e. that Panama had consented
7 to the boarding of the *Andrea I* in its waters."

8 So I read that. And I don't know. Maybe I'm a little
9 bit neurotic. But I decided to go ahead and check out the PSI.

10 So I look at the PSI and at ECF 116, which is the
11 initial version of the PSI; maybe it was called the draft of
12 the PSI. On pages -- on Page 7, up at the top, it says,
13 "Shortly after the request was made, Panama authorized the
14 United States to board the *Andrea I* in Panamanian territorial
15 seas." So that to me sounds inconsistent with the argument
16 that you made under the category first.

17 Then I took a look at the final version of the PSI,
18 which is ECF No. 152. And in that document, on Page 7,
19 numbered Paragraph 13, it says, again, "Shortly after the
20 request was made, Panama authorized the United States to board
21 the *Andrea I* in Panamanian territorial seas."

22 So I know you have other arguments concerning whether
23 the PSI can be relied upon or not. But this is the PSI for
24 Mr. Nuñez, not any other Defendant. It seems to say to me in
25 fairly straightforward terms that Panama authorized the United

1 States to board the vessel.

2 So would you explain to me your view on your statement
3 on Page 2 that the Government admits that Mr. Nuñez's PSI did
4 not state that Panama had consented to the boarding of the
5 *Andrea I* in its waters?

6 MR. BASCUAS: Your Honor, the argument is that the
7 parties agree -- and I'm looking at Docket Entry 11, Page 20,
8 Footnote 9, the Government's response -- that, quote, "Nuñez's
9 amended PSI does not indicate that Panama consented to the
10 jurisdiction of the United States."

11 And so that they authorized the boarding of the vessel
12 is not the same thing as they consented to the exercise of
13 jurisdiction over the vessel.

14 In any event, whether jurisdiction exists or not does
15 not depend on whether the parties believe it exists. Whether
16 jurisdiction [sic] always depends on evidence. And a PSI is
17 not evidence.

18 THE COURT: So are you suggesting to me that the
19 Government's response memo in its footnote is incorrect when it
20 says in Footnote 9 -- you said that was Page --

21 MR. BASCUAS: 20.

22 THE COURT: -- 20, Footnote 9: "Nuñez's amended PSI
23 does not indicate that Panama consented to the jurisdiction of
24 the United States."

25 And so in your mind --

1 MR. BASCUAS: In the parties' mind. Both of us.

2 THE COURT: You both take the position that there is a
3 distinction, a significant legal -- legally meaningful
4 distinction between authorizing the boarding of the boat and
5 consenting to the jurisdiction of the United States?

6 MR. BASCUAS: That is what Footnote 9 says. And
7 Mr. Nuñez agrees with Footnote 9.

8 THE COURT: And what do the courts say?

9 MR. BASCUAS: What courts?

10 THE COURT: What do courts say about that point?

11 MR. BASCUAS: Oh.

12 THE COURT: Is there a legal distinction --

13 MR. BASCUAS: Your Honor, I have not found a need to do
14 any research on something that the parties agree about. So
15 since the parties agree that the amended PSI doesn't say that,
16 it isn't a point I pursued.

17 In any event, the PSI -- the parties' agreement about
18 jurisdiction never matters. Parties cannot stipulate to
19 jurisdiction. So the PSI is irrelevant.

20 THE COURT: I realize that's one of several arguments
21 that you're making about the PSI.

22 MR. BASCUAS: It's --

23 THE COURT: I get that. But that's a different issue.

24 MR. BASCUAS: I'm --

25 THE COURT: I'm on step one.

1 MR. BASCUAS: I'm explaining why I haven't researched
2 this point.

3 THE COURT: Okay.

4 MR. BASCUAS: Because it's agreed. And it's not the
5 most important point. That's why it hasn't been researched.

6 THE COURT: So let me just hear from the Government on
7 that one point.

8 Is there in your mind a distinction between Panama
9 consenting to the jurisdiction of the United States and Panama
10 consenting to the boarding of the vessel?

11 MR. YERA: Yes, Judge. In the our mind, there is. Not
12 to mean that we can't be wrong.

13 By way of explanation, Judge, the reason that I'm here
14 is because I drafted a significant portion of this response,
15 being the collateral litigation coordinator for the office.
16 I'm involved with lots of 2255s. I don't always put my name on
17 them for reasons that you can understand, Judge. But when
18 they're called for a hearing, I do appear.

19 So with regard to directly to your question, Judge,
20 Page 18 and 19, we quote from the PSI, the section that your
21 Honor indicated, having to do with the permission to board the
22 ship.

23 And then later on, we discuss Castaneda's PSI -- which
24 I'd have to agree with Mr. Bascuas, under *Iguaran*, we're not
25 allowed to use -- to make the second point that your Honor

1 asked about. And that is, that the Panamanians would have to
2 concede to the jurisdiction.

3 And then the last thing that I'll say to that, Judge,
4 with regard to that issue is on the last page of our motions,
5 the last two pages of our response, we cite to a diplomatic
6 note where the Government does concede to the jurisdiction, or
7 they say they do not object to the United States during --
8 taking --

9 THE COURT: Meaning Panama?

10 MR. YERA: Yes, sir.

11 THE COURT: Panama does not object to the US
12 jurisdiction?

13 MR. YERA: Yes. Exactly on Page 20, Judge.

14 THE COURT: Right.

15 MR. YERA: It says they "would like to express to the
16 Honorable Embassy of the United States of America that the
17 government of Panama do not object that your state exercise
18 jurisdiction over the vessel *Andrea I*."

19 THE COURT: Right.

20 And so where is this diplomatic note found?

21 MR. YERA: We -- well, Judge, we have that note in our
22 possession.

23 One of the reasons that I didn't cite to it is because
24 we believe that it was turned over in discovery. As I stand
25 here right now, Judge, I cannot tell you exactly where and when

1 that happened. But it is kept in the regular course of the
2 business documents that the Coast Guard maintains ordinarily in
3 all cases like this. In other words, they keep their own
4 reports --

5 THE COURT: So, counsel -- counsel --

6 MR. YERA: -- situation reports. And in those
7 situation reports, they have copies of the diplomatic notes,
8 Judge.

9 THE COURT: That's interesting to hear.

10 So maybe I phrased my question inartfully. Let me try
11 it again.

12 Where in the record can I find the diplomatic note?
13 Because when you're talking about an appeal or a 2255, the
14 Court looks to the record.

15 So I was hoping that you would say to me, "Oh, Judge,
16 it's found at ECF No. 137 in the criminal case, Attachment A."
17 Then we could say it's filed as a matter of record and either
18 an appellate court or me or a district court could say, "Aha.
19 That diplomatic note is in the record. And since we can't
20 stipulate to jurisdiction, the Court has to see whether there
21 are facts in the record to support jurisdiction."

22 And if the diplomatic note is in the record, we can
23 take a look at it.

24 So what you're telling me is, it's not in the record.
25 I think you're sort of -- that's the bottom line. It's not in

1 this record. Am I right?

2 MR. YERA: Yes, your Honor.

3 THE COURT: So can I rely on it if it's not in this
4 record?

5 MR. YERA: Well, if you'll allow me, Judge, to expand
6 on that, one of the things that I came here to do today was to
7 indicate to you that after reviewing this all again, the United
8 States would think that the better course would be to follow
9 the exact process that was followed in *Iguaran*, which is --

10 THE COURT: Remanding it for additional fact-finding to
11 give the Government the opportunity to show that there is
12 jurisdiction or was jurisdiction and give the defense the
13 opportunity to prove the contrary?

14 MR. YERA: That's exactly correct, your Honor. Your
15 Honor beat me to it. That's exactly correct.

16 And if I may, your Honor, if you look in Westlaw on
17 2016 Westlaw 44971 --

18 THE COURT: I'm sorry. 2000 --

19 MR. YERA: 2016 WL --

20 THE COURT: Yes.

21 MR. YERA: -- 4497158.

22 THE COURT: And what's --

23 MR. YERA: And that is, your Honor, an order from Judge
24 Gayles at the -- after -- following the remand where he makes
25 13 specific findings of fact and six conclusions of law in

1 *Iguaran* after the remand in that case.

2 THE COURT: I see. So that is, in fact, the
3 post-remand order of the trial judge in *Iguaran*.

4 MR. YERA: Right.

5 And lastly I'll say on that point, Judge, this is -- I
6 mean, this is something that -- well, let me just say it: In
7 that case, Judge Gayles did it himself. The United States
8 would have no objection to your Honor doing it and
9 recommending. But I just toss that out there in case that
10 becomes an issue, Judge.

11 THE COURT: So in this other matter that you just
12 mentioned to me, the 2016 Westlaw citation, was there a
13 supplemental or followup evidentiary hearing? Were there
14 additional evidentiary submissions made either by affidavit,
15 exhibit or some other submission? Or did Judge Gayles simply
16 go by the existing record?

17 I'm guessing he did not go by the existing record,
18 because the appellate court said: These facts are not in the
19 record; therefore, we need to remand it.

20 So where did Judge Gayles -- what source material did
21 Judge Gayles use for this order after the remand?

22 MR. YERA: I will read directly from the first page,
23 Judge. It said, "The Court held an evidentiary hearing on
24 August 25th, 2016, during which the Government proffered
25 evidence and presented testimony in order to meet their burden

1 of establishing that the vessel upon which the Defendant was
2 apprehended -- was apprehended was subject to the jurisdiction
3 of the United States."

4 Now, to be clear, Judge, that case involved a stateless
5 vessel. This is a little different.

6 But we don't think it's different in the procedure at
7 all. I understand Professor Bascuas would dispute that. But
8 we don't believe that there's any concrete difference
9 procedurally that would make this different from that to
10 distinguish, Judge, cases where you don't have jurisdiction and
11 cases where we're told that we didn't plead or prove
12 jurisdiction, which we believe to be the case here, Judge.

13 THE COURT: All right. So you think that this is more
14 of a technical defect as opposed to a factual omission, where
15 the facts simply don't exist?

16 You're telling me: Judge, look, you know,
17 Mr. Bascuas's argument is sort of hypertechnical. We actually
18 do have the evidence. Maybe we goofed. We didn't include it
19 in the record. Maybe we should have. Maybe we should have
20 framed our indictment a little more artfully. Maybe we could
21 have loaded up some additional facts in the factual proffer for
22 the plea agreement. So we procedurally messed up. But don't
23 worry. The facts are there.

24 As opposed to: My gosh, we didn't have the facts
25 before and maybe we'll never get the facts.

1 I think you're telling me the first category.

2 MR. YERA: That is correct.

3 THE COURT: So in effect -- well, let me ask you this:
4 Are you then in effect saying to me, "Judge, we agree that this
5 2255 petition should be granted at least in part for a remand
6 for additional fact-finding"? Is that another way of phrasing
7 what you're telling me?

8 MR. YERA: Well, Judge, I would like to say yes, but I
9 can't. And the reason that I can't is I believe that a fair
10 reading of Mr. Bascuas's 2255, which -- I mean, it's four pages
11 long. There's a lot in there in four pages. It's a little
12 broad. But I think a fair reading of that and a fair reading
13 of his reply don't indicate that he's willing to have this
14 remanded at all.

15 So I think that is --

16 THE COURT: I'm sorry. I did a bad job of phrasing my
17 question. So let me try it again.

18 Mr. Bascuas, if I'm wrong, you tell me.

19 I think the Defendant's petition or the Petitioner's
20 position is: Listen, this conviction should be vacated and
21 Mr. Nuñez should be set free. There should be no additional
22 evidentiary hearing. We shouldn't give the Government a second
23 bite at the apple. The Government had its chance. It didn't
24 meet its burden. So the conviction is faulty. There's no
25 jurisdiction. Now we shouldn't give the Government the

1 opportunity to show what it failed to show in the first place.

2 That's your position?

3 MR. BASCUAS: No, your Honor.

4 THE COURT: No?

5 MR. BASCUAS: My position is that you have no authority
6 to do any of that.

7 This is a collateral proceeding. The prosecution
8 against Mr. Nuñez is over. There's no way to remand this case
9 to the same court.

10 Judge Martinez in ruling on my appeal from this Court's
11 earlier denial of the motion challenging jurisdiction in the
12 case before I was forced to bring collateral proceedings,
13 because the Government has had five, five opportunities to
14 assert a cohesive jurisdictional theory and never did that
15 until I dismissed Mr. Nuñez's appeal voluntarily, closed that
16 case, and brought collateral proceedings.

17 There's no such thing as a remand. There's no such
18 thing as reopening the record at this point. The case is over.

19 *Iguaran* was on direct appeal. That's completely
20 different. Of course the Court -- of course the Eleventh
21 Circuit can remand a direct appeal for further fact-finding.
22 But you can't remand a case that's been closed.

23 Judge Martinez expressly held when he affirmed this
24 Court: This case is closed. Said that.

25 So that's the law of the case.

1 Also, this is a completely new argument that I
2 haven't -- this argument, with all due respect to opposing
3 counsel, should have been made when I first challenged
4 jurisdiction a year ago. A year ago.

5 Mr. Nuñez has been in jail for a year. Since I brought
6 up jurisdiction, I, having no knowledge of the case, not having
7 presided over it, not having prosecuted it, not having defended
8 it, when I challenged jurisdiction, they fought me tooth and
9 nail. They stalled. Mr. Nuñez has been in jail all that time
10 for a whole year.

11 And for them to now come in today and say, "Oh, you
12 know what? Mr. Nuñez's counsel has a point. He's been in jail
13 and there is no jurisdiction in the record."

14 *Iguaran* expressly requires jurisdiction must appear in
15 the record of every single criminal defendant's case. They've
16 conceded it doesn't. This 2255 is over. He needs to be
17 released. And there isn't a possibility for remand.

18 That is my position.

19 MR. YERA: If I may, Judge.

20 THE COURT: Yes.

21 MR. YERA: So --

22 THE COURT: By --

23 MR. YERA: Yes, Judge.

24 THE COURT: By the way --

25 MR. YERA: Yes, Judge.

1 THE COURT: -- I'm sure both of you are familiar with
2 Senior United States District Judge Paul Huck. Right? You're
3 familiar, both of you, with Judge Huck?

4 MR. YERA: Yes, Judge.

5 MR. BASCUAS: Yes.

6 THE COURT: So you may wonder, Gosh, why am I raising
7 Judge Huck's name now?

8 So here's why: So Judge Huck has certain phrases that
9 he is fond of saying. And one of Judge Huck's favorite
10 expressions is: Judges don't like surprises. And in fact, he
11 reads that mantra and invokes that mantra at judicial
12 workshops, seminars, bench and Bar meetings, et cetera,
13 whenever he's on a panel. And he even has a handout that he
14 passes out to lawyers, especially young lawyers, on "Judges
15 don't like surprises."

16 So in my mind's eye, I'm now picturing Judge Huck sort
17 of perched on my right shoulder here, because now for the very
18 first time you basically kind of throw a smoke bomb into the
19 proceedings. Surprise! And you say, "Guess what, Judge? We
20 sort of agree that we didn't prove up jurisdiction and we ought
21 to remand it to the trial court for some additional findings."

22 Now, setting aside Mr. Bascuas's point that because
23 this is a collateral proceeding you can't even remand it, why
24 are you coming up with this argument now for the first time at
25 a hearing?

1 By the way, I didn't have to schedule a hearing; I
2 chose to schedule a hearing after Mr. Bascuas filed a petition
3 for mandamus in the Eleventh Circuit.

4 So had I not scheduled the hearing and simply ruled on
5 the papers, apparently you never would have even brought up
6 this concession.

7 So what's going on? How is it that at the eleventh
8 hour, past the eleventh hour, like the thirteenth hour, you're
9 announcing this fairly dramatic shift in position? What the
10 heck is going on?

11 MR. YERA: All right, Judge. Let me try to explain.

12 First, Judge, to the extent that this comes up now,
13 it's all me. This is completely myself. It's not Ms. Botero.
14 This is totally on me. And it was my fault for not mentioning
15 it before.

16 But let me just explain to you, Judge. It's not
17 that -- well, first, in my defense, as I've said before,
18 there's a two-tiered argument going on here. One is, there is
19 no jurisdiction.

20 The other one is, you didn't plead or prove it.

21 Those are very, very different things. Okay? Which is
22 why we cited you the MDLE cases, et cetera.

23 With regard to the second part, Judge, I mean, we did
24 cite *Iguaran*. They did have a hearing. But your Honor is
25 right: We didn't ask for a hearing. I didn't put that in my

1 prayer for relief.

2 And I'm going to tell you why I do it now: Because ten
3 years in appeals has taught me that, while I think an
4 affirmance would come if your Honor voted for us or ruled with
5 us with regard to the MDLE cases and the other arguments we've
6 made, the fact is, one of the reasons that I think Professor
7 Bascuas doesn't cite a whole lot of cases with regard to, for
8 example, cause and prejudice in this context is because there
9 really aren't any or that many or -- or any on exactly this
10 point, to be precise.

11 So my -- my little person up here says to me, "You know
12 what? In order to be fair and safer, it is better to have a
13 complete record." That is the reason why I came in here.

14 And to -- for -- and just two more points, your Honor:
15 One, what would I have done had your Honor issued an R&R? What
16 I do all the time in *Johnson* cases, where I myself write
17 objections and say, I agree with the judge on these twelve
18 things. I did not ask for a prayer with the -- I mean, a
19 hearing in the prayer, which the exception is I'm asking for
20 one now. *Mea culpa*. I have done that, Judge.

21 And look, to be honest with you, you know, one of the
22 reasons that I've done this job is because of the *Johnson*
23 cases. I don't have to tell you how many we get. I've made a
24 fair amount of mistakes, Judge, looking at those cases because
25 the law is changing every week.

1 So I'm used to telling the judge: Not your fault; my
2 fault. I didn't ask for this before. I'm asking for it now
3 because I want a complete record.

4 And to the last point, Judge, to the last one, again,
5 in our defense, the fact is that frankly I don't understand how
6 some of Mr. Bascuas's argument makes sense. And let me just
7 put it in the plainest terms. And that is, what he is saying
8 is, Look, there's a habeas now.

9 The habeas is closed. I mean, I'm sorry. The case is
10 closed. So now this habeas does not allow you to reopen this
11 case to take evidence.

12 Really? How many times, your Honor, have you had
13 hearings where somebody has said, "My plea's incomplete; he
14 didn't tell me the whole story; I didn't -- I wasn't told that
15 there was a plea; he lied to me about it"? We get hearings in
16 that sense all the time.

17 And frankly, if we follow his logic to its extreme,
18 what that would mean is this: I'm a defense lawyer. I have
19 this problem that we have in this case. I say nothing about
20 it. Okay? Because if I directly appeal, then *Iguaran* says
21 we're going to have a hearing and I'm going to get, you know,
22 in trouble because they're going to present the evidence.

23 I'm going to wait. I'm not going to have -- I'm not
24 going to file my 2255 -- I mean -- I'm sorry -- my direct
25 appeal. I'm going to wait. Why? Because I think that if I

1 file a 2255, I'll get relief because they can't have the same
2 hearing in a 2255 setting that they would have been able to
3 have during a direct appeal.

4 How in the world does that make sense? It doesn't make
5 sense.

6 And again, along with this point, Mr. Bascuas in his
7 reply says that he doesn't understand where we get this
8 argument that on the habeas petition there's a higher standard.

9 Judge, that's legion. There are cases. *Brodie*. I
10 mean, there's a bunch of cases that say -- and it makes sense,
11 Judge, that in our system at every level, the standard gets a
12 little bit higher. I mean, just lately, you have *Beeman* coming
13 out and throwing out the whole *Johnson* thing saying: You know
14 what? The burden is always on the Defendant. Always, in 2255.

15 So the burden here is higher than it would be on direct
16 appeal. And it makes no sense that he would be able to skip
17 direct appeal, come here, file a 2255 and win because there's
18 no avenue to have a hearing when you would have to have one on
19 direct appeal.

20 THE COURT: So we're going to give Mr. Bascuas an
21 opportunity to address that issue.

22 Just have a seat, Mr. Bascuas. We'll get to you in
23 just a second.

24 But I'm not sure you adequately answered my first
25 question --

1 MR. YERA: Sure, Judge.

2 THE COURT: -- which is, why the surprise?

3 I mean, think about it. It's a very significant
4 concession. You're saying, Judge, we agree that the evidence
5 on whether or not there is maritime jurisdiction isn't in the
6 record sufficiently and therefore we ought to have an
7 evidentiary hearing back in the trial court and therefore
8 that's the result of this 2255 habeas petition.

9 I know Mr. Bascuas takes the position that that can't
10 happen. But still, this is a dramatic change in position. It
11 certainly wasn't mentioned in your opposition. Certainly it
12 wasn't even implicitly suggested.

13 So I'm just not understanding why suddenly now you're
14 strolling into this hearing with this change of position. I
15 just don't get it.

16 MR. YERA: And, Judge, all I can do is be as honest and
17 forward with you as I can be. And the only response that I can
18 give you is that I reassessed it and frankly I thought a better
19 record would be a complete record, because that way if your
20 Honor would rule on the MDLE cases and then rule on this on the
21 alternative, which some judges do all the time in 2255s, then
22 we could defend those both, because I would anticipate, Judge,
23 that this is going to go up. That's all I can say to you,
24 Judge.

25 THE COURT: So, Mr. Bascuas, let me ask you this

1 question. We all appreciate the distinction between a direct
2 appeal and a habeas. We all appreciate the fact that this is a
3 collateral proceeding.

4 But don't district courts grant evidentiary hearings in
5 habeas cases properly from time to time?

6 MR. BASCUAS: Your Honor, evidentiary hearings are
7 granted in habeas cases to prove ineffective assistance of
8 counsel. They're not granted to supplement the trial record.
9 That's completely different.

10 There's never been a hearing to supplement a trial
11 record under 2255 that I know of in the history of time. And
12 the Government hasn't cited a single case for that, nor has the
13 Government cited a single case for how, even with this
14 diplomatic note that they concede for the first time is not in
15 the record today, how that gives them jurisdiction over a man
16 who never left Colombia. That has yet to be explained. And
17 there is no cases for that either.

18 But before we get to that issue, let's go over the
19 points that the Government did make.

20 First, I appreciate that Mr. Yera is falling on the
21 sword for the United States of America. But this began in DE
22 247 in the criminal case, where the AUSA who -- I don't really
23 know of Mr. Quencer, but I assume he was the prosecutor below.
24 He took the position that the Government doesn't have to
25 explain jurisdiction. That was back on November 22nd, 2016, in

1 DE 247. That's more than a year ago.

2 So --

3 THE COURT: And what is DE 247? I don't have all --

4 MR. BASCUAS: That is --

5 THE COURT: -- 300 docket entries memorized.

6 MR. BASCUAS: That was the response to my motion for
7 clarification on my -- upon my appointment that your Honor
8 expressly asked for. Your Honor asked the Government to
9 respond to that motion.

10 And the response was: We don't have to explain
11 jurisdiction. We're just the United States.

12 So --

13 THE COURT: Give me just one second, please.

14 MR. BASCUAS: Sure.

15 THE COURT: Please continue.

16 MR. BASCUAS: I can hand up my iPad, if you like, your
17 Honor.

18 THE COURT: That's all right.

19 So we're at 247. AUSA Quencer says, We don't need to
20 argue jurisdiction.

21 MR. BASCUAS: That was the first chance the Government
22 had to explain itself. And, you know, the motion just said,
23 Listen. I've just been appointed. It doesn't -- I don't see a
24 basis for jurisdiction. Does anybody else?

25 And there was silence. Silence.

1 Here we are a year later and now the United States
2 says, Oh, you know what? He may have a point. And Mr. Yera
3 takes the blame magnanimously when in fact I don't really think
4 it's his fault.

5 The rule that I am -- that I have always been traveling
6 on is what *Iguaran* plainly states: The basis for jurisdiction
7 must appear in the record.

8 Maybe they have a diplomatic note in their back pocket.
9 But as *Iguaran* clearly holds, if it's not in the record, it
10 doesn't exist.

11 THE COURT: All right. So in *Iguaran*, it didn't exist
12 in the record. But the appellate court gave both sides the
13 opportunity to further flesh out that issue on remand and Judge
14 Gayles decided to handle the remand with an evidentiary
15 hearing.

16 MR. BASCUAS: Because the case was still live, your
17 Honor.

18 But the United States's position here is that
19 Defendants can't be allowed to -- we can't expect the
20 Government to make a complete record when it prosecutes
21 somebody. We have to give the Government a chance to fix the
22 record after the Defendant has appealed.

23 Except Defendants don't have to appeal.

24 And Mr. Nuñez in this case in fact didn't appeal until
25 seven months after his sentence. He filed a *pro se* notice,

1 which of course is, you know, as good as nothing, because it
2 was seven months late and there was no excusable neglect.

3 So what happened here was that there was no appeal.
4 The Government has to get it right the first time. That's what
5 it means when we say the Government has the burden of proving
6 guilt beyond a reasonable doubt. They get one try to do that.
7 Everybody has always thought that was fair.

8 That's why the Founding Fathers put the double jeopardy
9 clause right in the Sixth Amendment, because that's always been
10 considered a plenty -- plentiful opportunity to do the
11 Government's job.

12 They had a shot. All they had to do was put the
13 diplomatic note in the record and then explain how that
14 diplomatic note gives them jurisdiction over a man who never
15 left Colombia, which, again, we haven't even gotten to that.

16 So it's not that the Defendant is playing some kind of,
17 like, tricky little procedural game, as Mr. Yera seems to
18 suggest. It's really that the Government fumbled the ball.
19 And there are consequences for that. The Government can't
20 fumble the ball.

21 THE COURT: So let me just give you a hypothetical.
22 Let's say at the trial level the same thing happens. The same
23 factual proffer, the same inadequate factual proffer, the same
24 omissions, the same failure to create a proper record for the
25 maritime jurisdiction.

1 And let's assume back then that Mr. Nuñez had the
2 fortune of meeting you in time. And so you would have filed,
3 let's say, a timely notice of appeal. You needed -- let's say
4 you don't wait seven months. You just file a timely notice of
5 appeal. And you raise the lack of subject-matter jurisdiction.

6 So at that point, if it goes up on direct appeal, I
7 guess your position is, the appellate court, just like it did
8 in *Iguaran*, could have remanded it to give the Government in
9 effect another opportunity to prove it up. Even though it
10 dropped the ball the first time, we're going to give them the
11 opportunity to do it again.

12 Right so far?

13 MR. BASCUAS: I agree that's what *Iguaran* says.

14 THE COURT: Well --

15 MR. BASCUAS: I don't know if it's correctly decided.
16 But yes. If that had happened, then sure. They could do that
17 under the current law.

18 THE COURT: So maybe, you know, in your heart of
19 hearts, you disagree with *Iguaran*. Maybe you think the
20 appellate court got it wrong and the Government shouldn't have
21 been given a second chance. Maybe you think, Oh, that's just
22 the appellate court, you know, doing the Government's bidding.
23 The Government fumbled the ball back then. That's it. Game
24 over. And it should have simply been conviction reversed.
25 Done deal.

1 As opposed to: Let's give the Government the
2 opportunity to prove up in a remand what it should have done
3 initially.

4 But if that had happened, that is distinct from the
5 situation we have here where there really is no appeal because
6 the only notice was filed seven months late and now we're in a
7 2255 scenario where according to you there can't be a remand
8 for an evidentiary hearing on a jurisdictional point. There
9 can only be a remand in a 2255 to pursue ineffective assistance
10 of counsel arguments.

11 MR. BASCUAS: That would not be a remand either.
12 That's just -- that is a new evidentiary hearing on a new
13 claim. That's not a remand. There are no remands in 2255s.
14 That doesn't exist.

15 THE COURT: So when an evidentiary hearing happens in a
16 2255, it's simply part of the 2255.

17 MR. BASCUAS: It's part of a constitutional Sixth
18 Amendment ineffective assistance of counsel claim.

19 THE COURT: So, for example, if someone files a 2255
20 here in district court and then the trial court, the district
21 court, decides to hold an evidentiary hearing on the issue of,
22 let's say, whether or not defense counsel properly advised and
23 whether the Court properly advised the Defendant that he might
24 be deported if he enters a guilty plea if he's not a US
25 national, that's not a remand; that is simply a hearing in the

1 case?

2 MR. BASCUAS: Yes, your Honor.

3 And the easiest way to understand this is, let's think
4 about 2254.

5 THE COURT: Right.

6 MR. BASCUAS: You can't remand to the state court to
7 fix a state conviction. Collateral proceedings are collateral.
8 They're collateral because the main proceeding is finally --
9 and I don't mean "finally" like "It's about time"; I mean
10 "finally" like ultimately, conclusively -- concluded. That's
11 why it's collateral.

12 So in a 2254, if a federal court decides the state
13 court deprived the petitioner of the right to counsel or the
14 right to a fair cross-section jury -- I forget the standard --
15 then the Defendant would go free. We don't send them back to
16 state court to fix that.

17 THE COURT: Right.

18 MR. BASCUAS: So collateral proceedings are very
19 limited. You can only raise jurisdiction and a few
20 constitutional claims. We happen to have one of those claims
21 in this case. And that's it. In the interest of finality, the
22 criminal prosecution of Yency Nuñez concluded no later than
23 Docket Entry 247, November 22nd, 2016.

24 And shortly thereafter, Judge Martinez confirmed that,
25 said this case is done.

1 And so, you know, that's -- that's -- 2255s are very
2 limited things. It's -- you know, I understand the
3 Government's frustration at the fact that their record wasn't
4 perfected. But this is not some kind of, like, technicality or
5 gamesmanship. This is what happens in every
6 sufficiency-of-the-evidence case.

7 If you're a defense attorney and the Government fails
8 to prove that the gun traveled in interstate commerce in a 922
9 case or that the drugs in fact were cocaine, if they forget to
10 admit the lab report, the defense attorney doesn't have to say,
11 Excuse me, Mr. Prosecutor. You forgot to move the lab report
12 into evidence.

13 That's not how common law works. It's an adversary
14 system. You're responsible for making your own case.

15 They didn't make their case. Mr. Nuñez needs to go
16 free.

17 THE COURT: So you have a case from the Government's
18 perspective where in a 2255 petition, the Court permits an
19 evidentiary hearing to go forward in order to give the
20 Government the opportunity to prove up a critical element,
21 namely jurisdiction -- you can't get more critical than that --
22 which it failed to establish before.

23 MR. YERA: Well, Judge, let me -- that -- respectfully,
24 I don't like the phraseology of that question. And let me tell
25 you why I don't, if I may. And if your Honor wants me to

1 answer it -- but let me just try to clarify that. If your
2 Honor still wants me to answer that, I will attempt to answer
3 that.

4 But this case -- and again, it goes to my point of
5 looking at the entire record, having a complete record -- is a
6 little strange for this reason: If you look at *Iguaran* on the
7 first page, it says, "The act" -- and it's talking about the
8 MDLEA -- says, "The act also states that jurisdiction of the
9 United States with respect to a vessel subject to this chapter
10 is not an element of an offense and that jurisdictional issues
11 arising under this chapter are preliminary questions of law to
12 be determined solely by the trial judge."

13 THE COURT: Where are you reading from? I have *Iguaran*
14 right in front of me.

15 MR. YERA: It's on Page 1336, Headnote 3.

16 THE COURT: All right. Got it. Yes.

17 MR. YERA: So that's sort of odd. I don't know of many
18 statutes off the top of my head that do that that, say it's not
19 an element of offense that has to be proved, but it's only for
20 the trial judge to decide, which I would argue bodes in our
21 favor.

22 Now, to your Honor's question, having said that, Judge,
23 if you look at the wording of 2255 -- and let me just be
24 direct: I'm trying to think of instances where we have
25 constitutional claims that are not ineffectiveness claims. I'm

1 trying to think of the myriad *Johnson* claims that we've had
2 where we've had an evidentiary hearing or -- but, see, again,
3 Judge, those -- when you say "crucial element of the offense,"
4 then my answer would have to be, I think, no.

5 But I take issue with the way your Honor has phrased
6 "crucial element of the offense" belonging here because of what
7 I just read to you.

8 So if you look at the statute itself, I understand that
9 ineffectiveness is a large part of 2255. But the 2255 statute
10 says, "claiming the right to be released upon the ground that
11 the sentence was imposed in violation of the Constitution or
12 laws of the United States or that the Court was without
13 jurisdiction."

14 Paragraph B says, "Unless the motion and the files and
15 records of the case conclusively show that the prisoner is
16 entitled to relief, the Court shall cause notice thereof to be
17 served, grant a prompt hearing thereon, determine the issues
18 and make findings."

19 That language is broad in the 2255 context.

20 And lastly, again, Judge, his burden: If he would show
21 me a case that would limit us -- I mean, I'd be glad to rebut
22 it. But I don't think that exists, Judge.

23 THE COURT: So I actually like my phrasing better.

24 MR. YERA: Uh-huh.

25 THE COURT: Imagine that.

1 So do you in fact have a case that stands for that
2 proposition that in a 2255 case challenging jurisdiction, the
3 Court can hold an evidentiary hearing to plug up some critical
4 holes that it failed to fill below?

5 MR. YERA: No.

6 THE COURT: Thank you.

7 Mr. Bascuas, you have something further that you'd like
8 to say?

9 MR. BASCUAS: Yes, your Honor.

10 Just the rest of 2255(b), which says, "or shall dismiss
11 the case and set the prisoner free." That's the last part of
12 2255(b).

13 THE COURT: I understand.

14 MR. BASCUAS: Right.

15 I don't know if your Honor wants to hear about the lack
16 of jurisdiction over a Colombian national in Colombia.

17 THE COURT: Well, this is sort of an interesting case,
18 because the Defendant as I understand it was not on the vessel.
19 He was supposedly back in Colombia planning illegal shipments
20 of [inaudible] vessels, but he himself was not aboard a vessel
21 subject to the jurisdiction of the United States.

22 So yes. I would like to hear a little bit about that.

23 MR. BASCUAS: So, your Honor, I have tried to find any
24 case where that happened. I failed to find one.

25 The Government in its many opportunities to address

1 jurisdiction in this case has never cited one. And every --
2 every section of the Maritime Drug Law Enforcement Act uses the
3 phrase "on board a vessel." Every section. The definitions
4 section, the jurisdictional section, the prohibited acts
5 section. The phrase "on board a vessel" appears all over the
6 statute.

7 And I submit to the Court that the reason there are no
8 cases like this one and the reason that that phrase appears all
9 through the statute is because there's binding Eleventh Circuit
10 cases that say the United States doesn't have jurisdiction over
11 crimes committed in Colombia.

12 THE COURT: Understood.

13 So do you have, for example, a case, hopefully either a
14 Supreme Court case or an Eleventh Circuit case, upholding a
15 conviction of a defendant under the MDLEA where the Defendant
16 was not in fact on board the vessel?

17 MR. YERA: Excuse me one second, your Honor.

18 So, Judge, we -- I guess let me just say it this way:
19 I don't have a case right now at my fingertips that has that
20 situation in an affirmance, et cetera.

21 We do, however, have cases that have been affirmed by
22 the Eleventh Circuit where that's happened.

23 I don't know if on that particular point -- and mainly,
24 Judge, the reason is that I don't have that at my fingertips is
25 because in my thinking, the statute -- and again, here's where

1 the whole dual thing of no jurisdiction or not pled comes in --
2 the whole MDLE statute is so broad that, frankly, Judge, this
3 happens all the time.

4 So I could certainly supplement the -- our pleadings
5 with cases where that has happened and where there have been
6 affirmances; but I can't stand here right now, Judge, and say
7 that they've been affirmed on that basis, in other words, that
8 the person that --

9 THE COURT: Right. Well, that was really my point.

10 MR. YERA: Sure. And I understand that, Judge.

11 THE COURT: Because let's just say hypothetically you
12 say to me, Well, Judge, in the case of the *United States versus*
13 *Jones*, the Defendant was not aboard the vessel. He was sitting
14 in an apartment in Panama. Eight other Defendants were on
15 board the boat, but he was convicted. And the Eleventh Circuit
16 affirmed.

17 Well, that's interesting. But unless somebody raises
18 the issue that he wasn't on board the vessel and the statute
19 doesn't apply, then the fact that he happened to be not on the
20 vessel is a mere fortuity which doesn't have any legal
21 significance if the appellate court doesn't wade into that
22 issue.

23 So as I recast my question, I should phrase it this
24 way: Are you aware of any appellate case where the appellate
25 court, when confronted with the issue of whether the MDLEA can

1 assert jurisdiction over a defendant not on board a vessel,
2 addressed the issue of a defendant not on board the vessel and
3 discussed whether or not it was a crime and whether or not
4 there was jurisdiction? Are you aware of such a case?

5 MR. YERA: No, I am not. But I am not aware of a case
6 to the contrary. And in that context, I would say again: his
7 burden.

8 THE COURT: And, Mr. Bascuas, you said that you're not
9 aware of a case either way either?

10 MR. BASCUAS: Correct, your Honor.

11 I'm -- regarding the burden, the party invoking the
12 jurisdiction of the Court always has the burden of proving
13 jurisdiction. And that never goes away. That burden never
14 shifts.

15 Because the Government is supposed -- you know the
16 frustrating thing about this case, your Honor? And I
17 understand that Mr. Yera's come in at a late hour and is
18 defending a record that he's not responsible for.

19 But the frustrating thing about this case is that when
20 the Government indicts a person, especially when they take him
21 out of his home country, away from his family, away from his
22 resources, where he can defend himself properly, and ships him
23 internationally to a foreign land and then prosecutes him and
24 keeps him in jail for two years, they should have a
25 jurisdictional theory in advance.

1 And in fact, the Supreme Court has said that in *Steel*
2 *versus* -- I forget the last part -- *Steel Company*. I'll find
3 it. It's cited in my papers.

4 But, you know, it's not the time to establish
5 jurisdiction two years into the Defendant's sentence. The time
6 to do that is before you take a man out of his country and away
7 from his family, not after.

8 And the Government didn't do any of that work in this
9 case.

10 And so, your Honor, you know, it isn't -- it really
11 isn't fair to Mr. Nuñez. You know, this isn't like -- we're
12 going to do legal research anyway, the clinic students and I.
13 We've got plenty of cases. We could research this one or
14 another one.

15 But it isn't fair to Mr. Nuñez for the Government to
16 keep constantly asking for one more chance and another chance
17 and a little bit more time and if you'd just let us do this,
18 we'll get it right.

19 Mr. Nuñez has been in jail for two years. And the
20 Government can't articulate a jurisdictional theory for that.
21 It's time to release him. He should be home for Christmas.

22 MR. YERA: Judge, if I may, just to clarify this for
23 this record --

24 THE COURT: Wait just one minute, please.

25 MR. YERA: Sure.

1 THE COURT: So, Mr. Bascuas, I'm going to follow up on
2 your comment that the Government always has the burden to
3 establish jurisdiction.

4 Now --

5 MR. BASCUAS: The party invoking the Court's
6 jurisdiction.

7 THE COURT: Okay. Which in this case, in a criminal
8 case, is the Government.

9 So I'm aware of the legal doctrine that a court can
10 address jurisdiction at any time, even *sua sponte*. I think you
11 also cited that in your own papers. Correct?

12 MR. BASCUAS: Yes, your Honor.

13 THE COURT: Okay. But that's a different point than
14 the point you just raised, which is that the Government must
15 always assume the burden of establishing jurisdiction.

16 So is it your view that in a collateral challenge under
17 2255, it's the Government's burden to establish jurisdiction or
18 is it the habeas petitioner's burden?

19 MR. BASCUAS: The petitioner has the burden of
20 establishing jurisdiction over the petition. But if the
21 challenge is to the jurisdiction of the underlying criminal
22 court --

23 THE COURT: Correct.

24 MR. BASCUAS: -- the Government has that burden because
25 the party that invoked that Court's jurisdiction, presumably,

1 they did a little research before they brought the indictment,
2 the same way a civil law firm will research diversity and
3 amount in controversy and all those things before you file a
4 complaint. You don't do that after; you do that before.

5 THE COURT: So, Mr. Yera, do you agree that it is
6 always the Government's burden to establish subject-matter
7 jurisdiction over the case?

8 MR. YERA: In a habeas context, your Honor?

9 THE COURT: I didn't put it that way --

10 MR. YERA: Initially, yes, Judge.

11 THE COURT: -- but --

12 MR. YERA: But in this context, again, I have to keep
13 going back to the fact that, okay, you have cause and
14 prejudice. Let's put cause aside. He's saying he's been
15 prejudiced.

16 Well, the prejudice would be they don't -- they haven't
17 proved and pled jurisdiction.

18 Well, okay. If he -- if he meets that threshold
19 initially, I would agree that the Government then has to
20 respond to that. And today, I have said, we are prepared to do
21 that. We have a diplomatic note.

22 So, you know, there are lines, Judge.

23 So yes. If he meets the initial threshold in a habeas
24 context, then we have to come back and we have to rebut that.
25 And we're prepared to do that.

1 THE COURT: So is that your way of saying yes?

2 MR. YERA: Yes, in the way I phrased it. Yes, your
3 Honor.

4 THE COURT: "Yes, in the way I phrased it." That --

5 MR. YERA: Judge, I'm not trying to be coy. I'm
6 separating the initial jurisdiction up front with the
7 jurisdiction now.

8 And why am I doing that? Because again, Judge, I read
9 that section from *Iguaran*, and it says you've got to bring up
10 jurisdiction in front of the trial court. It doesn't say the
11 United States has to do it. It says somebody has to bring it
12 up. And I can't but help to be clear that we are in a habeas
13 context. And given that, that has to mean something. And it
14 means cause; it means prejudice; it means how we got here.

15 And this would be a different matter, Judge, if we
16 didn't have the diplomatic note.

17 MR. BASCUAS: Your Honor, could --

18 THE COURT: Not yet.

19 I'm going to try to get at this one more time. And
20 maybe it's my fault for asking an inartful question. So I'm
21 going to try to phrase my question in a fairly simple,
22 straightforward way that should be susceptible of being
23 answered yes or no, not "Yes, as I have phrased it" or "No, as
24 I have phrased it" or "Yes, as I'm dancing it on the head of a
25 pin," but you just yes or no. So I'm going to do my best.

1 Is it the Government's position that -- let me start it
2 differently.

3 Do you have legal -- let me start again.

4 Do you challenge Mr. Bascuas's legal position that the
5 Government always has the burden, whether at the trial court or
6 on appeal or in a habeas petition, to establish jurisdiction
7 over the case?

8 MR. YERA: Yes.

9 THE COURT: Okay. Why?

10 MR. YERA: Because -- and now, Judge, going back to my
11 answer, your Honor said at the initial appeal habeas. I would
12 agree. Initially, the burden is ours. Right?

13 But once that chance passes and once you don't object
14 to it, now we're at the habeas stage. And because of that, he
15 has to show prejudice. And the prejudice would be they didn't
16 prove and plead. And we're ready to prove and plead.

17 THE COURT: All right. So --

18 MR. YERA: Because I've already admitted to you --
19 Judge, I'm sorry. I didn't mean to interrupt you.

20 Because I've already admitted to you, Judge, that we
21 need that second portion that says that the country gave us
22 jurisdiction or did not object to our jurisdiction.

23 THE COURT: So let's break it down into different
24 stages: trial court, appellate court, collateral habeas
25 setting.

1 We're now in Stage 1, the trial court.

2 Do you agree that the Government always has the burden
3 to demonstrate sufficiently subject-matter jurisdiction?

4 MR. YERA: Yes.

5 THE COURT: Now we're at the appellate level, direct
6 appeal.

7 Do you believe that the Government always has the
8 burden to establish subject-matter jurisdiction over the case
9 in a direct appeal?

10 MR. YERA: No. Why? Because in this instance, if this
11 provision is cited, I would say, you didn't raise it at the
12 trial court. Now you have to do it by -- I would have said
13 plain error. But *Iguaran* tells me clear error. So it would
14 have to be clear error.

15 MR. BASCUAS: Your Honor, may I respond?

16 THE COURT: Not yet.

17 MR. YERA: And I'll tell you where it says that, Judge.
18 It says it -- because in that case, Judge, we made -- the
19 United States made the argument -- if I can find it. Here. We
20 made the argument -- well, let me just say: As an initial
21 matter, the Government contends that "we should review only for
22 plain error" -- this is on the same page as before, Judge --
23 "because *Iguaran* did not raise the jurisdictional objection in
24 the district court.

25 "The Government is wrong.

1 "The district court's subject-matter jurisdiction is a
2 question of law that we review *de novo* even when it is raised
3 for the first time on appeal."

4 And then it goes on to raise clear error.

5 But again, it's applying a standard, which is why it
6 wouldn't be the standard we like. And by the way, there's a
7 lot of cases that say that the appellate standard again is
8 lower than that on habeas.

9 THE COURT: So what you're saying is, on appeal, if the
10 Defendant didn't raise it below, it can in fact be reviewed and
11 considered *de novo*. But you're just saying at that point it's
12 no longer the Government's burden; it's the Defendant's burden?

13 MR. YERA: That's correct.

14 THE COURT: And then in the third setting, the
15 collateral habeas setting, is it your view that it's the
16 Government's burden to establish jurisdiction or is it the
17 habeas petitioner's burden?

18 MR. YERA: Initially, it would be the habeas
19 petitioner's burden.

20 THE COURT: To show what?

21 MR. YERA: Well, to get -- well, to get to the point
22 where he rebuts the fact that there is -- "rebuts" is the wrong
23 word, because we have to do that -- where he gets to the point
24 that he makes a *prima facie* case that there is no jurisdiction,
25 as he has done in this case, I have to admit -- I'm sorry. Not

1 that there is none, but it hasn't been proved and pled. Let's
2 be very clear about that.

3 And now we have the burden to come back and say we --
4 see, he has to -- well, actually, Judge, he has to prove -- if
5 your Honor finds that he has to prove prejudice, then he's got
6 to show that we don't have it. So we would have a hearing.
7 But it's still his burden.

8 So let me not put the onerous [sic] on us. But, of
9 course, we'd have to present the witnesses.

10 Judge, in many 2255 hearings I'm sure you've had, it's
11 their burden. But we go first. Why do we do that? Because we
12 have the evidence. So....

13 THE COURT: Yes, Mr. Bascuas.

14 MR. BASCUAS: Your Honor, Mr. Yera is correct that the
15 2255 petitioner generally only has the burden of making a *prima*
16 *facie* case.

17 In this case, all I required Mr. Nuñez to do is scour
18 the record and make a good-faith assertion that the record is
19 devoid of any evidence of jurisdiction, as everyone now agrees
20 that this record is.

21 Now, I'm not sure why we're talking about prejudice,
22 since on my reply, Docket Entry 12, Pages 1 through 2, I cite
23 one, two, three Eleventh Circuit cases with parentheticals that
24 all say, "We have held that a jurisdictional defect may not be
25 procedurally defaulted and that therefore a defendant need not

1 show cause and prejudice to justify this failure."

2 So there's three cases that are all binding that say
3 that.

4 And on Page 4 of Docket Entry 1, the amended verified
5 petition for habeas, it says at the very top of the page, "The
6 Government bears the burden of establishing that the statutory
7 requirements of subject-matter jurisdiction imposed by the
8 MDLEA have been met," *United States versus Tinoco*, Eleventh
9 Circuit, 2002.

10 So the United States needed to do this in their
11 response to this document, not months and months and months
12 later at a hearing where they're making brand-new arguments
13 that have never been made before the entire long time that
14 Mr. Nuñez has been in jail waiting for somebody to explain why
15 the United States has the power to drag him away from his
16 country and put him on trial and put him in prison.

17 THE COURT: Well, when you say the Government should
18 have done this in its response, what do you mean by "this"?
19 What do you believe the Government should have done in its
20 response --

21 MR. BASCUAS: To --

22 THE COURT: -- to this habeas petition but has not
23 done?

24 MR. BASCUAS: Number one, they should have said: We
25 admit that the standard set by *Iguaran* is not met. The record

1 in this case does not establish jurisdiction, period. That
2 should have been done immediately.

3 And in fact, there's an Eleventh Circuit case called
4 *Fitzgerald* that says parties are obligated to admit the lack of
5 jurisdiction. It's a civil case.

6 And the Eleventh Circuit goes on to say: And when they
7 don't do that, they should be sanctioned. That doesn't apply
8 to the United States of America. That doesn't apply in
9 criminal cases.

10 I only point that out because --

11 THE COURT: What's the name of that case, sir?

12 MR. BASCUAS: *Fitzgerald*, your Honor.

13 THE COURT: Is that cited in your reply?

14 MR. BASCUAS: It is. It's cited in many of these
15 things. I'll get your Honor a cite before the hearing's over.

16 And so the first thing they should have done was been
17 candid about that and said: Look, jurisdiction's not in the
18 record.

19 And then if they have arguments about why they can
20 exercise jurisdiction over a Colombian national who never left
21 Colombia or that they can reopen the record and they can do all
22 these things that they suddenly want to do, now in December of
23 2017, not November of 2016, they'd have all these things they
24 suddenly want to do, that should have all been in the response.
25 That should have all been explained, with cases, authority, so

1 that then Mr. Nuñez and his counsel could understand the
2 argument and fashion a cohesive reply for the benefit of the
3 Court.

4 But none of that's happened. And it's -- your Honor,
5 it's really a little bit, you know, unfair to this man who's
6 been in jail for two years to have these arguments made today
7 for the first time. Not a little bit; a lot. Egregiously
8 unfair.

9 MR. YERA: Judge, I don't know what "these arguments"
10 are. But let's clarify something here, to be clear.

11 Mr. Yency Nuñez was not rendered. He came to this
12 country through an extradition, through process. He's had two
13 lawyers. And if the Government -- before Mr. -- Professor
14 Bascuas. If the Government's going to take it on the chin for
15 this stuff before, well, those lawyers didn't read -- raise
16 these claims; and that's why we're here on an ineffective claim
17 and that's what we're here for.

18 I understand it's Christmas and I understand we all
19 want to be beneficent. But I don't want to make it sound like
20 this guy came here because we dragged him here. He's been
21 through process. He's been in front of the Court. He's had
22 two lawyers.

23 Secondly, Mr. Bascuas cites to the --

24 THE COURT: Well, maybe we just don't like the word
25 "dragged." But when there's an extradition request made and

1 Mr. Nuñez is brought here against his will, I mean, maybe he
2 wasn't literally dragged across the ground, but he was brought
3 here against his will pursuant to an extradition request. He
4 was in Colombia. He was never on the boat in the first place.
5 And I can appreciate Mr. Bascuas's point that the man may be
6 saying: What's going on? Here I am sitting in my home in
7 Colombia and then, you know, months later, suddenly I'm in a US
8 District Court in Miami. How did that happen?

9 MR. YERA: You know, Judge, I'm one of the few AUSAs
10 having grown up in a ghetto that understands that everybody is
11 entitled to a defense. And I respect that, and that's what
12 makes this a great country.

13 But having said that, Mr. Yency Nuñez couldn't have
14 been that shocked when there were recordings that I have
15 read -- I mean -- I'm sorry -- the synopsis that I have read
16 from the agents indicating that he was on the phone talking
17 about cocaine and that's why it was attached, using coded
18 language, attached to his extradition package.

19 So it couldn't have been shocking to him that something
20 happened.

21 My only point is, Judge --

22 THE COURT: What I mean is perhaps surprised that he
23 was charged with being aboard a vessel subject to the
24 jurisdiction of the United States when he never was on a vessel
25 in the first place.

1 MR. YERA: He was charged in a --

2 THE COURT: That's part of the surprise.

3 MR. YERA: He was charged in a conspiracy, Judge --

4 THE COURT: Understood.

5 MR. YERA: -- which is different, I think, than being
6 charged on a vessel. But I take your point. But he was
7 charged in a conspiracy. I think it was a one-count indictment
8 and conspiracy.

9 So having -- and, Judge, just let me get to the other
10 point. Let me just make sure. Yeah, Judge. It's a one-count
11 indictment.

12 To Mr. Bascuas's other point, Judge -- and let me
13 just -- it's on -- he made reference to Docket Entry 12. The
14 first three cases on the front do not say -- let me just try to
15 say this a little more artfully.

16 They do not -- they're not holding that if you have a
17 situation like this where there is a jurisdictional defect and
18 we didn't come forward to present evidence that cause and
19 prejudice does not apply. They don't say that, Judge.

20 The first case, *Howard*, is about uncounseled
21 convictions.

22 THE COURT: Which page are you on, sir?

23 MR. YERA: On page -- Docket Entry 12, Page No. 1. The
24 three cases he cites.

25 So just to make it -- I know your Honor's going to read

1 this, the cases. But the first one, *Howard*, is about
2 uncounseled convictions when *Shelton* came out and said: You
3 can't use uncounseled convictions to enhance somebody's
4 sentence.

5 The second one, *McCoy*, is an *Apprendi* error. And that
6 case as a matter of fact said that since *Apprendi* wasn't
7 jurisdictional, it was procedurally barred. But it does have
8 the language that says that a procedural bar does not apply
9 when you have no jurisdiction. And we've never disputed that.

10 And the third case, *Harris*, right there on its face is
11 about cause and prejudice and attacking an enhanced sentence
12 because of a jurisdictional claim that was not procedurally
13 faulted: Again, Judge, not like this case.

14 I can't find any case and I don't think Mr. Bascuas --
15 or Professor Bascuas has found one that says that he doesn't
16 have to show that he was prejudiced, you know, after the time
17 for appeal has passed because, ordinarily, Judge, he would say:
18 Okay. I'm prejudiced.

19 How are you prejudiced?

20 Well, I'm prejudiced because they didn't have
21 jurisdiction or whatever.

22 Let's assume he says that.

23 Then what would happen? Then we would have to show we
24 do have jurisdiction. Either we'd show it on the papers or
25 we'd show it like we're attempting to do by saying: Look at

1 *Iguaran*. I mean, we have the diplomatic note; but for a full
2 and complete record, we'd present evidence.

3 So those cases, Judge, are just not applicable. And
4 I'm not going to belabor that because of course your Honor's
5 going to decide whether they are or not. And I understand you
6 can read better than I can.

7 But that's the position we would take, Judge.

8 THE COURT: So I'm thinking back to one of the classic
9 fact patterns that we studied even back in law school and as a
10 young prosecutor where you were taught how important it is to
11 establish all the prerequisites of the case and the elements of
12 the offense and jurisdiction.

13 And so let's say you're in state court and somebody is
14 being prosecuted for robbery and the defendant is guilty as all
15 get-out and there's plenty of evidence; there's eyewitness
16 testimony; et cetera, et cetera, et cetera.

17 But the prosecutor neglects to establish venue, a
18 critical part of a crime. They just -- they're so enthralled
19 with their evidence in the case and they're doing such a
20 wonderful job that they forget the basic element of venue.

21 So then the case goes up on appeal: failure to
22 establish venue. Keep in mind that, otherwise, the defendant
23 is guilty. They have, you know, photographic evidence; they
24 have eyewitness testimony; they have DNA; they have CSI-type
25 evidence; maybe a confession. But for some reason, this

1 element of venue isn't in the record.

2 The case goes up on appeal: Nothing in the record on
3 venue.

4 Can the appellate court send it back to say: All
5 right. We're going to give you another bite at the apple.
6 Prove up venue. Can that happen?

7 MR. YERA: I'm trying to think of instances where it
8 has happened. Normally, what we've done in that situation,
9 Judge, is we've just reindicted the person.

10 But I think -- I think it can.

11 THE COURT: You reindicted them? I mean --

12 MR. YERA: Meaning -- in cases where we found there was
13 a venue problem, we superceded the indictment.

14 THE COURT: Well --

15 MR. YERA: But your point is, we've gone before that.

16 THE COURT: Well, before the conviction. I'm talking
17 about it goes up on appeal after conviction.

18 MR. YERA: We're at the appellate court after he's been
19 convicted? There's no venue?

20 THE COURT: Right.

21 MR. YERA: I --

22 THE COURT: They just blew it. They blew it. To use
23 Mr. Bascuas's analogy, they fumbled the ball. They dropped the
24 ball. That's it. You don't get a second bite at the apple.
25 You don't get a second trial to do a better job than you did

1 the first time.

2 MR. YERA: I understand your question now, Judge.

3 THE COURT: How is that any different than this
4 situation here?

5 MR. YERA: Because again, Judge, we're in collateral
6 review, which is completely different.

7 And, Judge, we have *Iguaran*, which tells you what?
8 Which tells you that you can present evidence. How can you --
9 how can you present it at the initial appeal and not now? That
10 makes no sense, Judge.

11 Like I don't understand why if I were a defense
12 attorney I would skip. And by the way, you jump cause and
13 prejudice. There's no case for doing that. I've never seen
14 that. I mean, it's possible that your Honor may rule that way.
15 But I just don't know of anything that I've ever seen in the
16 2255 context that does that, Judge.

17 THE COURT: So, Mr. Bascuas, what about that point?
18 You have a fundamental aspect of the case that the Government
19 needed to prove in *Iguaran*, namely jurisdiction. They dropped
20 the ball. They didn't do it. They messed up. They bumbled.
21 They fumbled.

22 The case goes up on appeal. And the appellate court
23 says: You're right. There's no record evidence in this
24 record. We can't rely on the PSI from another Defendant. So,
25 yes, we, the appellate court, agree there's no jurisdiction in

1 the record.

2 But basically what the appellate court did is, it did
3 in fact give the Government a second bite at the apple. They
4 send it back on remand for an evidentiary hearing to give the
5 Government the opportunity to plug in the holes that it forgot
6 to fill in the first instance.

7 So what about that?

8 MR. BASCUAS: So let me explain that with reference to
9 retroactivity law.

10 When you have a *Johnson* situation or some guidelines
11 situation or some other rule of law and the Supreme Court
12 decides -- *Crawford* is a good example -- and the Supreme Court
13 decides, "We're going to make a change in the law," all the
14 cases that are in the pipe that are on direct appeal get the
15 benefit of the rule, because they're live cases.

16 But when you're not on direct appeal, when you're
17 collateral, you don't get the benefit of that unless the
18 Supreme Court makes the rule retroactive, because there's a
19 difference between a live case, right, a live criminal case and
20 a collateral civil habeas proceeding which has its own rules,
21 the 2254, 2255 rules governing habeas, and its own limited
22 procedures because we're only looking to correct a narrow class
23 of constitutional-level errors. Okay?

24 So those are not live cases. Those are just habeas
25 petitions brought to make sure that your detention, habeas

1 corpus, produce the body, your detention comports with the
2 United States Constitution. That's the only question on a
3 habeas case.

4 And so there's no remanding; there's no do-overs;
5 there's no "Give us one more chance." It's: Did you comply
6 with the United States Constitution in the one and only chance
7 you had to prosecute Yency Nuñez? Yes or no.

8 That's the law. I didn't make it up. It's just what
9 it is.

10 THE COURT: So let's try to stick with my question. I
11 didn't talk about retroactivity cases. We're not talking about
12 collateral proceedings. Let's just focus on this case within
13 the past year and a half decided by the Eleventh Circuit Court
14 of Appeals, *Iguaran*.

15 Not collateral; direct appeal. Right from the trial
16 court to the Eleventh Circuit.

17 MR. BASCUAS: Live case.

18 THE COURT: Live case.

19 The Government drops the ball. Failed to establish
20 jurisdiction. Not in the record.

21 The appellate court rejects all of the Government's
22 efforts to explain away the jurisdiction or to rely on other
23 arguments.

24 So basically, the appellate court said: Yes. We
25 agree. No record evidence of jurisdiction.

1 So what does the appellate court do? It could have
2 said, basically -- it could have said: The evidence is
3 insufficient. We reverse. Case over. The Government doesn't
4 have an opportunity to try him again or to plug up the holes
5 again. Double jeopardy. You had your one time. You failed.
6 That's what the Eleventh Circuit could have done. Maybe in
7 your view that's what it should have done.

8 But it didn't. It sent it back to give the Government
9 a second chance.

10 So maybe ultimately your theory is correct. Maybe if
11 you were deciding *Iguaran*, you would have done something
12 different. Maybe you would have said: That's it. Reversed.
13 Not remanding it. It's basically insufficiency. Not
14 jurisdiction. We're not going to give you another bite at the
15 apple.

16 But given the choice between following the law as
17 articulated by Bascuas or the Eleventh Circuit, no insult
18 intended, I've got to follow the Eleventh Circuit.

19 MR. BASCUAS: Of course.

20 THE COURT: So what the Eleventh Circuit says is: In
21 that case, we're going to give the Government an opportunity to
22 do what it should have done the first time, even though the
23 record is devoid.

24 So how do you square that, giving the Government a
25 second bite at the apple, with your argument that it should not

1 happen?

2 MR. BASCUAS: With *Iguaran* itself. *Iguaran* itself says
3 the record of every criminal case has to show a basis for
4 jurisdiction.

5 THE COURT: And it didn't.

6 MR. BASCUAS: And it doesn't.

7 THE COURT: Right.

8 MR. BASCUAS: And so the question then becomes not:
9 Does the Government get a second chance? The question is: Is
10 the criminal case still live? That's the question.

11 In *Iguaran*, the answer was yes. And so they did what
12 they did.

13 THE COURT: I'm pretty sure that the opinion in *Iguaran*
14 doesn't talk about whether the case is alive or dead.

15 MR. BASCUAS: There was no need to. There was no --
16 there was no dispute about that. In other words, that wouldn't
17 come up in that situation because it is a live case. Everyone
18 knows it's a live case. Everyone knows that the Court of
19 Appeals can do limited remands. It can do full remands. It
20 can do lots of things.

21 THE COURT: But in your typical appeal -- let's say
22 there's a direct appeal on a sufficiency basis, or the argument
23 is insufficiency of evidence. The record either shows what the
24 Government needs to show or it doesn't.

25 So I'm not talking about *Iguaran*. I'm just talking

1 about any case, direct appeal. It's a live case, live case,
2 direct appeal.

3 The appellate court agrees. The evidence is
4 insufficient on either jurisdiction, an element of defense.
5 That's it. They don't send it back. Right? Because the
6 record didn't contain what it needed to contain. The
7 Government didn't meet its burden. There was insufficient
8 evidence. Correct?

9 Because -- you keep on giving me these facial
10 expressions. You're frowning; you're raising your eyebrows --

11 MR. BASCUAS: I'm trying to think of an analogy --

12 THE COURT: -- as if you have no idea what the heck I'm
13 talking about.

14 MR. BASCUAS: I'm trying to think of an analogy that
15 will explain this.

16 But the difference between *Iguaran* and this case to me
17 is both huge and plain. It's that in -- when you're on
18 collateral review, the criminal case is over. It's over. It's
19 over. I don't know how else to put that.

20 In other words, whatever I personally think about
21 *Iguaran* is beside the point. When your Honor asked me, do I
22 agree with *Iguaran*, I mean, I answered no. I personally don't.
23 I agree with the Ninth Circuit, which in an FDIC case. When
24 the Government failed to prove that the bank was insured by
25 FDIC, it said: Sorry. So sad, too bad. It's over.

1 But even -- nothing about *Iguaran* would justify
2 reopening a record. Reopening a record in a criminal justice
3 case is done only in the most egregious circumstances in the
4 interest of justice when a defendant has been falsely convicted
5 and there's DNA evidence or something like that, like it's only
6 ever done when there's an actual innocence concern. It's not
7 done because the Government didn't do its job. That's not a
8 reason.

9 And I think the real question here is not: Can we hold
10 up *Iguaran* to the light and kind of read between the lines?

11 It's: Does the Government have a 2255 case where the
12 underlying criminal record has been reopened so that the
13 Government could submit additional proof? And they don't have
14 one. And I don't think they'll find one.

15 And if they did have one, the time to bring it up was
16 after Docket Entry No. 1 was filed, not at today's hearing.

17 Oh, your Honor, the cite. *Fitzgerald versus Seaboard*
18 *Systems*, 760 F.2d 1249.

19 MR. YERA: Judge, a --

20 THE COURT: *Fitzgerald* versus...? Just give me the
21 rest of the cite, please.

22 MR. BASCUAS: *Fitzgerald versus Seaboard Systems*
23 *Railroad*.

24 THE COURT: Right.

25 MR. BASCUAS: 760 F.2d 1249.

1 THE COURT: And that's an Eleventh Circuit case?

2 MR. BASCUAS: Yes, your Honor. 1985 vintage.

3 THE COURT: So it's nice to see five research
4 assistants sitting behind you during the middle of a hearing.
5 Then they can --

6 MR. BASCUAS: I think that cite is right.

7 THE COURT: I'm sure it is. I'm sure they
8 double-checked it before they gave it to you.

9 Yes, sir.

10 MR. YERA: So, Judge, again, words matter. To present
11 any proof, Mr. Bascuas says? Not proof here, Judge. Not an
12 element of the offense. I believe *Iguaran* says that. And
13 by -- and it says that plainly.

14 And again, Judge, I believe *Iguaran* makes very clear
15 itself by saying after *Iguaran*'s factual proffer, his
16 presentence investigation report and the transcript from his
17 change of plea hearing also failed to supply facts which
18 establish that *Iguaran*'s vessel was subject to the jurisdiction
19 of the United States.

20 And the record --

21 THE COURT: Just like here.

22 MR. YERA: And the record is devoid of any other facts
23 that would provide a basis for federal subject-matter
24 jurisdiction.

25 THE COURT: Just like here.

1 MR. YERA: And, Judge, we open cases all the time, as
2 I've indicated, with the plea. Even Mr. Bascuas's new evidence
3 cases -- that's a good example. Not necessarily ineffective,
4 but constitutional. Open the record. It happens all the time.

5 And lastly, Judge, while I don't have a plethora, a
6 virtual team of sophisticated law students behind me, we do
7 have a couple people in the office. Thank God for Ms. Botero.
8 I have two cites for you, Judge, on the question you asked
9 me --

10 THE COURT: Yes.

11 MR. YERA: -- about somebody being not on the boat,
12 being in the country and being held responsible for the drugs
13 under the MDLE.

14 THE COURT: And the appellate court talking about that
15 issue.

16 MR. YERA: Yes, Judge.

17 THE COURT: All right.

18 MR. YERA: We have a district circuit court case, 795
19 F.3d 138. It's 2015.

20 THE COURT: What circuit?

21 MR. YERA: District of Columbia.

22 THE COURT: Oh, okay. It's a DC Circuit case? DC
23 Circuit. Okay.

24 MR. YERA: And then -- and, Judge, Pages 10 to 12 tell
25 us that the District Court rejected the contention -- I'm

1 sorry -- the DC rejected the contention that --

2 THE COURT: When you say Pages 10 to 12, if it's 138,
3 it's got to be --

4 MR. YERA: I think, Judge, because they're using the WL
5 cite pages. But the cite is 138, Judge. We'll try to get you
6 the precise page.

7 It says the -- DC rejected the contention that it's
8 limited to conduct on boats, that the MDLE is limited to
9 conduct on boats.

10 A defendant can be held liable for entering into a
11 conspiracy in Colombia as long as an overt act takes place on a
12 vessel.

13 THE COURT: And the second case?

14 MR. YERA: Is *Salcedo*, S-A-L-C-E-D-O -- I think it's
15 *Ibarra*, I-B-A-R-R-A, or "*Ibarra*." It's 209 Westlaw 1953399.
16 That's the Middle District of Florida. It's 2009. And it says
17 that under the MDLE, there is no meaningful distinction between
18 individuals found on vessels and those who planned, organized
19 or funded.

20 "Here, the extraterritorial application of MDLE to a
21 Defendant who was not found on board a vessel is subject to the
22 jurisdiction of the United States, who conspired with those on
23 board."

24 THE COURT: And the citation of that first case at 795
25 F.3d 138?

1 MR. YERA: It's 795 -- I'm sorry. Let me stand up,
2 Judge.

3 THE COURT: If you don't know the name, we can look it
4 up.

5 MR. YERA: I do have the name, Judge. Forgive me.

6 B-A-L-L-E-S-T-A-S. *Ballestas*.

7 THE COURT: *Versus the United States?*

8 MR. YERA: *United States versus*.

9 THE COURT: *United States versus Ballestas*.

10 MR. YERA: The other one is *United States versus*
11 *Salcedo-Ibarra*.

12 THE COURT: Right. Okay. Fair enough.

13 Does either side have anything further that you'd like
14 to focus on with me?

15 MR. YERA: Nothing from the United States, your Honor.

16 MR. BASCUAS: Your Honor, I'm going to treat the
17 citation of these two cases as supplementary authority and I'll
18 be filing a written response.

19 THE COURT: Well, I'm going to actually give both sides
20 a little bit of a homework assignment. So that's fine.

21 Because we discussed some issues that really were not
22 adequately fleshed out in the briefing before the hearing.

23 So I would like you both to submit a post-hearing
24 memorandum of law.

25 And naturally, Mr. Bascuas, you can discuss the

1 *Ballestas* case and the *Salcedo-Ibarra* case. You can attempt to
2 distinguish those cases. You can cite what you consider to be
3 some contrary cases. That's fine, because you were not aware
4 that the Government was going to be relying on those cases
5 before the hearing.

6 Yes?

7 MR. BASCUAS: I'm sorry. I don't mean to interrupt
8 you. But I've read your very detailed discovery order in civil
9 cases and I know it's written that way for a reason. So you
10 understand what I'm about to ask you.

11 Can you please indicate who goes first? Do we do this
12 simultaneously? I just want that to be clear, Judge, if that's
13 okay.

14 THE COURT: That's fine. It's a perfectly legitimate
15 request, and I'll get to that in just a minute. Or I can tell
16 you now. It's going to be a simultaneous filing. We're not
17 going to have ping-ponging back and forth with a memo and then
18 a response to the memo and a sur-reply and all of that. It's
19 just simultaneous filing on a couple of points.

20 The first point is these two cases that the Government
21 just cited.

22 Now, let me just be clear: It's not going to be --
23 this first point is not going to be limited to just the two
24 cases cited. It'll be on the issue of whether the Court can
25 convict a defendant under the statute when he is not actually

1 on board the vessel.

2 So we had Ms. Botero doing some quick, under-the-gun
3 research here in court on her cell phone and she picked up
4 those cases.

5 I suspect that when the Government and Mr. Bascuas and
6 his clinic participants do a little bit of a deeper dive, maybe
7 they'll find some other cases.

8 So Point No. 1 is that issue, whether or not you can
9 properly convict a defendant under the statute when he is not
10 actually on board the vessel. And you're not limited to just
11 those two cases. But certainly you'll feel free to discuss
12 those cases and/or to distinguish those cases.

13 And the second point that I want you folks to discuss
14 is the propriety in a collateral habeas case of holding an
15 evidentiary hearing to permit the Government to supplement the
16 record with evidence -- actually, I'm not even going to phrase
17 it that way, because it might not technically be supplementing
18 the record. So I'll phrase it this way: to enable the
19 Government to submit evidence of subject-matter jurisdiction
20 when the record in the underlying criminal prosecution lacked
21 sufficient record evidence of jurisdiction.

22 Bear with me for just one minute.

23 Are there any other precise legal issues that either
24 side would like to address in this post-hearing submission?

25 First, let me ask Mr. Bascuas.

1 MR. BASCUAS: I don't believe so, your Honor.

2 THE COURT: Government?

3 MR. YERA: No, your Honor.

4 THE COURT: So the next question we should talk about
5 is the page limits for this submission. And then after that
6 we'll talk about the deadline.

7 So under the local rules, the parties have the ability
8 to submit memoranda in one-and-a-half spacing. But I have
9 62-year-old eyes and I don't really do well with one-and-a-half
10 spacing. So it'll be double-spaced memoranda.

11 So we have a situation -- and I don't say this in any
12 way to either compliment or fault any party. But we have two
13 lawyers or teams of lawyers who have different writing styles.
14 Mr. Bascuas is basically a very succinct, straightforward,
15 to-the-point, somewhat minimalist of a writer. His petition
16 was, I think, four pages and his reply was, I think, five
17 pages.

18 And the Government's style, at least in this case, is
19 on the other end of the spectrum. I think the Government's
20 memorandum was -- the response was 22 pages.

21 So it doesn't mean anybody's right or wrong. But we
22 just have different writing philosophies, in this case anyway.

23 So by way of suggestion, how many pages are you
24 suggesting for the supplemental brief?

25 MR. BASCUAS: 15.

1 MR. YERA: That's fine. You won't use them. That's
2 fine.

3 THE COURT: All right. So 15 pages. And I'm going to
4 invoke former Eleventh Circuit Judge Stanley Birch. Maybe you
5 argued in front of Judge Birch before?

6 MR. BASCUAS: I would have been 4, your Honor.

7 MR. YERA: I did. I think I did. Thank you for that,
8 by the way, Judge. I thank him for that.

9 THE COURT: So whenever Judge Birch would talk about
10 page limits, he'd always say, "Don't treat this as
11 aspirational."

12 So you have up to 15 pages. But if you can get it done
13 in less or even far less, fine by me.

14 And now let's talk about timing. What do you think
15 makes sense? When do you think you can get this done? So
16 let's talk about the realities. It's a holiday week. We have
17 the New Year's coming up. Maybe you folks have travel plans or
18 family plans or other projects on your plate.

19 On the other hand, we do have a mandamus petition that
20 sat there ticking away, and I don't want to prolong this any
21 further than necessary.

22 MR. YERA: Judge, may I confer with Mr. Bascuas for a
23 second? Would you mind?

24 THE COURT: Sure.

25 (Brief pause in the audio recording.)

1 THE COURT: So, folks, what about tomorrow at noon?

2 (Laughter.)

3 MR. YERA: See, Judge, I didn't even move because I'm
4 just used to this.

5 THE COURT: No, you didn't. But Ms. Schultz actually
6 responded three rows back.

7 MR. YERA: Judge, we've decided --

8 Mr. Bascuas?

9 MR. BASCUAS: Let me just make sure that that's not a
10 weekend. That's what I'm trying to make my computer do, but
11 it's not that good.

12 Monday, January 15th, your Honor.

13 MR. YERA: Which Ms. Botero tells me is a holiday.

14 MS. BOTERO: Martin Luther King Day.

15 MR. BASCUAS: Oh, you're right.

16 So the 16th?

17 MR. YERA: Great. Thank you.

18 MR. BASCUAS: And I will --

19 MR. YERA: I'm assuming your Honor agrees with that.
20 Sorry. We didn't mean to decide.

21 MR. BASCUAS: I will file a status with the Eleventh
22 Circuit and let them know that the case is moving and then they
23 won't worry about the mandamus.

24 THE COURT: Fair enough.

25 And Judge Martinez won't worry about the mandamus,

1 because I have many bosses. The Eleventh Circuit of course is
2 a boss in a way. But the more immediate boss for me in this
3 case is Judge Martinez. I want to make sure that he's
4 satisfied with the way things are going.

5 So I appreciate that status report.

6 My suggestion is, in addition to filing it with the
7 Eleventh Circuit, just do --

8 MR. BASCUAS: Put it in the record.

9 THE COURT: -- a filing in this case as well.

10 Okay, folks. Anything further?

11 MR. YERA: Nothing from the United States, your Honor.

12 MR. BASCUAS: No, your Honor. Thank you. Happy New
13 Year.

14 THE COURT: Well, Happy New Year to you. Everybody
15 have a good holiday.

16 And for your law clinic students, good to see all of
17 you.

18 Are all of you third-year students or some of you are
19 second-year students?

20 MR. BASCUAS: They're all about to be lawyers.

21 THE COURT: Oh, is that right? You're going to be
22 taking the Bar this summer? All right. Very nice.

23 And you've all taken professor's evidence class? All
24 right.

25 MR. BASCUAS: [Inaudible] because they set up during

1 Christmas break for this.

2 THE COURT: So there is a concept in the law. I want
3 to make sure that I use the right legal term. I think it's
4 called sucking up. So good for all of you.

5 MR. YERA: Judge, as an aside, are you familiar with
6 Mr. Bascuas's evidence exams?

7 THE COURT: I am. Well, not personally.

8 MR. YERA: Well, of course not. But do you know how he
9 gives them, what the style is? It's TV shows. The so this
10 last year was Stranger Things.

11 THE COURT: Oh, you know what? My wife and I got
12 hooked on Stranger Things.

13 MR. YERA: He's not the only one, I hear, but
14 apparently Mr. Bascuas is ahead of us.

15 MR. BASCUAS: I have not seen season two, so no
16 spoilers.

17 THE COURT: And so since all of you are fans of TV and
18 film and all of that, before you go, I'm going to pass on one
19 recommendation. It's a movie recommendation, not a TV show.
20 And it's called Three Billboards Outside of Ebbing, Missouri.
21 Have you all heard of that movie?

22 MR. YERA: I have, your Honor. It's gotten great
23 acclaim. My wife has wanted to see it and I've been a little
24 hesitant. But now I'm going to have to tell her we've been
25 ordered to see it.

1 THE COURT: Well, I wouldn't classify it as an order.
2 But it might be a suggestion. It's a wonderful, wonderful
3 movie. It's been out in the theaters for like two or three
4 weeks. Hopefully, it's still around.

5 The main star is Frances McDormand. All of you are
6 probably too young to remember Frances McDormand. But I see
7 some heads nodding. Does anybody know who Francis McDormand
8 is?

9 MR. BASCUAS: Fargo.

10 THE COURT: Fargo. She played the sheriff in Fargo.

11 And then the other well-known actor in this movie is
12 somewhat a smaller role, but he really does a masterful job
13 with it, is Woody Harrelson. And then there's a fellow by the
14 name of Sam Waterston. Do you know who that guy is?

15 So I'm telling you, it's a really wonderful movie. If
16 you go and watch it and don't like it, Ms. Schultz will pay for
17 your tickets.

18 (Laughter.)

19 THE COURT: All right, folks. Good to see you all.
20 Take care.

21 MS. BOTERO: Happy New Year.

22 THE COURT: Thank you.

23 (Proceedings concluded.)
24
25

C E R T I F I C A T E

I hereby certify that the foregoing is an
accurate transcription of the proceedings in the
above-entitled matter to the best of my ability.

DATE

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