

**IN THE SUPREME COURT OF THE UNITED STATES**

**No.**

**WALTER ACEITUNO,  
Petitioner-Appellee**

**V.**

**UNITED STATES,  
Respondent-Appellant**

**On Petition for a Writ of Certiorari to  
the First Circuit Court of Appeals**

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- 1) Mr. Aceituno, a lawful permanent resident, was advised by his attorney that as a result of his guilty pleas to aggravated felonies in a drug case, he would likely be deported. The record is undisputed, however, that his attorney did not advise him he would face a lifetime ban on reentering the United States. The question presented is whether pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010), and the Sixth Amendment's right to effective assistance of counsel, a criminal defense attorney is required to advise his client he will face a permanent ban on re-entry where the adverse immigration consequences are clear in the applicable statutes, and the attorney has reason to believe that a permanent ban on re-entry would be an important consideration in the defendant's decision about whether to enter a guilty plea.
- 2) Following an evidentiary hearing, the district court judge granted Mr. Aceituno's petition for a writ of coram nobis, allowing him to withdraw his guilty pleas, and finding that the delay with respect to the filing of his petition was reasonable. The questions presented are whether the First Circuit erred in concluding the district court judge

abused his discretion in finding the filing was timely under the circumstances, and in holding the district court judge abused his discretion in granting the writ.

LIST OF PARTIES AND STATEMENT OF RELATED PROCEEDINGS

All parties are listed in the caption to the case.

This case arises from the following proceedings:

United States District Court, District of Rhode Island,

#1:13-cr-00181-JJM-PAS-1 (coram nobis petition allowed February 9, 2024)

*Aceituno v. United States*, 132 F.4th 563 (1st Cir., March 27, 2025)

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## INTRODUCTION

In Mr. Aceituno's case, the First Circuit held *Padilla v. Kentucky*, 559 U.S. 356 (2010), requires a lawyer to advise a defendant concerning deportation only, and the failure to advise the client about a lifetime ban on re-entry to the United States cannot be considered ineffective assistance of counsel. No other circuit court has reached the merits of this issue, other than the 9th Circuit in *United States v. Chan*, 792 F.3d 1151, 1154 (2015), which also stated, in dicta, the required advice pursuant to *Padilla* is limited to deportation. State courts are split on the issue, but the Iowa Supreme Court held *Padilla* and professional standards of practice require defense lawyers to give their clients a full explanation of all adverse immigration consequences resulting from a guilty plea to a charge clearly covered by an immigration statute. *Diaz v. State*, 896 N.W. 723, 731 (2017). This case presents an ideal opportunity to clarify the scope of the immigration advice required pursuant to *Padilla*, and to resolve the split between the federal and state courts, as well as the split in the state courts.

## OPINIONS BELOW

The opinion of the First Circuit is reported at 132 F.4th 563 (1st Cir. 2025), and reproduced in Appendix A. The district court judge's written order is unreported and reproduced in Appendix B.

## JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1331. The First Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291, and the district court had jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651. The First Circuit entered judgment on March 27, 2025.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right .... to have the assistance of counsel for his defense."

## STATEMENT OF THE CASE

1. Mr. Aceituno came to the United States from Guatemala as a child with his mother and siblings. He obtained a green card when he was approximately ten years old. He has a wife and two children, all of whom are United States citizens. (Appendix C, 34a-36a, 61a).

2. In 2013, Mr. Aceituno was charged with conspiracy to distribute cocaine and attempted possession of cocaine with intent to distribute. He hired an attorney to represent him in the criminal case, and another to advise him on immigration matters. He was told that he would likely be deported as a result of

guilty pleas. Neither attorney ever told him he would be permanently barred from re-entering the United States. (Appendix C, 44a-45a, 51a-52a).

3. Mr. Aceituno pleaded guilty to conspiracy to distribute cocaine and attempted possession with intent to distribute cocaine, and was sentenced to time served. Mr. Aceituno was detained by ICE immediately after sentencing. He applied for relief in the immigration court, but was deported to Guatemala in January of 2015. (Appendix C, 53a-56a).

4. Because he was a former U.S. green card holder, the police in Guatemala tried to extort Mr. Aceituno. They beat him and burned his back with a circular object in four places, leaving him with permanent scars. (Appendix C, 63a-67a).

5. Believing that his life was in danger, Mr. Aceituno re-entered the United States at a checkpoint in November of 2019. He was charged with illegal entry, and pleaded guilty to a misdemeanor in connection with that entry. (Appendix C, 68a-70a).

6. Mr. Aceituno made a claim under the Convention Against Torture (CAT). His claim under CAT was rejected by an immigration judge, the BIA, and ultimately the Ninth Circuit. (Appendix C, 73a-76a). In August of 2020, Mr. Aceituno's wife sent a letter to district court judge in Rhode Island requesting that

he be allowed to vacate his guilty plea in the drug case. The district court judge appointed a lawyer to represent him.

7. Mr. Aceituno's post conviction lawyer filed a petition for a writ of coram nobis. After an evidentiary hearing, the district court judge granted the writ.

8. In a written order, the district court judge made the following findings:

1) Mr. Aceituno acted reasonably in not seeking earlier relief because of the lengthy process involved in appealing his immigration status; 2) Mr. Aceituno and his family continue to suffer significant collateral consequences from the judgment of conviction<sup>1</sup>; 3) The judgment of conviction resulted from an error of fundamental character, i.e. Mr. Aceituno was not informed or aware when he pleaded guilty that he would be permanently barred from reentering the United States; 4) Mr. Aceituno's attorney's representation fell below an objective standard of reasonableness because he did not inform Mr. Aceituno he was likely to be separated from his family forever, or that his exclusion would be permanent; 5) But for counsel's errors, Mr. Aceituno would not have pleaded guilty, and there is a reasonable probability the results of the proceedings would have been different sufficient to undermine confidence in the outcome; 6) Granting of the writ was necessary to achieve justice. (Appendix B, 21a-22a).

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<sup>1</sup> This factor is not contested by the Government.

9. A panel of the First Circuit reversed, holding the immigration advice provided by Aceituno's lawyer complied with *Padilla*, his delay in filing the petition was unreasonable, and the equities weighed against issuance of the writ. See *Aceituno v. United States*, 132 F.4th at 570-2.

## REASONS FOR GRANTING THE WRIT

### A. There Is A Split Between The Federal Courts And A State Supreme Court.

The First Circuit Court of Appeals held Mr. Aceituno's lawyer was not required, pursuant to *Padilla*, to advise him of a lifetime ban to re-entry if he pleaded guilty to an aggravated felony. While the Ninth Circuit in *United States v. Chan*, 792 F.3d 1151, 1154 (9th Cir. 2015), also found the advice required after *Padilla* concerned only deportation, the statement of the Ninth Circuit in *Chan* was dicta.

In *Chan*, the defendant, a permanent resident, pleaded guilty to multiple counts of perjury. *Id.* at 1152. Her defense attorney told her she would not face any adverse immigration consequences as a result of her guilty pleas, advice that was clearly incorrect. *Id.* at 1153. Chan subsequently sought to withdraw her guilty pleas by filing a writ of coram nobis. *Id.* at 1153. The legal issues in *Chan* were whether the Ninth Circuit's holding in *United States v. Kwan*, 407 U.S. F.3d 1005

(9th Cir. 2005), which held that affirmative immigration misadvice constitutes ineffective assistance of counsel, survived *Padilla*, and whether *Kwan* should be applied retroactively to Chan’s case. *Id.* at 1152. The petitioner in *Chan* did not allege counsel was ineffective for failing to advise her concerning a permanent bar to re-entry, or any other deportation consequence aside from removal.

With respect to whether *Kwan* survived *Padilla*, the Ninth Circuit stated: “*Padilla* was simultaneously broader and narrower than our decision in *Kwan*: broader in that *Padilla* reached affirmative misrepresentations and failure to advise, but narrower in that *Padilla* concerned only deportation whereas *Kwan* considered all “immigration consequences.” *Id.* at 1154. That statement was not essential to the panel’s holding that the *Kwan* decision survived *Padilla*, or its holding that *Kwan* did not announce a new rule of criminal procedure, and therefore could be applied retroactively to Chan’s case. *Id.* at 1156-7. As a result, the Ninth Circuit’s finding concerning the scope of advice required by *Padilla* was dicta, and is not binding precedent. The First Circuit in Mr. Aceituno’s case is therefore the only federal appeals court to directly decide this issue. But see *United States v. Nuwintore*, 696 F. Appx. 178, 179 (9th Cir. 2017) (counsel performed deficiently by not advising client of loss of eligibility for asylum as a result of guilty plea).

A small number of lower federal courts have held, similar to the First Circuit, that advice pursuant to *Padilla* applies to deportation only. See e.g., *United States v. Suero*, 2014 U.S.. Dist. LEXIS 168644 at \*11, f.n. 2 (D.N.H. Dec. 05, 2014) (citing *Padilla*’s “express” reliance on the “unique consequences of deportation”); *Garcia v. United States*, No. 2012 U.S. Dist. LEXIS 158506 at \*13-14, f.n. 4 (N.D. Cal. Nov. 5, 2012) (finding the lawyer had no duty to advise her client he was inadmissible because the duty to advise was limited to removal).

In *Diaz v. State*, 896 N.W.2d 723, 730 (Iowa 2017), however, the Iowa Supreme Court held *Padilla* was not intended to limit the immigration advice defense lawyers are required to provide to noncitizens, or “to exclude a full explanation of the various immigration consequences of pleading guilty.” In *Diaz*, the petitioner argued his lawyer should have advised him of the deportation consequences of pleading guilty to an aggravated felony, including ineligibility for “cancellation of removal.” *Id.* at 727. As in Mr. Aceituno’s case, *Diaz*’s lawyer advised him he would likely be deported as a result of his plea. *Id.* at 729.

The *Diaz* Court stated: “[D]eportation is a broad concept, and the adverse immigration consequences of a criminal conviction to a noncitizen under the immigration statute are not limited to removal from this country.” *Id.* at 729. The Court noted a lawyer’s performance, post *Padilla*, should be judged the same way

it was prior to *Padilla*, by prevailing professional norms as to what is objectively reasonable assistance of counsel. *Id.* at 730. The Court cited the "proliferation of reference guides since the *Padilla* decision" as well as the 2015 American Bar Association (ABA) standards in support of its more expansive reading of *Padilla*. The ABA standards require a criminal defense attorney to ascertain whether the client is a citizen, and thereafter to determine and advise the client of all "potential adverse immigration consequences from the proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family." *Id.* at 731.

The *Diaz* Court found: "[A]ny person contemplating a plea of guilty to a crime that could lead to deportation would want to know the full meaning and consequences of deportation." *Id.* at 732. The Court concluded, based upon "[t]he practice and expectations of the legal community, and its clients," counsel for Mr. *Diaz* had a duty to provide him with information about the "sweeping" immigration ramifications of pleading guilty to an aggravated felony, and his attorney provided constitutionally deficient representation because he did not do so. *Id.*

As a result of the foregoing, there is now a split and conflict in the law between a federal circuit court and a state supreme court on this important Sixth

Amendment issue. There is no meaningful distinction between Mr. Diaz's successful ineffective assistance of counsel claim and the unsuccessful one of Mr. Aceituno, and criminal lawyers are left without clear guidance concerning their obligations under *Padilla*.

B. There Is A Split In The State Courts.

In *Garcia v. State*, 425 S.W.3d 248, 260 (Tenn. 2013), the Tennessee Supreme Court held *Padilla* does not require a defense attorney to advise his client concerning the effect of a guilty plea on the client's "future attempts to legally immigrate to the United States" because "[l]egal immigration depends upon many factors, which may change as a result of Congressional action, executive agency policy choices, or court decisions," and such a requirement would thus "impose a substantial burden on defense counsel." The Court's decision in *Garcia* is therefore in direct conflict with *Diaz*.

Several lower state courts have also held that *Padilla* should not be read to impose a duty upon a defense lawyer to advise his client concerning a lifetime ban on re-entry. See *Rosario v. State*, 165 So. 3d 672 (Fla. 4th DCA 2015) (per curiam) (Sixth Amendment duty recognized in *Padilla* does not encompass advice on whether a guilty plea will have a negative impact on avoiding removal or being able to re-enter the United States); *People v. Terrero*, 198 A.D.3d 930, 932 (N.Y.

App. Div. 2021) (no deficient performance shown where defense counsel informed the defendant that he would be deported as a result of his guilty plea, but did not advise him he would be ineligible for re-entry because exclusion or inadmissibility is not a direct deportation consequence). Compare *Ex parte Gomez-Rodriguez*, 2023 Tex. App. LEXIS 4844 at \*6 (July 6, 2023), *review denied*, 2024 Tex. Crim. App. LEXIS 96 (2024) (“The Sixth Amendment right to effective assistance of counsel requires counsel to correctly advise non-citizen clients about potential immigration law consequences, including deportation, *exclusion from admission*, and denial of naturalization,” citing *Padilla*) (emphasis added).

At least two appellate state courts, while not deciding the issue, have noted the split in the courts. See *Daramola v. State*, 430 P.3d 201, 208-9 (Ore. 2018), *review denied*, 440 P.3d 667 (2019), and *State v. Castro-Osegueda*, 2019 Wash. App. LEXIS 157 at \*20-1 (Jan. 22, 2019) (unpublished), *review denied*, 2019 LEXIS 168644. Because state courts are divided and continue to struggle with the scope of the *Padilla* decision, this Court should grant certiorari in Mr. Aceituno’s case in order to clarify the extent of a defense lawyer’s professional duty to a non-citizen.

C. The First Circuit’s Resolution Of The *Padilla* Question Was Erroneous.

The panel of the First Circuit held *Padilla*’s holding “applies only to the risk of deportation.” *Aceituno*, 132 F.4th at 572. The plain language of *Padilla*, however, can reasonably be read to require a lawyer to advise his client that he faces a lifetime ban on re-entry if he pleads guilty to an aggravated felony. The *Padilla* decision repeatedly used the phrase “deportation consequences,” suggesting more than deportation by itself. See e.g., 559 U.S. at 369, 373. Moreover, a ban on re-entry is closely associated with deportation because the ban becomes applicable upon the alien’s physical removal. Inadmissibility should therefore be considered a “deportation consequence” pursuant to *Padilla*. In a footnote, the *Padilla* Court also referred to “banishment and exile.”<sup>2</sup> 559 U.S. at 371, f.n. 11. The plain meaning of “exile” includes a period of forced absence.<sup>2</sup> A lifetime ban on re-entry is perpetual exile for a permanent resident like Mr. Aceituno who has lived in the United States for most of his life.

As with removal or deportation, a lifetime ban on re-entry is an easily determined consequence of a guilty plea to an aggravated felony. See 8 U.S.C. § 1182(a)(9)(A)(i) (an alien convicted of an aggravated felony is ineligible for

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<sup>2</sup> Exile means “the state or a period of forced absence from one’s country or home.” See <https://www.merriam-webster.com/dictionary/exile>

admission “at any time”). In *Padilla*, this Court rejected a rule that counsel is only ineffective if he misadvises his client with respect to the immigration consequences of a plea, stating: “When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.” *Id.* at 370. This Court also acknowledged defense counsel’s “critical obligation” to advise the client of “the advantages and disadvantages of a plea agreement,” citing *Libretti v. United States*, 516 U.S. 29, 50–51 (1995). *Id.* The First Circuit’s decision would encourage lawyers to be silent concerning a permanent bar to re-entry, a consequence that is easily determined and equally if not more serious than deportation.

In a case decided prior to *Padilla*, *Immigration and Naturalization Services v. St. Cyr*, 533 U.S. 289, 323, f.n. 50 (2001), this Court stated that competent defense counsel would advise a client concerning § 212(c) of the Immigration and Nationality Act of 1952<sup>3</sup> which gives the Attorney General broad discretion to waive the deportation of residence aliens who are sentenced to less than five years incarceration. This language in *St. Cyr* suggests that pursuant to the Sixth Amendment’s right to effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), defense counsel has

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<sup>3</sup> See 8 U.S.C. § 212(c)

a duty to do more than simply advise his client that he faces deportation as a result of his guilty plea. But see *Chaidez v. United States*, 568 U.S. 342, 352 (2013) (deportation is a “unique” consequence of a criminal conviction).

In *Strickland* and *Padilla*, this Court cited professional norms as guides in determining what is reasonable conduct by defense counsel. See 466 U.S. at 688-9 and 559 U.S. at 371, f.n. 11. Professional standards adopted following *Padilla* require defense counsel to advise their clients concerning other adverse immigration consequences of a guilty plea, including bars to re-entry. For example, in 2015, the American Bar Association revised its performance standards in light of *Padilla*. Standard 4-5.5 entitled Special Attention To Immigration Status And Consequences, states in pertinent part:

(c) After determining the client’s immigration status and potential adverse consequences from the criminal proceedings, including removal, *exclusion*, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client’s immediate family, counsel should advise the client of all such potential consequences and determine with the client the best course of action for the client’s interests and how to pursue it. (emphasis added).

[https://www.americanbar.org/groups/criminal\\_justice/resources/standards/defense-f  
unction/](https://www.americanbar.org/groups/criminal_justice/resources/standards/defense-function/). Although these standards were published after Mr. Aceituno entered his guilty pleas, they nonetheless reflect what the ABA considers objectively reasonable performance by defense counsel after *Padilla*. See also *Commonwealth*

*v. Marinho*, 464 Mass. 115, 125-6 (2103) (citing the performance standards for the Committee For Public Counsel Services (revised June of 2011), requiring attorneys to advise their clients of possible immigration consequences including, but not limited to “deportation, denial of naturalization or refusal of reentry into the United States”).

Finally, numerous states require judges, at the time of arraignment and/or when accepting guilty pleas, to caution defendants that they may face adverse immigration consequences as a result of their pleas, including exclusion from the United States. See e.g., Alaska R. Crim. P. 11(c)(3)(C); Cal. Penal Code 1016.5; Conn. Gen. Stat. § 54-1j; Hawaii Rev. Stat. Ann. §802E-4; Ill. Comp. Stat. Ann. § 5/113; Mass. G.L. c. 278, § 29D; Minn. R. Crim. P. 15.01(6)(1); Mont. Code Ann. 46-12-210(1)(f); N.C. Gen. Stat. § 15A-1022; Ore. Rev. Stat. § 135.385(d); R.I. Gen. Laws §12-12-22(b); Tex. Code Crim. Proc. Art. 26.13(a)(4); Wash. Rev. Code § 10.40.200; Wis. Stat. 971.08. The Federal Rules of Criminal Procedure also contain this warning. See Fed. R. Crim. P. 11(b)(1)(O). If judges are required to give warnings concerning possible exclusion or inadmissibility, it is objectively reasonable to require defense counsel to advise noncitizens clients about those adverse immigration consequences also, at least where those consequences are clear from the applicable statutes.

D. The First Circuit Erred In Concluding The District Court Judge Abused His Discretion In Finding Any Delay In Filing The Petition Was Reasonable, And In Granting The Petition For A Writ Of Coram Nobis.

1. The district court judge acted within his discretion in finding the delay reasonable under the circumstances.

In his written order, the district court judge held Mr. Aceituno “acted reasonably in not seeking relief earlier because of the lengthy process in appealing his immigration status.” (Appendix B, 21a). The First Circuit held Mr. Aceituno failed to adequately explain his delay in seeking relief from his criminal conviction, citing statements the judge made from the bench rather than those in his written order. *Aceituno*, 132 F.4th at 572. This was error. See *Healix Infusion Therapy, Inc. v. Heartland Home Infusions, Inc.*, 733 F.3d 700, 704-05 (7th Cir. 2013) (“district judges are not bound by their oral remarks from the bench”).

The First Circuit further held Mr. Aceituno’s repeated attempts to obtain relief through withholding of removal and CAT did not explain why he did not earlier seek to attack his conviction or attempt to withdraw his guilty pleas because he could have pursued both remedies at the same time. See *Aceituno*, 132 F.4th at 572. But the record here is clear that Mr. Aceituno’s lawyer advised him immigration court was the only avenue to seek relief from deportation, and thus he was unaware, until at least 2020, that he could also seek to withdraw his guilty

pleas. See *Gonzalez v. United States*, 981 F.3d 845, 852 (11th Cir. 2020) (assuming, without deciding, that bad legal advice is a valid excuse for not seeking coram nobis relief earlier).

Finally, the First Circuit found the district court judge ignored the more than four year period when Mr. Aceituno was in Guatemala and was not seeking to further his goal of re-entering the United States. *Aceituno*, 132 F.4th at 570-1. There is nothing in the record to suggest the district court judge ignored this time period, however. The judge did not find that Mr. Aceituno had immigration proceedings pending during the entire time he was in Guatemala. (See Appendix B, 21a-22a). Moreover, other courts have excused delay longer than the period to time at issue here. See *Kovacs v. United States*, 744 F.3d 44, 54 (2nd Cir. 2014) (eleven year delay); *United States v. Castro-Taveras*, 841 F.3d 36, 37, (1st Cir. 2016) (nine year delay). See also *Doe v. United States*, 915 F.3d 905, 915 (2nd Cir. 2019) (excusing eleven year delay where there was no evidence the delay was the result of a tactical decision).

The district court judge was well within his discretion in finding Mr. Aceituno acted reasonably in seeking relief in the immigration courts. See *Foont v. United States*, 93 F.3d 76, 79 (2nd Cir. 1996) (district court's determination that delay was reasonable is reviewed for an abuse of discretion).

2. The district court judge acted within his discretion in granting the writ of coram nobis.

The district court judge held granting the coram nobis writ was necessary to achieve justice because Mr. Aceituno was never advised before he entered his guilty pleas that he was likely to be separated from his family forever, or that his exclusion from the United States would be permanent. (Appendix B 22a). The First Circuit held the judge abused his discretion in this regard because the equities did not favor granting the writ, pointing to Mr. Aceituno's acceptance of responsibility for drug offenses at the time of his guilty pleas, as well as the Government's interest in the finality of the judgment. *Aceituno*, 132 F.4th at 572.

The First Circuit's statement that he "repeatedly acknowledged" that he "did, in fact commit the drug trafficking offenses" is not accurate. *Id.* Mr. Aceituno has always maintained that he drove his co-defendant to the drug transaction only because his co-defendant did not have a driver's license, and he was not involved in any plan to possess or distribute the cocaine. (See Appendix D, 148a-157a; Appendix E, 184a). At the change of plea hearing, Mr. Aceituno did not admit to having earlier conspired with Ramos to buy and distribute the cocaine, but instead simply admitted being present when the transaction was discussed, and when Ramos returned to the same location with the money. (Appendix E , 184a). In

phone calls with government agents, his co-defendant, Ramos, referred to a partner in the transaction who was not Mr. Aceituno. (Appendix D 147a, 153a). At sentencing, the judge found Mr. Aceituno “did not appear to have much of a role” in Ramos’ larger scheme. (Appendix D, 160a).

Although Mr. Aceituno received a benefit from his guilty pleas in terms of the applicable sentencing guidelines range, the convictions came at a great personal cost to him. Following his sentence, he was detained and deported. He was separated from his family, including his children, for approximately five years. He was also extorted, beaten, and burned by the police in Guatemala. (Appendix C, 41-44a).

The district court judge<sup>4</sup> was in a better position to balance the equities in this case, having conducted an evidentiary hearing where Mr. Aceituno and his immigration attorney testified. The First Circuit erred in holding that he abused his discretion in granting the writ of coram nobis.

## CONCLUSION

For all of the forgoing reasons, the petition for a writ of certiorari should be granted.

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<sup>4</sup> The district court judge who sentenced Mr. Aceituno in 2014 was also the hearing judge for his coram nobis petition.

Respectfully submitted,

/s/ Katherine C. Essington  
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Counsel Of Record For Petitioner,  
Walter Aceituno

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# United States Court of Appeals For the First Circuit

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No. 24-1343

WALTER ACEITUNO,  
Petitioner, Appellee,  
v.  
UNITED STATES,  
Respondent, Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

[Hon. John J. McConnell, Jr., U.S. District Judge]

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Before

Aframe, Lynch, and Howard,  
Circuit Judges.

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Katherine C. Essington for appellee.

Lauren S. Zurier, Assistant United States Attorney, with whom  
Zachary A. Cunha, United States Attorney, was on brief, for  
appellant.

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March 27, 2025

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**LYNCH, Circuit Judge.** The United States appeals from the grant of the petition for a writ of error coram nobis of Walter Aceituno, a citizen of Guatemala. Aceituno's petition alleges that he is entitled to this "hen's-teeth rare" writ, United States v. George, 676 F.3d 249, 254 (1st Cir. 2012), because his attorneys, before he pled guilty in 2014 to drug-trafficking charges, had informed him he would be deported but did not go further to inform him that his guilty plea would result in a permanent ban on reentering the United States. Aceituno's petition does not contest that he was guilty of drug trafficking, that Immigration and Custom's Enforcement (ICE) informed him prior to his departure in 2014 that he was permanently barred from reentry, or that he illegally reentered in 2019. Rather, his coram nobis argument is that he should be permitted to withdraw his 2014 criminal plea and vacate his criminal conviction based on the allegedly ineffective assistance of his attorney.

In granting the writ and allowing withdrawal of the plea, the district court committed errors of law and a clear error of fact and ventured beyond the bounds of its discretion.

**I.**

Aceituno is a Guatemalan citizen who became a lawful permanent resident of the United States in 1989 but lost that status in 2014. He ran a barber shop in Pawtucket, Rhode Island. On April 18, 2013, Aceituno drove one of the barbers who rented

space in his shop, Geronimo Ramos, to a meeting in Warwick, Rhode Island. At the meeting, Aceituno and Ramos "discussed the purchase of two kilograms of cocaine at \$28,000 per kilogram," as well as the future purchase of three additional kilograms. During these conversations, Aceituno inquired about the cocaine's purity. In fact, they were meeting with an undercover Drug Enforcement Agency (DEA) agent and a cooperating witness. When the discussion concluded, Aceituno and Ramos left the restaurant and travelled to Aceituno's barber shop to obtain the purchase money. After an hour passed without contact from the two men, the cooperating witness called Ramos to see what was causing the delay. Ramos informed the cooperating witness that he only had enough money for one kilogram of cocaine and that he was trying unsuccessfully to reach a friend who had money for the second kilogram. The cooperating witness told Ramos to return with the money he had. Ramos and Aceituno did so, meeting the cooperating witness and undercover DEA agent in the parking lot of the Warwick Mall. At that second meeting, Ramos showed the cooperating witness approximately \$28,000 in a plastic bag. The cooperating witness then told Aceituno and Ramos that they would all go to Aceituno's barber shop in Pawtucket to make the exchange, at which time Aceituno and Ramos began to drive away. As they did, other members of the investigation team approached the Mercury Mountaineer. Aceituno was driving and Aceituno attempted to drive away and flee.

the scene, but he was stopped a short distance away. Aceituno and Ramos were both arrested, and Aceituno was charged with conspiracy to possess with intent to distribute cocaine and attempted possession of cocaine with intent to distribute.

Aceituno retained two lawyers in relation to his arrest: Thomas F. Connors, a criminal defense attorney, and Robert D. Watt, an immigration attorney. Attorney Watt had been helping the family of Aceituno's common-law wife with immigration matters since the 1980s and is a skilled immigration attorney. On January 7, 2014, after consulting with both his attorneys, Aceituno pled guilty, pursuant to an agreement, to conspiracy to possess with intent to distribute cocaine and attempt to possess with intent to distribute cocaine. As we describe below, both attorneys Connors and Watt provided Aceituno with advice before he entered his plea that he would certainly be deported after entering the plea.

Under the plea agreement, the government agreed to recommend a sentence at the low end of the guidelines range and a three-level reduction in Aceituno's offense level for the purpose of calculating that range, reducing the guidelines range imposed from 63-78 months of incarceration to 46-57 months. See U.S.S.G. ch. 5 pt. A. The agreement also stated that "Defendant recognizes that pleading guilty may have consequences with respect to his immigration status if he is not a citizen of the United States" and that "because Defendant is pleading guilty to conspiracy to

possess with intent to distribute cocaine and attempted possession with intent to distribute cocaine, removal is presumptively mandatory." The agreement further stated that "Defendant understands that no one, including his attorney or the district court, can predict to a certainty the effects of his conviction on his immigration status." In signing the plea agreement, Aceituno "nevertheless affirm[ed] that he want[ed] to plead guilty regardless of any immigration consequences that his plea may entail."

At his change-of-plea hearing, Aceituno stated that he understood that pleading guilty made it "quite likely and probable" that he would be deported after serving any period of incarceration. Aceituno never asked his lawyers whether he would be able to return to the United States after being deported, nor did they otherwise discuss the issue. Aceituno affirmed that he was "completely satisfied" with the representation he had received from his lawyers.

Attorneys Connors and Watt were both present for Aceituno's sentencing hearing on March 25, 2014. During that hearing, attorney Connors acknowledged that Aceituno would be deported as a result of his conviction and contended that this justified imposition of a below-guidelines sentence. Aceituno was sentenced to time served (approximately eleven months) and three

years of supervised release, despite the guidelines range of 46-57 months of incarceration.

Aceituno was taken into custody by Immigration and Customs Enforcement (ICE) shortly after sentencing and, again represented by attorney Watt, conceded before an Immigration Judge that his criminal conviction made him removable. Aceituno sought to avoid removal by arguing that he was eligible for withholding of removal and protection under the Convention Against Torture (CAT). The Immigration Judge found that Aceituno did not satisfy the relevant legal criteria and ordered him removed to Guatemala. The Board of Immigration Appeals affirmed the judgment and Aceituno was removed to Guatemala in January 2015. While in ICE detention awaiting removal, according to Aceituno, his fellow detainees told him that he would be able to reenter the United States five years after deportation. He was quickly informed that was not true when, in December 2014, Aceituno received from ICE a document called a "Warning to Alien Ordered Removed or Deported" which stated that, because of the nature of his conviction, he was permanently barred from reentering the United States. Aceituno refused to sign the Warning but did not attempt to contact his criminal defense attorney or his immigration lawyer before or after his removal to Guatemala in January 2015. He also did not seek to file a petition for post-conviction relief from his criminal conviction under 28 U.S.C. § 2255 at any point. Nor did he seek to withdraw his guilty

plea at any time before his *coram nobis* petition was filed in March 2023.

Aceituno remained in Guatemala until 2019. While in Guatemala, Aceituno did not consult with an attorney or otherwise attempt to challenge his conviction or reentry ban.

Notwithstanding his knowledge that he was permanently barred from reentry to this country, Aceituno illegally reentered the United States on November 15, 2019, by crossing the border on foot at San Ysidro, California and attempted to gain entry using his expired green card. Aceituno was detained by federal authorities and pled guilty to misdemeanor illegal entry in violation of 8 U.S.C. § 1325.

Aceituno sought asylum, withholding of removal, and relief from deportation under the CAT, alleging that he had been harassed and assaulted by police while in Guatemala. His applications were denied on November 27, 2020. Aceituno then filed a petition for review in the Ninth Circuit, and on August 11, 2021, Aceituno was released on bond from the immigration authorities and returned to Rhode Island while awaiting the Ninth Circuit's decision. The Ninth Circuit denied Aceituno's petition for review on August 23, 2023.

**The Petition for Writ of Coram Nobis**

In August 2020, Aceituno's common-law wife, Erika Larivee, wrote to the federal district court in Rhode Island which

had overseen his 2014 guilty plea in this case. Larivee claimed that Aceituno "was not . . . advised of or explained the actual repercussions or consequences of his plea agreement with respect to his immigration case" and requested that the district court vacate Aceituno's sentence. The district court appointed counsel to represent Aceituno on August 28, 2020. Appointed counsel filed a petition for writ of error coram nobis on March 22, 2023, approximately two-and-a-half years after being appointed and more than eight years after Aceituno was removed to Guatemala.

Aceituno's petition alleged that attorney Connors never advised Aceituno "that he would be permanently barred from applying for future re-entry into the United States." Aceituno claimed that, had he been so advised, "he would have refused to plead guilty and instead proceeded to trial."

The district court held an evidentiary hearing on February 7, 2024, at which both Aceituno and attorney Watt testified.<sup>1</sup> Attorney Watt testified as to the advice he gave, with the knowledge of attorney Connors, to Aceituno before Aceituno entered his plea. Attorney Watt testified that he believed the advice he gave Aceituno as to the risk of deportation "comport[ed] with his understanding of Padilla versus Kentucky" and that he had "provided Mr. Aceituno with competent advi[c]e despite

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<sup>1</sup> Attorney Connors passed away in April 2016.

[Aceituno's] claims to the contrary."<sup>2</sup> Attorney Watt further testified that he had previously "filed disciplinary complaints against [him]self . . . when [he] felt that [he] had broken some particular duty to a client" but that he "did not in this case."

Attorney Watt never stated that he had failed to provide the effective representation Padilla required. Attorney Watt testified he was not asked by Aceituno at any time for a complete immigration consultation. Attorney Watt did state that "[t]here certainly is an argument to be made that a complete immigration consultation should include . . . advice . . . as to what's going to happen, five, ten, fifteen, twenty years down the road." But he tempered that statement by testifying that there was some uncertainty as to the inevitability of a permanent bar in the future:

I kind of know there was no conversation about permanency, because like immigration law, if you know it well, there's always ways around anything and everything, theoretically. . . . There's a special program available within the Immigration Act itself. I have brought back people for temporary visits, aggravated felons, applying in advance, but I've brought people back.

The district court then granted Aceituno's petition for a writ of coram nobis on February 9, 2024. In its written order,

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<sup>2</sup> Aceituno acknowledges through counsel that, although attorney Connors represented him during his criminal case and died prior to the February 7, 2024 evidentiary hearing, "Mr. Connors deferred to Mr. Watt as to any immigration" matter.

the district court found that, *inter alia*, "Mr. Aceituno acted reasonably in not seeking earlier relief considering the lengthy process involved in appealing his immigration status," and that "the judgment of conviction resulted from an error of fundamental character" because "Mr. Aceituno's attorney's representation fell below an objective standard of reasonableness because he did not inform" Aceituno that he would be permanently barred from reentering the United States. The district court further found that Aceituno's "own attorney testified, uncontradicted by any other evidence, that a reasonable attorney at the time should have informed Mr. Aceituno of the fact that his deportation from the country would be permanent" and that "but for the counsel's error, Mr. Aceituno would not have pleaded guilty." For the reasons described below, we hold these rulings were in error.

## II.

We review the district court's legal conclusions as to Aceituno's eligibility for *coram nobis* relief *de novo* and its findings of fact for clear error. United States v. Castro-Taveras, 841 F.3d 35, 38-39 (1st Cir. 2016). We review the district court's ultimate decision to grant the writ for abuse of discretion. See George, 676 F.3d at 255. "[A] material error of law always amounts to abuse of discretion." United States v. Vasquez-Landaver, 128 F.4th 358, 361 (1st Cir. 2025) (quoting United States v. Rodriguez, 919 F.3d 629, 634 (1st Cir. 2019)). Under the clear-error

standard, we will overturn the district court's "findings of fact or conclusions drawn therefrom" when "on the whole of the record, we form a strong, unyielding belief that a mistake has been made." United States v. Marquez, 280 F.3d 19, 26 (1st Cir. 2002) (quoting Cumpiano v. Banco Santander P.R., 902 F.2d 148, 152 (1st Cir. 1990)).

The writ of coram nobis is "a remedy of last resort for the correction of fundamental errors of fact or law." George, 676 F.3d at 253. To establish that coram nobis relief is warranted, a coram nobis petitioner must "explain his failure to seek earlier relief from the judgment, show that he continues to suffer significant collateral consequences from the judgment, and demonstrate that the judgment resulted from an error of the most fundamental character." Woodward v. United States, 905 F.3d 40, 43 (1st Cir. 2018) (quoting George, 676 F.3d at 254). Even when these three requirements are satisfied, the court may exercise its discretion to deny the petition if "the petitioner fails to show that 'justice demands the extraordinary balm of coram nobis relief.'" Castro-Taveras, 841 F.3d at 39 (quoting George, 676 F.3d at 255).

The district court committed errors of law and fact in finding Aceituno satisfied the first and third preconditions for

coram nobis relief.<sup>3</sup> Aceituno failed to adequately explain his delay in seeking relief from his guilty plea and conviction. Further, Aceituno's attorneys did not provide constitutionally ineffective assistance by failing to inform him that his conviction would permanently prohibit him from entering the United States, and so there was no "error of the most fundamental character" warranting issuance of the writ. George, 676 F.3d at 254; see also United States v. Morgan, 346 U.S. 502, 512 (1954) (writ of coram nobis may issue to address deprivation of counsel). Even if Aceituno had satisfied all three preconditions, he also failed to show that justice required coram nobis relief be granted in this case. We take each in turn.

**Aceituno's Delay in Filing His Petition was Unreasonable**

The district court found that Aceituno adequately explained his delay in challenging his conviction because it was

clear that Mr. Aceituno was, at every moment in time, seeking a way to reunite with his American family. Whether that was through plea negotiations, whether that was through immigration, whether that was through CAT, whether that was through asylum. And always, once he found out that he might be permanently barred from coming back into this country, everything he did was an attempt to get that bar removed.

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<sup>3</sup> The parties do not dispute that Aceituno satisfies the second prong of the test.

The district court misapprehended the correct inquiry. The correct inquiry was not about whether Aceituno had been seeking to reunite with his family, but whether it was reasonable for Aceituno to wait ten years from entry of his guilty plea to attempt to withdraw his plea and challenge his convictions. The consideration of delay by a coram nobis petitioner inherently includes consideration of whether the petitioner has exercised diligence. See Foont v. United States, 93 F.3d 76, 80-81 (2d Cir. 1996) ("[I]t is . . . important that reasonable diligence be required [of a coram nobis petitioner] in order that litigation may one day be at an end." (quoting Honeycutt v. Ward, 612 F.2d 36, 42 (2d Cir. 1979))). Nor does the fact that Aceituno repeatedly applied for withholding of removal or CAT relief explain in any way why he did not during this period seek to attack his criminal conviction or seek to withdraw his plea.

Beyond that, the district court ignored the more than four years between June 2015 and November 2019 in which Aceituno acknowledges that he did nothing to further his purported goal of reentering the United States. Aceituno learned from ICE no later than December 2014 that he would be permanently barred as a consequence of his conviction from reentering the United States. Yet he took no steps to challenge that conviction though he could have done so. Even assuming arguendo that Aceituno could not have learned of the permanent bar on reentry earlier despite the

availability of attorney Watt or others, he was then on federal supervised release and he could have challenged his conviction by filing a motion for post-conviction relief pursuant to 28 U.S.C. § 2255.<sup>4</sup> He did not do so. Nor did he take steps to withdraw his plea.<sup>5</sup>

The district court clearly erred when determining Aceituno had satisfied this precondition for coram nobis relief by excusing delay in light of his efforts in the immigration agency to avoid removal and then his removal afterward. These efforts do not excuse his delay in challenging his criminal conviction because he could have pursued both avenues for relief from his criminal conviction and his guilty plea and immigration relief from removal at the same time. See Ragbir v. United States, 950 F.3d 54, 64 (3d Cir. 2020) (pursuit of administrative remedy for removal did not excuse six-year delay in filing petition for coram nobis where

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<sup>4</sup> See Jackson v. Coalter, 337 F.3d 74, 78-79 (1st Cir. 2003) (noting that supervised probation is sufficient to satisfy the "in custody" requirement of federal habeas relief); United States v. Delhorno, 915 F.3d 449, 455 (7th Cir. 2019) (noting that the statute of limitations on § 2255 motions is one year from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence" (quoting 28 U.S.C. § 2255(f)(4))).

<sup>5</sup> "A defendant may withdraw a plea of guilty . . . after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(b). "After the court imposes sentence . . . [a] plea may be set aside only on direct appeal or collateral attack." Id. at 11(e).

petitioner "offer[ed] no acceptable explanation for why he did not seek both forms of relief concurrently"). Indeed, the factual record contradicts the assertion that "once he found out that he might be permanently barred from coming back into this country, everything he did was an attempt to get that bar removed." He did not seek to have removed the criminal conviction which caused the bar.

Nor does Aceituno's period in Guatemala from January 2015 to November 2019 explain his failure to act. Aceituno's criminal defense attorney did not pass away until April of 2016, yet Aceituno did not consult with attorney Connors or any other criminal attorney about any possible avenues for attacking his conviction or withdrawing his guilty plea despite having the resources available to do so.

Moreover, while not dispositive, the extraordinary length of Aceituno's delay given his thin rationale for it underscores its unreasonableness. See, e.g., Thornburg v. United States, 574 F.2d 33, 36-37 (1st Cir. 1978) (petition untimely after delay of slightly less than three years); United States v. Kroytor, 977 F.3d 957, 959, 960-61 (9th Cir. 2020) (petition untimely where defendant waited two years to file after learning that "his only chance to avoid removal was vacating his conviction"); Delhorno, 915 F.3d at 455 (petition untimely where defendant waited five years to file); Mendoza v. United States, 690 F.3d 157, 159-60 (3d

Cir. 2012) (petition untimely where defendant waited four years to file).

**The Immigration Advice Provided to Aceituno Complied with Padilla**

Where, as here, "the district court held an evidentiary hearing on an ineffective assistance of counsel claim, we review its factual conclusions for clear error and its legal conclusions de novo."<sup>6</sup> United States v. Manon, 608 F.3d 126, 132 (1st Cir. 2010).

The district court committed legal error when it concluded that Aceituno's two counsel were required to go beyond informing Aceituno that his plea carried a risk of deportation but also were required to inform him that he would be permanently barred from reentering the United States. In Padilla v. Kentucky, 559 U.S. 356 (2010), the Court held that "counsel must inform her client whether his plea carries a risk of deportation" to provide effective assistance. Id. at 374 (emphasis added). Aceituno was

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<sup>6</sup> To establish ineffective assistance of counsel in the context of a guilty plea, Aceituno must show that "(1) 'counsel's representation fell below an objective standard of reasonableness' and "(2) 'there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.'" United States v. Luis Rivera-Cruz, 878 F.3d 404, 410 (1st Cir. 2017) (quoting Hill v. Lockhart, 474 U.S. 52, 57, 59 (1985)). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." Quintanilla v. Marchilli, 86 F.4th 1, 17 (1st Cir. 2023) (quoting Harrington v. Richter, 562 U.S. 86, 104 (2011)).

plainly given the advice Padilla required. Indeed, he was advised not only of a risk of deportation but that he would in fact be deported.

Aceituno attempts to argue that Padilla requires attorneys to inform their defendant clients not just that a guilty plea will result in deportation, but also of any other adverse immigration consequences the guilty plea may have that are "clear and easily determined." Not so. The Court in Padilla "granted certiorari to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country," id. at 360 (emphasis added) (citation omitted), and its holding applies only to the risk of deportation, see, e.g., id. at 367 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."); id. at 373 ("By bringing deportation consequences into th[e plea-bargaining] process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."); see also United States v. Chan, 792 F.3d 1151, 1154 (9th Cir. 2015) (finding that Padilla's holding applies only to deportation).

The district court stated that attorney Watt "testified, uncontradicted by any other evidence, that a reasonable attorney at the time should have informed Mr. Aceituno of the fact that his

deportation from the country would be permanent." The district court's characterization of attorney Watt's testimony was contradicted by the record and is clearly erroneous. See United States v. Sawyer, 239 F.3d 31, 42-43 (1st Cir. 2001) (finding of fact was clear error where it was unsupported by the record). Attorney Watt testified unequivocally that he believed he had complied with his obligations under Padilla and explained why. The district court found attorney Watt to be credible, and it is not in dispute that attorney Connors deferred to attorney Watt as to any immigration advice.

**The Equities Weigh Against Issuance of the Writ**

Lastly, the district court abused its discretion in granting Aceituno's petition because the equities of this case do not justify issuance of the writ. "[A] writ of error coram nobis should issue 'only under circumstances compelling such action to achieve justice.'" George, 676 F.3d at 255 (quoting Morgan, 346 U.S. at 511). "[I]t is not enough for a coram nobis petitioner to show that he can satisfy the elements of the tripartite test: he must also show that justice demands the extraordinary balm of coram nobis relief." Id. Aceituno has not made such a showing. On the contrary, "when a defendant seeks to vacate a guilty-plea conviction by way of coram nobis, red flags accompany that request." Id. at 258. Indeed, Aceituno has repeatedly acknowledged, including at the 2024 evidentiary hearing, that he

did, in fact, commit the drug-trafficking offense.<sup>7</sup> "[I]t 'seems dubious that granting the writ w[ould] promote the interests of justice.'" Williams v. United States, 858 F.3d 708, 718 (1st Cir. 2017) (alteration in original) (quoting George, 676 F.3d at 260); see also Woodward, 905 F.3d at 43, 49 (affirming denial of coram nobis where petitioner's admitted conduct "flouted" related state laws). He has not explained how the interests of justice could possibly be served by allowing him to withdraw his plea some ten years after he entered this plea. The guilty plea he entered benefitted him greatly by reducing the applicable guidelines sentencing range. He said then he admitted his guilt "regardless of any immigration consequences." Nor has he explained why it would be equitable to force the government to retry the case some eleven years after the events. Finality would be undercut, not served, by issuance of the writ.

Equity also requires that the finality of "a great number of cases" not be put at risk by extending Padilla beyond its requirements. See United States v. Denedo, 556 U.S. 904, 911 (2009) ("To confine the use of coram nobis so that finality is not at risk in a great number of cases, we were careful . . . to limit the availability of the writ to 'extraordinary' cases presenting

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<sup>7</sup> The government correctly makes no argument that a condition of coram nobis relief is that the petitioner show actual innocence.

circumstances compelling its use 'to achieve justice.'" (quoting Morgan, 346 U.S. at 511)).

**III.**

We reverse the district court's grant of the writ of *coram nobis*, quash the writ, and dismiss the petition.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA, )  
 )  
 )  
v. ) C.R. No. 13-CR-181-JJM-PAS  
 )  
WALTER ACEITUNO, )  
Defendant. )  
 )

**ORDER**

Defendant Walter Aceituno filed a Petition for a Writ of Coram Nobis (ECF No. 42) which the government opposed. ECF No. 47. The Court held an evidentiary hearing with testimony from Mr. Aceituno and his earlier immigration attorney. The Court found both witnesses to be credible. Based on the evidence before the Court, it finds:

1. Mr. Aceituno acted reasonably in not seeking earlier relief considering the lengthy process involved in appealing his immigration status;
2. Mr. Aceituno and his family continue to suffer significant collateral consequences from the judgment of conviction (which the government concedes);
3. That the judgment of conviction resulted from an error of fundamental character, i.e., Mr. Aceituno was not informed or aware when he plead guilty to the felony charge that he would be permanently barred from the United States and forever separated from his family – his United States citizen spouse and his two United States citizen children;

4. Mr. Aceituno's attorney's representation fell below an objective standard of reasonableness because he did not inform Mr. Aceituno of the most dreaded consequence for him of pleading guilty – that he was likely to be separated from his family forever. His own attorney testified, uncontradicted by any other evidence, that a reasonable attorney at the time should have informed Mr. Aceituno of the fact that his deportation from the country would be permanent;

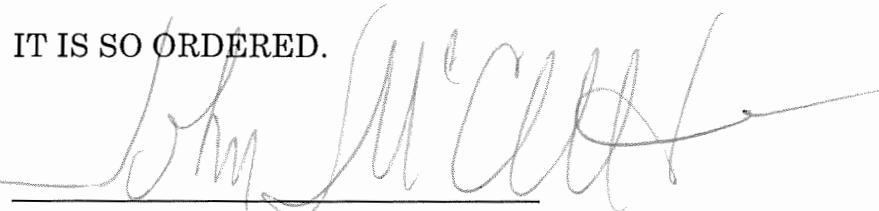
5. The Court finds without question, after seeing Mr. Aceituno testify, that but for the counsel's error, Mr. Aceituno would not have pleaded guilty. There is thus a reasonable probability that the results of the proceeding would have been different, sufficient to undermine confidence in the outcome; and

6. These circumstances compel this Court to grant the Writ of Coram Nobis to achieve justice.

THEREFORE, the Court hereby ORDERS as follows:

1. The Petition for a Writ of Coram Nobis is GRANTED and the Writ shall issue;
2. The Judgment in a Criminal Case entered on March 27, 2014 (ECF No. 32) is hereby VACATED;
3. Mr. Aceituno's plea of Guilty is WITHDRAWN; and
4. Mr. Aceituno is ordered released pending trial.

IT IS SO ORDERED.

  
John J. McConnell, Jr.  
Chief United States District Judge

February 9, 2024

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

BEFORE THE HONORABLE JOHN J. McCONNELL, JR.,

CHIEF JUDGE

## Writ of Coram Nobis

## APPEARANCES:

Court Reporter: Denise A. Webb, RPR  
One Exchange Terrace  
Providence, RI 02903

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1 07 FEBRUARY 2024 -- 10:00 A.M.

2 THE COURT: Good morning, everyone.

3 MR. MacDONALD: Good morning.

4 MS. ZURIER: Good morning, your Honor.

5 THE COURT: We are here this morning in the case of  
6 the United States versus Walter Aceituno. Did I say it  
7 right?

8 THE DEFENDANT: That's correct.

9 THE COURT: Aceituno. Criminal Action 13-181.  
10 We're here on a petition for a writ of coram nobis.

11 Would counsel identify themselves for the record.

12 MS. ZURIER: Lauren Zurier for the Government.  
13 With me is co-counsel, Julie White.

14 MS. WHITE: Good morning, your Honor.

15 THE COURT: Good morning, folks. Welcome.

16 MR. MacDONALD: Good morning, your Honor. John  
17 MacDonald for Mr. Aceituno.

18 THE COURT: Great. Good morning, Mr. MacDonald.  
19 Good morning, Mr. Aceituno.

20 THE DEFENDANT: Good morning.

21 THE COURT: How are you?

22 THE DEFENDANT: Good, your Honor.

23 THE COURT: Good. Why don't you have a seat. I'm  
24 going to hear how counsel would like to -- well, why don't I  
25 hear now. Has counsel decided how they'd like to proceed

1 this morning? Mr. MacDonald.

2 MR. MacDONALD: Your Honor, the petitioner's plan  
3 is to call Mr. Aceituno to testify and followed by Attorney  
4 Robert Watt who was the immigration attorney at the time of  
5 the plea. Mr. Watt is not here, but we do expect him  
6 shortly.

7 THE COURT: I had heard that he might have a  
8 conflict until 11, so when he gets here, we can put him up.  
9 Ms. Zurier, is that --

10 MS. ZURIER: Yes, your Honor. We worked this out  
11 with Mr. MacDonald before the hearing started.

12 THE COURT: That's great. Thank you. Just before  
13 that happened, I just want to make sure that I've got the  
14 facts correct leading up to where we are today. It's my  
15 understanding, from having reviewed the entire record, the  
16 old PSR and the current papers in this case, is that  
17 Mr. Aceituno came to the United States when he was about  
18 five years old, which was, I think, approximately 1984,  
19 brought here by his parents.

20 In 1989, he became a lawful, permanent resident of the  
21 United States. And from 1989 until -- am I wrong,  
22 Mr. MacDonald? You seem --

23 MR. MacDONALD: Your Honor, I did not have the  
24 PSI --

25 THE COURT: PSR.

1 MR. MacDONALD: -- PSR information. My information  
2 came from Mr. Aceituno. He's a little vague on the early  
3 dates having come here as a minor. That's all.

4 THE COURT: The PSR reports as follows: Thanks for  
5 that -- so came here as a minor. It says he was about five  
6 years old, but became a lawful, permanent resident in 1989.  
7 From 1989 until 2013, for those 24 years, he was legally in  
8 this country working, building his family to at least two  
9 children, I think, that are both U.S. citizens.

10 In 2013, he was charged with conspiracy with intent to  
11 deliver cocaine, two counts of that, pled guilty in 2014,  
12 and this Court sentenced him to time served.

13 He was then turned over to immigration authorities in  
14 2015. He was removed back to Guatemala. Mr. Aceituno, who  
15 hadn't lived in Guatemala since he was five years old, built  
16 up a barber shop business, from what I understand, and  
17 encountered some less than desirable activity by government  
18 officials there, including being forced to pay bribes or  
19 being requested to pay bribes and physical harm that came to  
20 him.

21 Four years later, he reentered the United States,  
22 turned himself into authorities, applied for CAT status.

23 MR. MacDONALD: Convention against torture.

24 THE COURT: Convention against torture. I couldn't  
25 think of what the C stood. Convention against torture. He

1 was held in 2021.

2           In 2022, he was released back to the community and his  
3 family, on bond from the immigration authorities, and at  
4 some point last year, last year in March, the Court --  
5 Mr. MacDonald, on his behalf, filed the coram nobis seeking  
6 to vacate the judgment of conviction that resulted from his  
7 plea and to allow him to withdraw his plea, in essence,  
8 claiming that his plea wasn't knowing and voluntary because,  
9 in essence, he didn't realize at the time that his change to  
10 immigration status, which might have had him deported,  
11 might -- could well bar him for life. And he found himself  
12 in 2019 barred from coming back in.

13           And here we're to decide coram nobis, which I thought  
14 was kind of unique that the First Circuit referred to it as  
15 a Hail Mary pass. Because before I looked at it, I thought  
16 to myself, Oh, this sounds like a Hail Mary pass, and here  
17 we are.

18           Does that, in essence -- and in addition, Ms. Zurier  
19 informed me that the Ninth Circuit rejected his CAT status.

20           MS. ZURIER: Yes. I can add one thing to that.  
21 They recently denied his petition for rehearing and the  
22 mandate issued. My understanding from immigration is that  
23 he is not a priority for deportation at this point because  
24 he's not detained in confinement.

25           THE COURT: Got it. Thanks, Ms. Zurier. I

1 appreciate it.

2 MR. MacDONALD: And I can add to that.

3 Mr. Aceituno was informed this morning by ICE to report to  
4 the Warwick detention facility, the Warwick facility next  
5 week, the 14th. I don't know if they're going to take him  
6 into custody or not, but that's information for the Court.

7 THE COURT: Okay. So with that general background,  
8 Mr. MacDonald.

9 MR. MacDONALD: Thank you, your Honor. Petitioner  
10 calls Mr. Aceituno.

11 WALTER ACEITUNO, DEFENDANT'S WITNESS, SWORN

12 THE CLERK: Please state your name and spell your  
13 last name for the record.

14 THE DEFENDANT: My name is Walter Aceituno,  
15 A-C-E-I-T-U-N-O.

16 THE CLERK: Thank you very much. You may be  
17 seated.

18 DIRECT EXAMINATION BY MR. MacDONALD:

19 Q. Good morning, Mr. Aceituno.

20 A. Good morning.

21 Q. As you testify here today, could you tell the Court how  
22 old you are?

23 A. I am 44 years old.

24 Q. And where were you born, Mr. Aceituno?

25 A. I was born in Guatemala.

1 Q. Who is your mother?

2 A. My mother is Maria Montenegro. She's here.

3 Q. She's present in court?

4 A. She's present in court.

5 Q. And I know there was some family history put on the  
6 record earlier, but do you recall traveling to the United  
7 States from Guatemala at an early age?

8 A. Yes.

9 Q. And do you recall who you traveled with?

10 A. Yes, I do.

11 Q. Who was that?

12 A. With my brother, my sister and mother.

13 Q. Okay. You've indicated --

14 THE COURT: Hold on a minute. Could you just,  
15 again, pull that -- it's difficult to hear in here, and if  
16 you talk right into it, that way everyone here will hear.

17 THE DEFENDANT: Okay.

18 THE COURT: Perfect. Thanks.

19 Q. What is your brother's name?

20 A. My brother's name is Lester Aceituno.

21 Q. And is Lester present in the courtroom?

22 A. Yes, he is.

23 Q. What is your sister's name?

24 A. My sister's name is Consuelo Aceituno.

25 Q. And is Consuelo present in the courtroom?

1 A. She is not here today.

2 Q. Where does she reside?

3 A. She resides in Texas.

4 Q. Okay. And where are you in the birth order?

5 A. I'm the middle child.

6 Q. Gotcha. After arriving in the United States at a young  
7 age, did the family initially reside in a particular state?

8 A. Yes. In California.

9 Q. Okay. And do you recall being -- going to school and  
10 being raised in California?

11 A. Yes.

12 Q. All right. At some point, do you recall obtaining  
13 what's called lawful permanent residence?

14 A. Yes.

15 Q. It's known as a green card, right?

16 A. It's a green card, yes.

17 Q. And so do you recall approximately how old you were when  
18 you became a permanent resident?

19 A. I would say around when I was ten years old.

20 Q. Okay. And you may not have known it at the time, but  
21 did you later learn how your mother or how your mother  
22 became a permanent resident?

23 A. Yes, I did.

24 Q. How was that?

25 A. She sought political asylum, I believe.

1 Q. And she was successful?

2 A. Yes, she was.

3 Q. And were you and your siblings beneficiaries of her  
4 application?

5 A. Yes.

6 Q. At some point, did the family relocate to Rhode Island?

7 A. Yes.

8 Q. And do you recall how old you were when that happened?

9 A. I was a junior in high school --

10 Q. All right.

11 A. -- which is 17 -- 16, 17 years old.

12 Q. Okay. And when you came to Rhode Island, did you finish  
13 high school in Rhode Island?

14 A. Yes, I did.

15 Q. What school was that?

16 A. I did -- I got my high school diploma from Central Falls  
17 High School.

18 Q. After Central Falls High School, did you pursue any  
19 higher learning?

20 A. Yeah. I went to Johnson & Wales University.

21 Q. Johnson & Wales in Providence?

22 A. Yes.

23 Q. What did you pursue at Johnson & Wales?

24 A. Business administration.

25 Q. Did you receive a degree?

1 A. Associate's.

2 Q. Okay. I'm going to talk briefly about your work  
3 history, Mr. Aceituno.

4 A. Um-hm.

5 Q. And after graduating Johnson & Wales, could you tell the  
6 Court briefly what work you pursued?

7 A. I did various jobs. Worked for GTECH, also, I started  
8 working more at the barber shop.

9 Q. Okay. How long had you been involved in -- as a barber?

10 A. I've been cutting hair since elementary school.

11 Q. Since when?

12 A. Since, like, elementary -- since elementary school.

13 Q. Did anyone in particular teach you how to cut hair?

14 A. Yeah. I had one of my cousins kind of guiding me, and  
15 then after that I was just cutting everybody, the whole  
16 family and friends and stuff like that.

17 Q. Ultimately, was pursuing employment as a barber, was  
18 that your primary form of income into your adult years?

19 A. Yes.

20 Q. I'd like to talk to you about your family.

21 A. Okay.

22 Q. And do you have any children?

23 A. Yes, I do.

24 Q. And could you tell the Court who your children are?

25 A. Julian Aceituno and J [REDACTED] A [REDACTED]. They are present

1 here.

2 Q. Both are present in court?

3 A. Yes.

4 Q. How old is Julian?

5 A. Julian, he is 21 years old.

6 Q. And is he currently in school?

7 A. Yes.

8 Q. Where?

9 A. He's enrolled in URI.

10 Q. University of Rhode Island?

11 A. University of Rhode Island.

12 Q. And how about J [REDACTED], your daughter?

13 A. J [REDACTED], she is 16 years old, and she attends BVP.

14 Q. B [REDACTED]?

15 A. B [REDACTED].

16 Q. Could you tell us, what is your relationship with their  
17 mother?

18 A. She is my wife.

19 Q. Who is?

20 A. Erika Larivee.

21 Q. Okay. Is Erika present in court?

22 A. Yes, she is.

23 Q. And so Erika is the mother of both children?

24 A. Yes.

25 Q. Are you lawfully married, legally married?

1 A. No.

2 Q. Do you consider yourselves husband and wife?

3 A. Yes.

4 Q. How long have you been together with Erika?

5 A. Over -- I'd say, I think it's about, like, 28 years,  
6 around there, 30. Yeah. Well, Julian is 21, so I'd say  
7 more than that. Probably about 23 years.

8 Q. Okay.

9 THE COURT: You should get this right. She's in

10 the room.

11 Q. We can always call her to the stand. I'd like to now  
12 talk about the events that brought you first to this  
13 courthouse in 2013. All right? In 2013, how were you  
14 employed?

15 A. As a barber.

16 Q. All right. Where?

17 A. Well, I was working at a barber shop called Latin Touch,  
18 but, eventually, I was able to open up the barber shop. So  
19 in 2013, I was working in my own shop.

20 Q. Your own shop. Where was the shop located?

21 A. It's on Broadway, Pawtucket.

22 Q. In Pawtucket?

23 A. Yeah. Broadway.

24 Q. And what was the name of the barber shop?

25 A. It's called Broadway's Barber Shop.

1 Q. And you were the owner?

2 A. Yes.

3 Q. And did you have tenants who were other barbers who  
4 worked there as well?

5 A. That's correct.

6 Q. How many?

7 A. At the time, it must have been six, six barbers.

8 Q. And did you have about six booths then at the barber  
9 shop?

10 A. Yes.

11 Q. And was one of those tenants Geronimo Ramos?

12 A. Yes.

13 Q. How did you know Mr. Ramos?

14 A. I was introduced to him by one of the instructors at Rob  
15 Roy Academy. I used to cut his hair. So he would send the  
16 best talent coming out the school so I could give them a  
17 job.

18 Q. And was one of those individuals -- that's how you  
19 met --

20 A. That's how I met Geronimo Ramos, yes.

21 Q. Did Mr. Ramos sublet a booth from you?

22 A. That's correct.

23 Q. During the course of the time that Mr. Ramos was at your  
24 barber shop, did there come a time where Mr. Ramos asked for  
25 a ride from you?

1 A. Yes.

2 Q. Did he indicate why he needed a ride?

3 A. No.

4 Q. Did he indicate why he couldn't drive himself?

5 A. Yes. He indicated that he didn't have a license, so he  
6 wanted me to drive.

7 Q. Okay. And did you have an active license at the time?

8 A. Yes.

9 Q. All right. And at this time, where was the ride to?

10 A. To Warwick.

11 Q. Was there any particular place you were told?

12 A. Yeah. He said he wanted to go meet up with somebody at  
13 a restaurant in Warwick.

14 Q. Okay. And did you agree to drive him?

15 A. Yes, I did.

16 Q. Do you recall the restaurant?

17 A. Yes.

18 Q. What was it?

19 A. Red Robin.

20 Q. The Red Robin in Warwick?

21 A. That's correct.

22 Q. Upon arriving to the Red Robin in Warwick, did you  
23 simply drop Mr. Ramos off?

24 A. No, I didn't.

25 Q. What happened?

1 A. I walked into the restaurant with him.

2 Q. Okay. And prior to walking into that restaurant, did  
3 Mr. Ramos advise you of what he was there for?

4 A. Yes.

5 Q. What did he say?

6 A. He said he was going to pick up some marijuana.

7 Q. And during the course of walking to the restaurant, did  
8 you meet other individuals?

9 A. Yes, I did.

10 Q. And let me ask you this: Before you even agreed to give  
11 him a ride, what were you going to get out of this?

12 A. I was going to get some marijuana.

13 Q. And how much marijuana were you going to get?

14 A. Just a small amount. About \$50 worth maybe.

15 Q. For personal use?

16 A. Personal use.

17 Q. Were you using marijuana at this time?

18 A. Yes, I was.

19 Q. And what were you using it for?

20 A. Just personal.

21 Q. Did you have any medical issues that required that  
22 marijuana assisted you with?

23 A. Well, just kind of relieved me from my anxiety.

24 Q. Okay. Were you on any anxiety medicine at this time?

25 A. No.

1 Q. But the marijuana helped?

2 A. Yes.

3 Q. So at some point, do you sit down with Mr. Ramos and  
4 these other individuals?

5 A. Yes, I did.

6 Q. And was there a conversation?

7 A. Yes, there was.

8 Q. And what was the conversation about?

9 A. They were talking about drugs.

10 Q. And what drugs in particular?

11 A. At the moment of the meeting, they started talking about  
12 cocaine afterwards.

13 Q. Is it -- at this point, did you learn that Mr. Ramos is  
14 not picking up marijuana, he's picking up cocaine?

15 A. That's correct.

16 Q. And at some point later on, you learned that this  
17 conversation was tape recorded?

18 A. After, yes.

19 Q. Right. And you were on the conversation, as well?

20 A. Yes, I was.

21 Q. And I believe during the course of this conversation you  
22 asked some questions about purity, correct?

23 A. That's correct.

24 Q. Not purity of marijuana; purity of cocaine?

25 A. Purity, yes.

1 Q. And could you tell us why you asked those questions?

2 A. The reason why I asked is, I mean, I'm known to have a  
3 big mouth. I have a big mouth, yes. I was in the meeting  
4 with this guy. I don't know these people. I don't want to  
5 sound -- I want to kind of sound like a big shot, so I spoke  
6 out.

7 Q. Were you involved in this deal with Mr. Ramos at all?

8 A. No, I was not.

9 Q. Were you getting any slice of the profits?

10 A. No, I was not.

11 Q. Were you contributing any money to the deal?

12 A. No, I did not.

13 Q. At some point did the meeting end and you left the  
14 restaurant with Mr. Ramos?

15 A. Yes.

16 Q. Where were you going?

17 A. We were going to the barber shop.

18 Q. Okay. And, again, you're still driving?

19 A. Yes.

20 Q. And what was your understanding when you were going to  
21 the barber shop? Why?

22 A. Because he said he was going to -- to pick up some money  
23 to talk to these guys.

24 Q. He was going to pick up money to make the deal --

25 A. Yeah.

1 Q. -- for the cocaine --

2 A. That's right.

3 Q. -- correct?

4 A. Yes.

5 Q. All right. And did you know where Mr. Ramos was keeping  
6 the money?

7 A. No.

8 Q. When you got back to the barber shop, what happened?

9 A. I had a client, so I had work. So he came back, and  
10 then we left.

11 Q. Okay. So when you came back to the barber shop, were  
12 you cutting someone's hair?

13 A. Yeah.

14 Q. And where was Mr. Ramos?

15 A. Mr. Ramos stepped out.

16 Q. Okay. And by the way, when you drove Mr. Ramos to the  
17 Red Robin, what car did you use?

18 A. His car.

19 Q. All right. It was -- you drove because you had the  
20 active license?

21 A. That's correct.

22 Q. And at some point, did you and Mr. Ramos leave the  
23 barber shop and go back to the Red Robin?

24 A. Yes, we did.

25 Q. At this point, was it your understanding that he had

1 money to make the purchase?

2 A. Yes.

3 Q. And why did you agree to bring him back?

4 A. I just -- I had already said yeah, and then I figured  
5 I'll just go and bring him back, and that's it.

6 Q. Did you go back to the Red Robin?

7 A. Yes.

8 Q. What happened when you got back?

9 A. When we got there, I seen the guy that was there  
10 originally, and he came to the car. He went to the back  
11 seat. I guess that's where he had the money, so he just --  
12 he looked and he made a signal, and then there was a bunch  
13 of undercover cops or undercover agents.

14 Q. Did you and Mr. Ramos ultimately get detained?

15 A. Yes.

16 Q. And you were both charged, and those charges led you to  
17 this courthouse; am I correct?

18 A. That's correct.

19 Q. Prior to this event, is it fair to say you had been  
20 previously arrested for some minor misdemeanor charges?

21 A. Yes.

22 Q. Suspended licenses, correct?

23 A. Yeah, that's correct.

24 Q. And I believe you had one driving under the influence --

25 A. That's correct.

1 Q. -- correct? But prior to this, had you been arrested  
2 for anything that could have potentially affected your green  
3 card?

4 A. No.

5 Q. All right. And after getting arrested, did you and your  
6 family hire an attorney to assist you with the criminal  
7 case?

8 A. Yes, we did.

9 Q. Who was that?

10 A. Tom O'Connor.

11 Q. Tom Connors?

12 A. Tom Connors, yes.

13 Q. Okay. Did you also hire an attorney to assist you with  
14 potential immigration consequences?

15 A. Yes, I did.

16 Q. Who was that?

17 A. Robert Watt.

18 Q. How did you -- let me ask you this: Why did you hire  
19 Mr. Watt in addition to Mr. Connors?

20 A. Just to take care of my immigration.

21 Q. Were you concerned at that time with being deported?

22 A. I was concerned about immigration.

23 Q. Okay.

24 A. Yes, I was.

25 Q. Did you have to pay Mr. Watt in addition to paying

1 Mr. Connors?

2 A. Yes, I did.

3 Q. And, ultimately, did they both assist you with making  
4 decisions in this case?

5 A. Yes.

6 Q. Did you receive advice from Tom Connors?

7 A. Yes, I did.

8 Q. And what was that advice?

9 A. The advice that I received from him was to plead out.

10 Q. Okay. And did Mr. Connors tell you why?

11 A. Tell me --

12 Q. Did Mr. Connors tell you why you should plead out versus  
13 going to trial?

14 A. Yes. He told me to just plead out because it was -- the  
15 evidence that was on there from me talking.

16 Q. Things like talking about cocaine on a recorded wire --

17 A. Yeah.

18 Q. -- correct? And driving Mr. Ramos --

19 A. That's correct.

20 Q. -- is that correct?

21 (Witness nods)

22 Q. All right. Did Mr. Connors tell you what jail range,  
23 what prison range you were looking at if you pled?

24 A. Yes.

25 Q. What was that?

1 A. He said I would be -- it would be about 36 months.

2 Q. Okay. Did you ultimately speak to -- and by the way,  
3 when you were arrested, and the date I have approximately is  
4 April 18, 2013, were you denied bond in this court?

5 A. Yes.

6 Q. By a federal magistrate?

7 A. Yes.

8 Q. Not this particular Judge --

9 A. Not this --

10 Q. -- but another one? And where were you held at that  
11 time?

12 A. I was held at the Wyatt in Central Falls.

13 Q. So while you were making these decisions, were you  
14 meeting with Mr. Connors at Wyatt?

15 A. Yeah, I met him a few times.

16 Q. Did your family visit you at Wyatt?

17 A. Yes, they did.

18 Q. How often?

19 A. Every visit.

20 Q. Was your family living in Central Falls at the time?

21 A. Central Falls, Pawtucket and the Providence area.

22 Q. Okay. Right in that area. So every potential visit,  
23 your family would be there?

24 A. Yes, sir.

25 Q. And you separately hired Mr. Watt to advise you as to

1 immigration. What did Mr. Watt tell you?

2 A. He advised me that we have a shot and that I would be  
3 deported, that I have a good chance of being deported, but  
4 we would fight.

5 Q. Did Mr. Watt tell you that this sort of conviction is  
6 going to get you deported?

7 A. Yes.

8 Q. Did he tell you that there were still things that you  
9 could apply for to stay in the country?

10 A. Yes.

11 Q. And do you remember what that was?

12 A. Yes. One of them was the withholding or removing the  
13 CAT, Convention Against Torture.

14 Q. Okay. And did Mr. Watt give you any sense of what your  
15 chance was, good, bad, indifferent, to obtain this relief?

16 A. It was just about just fighting. There was never, like,  
17 a great chance or anything like that. We were just like, we  
18 have to fight.

19 Q. Okay. Did you think you had a chance for it?

20 A. Yes.

21 Q. And did the fact that your mother received asylum  
22 originally enter into that thinking?

23 A. That's correct, yes.

24 Q. And so, ultimately, you pled guilty before this Court;  
25 am I correct?

1 A. That's correct.

2 Q. And during the plea colloquy itself before Judge  
3 McConnell, do you recall a discussion about potential  
4 immigration consequences?

5 A. Yes.

6 Q. Okay. What did Mr. Watt tell you in terms of the  
7 potential immigration consequences for you, so we're clear?  
8 What did he say would happen to you at immigration court?

9 A. He said that we have -- what do you mean, before or --

10 Q. Before you changed your plea before Judge McConnell --

11 A. Um-hm.

12 Q. -- what did Mr. Watt advise you about deportation?

13 A. He said that I would be deported.

14 Q. Okay. Did he give you some hope for staying in the  
15 country?

16 A. Yes.

17 Q. And is that the withholding of removal --

18 A. And the CAT.

19 Q. And CAT?

20 A. Yes.

21 Q. In your discussions with Mr. Watt, did he ever tell you  
22 that if withholding is denied and CAT is denied and you're  
23 sent back to Guatemala, you're never lawfully coming back to  
24 the United States?

25 A. No, he did not.

1 Q. Did that ever come up in your discussions?

2 A. No.

3 Q. As you're making these decisions, did you think at that  
4 time if you went back to Guatemala that you were never  
5 lawfully able to get back?

6 A. No.

7 Q. What were you thinking?

8 A. I was thinking I would get deported and be able to come  
9 back in five years.

10 Q. And why did you think that?

11 A. Well, I've -- I've seen -- after when I was detained, I  
12 was talking to a lot of people, and, you know, there's a  
13 bunch of people inside and everybody talks. So a lot of  
14 people were telling me that, you know, after five years,  
15 you're able to come back. So that was my way of thinking  
16 during the time. If worst comes to worse.

17 Q. But this particular discussion never came up with

18 Mr. Watt --

19 A. No.

20 Q. -- before you changed your plea before Judge McConnell?

21 A. No.

22 Q. If Mr. Watt had told you, By the way, Walter, if  
23 everything fails and you get sent back to Guatemala, you're  
24 never lawfully coming back to the United States, if he had  
25 told you that, would you have made a different decision?

1 A. Yes, I would have.

2 Q. What decision is that?

3 A. I would have took the case to trial.

4 Q. Why?

5 A. Because I don't -- I wouldn't want to get deported, and  
6 I have a better chance taking it to trial. I know the jury  
7 would have had some type of mercy on me by seeing all the  
8 details of what happened and my co-defendant, you know,  
9 taking responsibility.

10 Q. Okay. So you say -- let's just talk about -- because we  
11 know you're on a wire talking about purity of cocaine,  
12 right?

13 A. That's right.

14 Q. And we know that you're driving Mr. Ramos back and forth  
15 to pick up his cocaine, right?

16 A. That's correct.

17 Q. But your co-defendant, Geronimo Ramos, did you have  
18 discussions with him after you were arrested?

19 A. Yes.

20 Q. Could you tell us about those discussions?

21 A. Yes. I was in the Wyatt, in the same detention center  
22 as him. So we would talk, and he would just tell me not to  
23 worry about it, that he knew it wasn't me and he was taking  
24 the plea.

25 Q. Okay. And just focus on me, Mr. Aceituno.

1 A. Okay.

2 Q. Okay. Did Mr. Ramos ever tell you, while you were  
3 detained before you changed your plea, that if he needed to,  
4 he would testify for you?

5 A. Yes, he did.

6 Q. And he would testify essentially you weren't involved in  
7 the deal other than a last minute ride?

8 A. That's correct.

9 Q. And was that going to be your defense at trial?

10 A. Yes.

11 Q. Ultimately, you didn't pursue that; am I correct?

12 A. That's correct.

13 Q. You pursued the plea and you tried to minimize your  
14 sentence --

15 A. That's correct.

16 Q. -- right?

17 THE COURT: Mr. MacDonald, I don't want to jump  
18 your order, but are you going to ask him the same questions  
19 about the advice he got from Mr. Connors that you did about  
20 Mr. Watt?

21 MR. MacDONALD: I wasn't going to, your Honor,  
22 because it's my understanding that it was Mr. Watt -- that  
23 Mr. Connors deferred to Mr. Watt as to any immigration  
24 advise.

25 THE COURT: So there's no question that Mr. Connors

1 never told him that he could be permanently barred from the  
2 U.S.?

3 MR. MacDONALD: That's correct.

4 THE COURT: That's a fact --

5 MR. MacDONALD: Yes.

6 THE COURT: -- that the Court can rely on? Okay.

7 MR. MacDONALD: And I'm happy going through that  
8 now, Judge.

9 THE COURT: Nope. It's perfectly fine.

10 MR. MacDONALD: Okay.

11 Q. At any rate, you appeared before this Court for  
12 sentencing on March 25, 2014?

13 A. That's correct.

14 Q. And I believe, in reviewing the sentencing transcript,  
15 that lots of family members were present in court just like  
16 they are today?

17 A. Yes, sir --

18 Q. And you received scores of letters of support --

19 A. That's correct.

20 Q. -- right? And, ultimately, you had a guideline range;  
21 am I correct?

22 A. That's correct.

23 Q. And Judge McConnell went far below that guideline range  
24 and gave you time served?

25 A. Yes. And I will forever be grateful for that.

1 Q. And at any rate, after you were sentenced to time  
2 served, were you released?

3 A. No.

4 Q. What happened?

5 A. After sentencing, yes. The Judge, he -- this was his  
6 exact words. You gave enough heartache to your family. Go  
7 home to your family. And I got picked up by a U.S. marshal,  
8 and they arrested me or detained me again.

9 Q. Okay. So were you briefly released, and then --

10 A. For -- I don't know. For a second.

11 Q. Okay. And at that point, you're in immigration custody?

12 A. That's right. Yes.

13 Q. Where were you detained by immigration?

14 A. Bristol County.

15 Q. Bristol County? In Dartmouth, Massachusetts?

16 A. Dartmouth, Mass, yes.

17 Q. Who was your immigration attorney?

18 A. Robert Watt.

19 Q. So Mr. Watt who told you about CAT relief and  
20 withholding was now your attorney to pursue that in  
21 immigration court?

22 A. That is correct.

23 Q. Did Mr. Watt, to your knowledge, attempt to get you  
24 released on bond?

25 A. Yes.

1 Q. Was that denied?

2 A. Denied.

3 Q. And so now you're detained in Dartmouth. Is your family  
4 visiting you in Dartmouth?

5 A. That's correct.

6 Q. Now it's been over a year of incarceration. And is it  
7 fair to say this is the first time you've ever been  
8 incarcerated for anything?

9 A. That's correct.

10 Q. At that point in time, in March of 2014, could you have  
11 just taken an order of removal and went back to Guatemala?

12 A. Yes, I could have.

13 Q. And would that have gotten you out of prison earlier?

14 A. Yes.

15 Q. Did you decide to do that?

16 A. No.

17 Q. Why?

18 A. Because I didn't want to get deported.

19 Q. And so you made the decision to remain in custody to  
20 fight the case?

21 A. That's correct.

22 Q. And did you and Mr. Watt ultimately pursue Convention  
23 Against Torture and withholding of removal before a Boston  
24 immigration court judge?

25 A. Yes, we did.

1 Q. Did you have hearing?

2 A. Yes.

3 Q. Did you present evidence and witnesses?

4 A. Yes.

5 Q. And what was the result of that hearing?

6 A. I was denied.

7 Q. After you were denied by the immigration judge, did you  
8 pursue any appeal?

9 A. Yes.

10 Q. Where?

11 A. The Board of Immigration Appeals.

12 Q. And while you're pursuing this appeal, are you still  
13 detained.

14 A. Yes, sir.

15 Q. And at that point, before you pursued the appeal, could  
16 you have just gone back --

17 A. Yes.

18 Q. -- and be put on a plane?

19 A. Yes, I could have.

20 Q. Would that have shortened your prison stay?

21 A. Yes, it would have.

22 Q. Why did you pursue an appeal?

23 A. Because I did not want to get deported.

24 Q. Did Mr. Watt represent you on that appeal?

25 A. No, he didn't.

1 Q. Was that appeal before the Board of Immigration Appeals?

2 A. Yes.

3 Q. Called the BIA?

4 A. The BIA.

5 Q. All right. Was that appeal successful?

6 A. No, it was not.

7 Q. All right. And I believe that appeal was ultimately  
8 denied on November 7, 2014.

9 A. Okay.

10 Q. Right. Ultimately, did immigration authorities put you  
11 on a plane back to Guatemala?

12 A. Yes, they did.

13 Q. And when was that?

14 A. This was in January of 2015.

15 Q. Okay. And so at this point in time, you're back in  
16 Guatemala, and could you tell the Court, what's your plan;  
17 what's your hope at that point?

18 A. I was -- first I was devastated. I was lost, scared. I  
19 haven't been there. But, yeah, once I got there, you know,  
20 I'm just trying to make the best out of it. Trying to make  
21 the best life in Guatemala.

22 Q. At this point it's January 2015. At that point, had you  
23 been advised by anyone that, by the way, you can't ever come  
24 back? Now that you lost your case and your appeals have  
25 been denied, you can't ever lawfully come back to the United

1 States?

2 A. I don't really recall exact date when it happened, but I  
3 know it was during incarceration, like after when I was  
4 detained.

5 Q. Detained in immigration?

6 A. Yeah, immigration.

7 Q. Okay. So is it fair to say that some time after the  
8 criminal case is done and you're in immigration custody, you  
9 learn that you're forever banned from coming back lawfully  
10 to the U.S.?

11 A. That's correct.

12 Q. If your request for relief is denied?

13 A. Yes.

14 Q. So is it fair to say that you're back in Guatemala  
15 trying to make best of it?

16 A. That's correct, sir.

17 Q. And what do you do for work?

18 MS. WHITE: Your Honor, I'm going to object at this  
19 point. Most respectfully, what happened in Guatemala is  
20 irrelevant to whether the plea was taken with appropriated  
21 advise of counsel.

22 THE COURT: I'm going to overrule the objection.

23 That was my initial thought, as well, Ms. White. But one of  
24 the factors the Court has to find in a coram nobis is his  
25 failure to properly -- to timely file, say for instance, a

1 22-55 or any other relief he may have, is that that delay  
2 was reasonable. And his purpose for not pursuing a 22-55 or  
3 other relief is relevant I think to a Court's finding on  
4 that, so I'm going to overrule the objection. I think it is  
5 relevant as to that small aspect of a coram nobis.

6 MS. WHITE: Thank you, your Honor.

7 THE COURT: Mr. MacDonald.

8 MR. MacDONALD: Thank you.

9 Q. Getting back to that question, did you pursue employment  
10 back in Guatemala?

11 A. Yes, I did.

12 Q. And what did you pursue?

13 A. I was working for TELUS International. It's a call  
14 center in Guatemala.

15 Q. And what other work did you pursue?

16 A. I was -- when I was working there, I started getting  
17 clients and cutting hair. And, eventually, I was also  
18 importing cars.

19 MR. MacDONALD: Your Honor, I have some photographs  
20 to display to the Court.

21 THE COURT: Sure.

22 MR. MacDONALD: I believe they're marked as a group  
23 batch exhibit.

24 THE COURT: What are they marked as a group?

25 MR. MacDONALD: A. Petitioner's A. Thank you.

1 Q. I'm showing the first photograph, Mr. Aceituno. Could  
2 you describe what's depicted in the picture?

3 A. That's where I would park my cars. I would park them,  
4 you know, to be exposed to the public that they were for  
5 sale.

6 Q. And were you involved in importing cars to Guatemala  
7 from the United States?

8 A. Yes.

9 Q. Okay. And that's you displayed in the photograph?

10 A. That's correct.

11 Q. You indicated that you were pursuing -- you were cutting  
12 hair again?

13 A. That's correct.

14 Q. And it's fair to say, this had been your primary  
15 occupation while in the United States as an adult; am I  
16 correct?

17 A. That's correct.

18 Q. Did you ultimately pursue starting your own barber shop  
19 in Guatemala?

20 A. Yes, I did.

21 Q. Could you tell us about that?

22 A. After working for almost three years in Guatemala at the  
23 call center, I was able to save money with the cars and  
24 everything. I was able to start up the barber shop  
25 business.

1 Q. Okay. And I'm showing you another photograph. Do you  
2 recognize what's depicted in that?

3 A. Yes, sir. That's the barber shop that I built in  
4 Guatemala.

5 Q. Did you personally build it?

6 A. Yes.

7 Q. Was it your barber shop?

8 A. Yes.

9 Q. And what was it called?

10 A. Broadway's Barber Shop. Same one -- like the same one  
11 that's here.

12 Q. And the only thing different is this one says Guatemala  
13 City under Barber Shop?

14 A. That's correct.

15 Q. Let me show you another similar photograph. Could you  
16 tell us what's depicted in that?

17 A. That's me and the barbers that was working for me.

18 Q. Are these barbers that worked in your shop?

19 A. That's correct.

20 Q. All right. Now, while in Guatemala, did you continue to  
21 stay in contact with your family?

22 A. Yes, sir, I did.

23 Q. And, particularly, your wife Erika and your children  
24 Julian and J [REDACTED], did they visit you in Guatemala?

25 A. Yes, they did.

1 Q. How often?

2 A. I would say very often. When they had vacations, long  
3 vacations in the summertime.

4 Q. Okay. Any other times of the year?

5 A. Yeah. They went there on Christmas.

6 Q. In the course of while you're in Guatemala, between 2015  
7 and 2019, could you describe to the Court, how many times  
8 did your family visit you?

9 A. It was a lot of times. Passport was pretty full.

10 Q. Passport was full. Okay.

11 THE COURT: Mr. MacDonald, you may have asked this,  
12 I don't remember. Is his partner Erika a United States  
13 citizen?

14 Q. Is Erika a U.S. citizen?

15 A. Yes, she is.

16 Q. And your children both born in the United States are  
17 both citizens?

18 A. Yes.

19 Q. Okay. Could you tell us what is depicted in this  
20 photograph.

21 A. I've got to look.

22 Q. Your screen is not working?

23 A. Do I turn it on?

24 Q. It's working now. Great.

25 A. This is a picture where my family came to Guatemala to

1 visit me. One of the pictures.

2 Q. Okay. And that's Erika, Julian and J [REDACTED] in the  
3 picture?

4 A. That's correct.

5 Q. Okay. And how old is J [REDACTED] in this picture?

6 A. J [REDACTED], she's around eight.

7 Q. And Julian?

8 A. I would say, like, 13, 14 -- 13, 14.

9 Q. Okay. I'm just going to show you one more family  
10 picture. And when your family did visit, did you attempt to  
11 bring them around Guatemala?

12 A. Yes, we did.

13 Q. And could you tell us what's depicted in this  
14 photograph?

15 A. This is when we were at the Guatemalan -- the Mayan  
16 Ruins in Becan, Guatemala.

17 Q. And you took a trip to the Ruins with Julian and  
18 J [REDACTED]?

19 A. Yes.

20 Q. And J [REDACTED] looks a little bit older in this photograph.

21 A. Yeah.

22 Q. Now, while you were in Guatemala and you built a barber  
23 shop, your family is visiting you, you're making the best of  
24 it, correct?

25 A. That's correct.

1 Q. Did you have any issues with the local police?

2 A. Yes, I did.

3 Q. Could you tell the Court what those issues were?

4 A. They wanted to extort me, and they started questioning  
5 me.

6 Q. They're shaking you down for money?

7 A. Yeah.

8 Q. Okay. Was this standard practice in Guatemala City?

9 A. Yeah. With business owners and people that, you know,  
10 have any type of business or anything like that, you know.

11 Q. Okay. How did you deal with this? Would the police  
12 come by the barber shop?

13 A. At first I would tell them that the owner is not here  
14 and I was just working there. But eventually they started  
15 doing more research, and amongst the other business owners  
16 there, I believe they were the ones. Now that I think about  
17 everything, I believe they were probably the ones that kind  
18 of told them.

19 Q. And they figured you were the owner?

20 A. Yeah.

21 Q. They figured that out? Okay. Initially, did you not  
22 give them money?

23 A. Yeah. Initially I did not give them money.

24 Q. I'm going to show you a photograph. And Ryan, the  
25 screen is off. Okay. Great. Thank you. Could you tell us

1 what's depicted in this picture?

2 A. That's just one of the times where the police just, you  
3 know, they just pull us and start asking us for documents.

4 Q. Who's in this picture here? Who's the individual in the  
5 blue shirt?

6 A. That's Axe. He was one of the barbers at my barber  
7 shop.

8 Q. Did you take this picture?

9 A. I believe so.

10 Q. Okay. And what are the police doing in this photograph?

11 A. They are searching his bag.

12 Q. For what?

13 A. They're just looking. They're just looking for anything  
14 in there. Mostly money.

15 Q. Would this be a common occurrence, being stopped on the  
16 street --

17 A. Yeah.

18 Q. -- questioned and searched?

19 A. For us, yes.

20 Q. Why do you say "us"?

21 A. Well, in Guatemala, they're, how should I say, bias as  
22 far as, like, people come from the United States or are  
23 Americanized, they automatically become a target over there.

24 Q. So if you're -- if you get deported back to Guatemala,  
25 you became a target in Guatemala?

1 A. Absolutely.

2 Q. Okay. As an --

3 A. That's just how it is.

4 Q. -- ex-green card holder. Okay. What's depicted in this  
5 photograph?

6 A. That's the police. They always took pictures of us.

7 This is a chance that I got, I was able to take that.

8 Q. Did you take this picture?

9 A. Yes.

10 Q. Okay. And what's your understanding as to why police  
11 took pictures?

12 A. Yes.

13 Q. What's your understanding? Why did they do it?

14 A. Oh. What it is, they have a platform. They have a  
15 platform that they share amongst all police officers, mostly  
16 the crooked ones. And they have pictures -- they have  
17 pictures of everybody that, you know, they think that they  
18 could take for money.

19 Q. Okay. Ultimately, did you run into any personal issues  
20 with police involving a physical beating?

21 A. Yes.

22 Q. Could you describe it to the Court?

23 A. Yes. We got out of the barber shop, and we went to have  
24 a drink. We was having a couple of drinks. We stepped out.  
25 We were hungry, so we left. It was dark, so we started

1 walking towards the food -- one of the street food vendors  
2 that was on the other side. And as we were walking over  
3 there, we seen the police coming. They would park the cars,  
4 and they would walk half the time.

5 So they came and they told us to stop. And then it was  
6 in a dark area, like an alley type. And they started asking  
7 the same questions like, What are you doing, who are you  
8 working for. The guy starts looking at the cellphone, and  
9 he sees the pictures there that they all share amongst each  
10 other. So, oh, yeah, that's them.

11 And I seen my -- I seen one of the workers that was  
12 with me that day, Fernando, he was in the -- he starts  
13 getting -- he starts getting tortured. He starts getting  
14 beat down. And I seen them, and meanwhile, these guys, they  
15 have me on the floor. I got hit with the rifle on the side.  
16 That's how I fell.

17 Once I came down, the blood is gushing to my face, so I  
18 can't see, but I just hear screaming. I hear Fernando  
19 screaming, and I seen them make their way to me. And they  
20 started asking me, who do I work for, and, like, you know,  
21 they searched my pockets. They found my rent money. They  
22 took it. And I told them -- I had to tell them, like, look,  
23 I own the barber shop, that's my rent money, and I need it.  
24 They don't care.

25 When I felt just the burning pain in my back -- this is

1 before the money -- before they took my money and all that,  
2 they were burning me and asking me, who do you work for.  
3 And I'm like, look, I work for the barber shop. But I  
4 blacked out for a couple of minutes because the burning was  
5 really bad.

6 Q. Was your shirt off at this point?

7 A. Yes, my shirt was off.

8 Q. Who took it off?

9 A. The police.

10 MS. WHITE: Your Honor, at this point, I am going  
11 to object. And that's no disrespect to Mr. Aceituno, what  
12 he's gone through. We've read the pleadings, and I believe  
13 this was thoroughly vetted at the Commission Against Torture  
14 hearing in the Ninth Circuit. So at this point, having  
15 Mr. Aceituno recount that is irrelevant to this proceeding  
16 and whether his plea was freely and voluntarily given. So  
17 we would ask that we move along from this particular  
18 incident that occurred on one date.

19 THE COURT: I am -- I think you're right,  
20 Ms. White. Why don't you move on, Mr. MacDonald.

21 MR. MacDONALD: Okay.

22 Q. As a result of that particular beating with the police,  
23 and, again, you indicated you received burn marks and a  
24 facial beating, did you take any action to leave Guatemala?

25 A. Yes, I did.

1 Q. Prior to taking that action, did you file any complaints  
2 against the police?

3 A. Yes, I filed a complaint.

4 Q. Did that complaint go anywhere?

5 A. No, it didn't.

6 Q. And, ultimately, did you believe that your life was in  
7 danger?

8 A. Very much.

9 Q. Why is that?

10 A. Because I avoided going back to my workplace, my barber  
11 shop. And one of the -- the one that they were taking the  
12 picture of that you guys just prior seen, he got the same  
13 beating like me --

14 Q. Axe?

15 A. -- after. Yes. After. Because they was asking where I  
16 was at, my whereabouts.

17 Q. What efforts did you take at this point to leave  
18 Guatemala?

19 A. I was -- I left. I had to leave.

20 Q. Okay. How soon after this beating did you leave, if you  
21 recall?

22 A. I would say it was probably like a few weeks. I had to,  
23 you know, kind of get myself together and get away and had  
24 to move out of there.

25 Q. Were you staying at the same house?

1 A. No, I was not.

2 Q. So you changed your address, and you're making  
3 arraignments to leave?

4 A. That's correct.

5 Q. Did you lawfully cross the Guatemala/Mexican border?

6 A. No, I didn't.

7 Q. What did you do?

8 A. I had to go through the river there. The other side.

9 Q. And did that crossing into Mexico ultimately work?

10 A. No.

11 Q. What happened when you got into Mexico?

12 A. I got -- I got arrested by the immigration -- Mexican  
13 immigration, so I was detained in Mexico.

14 Q. Okay. And what happened?

15 A. I was detained, and then they deported me back to  
16 Guatemala.

17 Q. How long were you in Mexico before you were deported  
18 back?

19 A. I was there a couple of days in the detention center.

20 Q. After coming back to Guatemala, did you make another  
21 attempt to leave?

22 A. Yes, I did.

23 Q. When?

24 A. I would say probably, like, a couple of weeks later.

25 Q. Okay.

1 A. I wasn't -- no, it wasn't -- it was about a week or some  
2 days later, yes.

3 Q. Was that attempt successful?

4 A. Yeah. That one, yes.

5 Q. Okay. What happened?

6 A. I crossed, and then I applied for a visa, humanitarian  
7 visa.

8 Q. Where?

9 A. Mexico.

10 Q. In Mexico?

11 A. That's correct.

12 Q. From the Mexican Embassy?

13 A. Yeah.

14 Q. And did you successfully obtain that visa?

15 A. Yes.

16 Q. And did that visa allow you to travel through Mexico to  
17 the U.S. border?

18 A. That's correct.

19 Q. Okay. Did you get to the U.S. border?

20 A. Yes, I did.

21 Q. And now we're talking approximately -- it's November,  
22 right, 2019?

23 A. That's correct.

24 Q. What happened when you arrived at the U.S. border?

25 A. I got arrested.

1 Q. How?

2 A. I got taken in by the federal -- by federal agents.

3 Q. Did you present yourself at that port of entry?

4 A. Yes, I did.

5 Q. In other words, you didn't make an attempt to sneak  
6 across the border?

7 A. No, I didn't.

8 Q. Use a coyote?

9 A. That's correct.

10 Q. When you presented yourself at the border, did you  
11 ultimately show them any prior documentation that you had?

12 A. Yes, I did.

13 Q. What did you show them?

14 A. I showed them my expired green card.

15 Q. Okay. And, ultimately, you were arrested, correct?

16 A. Yes, that's correct.

17 Q. And were you detained by federal authorities?

18 A. Yes.

19 Q. And I believe at that point you were charged with the  
20 felony charge of illegal reentry?

21 A. That's correct.

22 Q. And did that felony charge ultimately change?

23 A. Yes, it did.

24 Q. To what?

25 A. To a misdemeanor.

1 Q. How come?

2 MS. WHITE: I'm going to object, your Honor. We're  
3 now in 2020 and a subsequent criminal conviction. It has no  
4 bearing on whether his plea was freely and voluntarily given  
5 with competent advice of counsel from Mr. Watt.

6 MR. MacDONALD: If I may be heard your Honor, all  
7 of these actions go to the decisions that he made -- even  
8 post go to whether or not the Court considers he would have  
9 made a different decision back in 2013, '14. And so the  
10 actions that he's taking all during this time frame reflect  
11 upon whether or not he would have made that decision to go  
12 to trial versus deportation.

13 THE COURT: I'm not a hundred percent sure how  
14 relevant it is, but because it's a bench evidentiary  
15 hearing, I think I'll take it and then be able to determine.

16 MR. MacDONALD: Thank you.

17 MS. WHITE: Thank you, your Honor.

18 THE COURT: So it's overruled without objection --  
19 without prejudice.

20 MS. WHITE: Thank you.

21 Q. What ultimately happened, Mr. Aceituno, to the criminal  
22 charges?

23 A. The criminal charges?

24 Q. Yup. You were originally charged with a felony, illegal  
25 reentry, and that was knocked down to a misdemeanor. Do you

1 know why?

2 A. Yeah. Because my case wasn't heard at the beginning, so  
3 they automatically -- they just wanted to give me a felony  
4 and try to tell me to plead out. So I had a talk with my  
5 attorney, and she seen my whole story, and I explained to  
6 her everything. And she was ultimately able to bring it up  
7 to the judge, and the judge brought it down to a  
8 misdemeanor.

9 Q. And did you show your attorney some of the pictures of  
10 the torture or the beatings you received?

11 A. Yeah. I explained her everything.

12 Q. Did you actually show her documentation?

13 A. No, I didn't show no documentation, but I explained to  
14 her everything.

15 Q. Ultimately, the record should reflect that you were  
16 released on time served on the federal charges --

17 A. That's correct.

18 Q. -- correct? And at that point, what happened to you?

19 A. I got detained by ICE.

20 Q. By immigration?

21 A. Immigration again, yes.

22 Q. And you could have made a decision at that point to  
23 agree to be deported and return back to Guatemala or fight  
24 the case?

25 A. That's correct.

1 Q. What did you choose?

2 A. Fight the case.

3 Q. Knowing that you were going to continue to be detained?

4 A. That's correct.

5 Q. Did you hire an immigration attorney?

6 A. Yes, I did.

7 Q. And what relief did you seek this time?

8 A. We sought the CAT, the Convention Against Torture.

9 Q. And this time, a little bit different, you had proof of  
10 persecution, torture, beatings in Guatemala, correct?

11 A. That's correct.

12 MS. WHITE: Objection, your Honor. Number one,  
13 that's leading. Number two, that's a legal finding that the  
14 Ninth Circuit disagreed with.

15 THE COURT: The Ninth Circuit disagreed that he met  
16 the CAT standard. The LAJ found that his testimony  
17 concerning his beatings and other handlings by the police  
18 was credible. So for whatever that's worth and however that  
19 has any legal significance is what it is.

20 MR. MacDONALD: Okay.

21 Q. Ultimately, your request before the immigration court  
22 judge was denied?

23 A. That's correct.

24 Q. At that point, are you still detained?

25 A. Yes.

1 Q. And this is now November 2020, correct?

2 A. That's correct.

3 Q. So that's a year in custody?

4 A. That's correct.

5 Q. And at that point, is it fair to say you could have  
6 taken the order of removal and gone back or taken an appeal?

7 A. Yes.

8 Q. What did you choose?

9 A. I chose to take an appeal.

10 Q. Even though you would still be detained?

11 A. That's correct.

12 Q. Why did you choose that?

13 A. Because I did not want to be deported.

14 Q. And what appeal did you pursue?

15 A. We appealed the CAT, Convention Against Torture.

16 Q. To the Board of Immigration --

17 A. The BIA. That's correct.

18 Q. Was that appeal successful?

19 A. It was denied.

20 Q. After that was denied, did you pursue any further  
21 appeals?

22 A. Yes, I did.

23 Q. To where?

24 A. To the Ninth Circuit.

25 Q. And that we just referenced. Ultimately, that petition

1 for review was filed, correct?

2 A. That's correct.

3 Q. And during the course of that petition for review  
4 pending in California before the Ninth Circuit, were you  
5 released on an order of supervision?

6 A. Yes, I was.

7 Q. Do you recall when that was?

8 A. I believe it was August 2022.

9 Q. And have you been out on that order of supervision ever  
10 since?

11 A. Yes, I have.

12 Q. Does the order require you to check in?

13 A. Yes, it does.

14 Q. And comply with whatever they ask you to do?

15 A. Yes.

16 Q. And have you done that?

17 A. Yes, I have.

18 Q. The petition for review, was that denied?

19 A. Yes.

20 Q. Did you take any further appeals?

21 A. Not as of yet.

22 Q. Who is your attorney, if you recall?

23 A. For this? What's his name?

24 Q. Is it Randy Olen?

25 A. Randy Olen, sorry.

1 Q. I believe Mr. Olen filed a petition for review, and when  
2 that was denied, he filed another for an en banc hearing?

3 A. He represented me for the en banc hearing.

4 Q. And was that recently denied?

5 A. Yes.

6 Q. So, Mr. Aceituno, I've got to ask you, you're taking all  
7 of these appeals to pursue all of these legal challenges,  
8 why?

9 A. Because I do not want to return to Guatemala. I do not  
10 want to get deported. I do not want to leave my family.

11 Q. Okay. I'm going to go back to a couple of different  
12 points before I conclude my questioning. We talked about  
13 the advice that you did not receive from Mr. Watt; am I  
14 correct?

15 A. That's correct.

16 Q. And I believe it's your testimony, at some point when  
17 you're in immigration custody, and you don't know when you  
18 learned that you were never going to lawfully be able to get  
19 back?

20 A. That's correct.

21 MR. MacDONALD: Thank you. No further questions.

22 THE COURT: Thanks a lot, Mr. MacDonald.

23 Ms. White.

24 MS. WHITE: Yes, your Honor. Thank you.

25 THE COURT: Hold on one second. John, did you want

1 to move the exhibits full for the hearing?

2 MR. MacDONALD: I would. Some of them I did not  
3 show the Court, and they're in the batch, the last three.

4 THE COURT: That's fine.

5 MR. MacDONALD: I move them full for the Court's  
6 consideration.

7 MS. WHITE: We have no objection to the exhibits  
8 that were published, your Honor. The other exhibits deal  
9 with the single incident with the police, and those we  
10 believe are irrelevant. He's already described those, and  
11 they haven't been published.

12 THE COURT: Why don't we just admit the ones that  
13 were published.

14 MR. MacDONALD: That's fine. So I will -- we can  
15 hand those over to Mr. Jackson.

16 (Defendant's Exhibit A admitted full)

17 THE COURT: Thanks.

18 MR. MacDONALD: Thank you.

19 THE COURT: Ms. White.

20 MS. WHITE: Thank you, your Honor.

21 CROSS-EXAMINATION BY MS. WHITE:

22 Q. Mr. Aceituno, good morning.

23 A. Good morning.

24 Q. You said you're 44?

25 A. Yes.

1 Q. We're about the same age. How much cocaine was involved  
2 in the deal that you sat in at the Red Robin?

3 A. The conversation was with them, but it was about -- I  
4 believe it was 3, 3 kilos.

5 Q. 3 kilograms?

6 A. That conversation that they were dealing with --

7 Q. And you said --

8 A. -- when I was there.

9 Q. Oh, I'm sorry. And you said that you knew Gerry Ramos?

10 A. Yes.

11 Q. And he worked in your shop as one of the barbers?

12 A. Yes.

13 Q. Okay. And you remember that meeting at the Red Robin on  
14 April 18th of 2013, right?

15 A. Yes.

16 Q. And you knew that Mr. Ramos had a car that day; is that  
17 right?

18 A. Yes.

19 Q. Was that a green Mercury Mountaineer?

20 A. Yes.

21 Q. And Mr. Ramos drove the car to the barber shop that day,  
22 didn't he?

23 A. Yes.

24 Q. But you drove to the restaurant in Warwick, didn't you?

25 A. Yes.

1 Q. And what vehicle did you drive?

2 A. His car.

3 Q. You drove the Mountaineer?

4 A. That's correct.

5 Q. Okay. And when you got to the restaurant, you said that

6 you went inside, correct?

7 A. That's correct.

8 Q. Now, you could have stayed in the car, right?

9 A. Yes.

10 Q. But you chose to go inside?

11 A. I chose to go inside.

12 Q. And you met with the sellers, correct?

13 A. Yes.

14 Q. And you heard Mr. Ramos arrange to buy 2 kilograms of

15 cocaine; is that right?

16 A. Yeah.

17 Q. And there was a discussion about price, wasn't there?

18 A. Yes. I believe so. I vaguely remember, but yeah.

19 Q. \$28,000 a kilo?

20 A. Yes.

21 Q. So you're really sitting at a table talking about

22 \$56,000 in drugs, right?

23 A. Yes.

24 Q. And then there was a conversation about buying a few

25 more kilos on credit; is that right? That's the 3 kilos you

1 mentioned a minute ago?

2 A. I believe so.

3 Q. So in reality, the conversation at the Red Robin was  
4 really about 5 kilos of cocaine, right?

5 A. Yes.

6 Q. Enough to make a man sweat if he knew that was illegal,  
7 right?

8 A. Yes.

9 Q. Did you get up and walk out?

10 A. No.

11 Q. Did you say, I can't be a part of this?

12 A. No, I didn't.

13 Q. You asked about the purity of the cocaine, didn't you?

14 A. Yes.

15 Q. You inquired about the quality of the product for that  
16 deal, right?

17 A. That's correct.

18 Q. You didn't have to say a word, did you?

19 A. I'm sorry?

20 Q. You didn't have to say a word --

21 A. I didn't.

22 Q. -- did you? Now, after that meeting, you and Mr. Ramos  
23 left, and you went back to your barber shop; is that right?

24 A. That's correct.

25 Q. So at that point, you could have been done, right?

1 A. Yes.

2 Q. You could have said, That was a near miss, and I don't  
3 know what you did, Mr. Ramos, but I'm never a part of that  
4 again, you understand?

5 A. That's correct.

6 Q. Did you say that?

7 A. No, I didn't.

8 Q. No. You agreed to drive Mr. Ramos back to finish the  
9 buy, didn't you?

10 A. Yes, I did.

11 Q. So you got back in the Mountaineer?

12 A. Yes, I did.

13 Q. Mr. Ramos got in the passenger seat, and you drove him  
14 and the money down to the Warwick Mall; is that right?

15 A. That's correct. Yes.

16 Q. And you saw Mr. Ramos show the cash to the seller; is  
17 that right?

18 A. Yeah. He didn't show him in the car, no.

19 Q. It was from in the glove box, wasn't it?

20 A. No. I think he had it in the back.

21 Q. Okay. But you knew it was in the car --

22 A. Yeah.

23 Q. -- right? Okay. And the seller told you, Okay, we'll  
24 finish the deal at your shop, didn't he? So you started to  
25 drive back to the shop, correct?

1 A. No. There was agents there.

2 Q. So the police didn't try to stop your vehicle when you  
3 fled the --

4 A. Yeah. They stopped, but there was undercover cops. It  
5 was undercover agents.

6 Q. So you're denying that you tried to flee the scene --

7 A. No.

8 Q. -- when the police converged on your --

9 A. What happened was he told me to go because he thought he  
10 was going to get robbed or something. He was like, Go, go,  
11 I think they're trying rob us, so I left. Then I seen  
12 cars -- after I seen the police car, I pulled over.

13 Q. So you pulled over, and then you fought with the police  
14 officer; is that correct?

15 A. No.

16 Q. So the police report is wrong when it says you resisted  
17 arrest and fought the officer?

18 A. I resisted arrest -- no. Yeah.

19 Q. Okay. Now, you weren't truthful with the police, were  
20 you?

21 A. About what?

22 Q. Well, you told them that you were there to buy a little  
23 bit of marijuana; isn't that right?

24 A. Yes.

25 Q. That wasn't true, was it?

1 A. Originally, yes.

2 Q. Mr. Aceituno, when you got back in that car and you  
3 drove back to the Warwick Mall, were you there to buy  
4 marijuana or were you there to buy kilos of cocaine?

5 A. Yes. I was -- to the transaction.

6 Q. I'm sorry?

7 A. I was there to help Gerry do the transaction.

8 Q. To buy what?

9 A. To buy some cocaine.

10 Q. Okay. So when you told the officer you were there to  
11 buy marijuana, that wasn't true, was it?

12 A. What's that?

13 Q. When you told the officer you were there to buy  
14 marijuana, that wasn't true, was it?

15 A. I don't recall. I mean, during the time, I was under so  
16 much pressure. So to the best of my knowledge, I do not  
17 remember.

18 Q. Well, I agree with that. You would agree that kilos of  
19 cocaine is a significant amount of drugs, correct?

20 A. That's correct.

21 Q. And so there's no question that qualified as drug  
22 trafficking, right?

23 A. Yeah.

24 Q. Okay. And so you knew when you were caught that you  
25 were in hot water, correct?

1 A. Yes.

2 Q. You got a lawyer, you said?

3 A. Yes.

4 Q. You hired two, as a matter of fact. You said  
5 Mr. Connors to help you with the criminal side and Mr. Watt  
6 to help you with immigration; is that right?

7 A. That's correct.

8 Q. How did you find Mr. Watt?

9 A. He's a family lawyer. He has helped my wife's family.

10 Q. He's been helping your wife's family since the 1980s; is  
11 that right?

12 A. That's correct.

13 Q. And he's known to be an immigration specialist; that's  
14 why you hired him, correct?

15 A. That's correct.

16 Q. So you were familiar with the fact that he was pretty  
17 good at what he did, correct?

18 A. Yes.

19 Q. Now, you said that your attorneys explained to you that  
20 the penalties would be harsher after a trial; is that right?

21 A. That's correct.

22 Q. You knew that if you went to trial you might face a  
23 mandatory minimum sentence of five years; is that correct?

24 A. During that time I don't think I had a minimum  
25 mandatory.

1 Q. Right. But the prosecutor told your lawyer that if you  
2 went to trial, there would be a mandatory minimum, didn't  
3 she? That's why you pursued the plea, wasn't it?

4 A. No.

5 Q. You don't recall that conversation?

6 A. I don't recall -- yeah, I don't recall any of that.

7 Q. So your lawyer never told you that --

8 A. Oh, yeah. He did tell me that I would --

9 Q. Okay.

10 A. That's the reason why to take the plea.

11 Q. To avoid a lengthy jail sentence, right?

12 A. Yeah.

13 Q. Okay. And you said that you knew you were going to be  
14 deported, right?

15 A. Yes.

16 Q. Okay. And the jailhouse lawyers at the Wyatt told you  
17 you might be able to come back in five years? That was your  
18 testimony this morning, right?

19 A. No. Not at the Wyatt.

20 Q. You said that the inmates at the jail --

21 A. Not at the jail. At the detention center. At the  
22 detention center --

23 Q. Okay.

24 A. -- in Bristol.

25 Q. Okay. Now, when you were talking to Mr. MacDonald, you

1 said that the people at the jail told you you couldn't come  
2 back for five years and that you knew that before you took  
3 your plea?

4 A. No, I did not never say that.

5 Q. So I misunderstood you a moment ago?

6 A. Yes.

7 Q. Okay. Well, so if you didn't know when you could come  
8 back when you're negotiating your plea, what did you ask Bob  
9 Watt about it?

10 A. I asked about my relief and if I could get out. I was  
11 trying to get out of the detention center.

12 Q. But was it important to you to come back to the United  
13 States after being deported?

14 A. Yes.

15 Q. Okay. So you asked your lawyer about what the rule was  
16 for that, correct?

17 A. Yes.

18 Q. And what did he say?

19 A. He said I would be deported.

20 Q. Let me ask my question again. He told you you would be  
21 deported, and then you knew you wanted to come back,  
22 correct?

23 A. That's correct.

24 Q. Okay. So when you asked him how long you needed to  
25 wait, what did he tell you?

1 A. We wasn't discussing that. We was discussing everything  
2 else, what we were fighting for.

3 Q. So, Mr. Aceituno, is it your testimony that the most  
4 important thing to you was being able to come back and be  
5 with your family, correct, but you never asked your  
6 immigration specialist lawyer, if this all goes to pot,  
7 what's the worst I'm facing, how long will it be until I  
8 come back?

9 A. No.

10 Q. Why not?

11 A. I don't -- I was trying to get out. I was not  
12 thinking -- my mind was just on getting back home.

13 Q. So you didn't bother to ask him when you could come back  
14 after being deported; that's your testimony?

15 A. Yes.

16 Q. Okay. And you recall the plea hearing in January of  
17 2014, that's right?

18 A. That's correct.

19 Q. And the Judge told you that you were most likely going  
20 to be deported; is that right?

21 A. That's correct.

22 Q. Okay. And then you had a sentencing in March of that  
23 year. Do you remember both your lawyers being there,  
24 Mr. Connors and Mr. Watt?

25 A. Yes.

1 Q. Okay. So after you resolved the felony drug convictions  
2 that you got here in this courthouse, then you said you were  
3 detained by ICE, correct?

4 A. Yes.

5 Q. Okay. You had an attorney helping you. Who was that?

6 A. Robert Watt.

7 Q. Okay. So Mr. Watt is still helping you. And at this  
8 point, it's your testimony that other folks in the jail told  
9 you that you would have to wait five years before you come  
10 back to the United States?

11 A. That's correct.

12 Q. So you found that out in 2015; is that right?

13 A. I don't recall exact date, but I know it was at the  
14 Bristol.

15 Q. Well, do you remember when you were deported?

16 A. Yes. 2015.

17 Q. So it had to be before you were deported, right?

18 A. Yes.

19 Q. Okay. So in 2015, your information from fellow inmates  
20 was that you'd have to wait five years to come back?

21 A. Yes.

22 Q. When you heard that, what did Bob Watts say when you  
23 asked him about five years?

24 A. I didn't ask him. I wasn't -- it was already over. The  
25 appeal was done already.

1 Q. Well, that's not what you just said. You said you were  
2 being detained and you found out that you would need to wait  
3 five years. So I'm asking you, when you found out that it  
4 was a five-year ban from reentry, what did you do?

5 A. After I found out that I wasn't able to come back? Is  
6 that what you're saying?

7 Q. Nope. You testified that you found out while you were  
8 being detained that you could not come back for five years,  
9 correct?

10 A. Yeah.

11 Q. When you found that out, what did you do next?

12 A. I was fighting my immigration case.

13 Q. So did you ask your lawyer at the immigration case about  
14 this five-year ban?

15 A. No.

16 Q. You weren't interested in the fact that you had just  
17 been kicked out of the United States for five years?

18 A. Yes.

19 Q. But why didn't you ask?

20 A. During that -- I believe when I found out, because I  
21 don't really -- what I recall is my case was already denied  
22 by the BIA, so I was just, like, kind of like a sitting duck  
23 there. And I -- when we appealed and it was denied, that's  
24 when I -- it felt like it was over.

25 Q. So you never called your lawyer to say, then what's the

1 next step, I'm exiled for five years? You never did that?

2 A. No.

3 Q. You never asked for help?

4 A. No, I didn't.

5 Q. Okay. Now, eventually you got deported back to  
6 Guatemala; is that correct?

7 A. That's correct.

8 Q. And you testified that you had family visits and close  
9 contact with your family during that time?

10 A. Yes.

11 Q. And, Mr. Aceituno, I don't want to take anything away  
12 from the challenge that that must have been personally, but  
13 you had the resources for your family to travel during that  
14 time, correct?

15 A. What do you mean? As far as what? Resources as far as  
16 what?

17 Q. Well, they had the money to fly to Guatemala multiple  
18 times; is that right?

19 A. Yes.

20 Q. Three tickets each time?

21 A. Yes.

22 Q. How many visits, do you think?

23 A. I would say, like, two visits a year maybe.

24 Q. Two visits a year. So what is that, half a dozen, eight  
25 visits, 24 plane tickets?

1 (Witness nods)

2 Q. Okay. So it's fair to say that there was the financial  
3 ability to travel?

4 A. Yeah. We were really financially supported by what we  
5 call Pa. He, like, my in-law. He's the one that was really  
6 helping us out throughout this whole case.

7 Q. Okay. And your family back in Rhode Island maintained a  
8 close relationship with Bob Watt; is that right?

9 A. That's correct.

10 Q. So you had access to an immigration lawyer, correct?

11 A. You could say yes.

12 Q. You never called him to ask about this five-year ban,  
13 did you?

14 A. No, I didn't.

15 Q. So the only source of your knowledge of when you could  
16 come back came from a jailhouse inmate -- excuse me -- a  
17 detainee at the detention facility, right?

18 A. Yes.

19 Q. You had multiple lawyers, and you never asked any of  
20 them, correct?

21 A. Correct.

22 Q. Okay. Now, you're aware that you're going to be  
23 deported anyway because of your 2019 conviction; is that  
24 right?

25 A. Yeah.

1 MS. WHITE: Nothing further, your Honor. Thank  
2 you.

3 REDIRECT EXAMINATION BY MR. MacDONALD:

4 Q. Mr. Aceituno, I'm going to show you some exhibits that  
5 the Government provided me with yesterday.

6 A. Okay.

7 MR. MacDONALD: Okay. And the first -- I don't  
8 know if you want to use, Ms. White, the marked exhibits, or  
9 does Mr. Jackson have them?

10 THE CLERK: I don't have them.

11 MR. MacDONALD: I'll mark this as Petitioner's B,  
12 then.

13 MS. WHITE: Mr. MacDonald, I understand what you're  
14 saying. Normally I would say fine, but I didn't put them in  
15 the electronic system.

16 THE COURT: John, you can just use the other one.

17 Q. I'm going to show you what I'll identify for the record  
18 for identification purposes as Petitioner's B, exhibit. Is  
19 that on, Mr. Aceituno?

20 A. Yes.

21 Q. And we're going to -- is it fair to say, Mr. Aceituno,  
22 that this is called a Warning to Alien Ordered Removed or  
23 Deported? Do you see that?

24 A. Yes.

25 Q. It's dated at the top December 8, 2014; is that correct?

1 A. That's correct.

2 Q. Now, by December of 2014, you had lost your withholding  
3 case before the Boston immigration court already?

4 A. Yes.

5 Q. And Bob Watt represented you on that?

6 A. That's correct.

7 Q. Your appeal to the BIA had already been denied in  
8 November, correct?

9 A. Yes.

10 Q. Bob Watt did not represent you on your appeal?

11 A. No.

12 Q. Who did?

13 A. Randy Olen.

14 Q. Mr. Olen did?

15 A. Yes.

16 Q. And at that point, you're out of options; am I correct?

17 A. Yes.

18 Q. And this is the sitting duck time?

19 A. Yes.

20 Q. And you alluded to this sitting duck time as when you're  
21 talking to jailhouse lawyers and you're thinking about the  
22 five years coming back, right?

23 A. That's correct.

24 Q. According to this document, a box is checked right here  
25 advising when you can come back. Do you see that?

1 A. Yeah.

2 Q. All right. And the document starts -- the first box is  
3 five years from your departure. The next box is ten years,  
4 correct?

5 A. That's correct.

6 Q. The next box is 20 years. But the box that's checked in  
7 your case says you're never able to come back; am I correct?

8 A. Yes.

9 Q. And this is a document that supposedly was handed to you  
10 for your signature on December 8, 2014 or thereabouts?

11 A. That's correct.

12 Q. I'm going to show you page two. That's your picture,  
13 correct?

14 A. Yes.

15 Q. And under your signature it says, Refuse to sign. Do  
16 you see that?

17 A. That's correct. Yes, I see it.

18 Q. Why did you refuse to sign that form?

19 A. Because I'm not trying to get deported.

20 Q. And is it fair to say you didn't want to sign anything  
21 that you thought could help get you deported back in 2014?

22 A. That's correct.

23 Q. Is it fair to say that this might have been the first  
24 time that you were advised you can never lawfully come back  
25 to the U.S.?

1 A. This could have. I vaguely remember -- I don't even  
2 remember this paper, but, yeah, it could have been this.

3 Q. Okay. Because I know, again, we talked -- you alluded  
4 to five years in your mind, correct? But -- am I correct?

5 A. Yes, sir.

6 Q. And this document seems to indicate at some point ICE  
7 officials told you, you're never coming back?

8 A. Yes.

9 Q. And this is before you were put on a plane in January --

10 A. Yes.

11 Q. -- 2015. Did you think at this point you had any  
12 options to contest your deportation?

13 A. No.

14 Q. Did you believe you had any options to try to vacate  
15 your plea before this Court?

16 A. No, I didn't.

17 Q. At this point, having spent a year incarcerated on the  
18 criminal case and then another year on the immigration case,  
19 did you think you were out of options?

20 A. Yes.

21 Q. So it's at this point you know you're never lawfully  
22 able to come back. Is that why you never had conversations  
23 with Mr. Watt or anyone else to apply to come back to the  
24 U.S. while you were in Guatemala?

25 A. That's right.

1 Q. Because during the close to five years you're in  
2 Guatemala, four years, is it fair to say you never made a  
3 lawful application for another visa?

4 A. That's right.

5 Q. And is that because you didn't think you could?

6 A. That's right.

7 Q. And it's your testimony, you don't precisely recall this  
8 document, but it makes sense that you at least were handed  
9 it and you refused to sign it?

10 A. That's correct.

11 MR. MacDONALD: I'd move it full, your Honor.

12 THE COURT: Any objection?

13 MS. WHITE: No, your Honor.

14 THE COURT: It will be admitted full.

15 (Defendant's Exhibit B admitted full)

16 Q. And just to get back on some of the events that led to  
17 your arrest, Mr. Ramos asked you -- Geronimo Ramos asked you  
18 to drive his car in Warwick. Did he give you a specific  
19 reason why?

20 A. Yes. Because he didn't have a license during the time.

21 Q. And what was his concern?

22 A. That --

23 MS. WHITE: Objection. That goes to Mr. Ramos's  
24 intent. How could the witness testify to that? Beyond  
25 that, it's far --

1 THE COURT: Sustained. Rephrase.

2 Q. Okay. Did Mr. Ramos cite a particular concern with  
3 being seen by a Warwick police driving his car?

4 A. Yes, he did.

5 Q. And is that why he asked you to drive his car?

6 A. That's correct.

7 Q. All right. Again, were you getting anything out of this  
8 particular deal financial wise, money wise?

9 A. No. No money.

10 Q. Had you ever been involved with a cocaine transaction  
11 before?

12 A. Never.

13 MR. MacDONALD: Thank you, your Honor. No further  
14 questions.

15 THE COURT: Thanks, Mr. MacDonald.

16 MS. WHITE: Your Honor, just briefly. I won't  
17 belabor --

18 THE COURT: Ms. White, I don't allow recross ever.

19 MS. WHITE: I understand, your Honor.

20 THE COURT: Sorry. I should have told you  
21 before --

22 MS. WHITE: Obviously, there was new evidence  
23 presented on redirect, so my apologies.

24 THE COURT: You know what? You're right on that.  
25 With new evidence, come on up.

1 MS. WHITE: Thank you. I'll keep it brief.

2 RECROSS-EXAMINATION BY MS. WHITE:

3 Q. Mr. Aceituno, we just looked at that form that you said  
4 the INS agents gave you on December 8th of 2014; is that  
5 right?

6 A. Yes. I believe that's the --

7 Q. I'm not trying to trick you here. I'll put it back up  
8 on the screen. The date is right here by my finger.

9 THE COURT: I think he said he didn't remember it.

10 MS. WHITE: I just don't want him to think I'm  
11 tricking him on the date.

12 Q. I'm talking about this form, Mr. Aceituno. That's the  
13 one your lawyer just showed you?

14 A. Yes.

15 Q. You got that form when you were still here in the United  
16 States, correct?

17 A. That's correct.

18 Q. And that form was pretty upsetting, wasn't it?

19 A. Yeah.

20 Q. Did you call your lawyer?

21 A. No.

22 Q. Did you call Tom Connors?

23 A. No.

24 Q. Did you call Bob Watt?

25 A. No, I didn't.

1 Q. Did you call Randy Olen?

2 A. No, I didn't.

3 MS. WHITE: Thank you, your Honor. Nothing  
4 further.

5 THE COURT: Thanks, Ms. White. Mr. Aceituno, you  
6 can step down. Mr. MacDonald.

7 MR. MacDONALD: Petitioner calls Robert Watt.

8 THE COURT: Come on up, Mr. Watt, into the unusual  
9 seat for you.

10 ROBERT D. WATT, JR., DEFENDANT'S WITNESS, SWORN

11 THE CLERK: Please state your name and spell your  
12 last name for the record.

13 THE DEFENDANT: Robert D. Watt, W-A-T-T, Junior.

14 DIRECT EXAMINATION BY MR. MACDONALD:

15 Q. Good morning, Mr. Watt.

16 A. Good morning.

17 Q. Mr. Watt, could you advise the Court how long you've  
18 been a practicing attorney in Rhode Island?

19 A. Forty-five.

20 Q. Forty-five years?

21 A. Yes.

22 Q. And in any other states?

23 A. Massachusetts.

24 Q. Okay. And are you licensed to practice in both state  
25 and federal court?

1 A. I am.

2 Q. Is it fair to say that you have been a practicing  
3 immigration attorney during this time frame, as well?

4 A. Entire time, yes.

5 Q. Entire time. Okay. And is it fair to say that as part  
6 of your immigration background, you are well familiar with  
7 the rules and statutes concerning the immigration laws?

8 A. I think so, yup.

9 Q. Is it fair to say that they've changed over the years  
10 since you started your practice?

11 A. They have.

12 Q. All right. And is it fair to say that your practice is  
13 actually an emphasis in immigration?

14 A. I'd say more than 50 percent, yup.

15 Q. And in the course of practicing for 45 years, you've  
16 handled hundreds of removal cases?

17 A. I have.

18 Q. Primarily at the Boston immigration court?

19 A. Throughout New England and all other states, as well.

20 Q. All of them?

21 A. Yup.

22 Q. With immigration, at least, you can practice in other  
23 courts even telephonically?

24 A. You can.

25 Q. And you've done that?

1 A. I've done that.

2 Q. All right. Could you tell the Court how you became  
3 involved in Mr. Aceituno's case?

4 A. I think it came from the family. Bob Larivee married  
5 the mother-in-law, Mabel. And I handled Mabel's case and  
6 the daughter's cases who became Walter's common law wife  
7 Erika way back.

8 Q. So you handled Erika's immigration cases, and from that  
9 relationship, you got the call to assist Mr. Aceituno?

10 A. That's right.

11 Q. Did you -- at some point you became aware that Tom  
12 Connors represented Mr. Aceituno on the criminal matter,  
13 right?

14 A. I did.

15 Q. And Mr. Connors at the time worked very closely with  
16 Joseph Voccolla?

17 A. He did, yup.

18 Q. And is it fair to say that at that time you had a  
19 working relationship with the Voccolas to provide  
20 immigration counsel where needed?

21 A. That's correct.

22 Q. And is it fair to say that Tom Connors would defer to  
23 you as to immigration consequences?

24 A. Absolutely.

25 Q. He wouldn't attempt to give his own advice?

1 A. Not that I'm aware of on any of the cases that we worked  
2 together.

3 Q. Were you separately retained and paid by the Aceituno  
4 family to be the immigration counselor in this case?

5 A. I think it probably would have been Bob Larivee, the  
6 father-in-law.

7 Q. Paid that?

8 A. Yup.

9 Q. Gotcha. And what -- ultimately, Mr. Aceituno was  
10 charged with a conspiracy to attempt a drug trafficking  
11 offense --

12 A. Um-hm.

13 Q. -- and an attempted possession with intent to distribute  
14 cocaine?

15 A. Correct.

16 Q. Very serious federal charges?

17 A. Very serious.

18 Q. And were you able to confer with both Mr. Connors and  
19 Mr. Aceituno about his options?

20 A. Multiple times.

21 Q. All right. And, ultimately, could you advise --  
22 ultimately, we know Mr. Aceituno went in the direction of  
23 taking a plea. But prior to making that decision, did you  
24 discuss with him the adverse immigration consequences?

25 A. I did.

1 Q. Okay. What did you tell Mr. Aceituno?

2 A. Well, my memory -- and I can't find my file. It's not  
3 in the barn, it's not down in the cellar, it's not with  
4 Randy Olen, and it's not at Joseph Voccolla's, so I don't  
5 know where my file is specifically as to Walter.

6         But I told him if he was convicted of a drug  
7 trafficking crime, as defined in the Immigration Act, that  
8 he would be ineligible to get a new green card at the  
9 immigration court, and that his only relief would be either  
10 withholding a removal or CAT.

11 Q. And what is withholding a removal?

12 A. It's a variation on an asylum case in which you're  
13 asking for the government to be ordered to not deport  
14 someone.

15 Q. So, essentially, someone can be ordered removed for a  
16 drug trafficking offense but not removed if withholding is  
17 granted?

18 A. That's correct. It's a mandatory form of relief if it's  
19 proved.

20 Q. And what is Convention Against Torture, CAT relief?

21 A. It depends upon a government nexus where the government,  
22 by virtue of its composition, either has a personal animus  
23 against somebody or its agents have a personal animus  
24 against someone, that the person cannot be protected and  
25 would likely suffer torture or other serious physical harm.

1 Q. And in Mr. Aceituno's case, was there any particular  
2 facts that warranted a potential claim for either  
3 withholding or a CAT relief?

4 A. Absolutely.

5 Q. What were they?

6 A. Not specifically as to him, but his mother had gotten  
7 asylum many years before. But Guatemala has changed over  
8 the years, and I don't want to go into great detail about my  
9 opinion about the Guatemala government up until the most  
10 recent election, but the police, as shown in all of the  
11 department of states, human rights conditions are poor, the  
12 police are basically bought and paid for, they participate  
13 either directly or by others or gangs in the extortion of  
14 persons that they perceive to have money, property, et  
15 cetera. They run those operations out of prisons, they run  
16 them on the street, they run them everyplace.

17 Walter, in my opinion, going back is as much an  
18 American at least apparently as anyone else, he would  
19 particularly be subject to being targeted for extortion,  
20 kidnapping, harm, death.

21 Q. Okay. And these conversations that you had with  
22 Mr. Aceituno, I take it they would have taken place at the  
23 Wyatt Detention Facility?

24 A. At Wyatt.

25 Q. Where he was awaiting trial?

1 A. That's correct.

2 Q. And during the course of these conversations, was it  
3 clear to you that at least Mr. Aceituno wanted to fight his  
4 case and stay in the United States?

5 A. Absolutely. I was also consulting with Erika, Bob  
6 Larivee, Mabel off and on throughout this entire process.

7 Q. You're keeping Walter informed in person, and you're  
8 also keeping the family informed?

9 A. That's correct.

10 Q. Do you recall, as you testify here today, whether or not  
11 there were any discussions about Walter, if the relief  
12 didn't work, being permanently banned from ever applying to  
13 come back to the United States?

14 A. I don't remember the word permanent ever coming up  
15 between us.

16 Q. And your discussions with Mr. Aceituno, was it fair to  
17 say that the focus was beating the deportation, staying in  
18 the United States?

19 A. That's correct.

20 Q. Do you recall Mr. Aceituno asking you, what happens if I  
21 lose, will I ever get a chance to come back?

22 A. I do not.

23 Q. And a permanent ban from reentry to the United States,  
24 could you tell us why this particular -- these particular  
25 offenses trigger a permanent ban?

1 A. Well, it's a drug trafficking crime under the  
2 Immigration Act. Somebody convicted of a drug offense,  
3 forget about drug trafficking, is ineligible, unless it's  
4 marijuana, to get a waiver or a pardon to be able to become  
5 a permanent resident.

6 If it's an aggravated felony, you've already got a  
7 green card, you are prohibited from getting a bond. We know  
8 that he was held out at Bristol House of Correction. You're  
9 ineligible for asylum, and your only form of relief would be  
10 CAT and/or withholding of removal.

11 Q. You certainly testified you recall discussions about CAT  
12 relief, withholding relief, and as you testify here today,  
13 you don't recall a specific conversation about being banned  
14 permanently from reentry?

15 A. No. I kind of know that there was no conversation about  
16 permanency, because like immigration law, if you know it  
17 well, there's always ways around anything and everything,  
18 theoretically. Right?

19 So I have brought back people who have been  
20 deported for aggravated felonies, drug convictions in the  
21 past. There's a special program available within the  
22 Immigration Act itself. I have brought back people for  
23 temporary visits, aggravated felons, applying in advance,  
24 but I've brought people back.

25 So if we had had that conversation, then Walter

1 would have known that there were theoretical options  
2 available to him. What he would have known was that he  
3 could not get, in the immigration deportation defense, a new  
4 green card because there was no waiver available.

5 Q. In representing clients similar to Mr. Aceituno's  
6 position, is it your standard practice to talk about these  
7 adverse consequences after they're already removed, or is it  
8 your practice to focus on beating the deportation?

9 A. The deportation. Right.

10 Q. Okay. And that, to the best of your knowledge, is what  
11 your focus was with Mr. Aceituno?

12 A. That's correct.

13 MR. MacDONALD: Thank you, your Honor. No further  
14 questions.

15 THE COURT: Thank you. Ms. White.

16 MS. WHITE: Thank you.

17 CROSS-EXAMINATION BY MS. WHITE:

18 Q. Mr. Watt, good morning.

19 A. Good morning.

20 Q. I know that Mr. MacDonald called you, but I'm really the  
21 one responsible for you being here, so thank you for that.  
22 I appreciate you coming and your testimony. Now, we talked  
23 about some of the same things that you just talked with  
24 Mr. MacDonald about; is that right?

25 A. We did.

1 Q. Now, you had explained that you have known Walter's  
2 extended family since the 1980s; is that right?

3 A. Absolutely. Yup.

4 Q. So you've worked pretty closely with them?

5 A. Very closely.

6 Q. Do you think you -- fair to say you have a good working  
7 relationship with those folks?

8 A. Yeah. It's not -- we don't socialize together, but  
9 they're as close a family I can remember going way back in  
10 time.

11 Q. So if there was a problem, you might be one of the folks  
12 they would call?

13 A. I would hope so.

14 Q. Okay. And when did -- you specifically began helping  
15 Walter Aceituno prior to his guilty plea in his drug case;  
16 is that right?

17 A. Not prior to the drug case.

18 Q. I didn't ask that question well. You began helping  
19 Mr. Aceituno specifically once he was charged but prior to  
20 his guilty plea being entered?

21 A. That's correct.

22 Q. Thank you. I apologize for that. Now, there was some  
23 conversation about the drug charge, and you were aware of  
24 the amount of cocaine that was at issue; is that right?

25 A. I don't have a specific memory today, but, yes, it was

1 enough to make it an aggravated felony.

2 Q. Several kilos, right?

3 A. Yup.

4 Q. Now, are there any immigration advantages to ensuring  
5 that Mr. Aceituno, or someone situated like him, could not  
6 receive a sentence of five years or more?

7 A. If I understand the question, from an immigration  
8 standpoint, you could have a drug trafficking crime,  
9 possession with intent, and you could get no jail, and  
10 that's enough to make it an aggravated felony and have led  
11 to the same emphasis on the relief being CAT or withholding  
12 of removal. It's not dependent upon the sentence.

13 Q. But maybe I don't understand this very well. But I  
14 thought that in order to be eligible for withholding of  
15 removal, you had to have gotten a sentence of less than five  
16 years?

17 A. Absolutely not.

18 Q. That's not what the statute says under 1231(3)b(2) ?

19 A. A particularly serious crime can be defined as a drug  
20 trafficking crime, an aggravated felony. But  
21 circumstantially, if you can show that the participation was  
22 minimal, then you can get withholding or removal or CAT.

23 Q. So you're thinking or your advice would be that if you  
24 could show that Mr. Aceituno hadn't been engaged in the deal  
25 or able to minimize his conduct enough, maybe he could get a

1 withholding?

2 A. That's correct.

3 Q. And his sentence was irrelevant to that?

4 A. That's correct.

5 Q. Okay. But from a practical matter, he didn't want to go  
6 to prison; is that --

7 A. That's correct.

8 Q. And by taking this plea, he did not have any mandatory  
9 minimums put upon him; is that right?

10 A. That's correct. Yup.

11 Q. Okay. And did the advice that you gave Mr. Aceituno,  
12 did that comport with your understanding of Padilla versus  
13 Kentucky?

14 A. I understand Padilla versus Kentucky. I guess it's the  
15 other side of the coin as to whether or not a standing  
16 operating procedure of a lawyer advising on immigration  
17 consequences today should include a prediction as to what  
18 could be done down the road. I think I told you on the  
19 phone, I have filed disciplinary complaints against  
20 myself --

21 Q. You did.

22 A. -- when I felt that I had broken some particular duty to  
23 a client. I did not in this case --

24 Q. That was --

25 A. -- as of today.

1 Q. Yes, sir. Thank you. So you believe that you provided  
2 Mr. Aceituno with competent advise despite his claims to the  
3 contrary?

4 A. That's my belief.

5 MS. WHITE: Thank you, your Honor. Nothing  
6 further.

7 THE COURT: Thanks. Mr. MacDonald.

8 MR. MacDONALD: Thank you. Just briefly.

9 DIRECT EXAMINATION BY MR. MacDONALD:

10 Q. Is a permanent ban to lawful reentry to the United  
11 States as a result of this conviction, fair to say that  
12 would be considered an adverse immigration consequence in  
13 this matter?

14 A. It is.

15 Q. But as you sit here today, you have no memory of  
16 actually advising Mr. Aceituno as of it?

17 A. I do not.

18 Q. Okay. And if you had not advised Mr. Aceituno as to  
19 this permanent ban adverse consequence, is it fair to say  
20 that that would not comply with Padilla?

21 A. There certainly is an argument to be made that a  
22 complete immigration consultation should include, for a man  
23 that has two citizen kids and their lives of a long  
24 duration, an inquiry to be made and advice to be given as to  
25 what's going to happen, five, ten, fifteen, twenty years

1 down the road.

2 Q. And as you sit here today, you have no memory of that  
3 discussion ever taking place with Mr. Aceituno?

4 A. I do not.

5 MR. MacDONALD: Thank you.

6 THE COURT: Thanks, Mr. MacDonald. Mr. MacDonald,  
7 anything further?

8 MR. MacDONALD: No, your Honor.

9 THE COURT: Why don't we take a ten-minute break,  
10 and then I'll hear counsels' arguments.

11 MR. MacDONALD: Okay.

12 (Brief recess)

13 THE COURT: Mr. MacDonald.

14 MR. MacDONALD: Thank you, your Honor. Your Honor,  
15 so this petition ultimately starts with a review of Padilla  
16 and Strickland. Okay. And I'll just briefly address that.  
17 Padilla versus Kentucky, effective 2010, applies in this  
18 case requiring that counsel involved in a criminal case  
19 fully advise a client as to the adverse immigration  
20 consequences. It's not on the client to ask the questions.  
21 It is on the attorney to give the advice.

22 And in this case, the immediate consequence that  
23 Mr. Aceituno faced was fully informed and advised by  
24 Mr. Watt; and that was, is he going to be removed. As a  
25 lawful, permanent resident for over 24 years with all of his

1 family in the United States, including his wife and two  
2 children, his mother, his siblings, the prospect of removal  
3 to Guatemala was foremost on Mr. Aceituno's mind. No  
4 question Mr. Watt advised him as to that. He was going to  
5 be removed. That is Mr. Watt's memory. That's  
6 Mr. Aceituno's memory.

7 But he did have relief available. And that relief in  
8 the form of withholding and the Convention Against Torture,  
9 which is essentially asylum related, was relief that at  
10 least Mr. Watt and Mr. Aceituno were somewhat optimistic.  
11 After all, Mr. Aceituno's green card came from his mother.  
12 She received that due to a political asylum claim that  
13 worked.

14 In this case, however, the issue is whether or not,  
15 one, did Bob Watt have a requirement to talk about other  
16 adverse consequences, including the long-term consequence of  
17 a permanent ban to the United States, exclusion of admission  
18 down the road. And, secondly, did that discussion ever take  
19 place. And that is where Padilla versus Kentucky intersects  
20 with the facts in this case.

21 And, again, reviewing the Strickland standard, which  
22 I'll turn to now, is of a performance prong and a prejudice  
23 prong. The performance prong, I submit to the Court,  
24 requires that Mr. Watt advise Mr. Aceituno as to this  
25 long-term consequence, even if it wasn't on Mr. Aceituno's

1 mind at the time; even if it wasn't a concern for him  
2 thinking that he could win his asylum-related case. He  
3 still had the requirement to advise about, Hey, if we lose  
4 on this, you're permanently banned from the United States  
5 forever, a permanent banishment.

6 That discussion, your Honor, I submit did not take  
7 place. Mr. Aceituno makes clear he was never advised by  
8 Mr. Watt as to this. And, furthermore, Mr. Watt has no  
9 memory, despite a clear memory of these other conversations,  
10 he has no memory that it ever took place. And to that  
11 extent, your Honor, the performance prong under Strickland  
12 via Padilla has been met.

13 The issue of the prejudice prong is something for the  
14 Court's determination. And that is, okay, let's say  
15 Mr. Aceituno knew back in 2013 that he was -- you know, if  
16 removed, if the CAT didn't work, if the withholding didn't  
17 work, he was going to be permanently banned. Do we really  
18 believe, in light of this evidence, that he was going to  
19 make a decision to go to trial? And that's where the Court,  
20 as the fact finder, has to consider these factors.

21 We know from everything that the Court has allowed us  
22 to get into, that fighting deportation was critical to  
23 Mr. Aceituno from the moment he ultimately went into  
24 immigration custody right up until 9:00 this morning when he  
25 got a check-in with immigration. Fighting the deportation

1 case was paramount on his mind. And every action in this  
2 case points to the fact that he would have made -- there is  
3 a, quote, reasonable probability that he would have made a  
4 decision for a different outcome, and in this case, pursuing  
5 a trial.

6 And the factors that support this are this: First of  
7 all, his entire family is in the United States. His  
8 children, his wife, his parents -- or his mom and his  
9 siblings. And the family and friends that have come to  
10 court today are a further testament to that.

11 He came to the United States at a young age with no  
12 knowledge or real memories of Guatemala. His entire  
13 financial life, work history life was here. We all know  
14 that. And the question in this case is, is there a  
15 reasonable probability that he would have made a different  
16 decision.

17 You heard from his testimony in this case consistent  
18 with what you heard at the sentencing hearing. He didn't  
19 think he was going into a cocaine deal; he ended up being in  
20 the middle of one. But at the end of the day, he still had  
21 a story to tell to a jury down the road if he knew that,  
22 listen, if everything goes wrong, I'm never coming back, I  
23 will take my chances now in front of the jury.

24 THE COURT: But could that story, if the jury  
25 believed it a hundred percent, have led to an acquittal?

MR. MacDONALD: Your Honor, in my neck of the woods, criminal defense, it's not just an acquittal I advise the client about, maybe it's a hung jury and we get to do it again, or maybe there's a different outcome instead of doing it again. The chances of an acquittal, outright acquittal, Judge, are low. There's no question. Right? Between the talk on the wire and the driving back and forth. Right?

But would it have been rational -- and I use the language of Lee versus the United States. Would it have been rational to do so? Judge, it would not have been irrational if he knew that this is it, this is his last chance to really stay in the United States, because, let's face it, a withholding CAT claim is always a Hail Mary.

And if he knew at that given point in time that he had to tell his story and perhaps get Mr. Ramos, who this Court sentenced to 70 months, to come in and testify he didn't know it was this until the very end, you never know.

So my focus is not so much the acquittal percentages but what actions did he take. And then the Court considers, of course, how much time after the fact he voluntarily agreed to be detained while he fought his immigration case, an extra year.

And then the Court considers the efforts he took to come back into the United States after the problems with police in Guatemala. And presenting himself at the border

1 is a key factor, as well. He didn't hire a coyote to sneak  
2 in and live here under the radar. He presented himself to  
3 the border knowing he was going to be detained, knowing that  
4 he could be federally charged, of course, knowing that  
5 certainly immigration was going to attempt to detain him  
6 again. And he spent another 18 months incarcerated fighting  
7 his case.

8 We know from all of the appeals he took, your Honor,  
9 including an en banc appeal before the Ninth Circuit, he's  
10 doing everything possible to stay in the United States. So  
11 those are the factors that point to a reasonable  
12 probability. Not that it would have been a rational choice  
13 to go to trial; he doesn't have to prove that. He just has  
14 to show a reasonable probability.

15 In light of everything, in light of everything that  
16 he's facing, I believe the Court can answer that question in  
17 the affirmative, and I ask the Court to do so. Thank you.

18 THE COURT: Thanks, Mr. MacDonald. Ms. Zurier.

19 MS. ZURIER: Thank you, your Honor. May it please  
20 the Court, it's not a question of in light of everything.  
21 It's a question of, what did he know in 2013 and what was he  
22 weighing in 2013 and 2014. In Lee versus United States, the  
23 Court said that a defendant has a right to go to trial, even  
24 if it's irrational, but he has to demonstrate that he would  
25 have done so with contemporaneous and uncontroverted

1 evidence. So that is evidence from back at that time, not  
2 everything that happened in the five or seven years since.  
3 That's the first thing.

4 The second thing, more importantly, the problem with  
5 this case is that we're here because of consequences that  
6 happened afterwards but which Padilla versus Kentucky did  
7 not require Mr. Watt to advise Mr. Aceituno of. Padilla  
8 doesn't say that in a complicated area like immigration law  
9 the attorney has to advise concretely on every single thing.  
10 You have to advise on whether you're going to be deported.  
11 What are the chances of that? That advice was given. There  
12 is no dispute about that.

13 After that, Padilla says, you can't -- you don't have  
14 to give concrete advice because it's a complicated area.  
15 And that's exactly what Mr. Watt testified about, as well.

16 THE COURT: Apparently, there's nothing complicated  
17 about the fact that he was going to be permanently barred  
18 from returning. The box was checked at the time.

19 MS. ZURIER: Except there were all the theoretical  
20 ways you can get around that. And I have not found a case,  
21 and Mr. MacDonald hasn't found a case where a defendant was  
22 not advised as opposed to misadvised about a permanent ban.  
23 And that evidence was considered to be deficient. I think  
24 that's because Padilla doesn't go that far.

25 There's collateral -- deportation isn't considered a

1 traditional collateral consequence. What happens after that  
2 is much more up in the air, and the case law doesn't support  
3 the notion that you have to define more concretely. If that  
4 were the case, then, first of all, there are going to be a  
5 lot of plea agreements in this district that are going to  
6 have to be reattacked, because that paragraph that he agreed  
7 to that you read to him at his plea hearing says in black  
8 and white, no one can tell you what's going to happen after  
9 the deportation. It's a very complicated area of law.  
10 Everybody knew that. He made his plea with his eyes open.

11 And to decide that this advice given here, which  
12 Mr. Watt thought was competent and he did not turn himself  
13 into the bar like he apparently has on other occasions --

14 THE COURT: That was an astonishing statement and  
15 elevates Mr. Watt even more in terms of his reputation that  
16 I already had --

17 MS. ZURIER: But for this Court to decide that this  
18 advice was deficient when there's no case law to support  
19 that conclusion sets a bad precedent for every other person  
20 who has committed a crime and faces deportation  
21 consequences. Bad for the system, because all of those  
22 pleas are now theoretically uninformed.

23 And I think, also, we have to look at the posture in  
24 which this case came before this Court. It's coram nobis  
25 petition. That means that he has to prove four elements.

1 We're not contesting that he continues to suffer collateral  
2 consequences from his conviction. We're all here today, and  
3 we're all sympathetic to his plight and that of his family.  
4 But the fact remains, he also has to show why he didn't seek  
5 relief from the judgment earlier.

6 And that's a big problem here, because he knew before  
7 he left the country that he was subject to a permanent ban.  
8 He knew that he was going to -- he at least had information  
9 presented even before he knew that he might come in in five  
10 years. He didn't have a clear idea of what was going to  
11 happen after, and he didn't ask, even after he left the  
12 country.

13 He had contact with his family. His family had contact  
14 with Mr. Watt. He had resources or his family had resources  
15 to underwrite transportation back and forth to Guatemala.  
16 Trips. He never ever asked.

17 He didn't ask until -- he didn't contact this Court  
18 until 2020. That's six and a half or seven years after he  
19 knew that there was problem. And there's no good  
20 explanation to say, I didn't know what else to do or I  
21 wasn't thinking that way isn't what the case law says is a  
22 reasonable explanation for delay. And the reason that  
23 that's important is because we're not talking about justice  
24 to Mr. Aceituno; we're talking about justice to the whole  
25 system.

1                   The government should consider -- the Court needs to  
2 consider the government, the fact that with a passage of  
3 time it becomes much harder to pull a case together. We  
4 don't know where Mr. Ramos is, for example. And we don't --  
5 you know, witnesses move around, memories dim, evidence  
6 becomes misplaced or destroyed. That has to be taken into  
7 account, too. That's why there is a requirement that he not  
8 sit on his rights, which I submit he did.

9                   And even if Mr. Aceituno has demonstrated that he  
10 reasonably failed to seek relief any earlier than 2023 when  
11 the petition was filed or 2020 when his wife wrote the  
12 letter to the Court, and even if there is a demonstration  
13 that he received deficient advice and that he would  
14 definitely have gone or substantially likely to have gone to  
15 trial if he knew differently, even if all of that is met,  
16 the Court has to consider whether overturning Mr. Aceituno's  
17 conviction does justice.

18                   And, again, not just justice in the sense of what might  
19 be the best outcome for Mr. Aceituno, but what is the best  
20 outcome for the criminal justice system for a conviction  
21 that was valid, that was well supported by the evidence and  
22 that has long been final. And for these reasons, I ask the  
23 Court to please deny the petition. Thank you.

24                   THE COURT: Thanks, Ms. Zurier.

25                   MR. MacDONALD: Judge, may I just clarify one

1 additional --

2 THE COURT: Sure.

3 MR. MacDONALD: -- thing brought up by counsel?

4 Thank you. And that is, I agree that exclusion cases are a  
5 rarity, this particular argument. But Padilla references  
6 the fact that it incorporates one of the ABA standards, that  
7 in the ABA standards themselves, and I'll quote from Rule  
8 4-5.5(c), Potential adverse consequences from criminal  
9 proceedings, the requirement of counsel include removal,  
10 exclusion, and it goes on to other consequences. So it  
11 lists the consequences, specifically exclusion, and that's  
12 what we're talking about here.

13 A permanent ban, permanent bar to reentry is exclusion  
14 that the ABA, which Padilla references, requires counsel to  
15 talk about. So Mr. Watts certainly had an obligation to  
16 discuss that.

17 THE COURT: Ms. White.

18 MS. WHITE: Your Honor --

19 THE COURT: Why don't you come on up.

20 MS. WHITE: Yes, sir. I know this might be a bit  
21 out of order, your Honor, but I'm just curious as to what  
22 version of the ABA rules defense counsel is using. Because  
23 if it's not from 2013, we really can't hold someone to a  
24 standard that came in ten years later. Thank you.

25 THE COURT: Good point. Thanks, Ms. White. First

1 of all, let me thank all counsel, because I had never heard  
2 of the term coram nobis, I'm still not sure I'm pronouncing  
3 this correctly, until this was filed. And I have been  
4 sufficiently educated by all sides, to which I much  
5 appreciate.

6 The Court intends to grant the writ of coram nobis, and  
7 I will issue a short order later this week that grants the  
8 writ, vacates the judgment of conviction and withdraws  
9 Mr. Aceituno's guilty plea.

10 You first have to look at, as Ms. Zurier pointed out,  
11 the factors for coram nobis as the vehicle that got us here,  
12 explain his failure to seek earlier relief from the  
13 judgment. I thought the testimony that the Court received,  
14 which I and perhaps others that commented, that being my law  
15 clerk I should say, so the record is clear, found  
16 Mr. Aceituno's testimony to be highly credible and  
17 believable and consistent during both direct and  
18 cross-examination.

19 But the first one, explaining his failure to seek  
20 earlier relief, it is clear that Mr. Aceituno was, at every  
21 moment in time, seeking a way to reunite with his American  
22 family. Whether that was through plea negotiations, whether  
23 that was through immigration, whether that was through CAT,  
24 whether that was through asylum. And always, once he found  
25 out that he might be permanently barred from coming back

1 into this country, everything he did was an attempt to get  
2 that bar removed. When all else failed, he filed the Hail  
3 Mary pass, as the First Circuit calls it. And I must say,  
4 when Mr. MacDonald, acting as Doug Flutie through the Hail  
5 Mary pass, it was well received because his failure to file  
6 the coram nobis as a Hail Mary pass seemed to this Court,  
7 and the Court finds, was quite timely given all the other  
8 actions that he took.

9 The government rightly concedes that he continues to  
10 suffer significant collateral consequences from the  
11 judgment. And the Court finds that the error that occurred  
12 here, which I will address shortly under the Strickland  
13 standard, is of the most fundamental character and that  
14 justice would be achieved by the granting of the writ.

15 Mr. Watt, who this Court finds to be one of the more  
16 highly competent attorneys in both criminal law and in  
17 immigration law, has appeared before me on many, many, many  
18 occasions. And based on his testimony today, that  
19 impression I have is just reinforced.

20 He said at the very end, and I'm quoting from a draft  
21 part of the transcript, (reading) There is certainly an  
22 argument to be made that a complete immigration consultation  
23 should include, for a man that has two citizen kids and  
24 their lives of a long duration, inquiry to be made and to  
25 advise that he be given what's going to happen 5 years, 10

1 years, 20 years down the road. That didn't happen.

2 Mr. Watt did not inform him, the uncontroverted testimony,  
3 that he would be permanently barred from entering this  
4 country.

5 What becomes further clear, without a doubt, I find by  
6 the highest of standards, that Mr. Aceituno would never have  
7 pled to a charge that would have permanently kept him from  
8 his family. Mr. Aceituno is someone referred to as, in  
9 every respect, an American having come here at five. I  
10 think we might even refer to you as a dreamer, someone who's  
11 brought here by his parents at age five, though you obtained  
12 legal status.

13 You made a pretty terrible mistake in 2013, but the  
14 Court is convinced that there's an absolute probability that  
15 had you been properly informed that you would be permanently  
16 removed from his family, that you would have not pled  
17 guilty, and you would have rolled the dice before a jury.

18 That's not true in every case. Ms. Zurier is right.  
19 The Court needs to be careful about imposing obligations  
20 where it might not affect.

21 The Court finds in this case, given Mr. Aceituno's  
22 status in this country, given his three American family  
23 members who are here, and more extended, that there's  
24 absolutely no doubt in my mind that he constitutionally  
25 deserved to be informed that he would be permanently barred

1 from this country if he pled guilty to this. And the Court,  
2 therefore, so finds.

3 So the Court finds that both the standard for coram  
4 nobis and the standard under Strickland, et al for  
5 ineffective assistance from counsel are filed, and I will  
6 issue an order accordingly. Thanks, all.

7 MS. WHITE: Thank you, your Honor.

8 (Adjourned)

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## C E R T I F I C A T I O N

I, Denise A. Webb, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

Dated this 13th day of February, 2024

/s/ Denise A. Webb

Denise A. Webb, RPR  
Federal Official Court Reporter

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

BEFORE THE HONORABLE JOHN J. MCCONNELL, JR.  
DISTRICT JUDGE  
(Sentencing)

## APPEARANCES:

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Proceeding reported and produced by  
computer-aided stenography

1 25 MARCH 2014 -- 11:12 A.M.

2 THE COURT: Good morning, everyone. We're here  
3 this morning for sentencing in the case of the  
4 United States v. Walter Aceituno -- did I say it  
5 correctly?

6 MR. CONNORS: Aceituno, Your Honor.

7 THE COURT: Aceituno. I'm sorry. -- Criminal  
8 Action No. 13-181.

9 Could I have counsel's appearance?

10 MS. CHIN: Pamela Chin on behalf of the  
11 Government.

12 MR. CONNORS: Thomas F. Connors for  
13 Mr. Aceituno, Your Honor.

14 MR. WATT: Robert D. Watt, Jr., co-counsel for  
15 Mr. Aceituno.

16 THE COURT: Good morning to everyone. Good  
17 morning, Mr. Aceituno.

18 THE DEFENDANT: Good morning.

19 THE COURT: Mr. Aceituno, have you had a chance  
20 to review the presentence report that the Probation  
21 Department issued in this case?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Okay. And have you had any  
24 questions that you have about the presentence report  
25 answered by your attorneys?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Okay, great. So let me just  
3 review what I have -- or go over what I've reviewed.  
4 I've reviewed the presentence report. In addition, I  
5 received an objection and memorandum as to the  
6 presentence report from Mr. Aceituno's attorneys. I  
7 received a sentencing memorandum from the Government.

8 And I received 44 letters from friends and  
9 family of yours, Mr. Aceituno. I have read each and  
10 every one of them. Some of them were quite moving.  
11 And if any of the folks that wrote to me are here, I  
12 want to thank you for those. It's very helpful to a  
13 Court that's trying to determine both the crime and the  
14 human being that's before me to receive those kind of  
15 letters, so if any of you are here, thank you for that.

16 Let's review the calculation of the guideline  
17 ranges and see where we have objections or if we still  
18 have objections and how to proceed. The base offense  
19 level for unlawful manufacturing, importing, exporting  
20 or trafficking, in this particular case, because it  
21 involved between 500 grams and two kilograms of heroin,  
22 is a base offense of 26; there's a two-point reduction  
23 for acceptance of responsibility -- and Ms. Chin, do  
24 you wish to make a motion on the third point?

25 MS. CHIN: I do, Your Honor.

1                   THE COURT: Great. That'll be granted. -- for  
2 a three-point reduction, bringing the base offense  
3 level to 23; Mr. Aceituno has no criminal history  
4 points, and therefore, he's a Category 1. So we have a  
5 total offense level of 23, a criminal history category  
6 of 1, which brings with it a recommended period of  
7 incarceration of 46 to 57 months.

8                   Ms. Chin, does the Government have any objection  
9 to the advisory guideline range or to the presentence  
10 report in general?

11                  MS. CHIN: I don't, Your Honor. But just for  
12 clarification, the controlled substance is cocaine and  
13 not heroin.

14                  THE COURT: I apologize. No problem. Correct.  
15 Thank you.

16                  MS. CHIN: Thank you, Judge.

17                  THE COURT: Mr. Connors or Mr. Watt, any  
18 objections to the presentence report or to the  
19 calculation of the guidelines?

20                  MR. CONNORS: Yes, with respect to what I had  
21 filed in the motion, Your Honor, with respect to the  
22 respective change by the Sentencing Guideline  
23 Commission, the possible two-level reduction with  
24 respect to that. And also with the role in the  
25 offense, we feel that I should be able to at least

1 argue that he was either a minimal or a minor  
2 participate in this role. So with respect to those  
3 two, that would be the basis for my objection to the  
4 presentence calculation.

5 THE COURT: I've considered both of those,  
6 Mr. Connors, and I'm going to overrule your objection  
7 as to both of those. I think as to the -- I think you  
8 make a fine point on the Sentencing Commission's  
9 recommendation on the reduction of base offense levels  
10 for certain drug offenses, but that's not in effect  
11 yet. But I do think that would be a fine argument to  
12 be made under 3553 when the Court should consider what  
13 an appropriate sentence is, but I think the Court's  
14 required to impose the current guidelines, and the  
15 current guidelines call for a base offense level of 26.

16 As to the mitigating or minor role, again, I  
17 think it's clear from my read of the presentence  
18 report, and in particular the prosecution version  
19 that's contained in here, that Mr. Aceituno would not  
20 meet the guideline requirements for mitigating or minor  
21 role. Again, however, many of the points that you  
22 raise in that matter I think the Court would well  
23 consider in a 3553 argument when it comes time for the  
24 appropriate sentence. But I do find that the guideline  
25 range is in fact correctly calculated and will adopt it

1 at 23 with a criminal history category of 1.

2 With that, Ms. Chin, do you want to be heard on  
3 sentence?

4 MS. CHIN: Thank you, Your Honor.

5 As Your Honor noted, I submitted a sentencing  
6 memorandum, which included a rendition of facts, which  
7 I know the Court is quite familiar with, having gone  
8 through the change of plea hearing as well as read the  
9 memorandum, so I'm not going to go into much detail  
10 with respect to the particulars of the transaction back  
11 in April.

12 I will note that, as you've noted, the  
13 sentencing memorandum articulates the Department's  
14 policy with respect to the two-level reduction, and  
15 having denied Mr. Connors' motion for those two levels,  
16 as you'll see from the memorandum, the Government did  
17 recommend the 37-month level, and I'm not going to  
18 change that recommendation despite the Court's previous  
19 ruling. And I'm going to do that partly because of the  
20 policy and partly because of the facts of this case.

21 And this particular Defendant is unique, and  
22 he's unique because, after I read through all those  
23 letters from his family, I, for the life of me, cannot  
24 figure out why he made the choice he made to get into  
25 that car with Geronimo Ramos and try to procure two

1 kilograms of cocaine, which was going to be distributed  
2 into the District of Rhode Island.

3 He has a record consistent with driving offenses  
4 that are old, to say the least. There is nothing in  
5 his background which would indicate that he has the  
6 need to engage in the illegal narcotics trafficking  
7 business, which he was getting ready to embark on with  
8 Mr. Ramos.

9 He has a family which is supportive, as  
10 indicated by these voluminous letters. And I did read  
11 all of them, and as I was reading them, I kept  
12 wondering to myself, he has all this family support,  
13 he's been gainfully employed, he started his own  
14 business, and on the eve of living the American dream,  
15 he decides to get into a car with Geronimo Ramos and  
16 try to procure two kilograms of cocaine, which is a  
17 significant quantity.

18 And this is where the Government is going to get  
19 into a quantity discussion about how much drugs that is  
20 when you consider it's going to be stepped on, for lack  
21 of a better term, where it's repackaged and cut with an  
22 agent and distributed into the District of  
23 Rhode Island. And it's a significant quantity.

24 And currently we are faced with an epidemic of  
25 illegal narcotics entering into our lives, and it's

1       killing people. It's not particularly cocaine, but  
2       it's illegal narcotics trafficking, which is ultimately  
3       leading to deaths of individuals, families being torn  
4       apart. This family is going to be torn apart. This  
5       family has been torn apart.

6           Mr. Aceituno has been incarcerated since April  
7       for these offenses, and one thing that I will give  
8       significant credit for his attorneys is they have done  
9       a phenomenal job putting together a package which is  
10       going to be persuasive to this Court about why he  
11       should receive a sentence which is less severe than  
12       required under the guidelines.

13       And to counter that argument, Judge, I will  
14       submit that the Government has already taken  
15       significant steps to allow this Defendant to receive a  
16       less severe sentence than would be required should he  
17       face the full impact of what he's done. And what he's  
18       done is conspire to and attempt to bring two kilograms  
19       of cocaine into the District for distribution and sale.

20       As the Court's well aware, that is the type of  
21       offense which, should the Government have elected to  
22       proceed on an offense requiring the minimum mandatory  
23       sentence of five years, the Government could have done  
24       that. But the Government, in looking at this  
25       Defendant's history and background and his immediate

1 acceptance of responsibility, elected not to do that.  
2 And by doing that, we put him into a category where he  
3 is now subject to the drug-quantity table as well as  
4 the sentencing guidelines.

5 In this particular case, because of his limited  
6 history and the quantity, his sentencing guideline, as  
7 properly calculated by Probation, is 46 months to  
8 57 months. And had the Department not issued the  
9 policy about allowing the additional two levels, in all  
10 likelihood, because I did agree with the Defendant  
11 pursuant to the plea agreement to recommend a guideline  
12 sentence, I would have been recommending 46 months.

13 I feel comfortable in recommending the 37-month  
14 sentence, given that our Department has permitted us to  
15 agree to the two-level departure should they agree not  
16 to seek an additional two levels subsequently if the  
17 sentencing guidelines, as proposed, are ultimately  
18 adopted.

19 But this case I think warrants an additional  
20 consideration because of his, again, immediate  
21 responsibility of acceptance. As early as the time of  
22 his arrest, Mr. Connors was advising me that his client  
23 wished to take responsibility for what he did, he  
24 wanted to plead, and he was trying to assess for  
25 himself what his culpability sentence would be as well

1 as what immigration consequences he would have. And  
2 over that course of time, that has never wavered. He  
3 has always been representing to me that Mr. Aceituno  
4 wanted to accept responsibility, which the Government  
5 is very mindful when it considers rehabilitation and  
6 the 3553 prongs.

7 However, the quantity of drugs in this case is  
8 significant, and it cannot be overlooked. And because  
9 of that, the Government still is recommending a lengthy  
10 jail sentence for someone who has never had any jail to  
11 speak of. In fact he's never had a felony conviction.  
12 But the significance of his actions must be accounted  
13 for.

14 The facts of this particular case, while I know  
15 Mr. Connors was going to argue for a minor or minimal  
16 role, the Government just doesn't see that as the case  
17 because he's charged with conspiracy and attempt, and  
18 with respect to those two acts, everything he did on  
19 that day with Geronimo Ramos is consistent with being  
20 part of a conspiracy and engaging in actions of equal  
21 measure to attempt to procure those two kilograms.

22 They drove to the meeting, he went to the  
23 meeting, he engaged in the conversation with the  
24 undercover and the cooperating witness discussing  
25 purity. He's getting involved in the transaction,

1 which shows that he isn't a minor participant; he's an  
2 equal participant because, again, the charges are  
3 conspiracy and attempt. They go to procure the money  
4 from the barber shop, which this particular Defendant  
5 was running at the time, they leave, they go back to  
6 the meeting, and once the investigators reveal  
7 themselves, this Defendant attempts to flee in the  
8 vehicle he's driving with Geronimo Ramos. So from the  
9 Government's perspective, those parts are equal.

10 As I indicated in the sentencing memo, Judge,  
11 the Government is comfortable that 37 months is  
12 sufficient to have this Defendant accountable for his  
13 actions on that date, and I don't believe that it's  
14 greater than is necessary, especially given the fact  
15 that his guideline range would be 46 months to  
16 57 months. So I'm hoping Mr. Connors won't object to  
17 the fact that I am recommending below the guideline  
18 range, which was appropriately calculated by Probation,  
19 but that is the Government's recommendation for  
20 sentencing today, given the particular facts of this  
21 case, the Defendant's history as well as his immediate  
22 acceptance of responsibility.

23 Thank you.

24 THE COURT: Great. Thanks, Ms. Chin.

25 Mr. Connors.

1 MR. CONNORS: Yes, thank you, Your Honor.

2 Good morning, Your Honor. May it please the  
3 Court.

4 THE COURT: Good morning.

5 MR. CONNORS: Ms. Chin was very eloquent in  
6 stating the Government's position.

7 THE COURT: She always is.

8 MR. CONNORS: That's -- I've had a long history  
9 with her, and she's always been very professional.

10 Judge, the two crimes, as you know, that my  
11 client pled guilty to is conspiracy to possess with  
12 intent to deliver cocaine and an attempt to possess  
13 with the intent to deliver that cocaine.

14 And as Ms. Chin said, my client's been held  
15 almost a year now, since April 19th of 2013. Now,  
16 there's a co-Defendant in this case, Geronimo Ramos.  
17 We also agreed, Your Honor, as part of the plea  
18 agreement that the amounts that he would be responsible  
19 for would be between 500 grams and two kilograms, which  
20 is what gives us that base offense level of 26, but --  
21 and also the criminal history of 1, enough's been said  
22 about that.

23 He's basically -- he's 35 years of age. He came  
24 here from Guatemala at the age of five, worked his way  
25 up through college, through business, family, opening

1 up his business, living the American dream until this  
2 happened. But I think we need to take a look at it.  
3 So he's got no significant -- in 35 years, he has no  
4 significant criminal history, so that shows his  
5 character. I think before I really get into the meat  
6 of this, I think this was an aberration, Your Honor.  
7 This is something completely outside of what you would  
8 expect from this individual and what he had shown and  
9 demonstrated in the past, so to that extent.  
10 Obviously, there's never been any other drug  
11 involvement in the past whatsoever, no allegations, no  
12 charges, no anything, either as a minor or as an adult.

13 Now, with that said, Your Honor --

14 THE COURT: And no history of any violence.

15 MR. CONNORS: That's correct, Your Honor.

16 THE COURT: In this instance or in anywhere in  
17 the past.

18 MR. CONNORS: That's absolutely correct. I  
19 think what I'd like to, I think, demonstrate, which  
20 does not appear in the Probation's recommendation or in  
21 the Government's position, is that you have to  
22 understand that my client opened up his barber shop in  
23 December of 2012, all right? He met Geronimo Ramos as  
24 a barber, he came out of a barber school, so he hired  
25 him as an independent contractor, among other people.

1 So in other words, he had, you know, a certain number  
2 of chairs in his barber shop, and people would work for  
3 him not as employees but as independent contractors.

4 So he only met this individual in January of  
5 2013, so he had no knowledge of this guy's past, and  
6 when I say this guy, I mean Mr. Ramos, no knowledge of  
7 his past. We find out later on, he actually had a  
8 criminal record. That was completely unknown to my  
9 client. So the relationship was strictly the owner of  
10 the shop and an independent contractor, they cut hair,  
11 they talked, things of that nature. It's not until  
12 just before this incident in April that things start  
13 developing. So I want to put that into a context.

14 So when they talk about it being -- the barber  
15 shop being my client's shop, there's no doubt about  
16 that, but they make it sound like this is headquarters  
17 for drug central and this is some kind of operation  
18 being masterminded by my client when in fact this is  
19 also the place that Geronimo Ramos worked at, so it's  
20 not like he made this place available for drug  
21 transactions or for Geronimo Ramos. This was their --  
22 both of their places of business, so I just want to put  
23 that into context.

24 The other factor is that, if you look at the --  
25 and I'm going to get to the role in the offense later

1 on. I'll just briefly mention that, as -- Your Honor's  
2 absolutely correct, the proposed sentencing guidelines  
3 are not in effect yet, so clearly they can't be  
4 calculated now by this Court, but without going into  
5 too much detail, and we have it in the memorandums, I'm  
6 suggesting that the Attorney General of the  
7 United States and the Sentencing Commission are in  
8 agreement that perhaps these guidelines are a little  
9 harsh with respect to these types of crimes and these  
10 particular levels, so they're suggesting themselves,  
11 this is the Attorney General of the United States and  
12 the Sentencing Commission, which are not -- you know,  
13 no one's going to consider them bleeding hearts.  
14 They're suggesting that it's a little hard.

15 THE COURT: I know Judge Sarah. Some people  
16 would call her a bleeding heart.

17 MR. CONNORS: I won't cast any aspersions,  
18 Your Honor.

19 THE COURT: You better not. She's right up the  
20 road.

21 MR. CONNORS: So what I'm saying is that even  
22 they appreciate that. So I'm saying that it's likely  
23 that's going to be granted perhaps in the near future,  
24 and perhaps that's something the Court could take into  
25 account in Mr. Aceituno's behalf at the present time.

1                   Now, with the role in the offense, I guess this  
2 is where the gist of my 3553 argument really is,  
3 Your Honor. As you know, if he's a minimal  
4 participant, he could come down four levels under the  
5 guideline calculations. If he's a minor participant,  
6 he could come down a couple. I think there's maybe a  
7 third one halfway in between somewhere. I'm not  
8 positive.

9                   But here's what I'd like to suggest, Your Honor.  
10 So we're asking for a downward variance based upon his  
11 role in the offense, and I know Your Honor's made a  
12 determination under the guidelines, but with respect to  
13 my 3553 argument, I'd like to say this, Your Honor, is  
14 that, again, we know, as a co-conspirator, he's  
15 responsible for the acts of the other individual. My  
16 client understands that.

17                   But you have to understand I believe the facts  
18 show my client was in a conspiracy for a couple of  
19 hours, all right? And the reason I say that, there's  
20 absolutely no evidence whatsoever suggested by anyone  
21 that my client was privy to any of the conversations,  
22 phone calls or anything of that nature with Mr. Ramos  
23 and the -- I'll just call them Government agents to  
24 make it simple, cooperating witness and an agent, but  
25 the Government witnesses. So what do we have? There's

1 no information that, prior to April 18th of last year,  
2 that any of that information that was gained by  
3 Mr. Ramos between him and the Government agents was  
4 ever communicated to my client. That has never been  
5 suggested or stated.

6 So the Government also says that, in part of  
7 their argument, that by pleading to the new policy  
8 position of the Attorney -- you know, of the  
9 US Attorney's Office, i.e., the Holder, you know,  
10 lowering of the sentencing guidelines that are  
11 proposed, she's saying he already got a benefit, in  
12 other words, you shouldn't even look into the  
13 mitigation role because he's already been mitigated by  
14 the fact that they didn't charge the mandatory minimum  
15 five-year sentence.

16 So she's -- you know, if I'm wrong, correct me,  
17 but inferentially I think what she's suggesting to the  
18 Court is that you shouldn't look at that 3(b)1.2  
19 mitigation in the role in the offense because that's  
20 already been mitigated. But I would --

21 THE COURT: Actually, I think she probably  
22 calculated it in when she recommended a below  
23 sentencing guideline, my understanding is where that  
24 37 months might have come from. Maybe I'm wrong.

25 MR. CONNORS: And that's what I'm saying. But

1 I'm suggesting this, Your Honor, if you really look at  
2 it, I believe on the facts of this case, my client  
3 would have qualified for the Safety Valve, so if he was  
4 looking at a mandatory minimum five-year sentence, he  
5 would have been able to get below that mandatory  
6 minimum sentence and qualify under the Safety Valve,  
7 and if he got the Safety Valve, he'd get another  
8 two-level reduction, which would actually put him down  
9 to 30 months, actually below what the Government is  
10 suggesting at the present time. So rather than a  
11 mitigating, it's actually going as an aggravating  
12 circumstance as far as the Government's argument with  
13 respect to that.

14 But let me get back to the role, Your Honor.

15 The --

16 THE COURT: That's a really good argument,  
17 Mr. Connors.

18 MR. CONNORS: So here's what we have. We have a  
19 Mr. Ramos who apparently is a nefarious individual,  
20 been engaging in conversations, I'm not even sure based  
21 upon what I've been presented with the evidence, as to  
22 when that started, he started talking to the agents.  
23 All of the conversations were on his phone with the  
24 agents, either he initiated or they called him back.  
25 They never ever, ever spoke to my client on a phone at

1 any time. My client's name was never mentioned at any  
2 time in all those conversations. They never suggested  
3 that someone he was working with at the barber shop was  
4 involved in any way, shape or form. My client made no  
5 contact with these agents whatsoever. So I'm talking  
6 about, What's his position in this conspiracy, in this  
7 scheme of things?

8 Now, also with the information provided to me by  
9 the US Attorney is that the conversations that  
10 Mr. Ramos and these agents had, he was talking about  
11 the other context, other, I guess you want to call  
12 them, co-conspirators in New York, in Texas, he talked  
13 about his cousin, people from outside the State of  
14 Rhode Island. So if you're going to talk about the  
15 conspiracy, there's the scope of the conspiracy. He's  
16 talking about his other agents in other states,  
17 including his cousin. There's not one scrap of  
18 evidence that shows that, that was ever -- that  
19 information was ever communicated to my client  
20 whatsoever.

21 Now, all the money. My client didn't contribute  
22 one cent to the \$28,000 that was part of this  
23 transaction, not one dime. He -- on the day this  
24 incident occurred, it was suggested to my client by  
25 Mr. Ramos that Mr. Ramos had no license. Now, whether

1 that's true or not, we have no idea, but that was the  
2 representation made to my client, that he had no  
3 license, and the Warwick Police were, quote, tough, so  
4 he asked him if he would drive him down. So that's how  
5 he winds up becoming the transportation in this  
6 conspiracy.

7 Now, clearly, I would say, and my client had a  
8 belief at that time, whether rightly or wrongly, that  
9 there was actually marijuana involved. But in any  
10 event, by any definition, the conspiracy has to start  
11 there because he's saying he knows he's taking this  
12 person down to engage in an illegal act, so not matter  
13 how you slice it, we have a conspiracy at that  
14 particular moment.

15 Now, what happens is that all of the  
16 communications in between are still between Mr. Ramos  
17 and the agent. So they meet at the Red Robin, so it's  
18 just a short trip, as you know, 15, 20 minutes from  
19 Providence to the Red Robin. My client should have  
20 never got out of the car. In fact he wasn't even  
21 intending to go inside the meeting. He was going to  
22 remain outside. Even to this day, he has no idea why  
23 he decided not to sit in the car and get out and go  
24 into this meeting.

25 Now, the Probation Officer and the Government's

1 position is that here's the factors why he should not  
2 be a minor or a minimal participant, they say because  
3 he drove to the meeting. All right. We just talked  
4 about that. I don't think that is a critical issue  
5 that makes you a major or minor person. If you're  
6 going down with the other person, either one person or  
7 the other has to drive, and under the circumstances,  
8 that's why my client decides to drive, because he's  
9 requested.

10 The second thing is that he participated in the  
11 negotiations. Now, I've been made available all of the  
12 transcripts and obviously the tapes, which I've  
13 listened to and looked at the transcripts, and they say  
14 he participated in the negotiations. That standing by  
15 itself is absolutely 100 percent true, but again, it's  
16 not in context because if you actually read the  
17 transcripts or listen to the tapes, other than saying  
18 "hello" and a couple of other, you know, I would say  
19 just, you know, chit-chat, he actually makes one  
20 statement and asks one question. He says that -- he  
21 says, What's the purity, how's the purity of this  
22 particular drug?

23 So clearly, at that particular point in time, no  
24 matter what he may have thought before or what he  
25 thought after, at that moment, he knows they're talking

1       about cocaine -- all right? -- there's no doubt about  
2       it, that the conversation is about cocaine. But the  
3       only other thing is he makes a statement saying that  
4       basically, you know, we work it out or be of some  
5       assistance. So basically you have so-called his  
6       participation in the negotiations is one question and  
7       one statement.

8           Now, unfortunately for him, that's what makes  
9       him liable for these crimes. And again, this is not  
10       justification; this is mitigation. But they say he's  
11       involved in negotiation. I would suggest to you,  
12       Your Honor, that 99.9 percent of all the negotiation  
13       was with Mr. Ramos. My client sat at the table, and  
14       those were the two contributions he made. It  
15       incriminates him, but I'm just saying that's -- we're  
16       talking about -- let's put the negotiations into  
17       context.

18           Then they also say that he transported the  
19       funds. Again, 100 percent true, but again, in context.  
20       See, now it makes it look like he's going back to get  
21       his money or he's going back to his special location to  
22       grab the funds to come back to the Red Robin in order  
23       to retrieve the cocaine. He should have never come  
24       back. That's, again, the second fatal mistake he made.  
25       Once he realized what was going on at that meeting, he

1 should have stayed at the barber shop and never agreed  
2 to drive this person back with the money.

3 So again, he says -- they say he transported the  
4 funds. Well, he transported the funds for the same  
5 reason he drove him down in the first place, because of  
6 the license and the request. But the barber shop, once  
7 again, they make it sound like it's his headquarters,  
8 he's running this operation. It's not true. It  
9 happened to be Ramos had the money stashed there, which  
10 my client didn't even know about, so he goes back to  
11 the barber shop, and that's when they retrieve the  
12 funds, Mr. Ramos gets the money, Mr. Ramos puts the  
13 money in the glove compartment of the vehicle, and then  
14 they drive down. Clearly, my client knows what he's  
15 doing at that time, and I mean, it's -- you know, he's  
16 inculpated, there's no question about it, but they're  
17 suggesting a different context.

18 And then they said he fled when he was  
19 confronted. Now, I don't know how that makes -- how  
20 that expands you into the mastermind of an operation or  
21 makes you some major player. He was scared. But at  
22 the time, what happened was at that scene, Your Honor,  
23 again, it was presented to me is that Ramos tells him  
24 when the people come out, at that moment, they're not  
25 identified as agents. I know they say they were, but

1 my client didn't know that for a few seconds, but Ramos  
2 says, "Go," he drives about a half a block or a block,  
3 I forget which one it was. As soon as he saw a Police  
4 vehicle with markings, an identified Police vehicle, he  
5 immediately pulled over and stopped the car.

6 So that's what they're talking about, fleeing.  
7 So this was not a, you know, five-mile chase at high  
8 speed with sirens on or anything of that nature,  
9 Your Honor, so he didn't get but a short distance, and  
10 it's because he was scared, and Ramos says, "Go," he  
11 drove, and as soon as he saw a Police vehicle, he  
12 pulled over and stopped, and I think that they would  
13 all confirm that. So I'm suggesting for 3553 purposes,  
14 Your Honor, this puts it in a very different context as  
15 far as what his role is.

16 Now, there was some suggestion that he was --  
17 perhaps Mr. Ramos, in these conversations, was talking  
18 about my client, Mr. Aceituno. Not true because they  
19 specifically mentioned that and talked about it, and  
20 when the negotiations were supposed to be for two  
21 kilos, Your Honor -- see, at that meeting, again,  
22 there's no proof my client knew about the phone  
23 conversations, but at that meeting, they clearly were  
24 discussing two kilograms, Mr. Ramos and the agents, so  
25 in his mind at that point in time, he thinks he's going

1 back with Mr. Ramos to get money for two kilos. That's  
2 what his belief is.

3 But in fact Mr. Ramos, again, whether it's truth  
4 or not truth, says, "All I have is 28,000," and that's  
5 what they were charging for one kilo. So at that  
6 particular point in time, he's going down knowing now  
7 that there's going to be a purchase of one kilo.

8 And the agents specifically asked, you know,  
9 "Are they talking about him," when he says, "I have  
10 to -- I need to get in touch with my partner for the  
11 other money?" And they specifically asked on the  
12 tapes, "Are you talking about Aceituno?

13 "No, no, not that guy. The guy in New York."

14 So, again, there's no, no connection to my  
15 client even about that conversation. So what I'm  
16 saying is his knowledge of the scope of this operation,  
17 his actual participation in context with it does give  
18 him a minor or a minimal role with respect to this  
19 whole operation, as opposed to Mr. Ramos, and  
20 potentially a larger aspect of Mr. Ramos.

21 Now, the bottom line, Your Honor, is that -- and  
22 you know the standards. I mean, I don't need to go  
23 through the 3553 standards, but the idea is, as  
24 Ms. Chin said, that this is a unique individual in  
25 front of you; this is not a generic sentencing. This

1 is probably the toughest job every Judge has ever --  
2 I've ever been in front of told me it's the hardest  
3 thing that they do, the most difficult thing that they  
4 do. How do you balance concerning the rights of the  
5 Defendant with the public at large? That's a very  
6 difficult balancing act. I don't think I could even do  
7 it.

8 But with that said, if you look at the nature  
9 and the circumstances of the offense, all right,  
10 clearly this is drug dealing, we all know what the  
11 ramifications of that is, we all know it's bad, we know  
12 it's evil, it shouldn't be going on. He made a bad  
13 decision, he got involved in this, but he's not the  
14 initiator of it, Your Honor. He is guilty because he  
15 did participate, and he knowingly participated in the  
16 end. That's what did him in. So you know what the  
17 nature and the circumstances of the offense is.

18 Now, Ms. Chin says, Oh, they're probably going  
19 to step on it, introduce it into the State of  
20 Rhode Island. The agents, if my understanding is  
21 correct, they wanted to do this transaction in  
22 New Jersey, but I guess Mr. Ramos, for some reason,  
23 refused to do that, and he wanted to do it in  
24 Rhode Island. Now, again, I don't know what the reason  
25 is for that. We don't know what Mr. Ramos was going to

1 do with this kilo. Was he going to turn around and  
2 sell it to someone else whole? Was he going to step on  
3 it and sell it on the street? There's no evidence  
4 whatsoever what he was going to do with this one  
5 kilogram of heroin.

6 But let's just assume it was going to be  
7 introduced into Rhode Island. There's, again, no  
8 information whatsoever my client was going to  
9 participate in that whatsoever. In fact there's no  
10 evidence anywhere of what, if anything, my client was  
11 going to get out of that transaction if in fact  
12 Mr. Ramos paid the 28,000 and he got the one kilo.  
13 There's none whatsoever that's even been alleged as to  
14 what he was going to get, if anything, as a result of  
15 that.

16 The -- 3553 says that you're supposed to give a  
17 sufficient sentence but not greater than is really  
18 necessary under the circumstances, and I'm arguing that  
19 if you put his role in the offense into context and you  
20 put the fact that he is in a conspiracy for roughly a  
21 couple of hours, if you put his entire history and  
22 character in the balance and compare this one act with  
23 that, I think you'll come to the conclusion that it is  
24 an aberration.

25 He's truly remorseful, wanted to accept

1 responsibility immediately, Your Honor, as soon as I  
2 talked to him, I think within ten minutes. And I  
3 communicated that to Ms. Chin, as she mentioned to you.  
4 I can't think of anyone more disturbed at his conduct.  
5 Like I said, he was living the American dream, and he  
6 blew it. He probably would rather spend a lengthy time  
7 in prison, Your Honor, rather than get deported. I  
8 think I can honestly tell you that. If this Court  
9 could give him more time in prison to serve rather than  
10 him being kicked out of the country, I think he would  
11 accept that gladly.

12 So that's another aspect of this case here too  
13 is he -- he brought it on himself, there's no question,  
14 he brought it on his family. But he made a mistake, it  
15 was bad judgment. I don't know if it became greed,  
16 Judge, at the last minute. I can't really explain it.  
17 I don't think he can really explain it. It was a bad  
18 decision, it was criminal, criminal in nature, not  
19 something that should be condoned, but I think it's  
20 something that, if you look in the usual context that  
21 we have with people appearing before you and in the  
22 State courts, we usually have, you know, criminals.

23 I would suggest to you, Your Honor, that he is  
24 a -- he's a law-abiding citizen that committed a crime,  
25 as opposed to being a criminal who is into all kinds of

1 nefarious deals and things of that nature. So I think  
2 that's what makes it a little bit different. Usually  
3 people dealing in kilos and stuff, they're -- you know,  
4 they've been around, Judge, they've had prior, you  
5 know, arrests and contacts, they -- you know, they're  
6 no good, you know, for the most part. I don't think  
7 that Mr. Aceituno is in that category.

8 So you're supposed to, obviously, reflect on the  
9 seriousness of the offense, you need to give a sentence  
10 that's going to promote respect for the law, and it's  
11 got to be a just punishment for the offense. One thing  
12 I might say, Your Honor, is that -- and there also has  
13 to be adequate deterrence. But again, if you look at  
14 his role in this, perhaps a higher sentence if you're  
15 the mastermind of something like this or you're  
16 operating, you know, in other states or what have you,  
17 then, you know, a harsher sentence is in order.

18 But here, Your Honor, I'm asking that you also  
19 take into account that, as a non-citizen who's going to  
20 be deported, he's not going to get the benefit of any  
21 halfway house or minimum sentence facilities, things  
22 that of nature, again, it's an aspect of the  
23 sentencing.

24 And finally I would say this, Your Honor. You  
25 can see the support he has from his family here.

1 You've seen the letters. I think -- if you ask me, I  
2 think he's already been rehabilitated. He's had a  
3 chance -- this is the first time he's ever been in  
4 prison, and I think that has more of an effect on  
5 someone than someone who's been and come and goes, they  
6 could care less, they view that as a course of doing  
7 business.

8 For someone who's never been incarcerated a day  
9 in his life up until the age of 35, this is hard to  
10 take. So he's been there almost a year now, and you  
11 know what the Wyatt Center is like, I mean, it's  
12 just -- it's not like you've been sentenced and you can  
13 take programs and you can do other things like that.  
14 It's a pretty harsh environment there, it's pretty  
15 regimented. I think we even provided a letter from the  
16 Correctional Officers there, absolutely a model  
17 prisoner.

18 So the bottom line is this, Your Honor: I think  
19 that, if you look at it in context, I think that he's  
20 deserving of something less than the 37 months that the  
21 Government is suggesting here, and I would ask that  
22 Your Honor take all this into account, look at it  
23 holistically and impose a reasonable sentence that you  
24 think is fair for Mr. Aceituno and for society at  
25 large.

1 Thank you.

2 THE COURT: Thanks, Mr. Connors.

3 Mr. Aceituno, do you want to address the Court  
4 before I impose sentence?

5 THE DEFENDANT: Yes.

6 THE COURT: Why don't you stand. And Mr. Watt,  
7 could you just raise that mike for him up? There you  
8 go. Thanks.

9 THE DEFENDANT: Well, I just would like to say  
10 that I'm very sorry to my family here. I know I let  
11 them down. And they always looked up to me, you know  
12 what I'm saying? Like, they always -- I always -- you  
13 know, like my kids and everybody, my in-laws, my --  
14 sorry.

15 THE COURT: That's okay. Take your time.

16 THE DEFENDANT: I just know that I made a big  
17 mistake that day, it was a bad decision, and all I'm  
18 asking is just for a second chance. And that's  
19 basically it. Okay, thank you.

20 THE COURT: Thanks. Why don't you remain  
21 standing, please.

22 The Court, Mr. Aceituno, has to consider two  
23 basic things. One is the offense that you committed,  
24 the nature and circumstances of the offense, and then  
25 secondly is the history and -- your history and

1 characteristics. So basically what it instructs Courts  
2 that sentence people to do is look at what you did but  
3 also look at the human being that stands before us.

4           When you look at the nature of the  
5 circumstances, there's no question that you were  
6 involved in a bad trade, you know, you don't have to --  
7 it doesn't take much thinking about your own children  
8 to think about what that drug trade would have done to  
9 other children, and I know from reading these letters  
10 how much family and friends and community mean to you,  
11 so there's no question that this was a serious offense.

12           There is a question about your amount of role in  
13 it. It doesn't appear that there was much of a role.  
14 It appears you were a participant in an otherwise  
15 larger, more intricate scheme, but it doesn't take away  
16 at all the seriousness of the nature of the offense, it  
17 just doesn't. At some point in time, people need to  
18 realize that, when they engage in illegal behavior  
19 about narcotics, it affects human beings, and Ms. Chin  
20 referenced it. We read about it in the paper every  
21 day, particularly lately we've been reading a lot about  
22 it, maybe not about cocaine but certainly about other  
23 drugs.

24           I do, however, looking at the nature of the  
25 circumstances, I have long thought and I particularly

1 think here that the sentencing guidelines that are so  
2 singularly driven by quantity are not always helpful in  
3 certain circumstances, and in your circumstance, that  
4 feeling of mine about the guidelines is highlighted,  
5 and it's highlighted because, as Mr. Connors so  
6 eloquently put, you are not the usual kind of person  
7 that stands before me in Federal Court charged with  
8 this kind of crime. I don't know that I've seen anyone  
9 without any criminal history points that's been charged  
10 with a serious crime that carries with it 26 base point  
11 levels. I've only been on the bench three years, but  
12 I've never seen that before.

13 So then the Court turns to the characteristics  
14 and the history of the person that comes before me, and  
15 if anything is abundantly clear, Mr. Aceituno, it is  
16 that you have led an exemplary life. Whether it's your  
17 relationship with your wife, your children and your  
18 relationship with them, your community involvement that  
19 I read so much about from the letters that I received,  
20 you giving back to schools and churches in your  
21 community, this clearly was an aberration in an  
22 otherwise well-lived life, from what I can observe from  
23 everything that's before me.

24 You did something incredibly stupid, and that  
25 stupid thing that you did has caused you a lot of

1 problems. But it does appear that it was a singular  
2 blip, albeit a large blip, in the middle of a life that  
3 you should otherwise, and your family and friends,  
4 should otherwise be proud of. And so it's one of those  
5 cases where the two factors that the Court has to  
6 consider somewhat conflict, a serious offense, albeit  
7 your role as a participant not as great as others, but  
8 an extraordinary history and character of a human being  
9 that stands before me.

10 I'm ultimately required to give a sentence  
11 that's sufficient but not too severe to accomplish  
12 everything that we try to accomplish in a sentence.  
13 And this Court believes, after a thorough review of all  
14 of the material and after reading the 44 letters,  
15 listening to Mr. Connors and hearing you this morning,  
16 that your current sentence fulfills all of the  
17 requirements of sentencing.

18 So I intend to impose a sentence of time served.  
19 I think the one year that you've spent in jail  
20 accomplishes all of the factors that the Court needs to  
21 in sentencing. It is clear to me and clear to my  
22 reading of your record that you have been punished.  
23 You've punished yourself severely. You've punished  
24 yourself because of what you've done to these families  
25 and friends. I cannot believe, Mr. Aceituno, that you

1 will do this again. I believe in my heart that, that  
2 won't happen, and I think the record is clear that,  
3 that won't happen, so deterring the public isn't as  
4 important. And as I said, the one year that you've  
5 spent -- or almost one year that you've spent in jail  
6 so far, in light of all the history, it appears to this  
7 Court to be sufficient punishment to accomplish  
8 everything that is currently needed.

9 So I'm going to impose a sentence of time  
10 served. I'm going to -- I am going to impose a period  
11 of three years of supervised release. And in addition  
12 to the standard conditions of supervised release, I'm  
13 going to require that you participate in a program of  
14 substance abuse treatment, inpatient or outpatient, as  
15 directed by the Probation Office, and that you  
16 participate in a program of drug abuse testing up to  
17 72 drug tests per year, as directed by the Probation  
18 Office, and that you pay for such treatment and testing  
19 based on your ability to pay, as determined by the  
20 Probation Office. I impose those conditions in light  
21 of some of the factors about your past history that  
22 were mentioned in the presentence report that I don't  
23 feel I need to go into but are contained in the  
24 presentence report. I will impose the \$200 mandatory  
25 special assessment.

1                   Mr. Aceituno, you asked for a second chance, you  
2                   asked for a break. The people that wrote to me  
3                   implored me to do that on your behalf. Mr. -- your  
4                   lawyer was incredibly eloquent both in writing and in  
5                   articulating the need to do that, and I just want to  
6                   make sure that you understand that --

7                   THE DEFENDANT: Yes, I do understand.

8                   THE COURT: -- that the break that you've been  
9                   given today isn't going to happen again. The next  
10                  Judge that you stand before will not see someone  
11                  without a criminal history record who is only a minor  
12                  participant in a crime. The next Judge that hopefully  
13                  never sees you, but if they do, is going put you away  
14                  for a long time because Ms. Chin is right, you were  
15                  looking at five years plus if it weren't for a couple  
16                  of breaks that didn't necessarily have anything to do  
17                  with you but are the realities of what the laws are.

18                  So I hope that you go back to being the fine  
19                  family member that you've been. I hope you go back to  
20                  productive economic life. I will say that I had  
21                  Probation yesterday check. There are no, as of  
22                  yesterday, detainees on you. I don't anticipate one  
23                  being filed, so once the Marshals get done checking to  
24                  ensure that that's true today, you may well be free to  
25                  go home today, so I hope that in fact is the case,

1       Mr. Aceituno. I hope that I never see you again, and I  
2       hope you thank your family and friends and turn to them  
3       --

4                   THE DEFENDANT: Thank you.

5                   THE COURT: -- when you find yourself in time of  
6       trouble again.

7                   You've waived any right to appeal this sentence,  
8       Mr. Aceituno, in the plea agreement, so I don't think I  
9       have anything to add to that.

10                  Mr. Pletcher, anything further from Probation?

11                  PROBATION OFFICER: No, Your Honor, thank you.

12                  THE COURT: Ms. Chin, anything further from the  
13       Government?

14                  MS. CHIN: No, Your Honor, thank you.

15                  THE COURT: Mr. Connors, anything for  
16       Mr. Aceituno?

17                  MR. CONNORS: No, Your Honor. Thank you.

18                  THE COURT: We'll stand adjourned.

19                  (Adjourned at 11:57 a.m.)

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## C E R T I F I C A T I O N

I, Debra D. Lajoie, RPR-FCRR-CRI-RMR, do  
tify that the foregoing pages are a true and  
transcription of my stenographic notes in the  
tled case.

/s/ Debra D. Lajoie

4 / 10 / 14

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

BEFORE THE HONORABLE JOHN J. MCCONNELL  
DISTRICT JUDGE  
(Change of Plea)

## APPEARANCES:

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Proceeding reported and produced  
by computer-aided stenography

1           7 JANUARY 2014 -- 2:00 P.M.

2           THE COURT: Good afternoon, everyone. We're  
3 here this morning for a change of plea in the case of  
4 the United States v. Walter Aceituno, Criminal Action  
5 No. 13-181.

6           Could I have counsel's appearance?

7           MS. CHIN: Pamela Chin on behalf of the  
8 Government.

9           THE COURT: Good afternoon, Ms. Chin.

10          MR. CONNORS: Thomas Connors on behalf of  
11 Mr. Aceituno, Your Honor.

12          THE DEFENDANT: Good afternoon. And  
13 Mr. Aceituno.

14          Ms. Maguire, would you swear Mr. Aceituno,  
15 please.

16          (The Defendant Was Sworn)

17          THE CLERK: Please state your name and spell  
18 your last name for the record.

19          THE DEFENDANT: Walter Aceituno,  
20 A-c-e-i-t-u-n-o.

21          THE CLERK: Thank you. You may be seated.

22          THE COURT: Mr. Aceituno, you understand that  
23 you're under oath, and that requires you to give me  
24 truthful answers to the questions I ask?

25          THE DEFENDANT: Yes, Your Honor.

1                   THE COURT: Okay. If you fail to give me  
2 truthful answers, then further charges could be brought  
3 against you; you understand that?

4                   THE DEFENDANT: Yes, Your Honor.

5                   THE COURT: Okay. Now, there's a plea agreement  
6 that's been filed in this case that you signed and your  
7 lawyer signed and the Government signed.

8                   Did you have a chance to thoroughly review that  
9 plea agreement?

10                  THE DEFENDANT: Yes.

11                  THE COURT: And did your attorney answer any  
12 questions that you might have about that agreement?

13                  THE DEFENDANT: Yes, he did.

14                  THE COURT: Mr. Aceituno, how old are you, sir?

15                  THE DEFENDANT: I'm 34.

16                  THE COURT: And how far did you go in school?

17                  THE DEFENDANT: I went till Associates Degree at  
18 Johnson & Wales University.

19                  THE COURT: Great. What was the degree in?

20                  THE DEFENDANT: Business Administration.

21                  THE COURT: Okay. And Mr. Aceituno, have you  
22 been treated recently for any mental illness or  
23 addiction to narcotic drugs?

24                  THE DEFENDANT: No, Your Honor.

25                  THE COURT: Okay. And are you currently under

1 the influence of any drugs, medication or alcoholic  
2 beverages?

3 THE DEFENDANT: No.

4 THE COURT: And have you received a copy of the  
5 information in this case; that is, the written charges,  
6 the two counts that the Government is bringing against  
7 you, in this case?

8 THE DEFENDANT: Yes, I have.

9 THE COURT: Okay. And have you had a chance to  
10 fully discuss the information and the charges and the  
11 consequences of the charges with your attorney?

12 THE DEFENDANT: Yes.

13 THE COURT: Okay. And are you fully  
14 satisfied -- are you completely satisfied with the  
15 representation that you've received from your lawyers  
16 in this case?

17 THE DEFENDANT: Yeah.

18 THE COURT: Now, Mr. Aceituno, if you change  
19 your plea to guilty, you'll be giving up certain rights  
20 that you have under the laws and Constitution of this  
21 country, and I need to make sure that you understand  
22 that you have these rights and that, if you change your  
23 plea, you'll be giving up these rights.

24 So you have a right to plead not guilty and to  
25 continue and maintain that plea of not guilty

1       throughout all of these proceedings. If you were to  
2       continue in a plea of not guilty, you would have a  
3       right to a trial by jury. At that trial, the  
4       Government would have to prove each and every element  
5       of the charge beyond a reasonable doubt. At that  
6       trial, you would be presumed to be innocent, and the  
7       Government's burden to prove you guilty would be  
8       required.

9           At that trial, you'd have a right to assistance  
10      of counsel, and the Court would appoint counsel for you  
11      both during trial and for all proceedings and matters  
12      in this case. You would have a right to present  
13      evidence. You would have a right to see and hear,  
14      confront and cross-examine all of the evidence that the  
15      Government puts on against you.

16           You would have a right to present a defense,  
17      you'd have a right to compel people, subpoena them, to  
18      have them come to Court and testify in your defense.  
19      You would also have a right to testify if you chose to  
20      testify, but perhaps more importantly, you would have a  
21      right not to testify, and if you chose not to testify,  
22      that fact could not be used against you by anyone.

23           But if you do change your plea to guilty, there  
24      will be no trial, and you will have given up each of  
25      these rights that you currently have. Do you

1 understand, sir, that you have these rights?

2 THE DEFENDANT: Yes.

3 THE COURT: And do you understand that, if you  
4 change your plea to one of guilty, you'll be giving up  
5 all of these rights?

6 THE DEFENDANT: Yes, I do.

7 THE COURT: Okay. Mr. Aceituno, has anyone in  
8 any way forced you to plead guilty or threatened you in  
9 any way in order to get you plead guilty?

10 THE DEFENDANT: No.

11 THE COURT: Has anyone made any promises or  
12 assurances to you, other than what's contained in the  
13 plea agreement, in order to get you to plead guilty in  
14 this case?

15 THE DEFENDANT: No.

16 THE COURT: Okay. And are you just knowingly  
17 and voluntarily asking this Court to allow you to  
18 change your plea to guilty because you believe it's in  
19 your personal best interests to do so?

20 THE DEFENDANT: Yes.

21 THE COURT: Okay. Now, Mr. Aceituno, I also  
22 need for you to understand the maximum sentence that  
23 the Court could impose at the time of sentencing in  
24 this case.

25 For Count I -- actually, for both counts, as to

1       each count, there is a period of imprisonment of up to  
2       20 years, a \$1 million fine, up to a lifetime of  
3       supervised release; and there's a \$100-per-count  
4       mandatory special assessment.

5               Now, if the Court were to impose the maximum  
6       sentence as to each count and if the Court were to  
7       impose that sentence to run consecutively, meaning one  
8       after the other, then the maximum term of imprisonment  
9       the Court could impose is 40 years, the maximum fine is  
10       \$2 million, with a lifetime of supervised release, and  
11       there will be a \$200 mandatory special assessment.

12              Do you understand that these are the maximum  
13       penalties that the Court could impose at the time of  
14       sentencing in this case?

15              THE DEFENDANT: Yes.

16              THE COURT: Do you also understand that, if the  
17       Court imposes a period of incarceration, prison, jail  
18       time and the Court imposes a period of supervised  
19       release after jail time, that if you violate any of the  
20       conditions of supervised release, that further prison  
21       time could be brought upon you? Do you understand that  
22       as well?

23              THE DEFENDANT: Yes.

24              THE COURT: Mr. Aceituno, are you a citizen of  
25       the United States?

1                   THE DEFENDANT: No.

2                   THE COURT: Say that again, please.

3                   THE DEFENDANT: No.

4                   THE COURT: No, you're not? Okay. Pleading  
5 guilty to this charge could affect your status with  
6 Immigration; do you understand that?

7                   THE DEFENDANT: Yeah.

8                   THE COURT: Okay. You understand that it's  
9 quite likely and probable that, if you plead guilty to  
10 this, after you serve any period of incarceration, that  
11 the United States Government will deport you? Do you  
12 understand that as well?

13                  THE DEFENDANT: Yeah.

14                  THE COURT: Ms. Chin, are there forfeiture  
15 allegations?

16                  MS. CHIN: There are, Your Honor. There are  
17 forfeiture allegations regarding a quantity of money.

18                  THE COURT: Okay.

19                  THE COURT: Mr. Aceituno, do you understand  
20 that -- first of all, have you discussed the forfeiture  
21 allegations with your attorney?

22                  THE DEFENDANT: Yeah.

23                  THE COURT: Okay. And do you understand that,  
24 by changing your plea to guilty, you're giving up your  
25 right to contest the forfeiture allegations?

1                   THE DEFENDANT: Yes.

2                   THE COURT: That is, you're giving up all right  
3                   and argument that you're entitled to any of the moneys  
4                   that's referred to in the forfeiture allegation; you  
5                   understand that?

6                   THE DEFENDANT: Yes.

7                   THE COURT: Now, in addition, Mr. Aceituno, I  
8                   want to make sure you understand the process that we'll  
9                   go through for determining what an appropriate sentence  
10                  is. You'll be asked to meet with the Probation  
11                  Department at some point after this hearing, and you  
12                  have a right to have your attorney present with you for  
13                  that interview, and I encourage you to make sure your  
14                  lawyer is with you. It's important for you to be  
15                  represented at that hearing.

16                  The Probation Department will then prepare a  
17                  presentence report. That report will help the Court  
18                  determine what an appropriate sentence is. It'll give  
19                  me information about the charges, about your  
20                  background, your history and what not.

21                  But it will also contain a calculation of the  
22                  advisory sentencing guidelines. Those guidelines  
23                  assist the Court in determining what an appropriate  
24                  sentence is. We don't know what those guideline ranges  
25                  are going to be. Your attorney or others may have told

1 you what they think the guideline range will be, but  
2 that's not binding on the Court; do you understand  
3 that?

4 THE DEFENDANT: Yes.

5 THE COURT: Okay. Now, in the plea agreement,  
6 so that we're clear, at Paragraph 4, you've agreed that  
7 the amount of cocaine involved in this case is between  
8 500 grams and two kilograms of cocaine; you understand  
9 that you're agreeing to that?

10 THE DEFENDANT: Yes.

11 THE COURT: Okay.

12 THE DEFENDANT: It says what?

13 THE COURT: Between that amount.

14 THE DEFENDANT: Oh, yeah.

15 THE COURT: And you understand, by agreeing to  
16 that amount, that that will affect what your advisory  
17 sentencing guideline will be? In fact, the plea  
18 agreement says that your base guideline will be 26  
19 because of that; do you understand that?

20 THE DEFENDANT: Yes.

21 THE COURT: And that has implications on what  
22 the ultimate recommendation of the sentence will be;  
23 you understand that as well?

24 THE DEFENDANT: Yeah.

25 THE COURT: Okay. And you've agreed to that;

1 correct?

2 THE DEFENDANT: Yes.

3 THE COURT: Okay. You also understand that the  
4 Court can impose a sentence that's above the sentencing  
5 guideline all the way as high as the maximum sentence I  
6 told you about? You understand that as well?

7 THE DEFENDANT: Yes.

8 THE COURT: Okay. Or the Court could impose a  
9 sentence that's at or below the advisory guideline  
10 range. We just don't know that now, and the Court  
11 won't determine the guideline range until the time of  
12 sentencing; you understand that?

13 THE DEFENDANT: Yes.

14 THE COURT: Okay. Do you also understand that  
15 in the Federal system, that parole has been abolished?  
16 There is no parole like there is in a state system. If  
17 the Court sentences you to a period of time in prison,  
18 you'll serve that entire time without a right to  
19 parole; do you understand that as well?

20 THE DEFENDANT: Yeah.

21 THE COURT: Okay. I'm going to ask Ms. Chin for  
22 the US Government now to tell us what the elements of  
23 the two counts are contained in the information and  
24 also then to tell us what the facts are that the  
25 Government would prove if this case went to trial.

1           And I want you to pay particular attention to  
2 the facts because, at the end of it, I'm going to ask  
3 you if you admit those facts as true; okay?

4           THE DEFENDANT: Okay.

5           THE COURT: Ms. Chin.

6           MS. CHIN: Thank you, Your Honor.

7           Your Honor, with respect to the two counts of  
8 the criminal information, with respect to Count I,  
9 which charges the Defendant with conspiracy to possess  
10 with intent to distribute a Schedule 2 controlled  
11 substance, the two elements involved in that offense  
12 are: First, that there exists an agreement between at  
13 least two people to possess with intent to distribute  
14 500 grams or more of cocaine; and, second, that the  
15 Defendants willfully joined in this agreement.

16           Your Honor, with respect to the quantity that  
17 I've just alleged, because we have the quantities as an  
18 agreement in this particular matter, the Government  
19 didn't charge that under the mandatory minimum statute,  
20 but because it has the quantity there, that's why I put  
21 that into the portion of the element.

22           THE COURT: That makes sense. Thank you.

23           MS. CHIN: With respect to Count II, which  
24 charges the Defendant with attempting to possess with  
25 intent to distribute a Schedule 2 controlled substance,

1       the two elements there are: First, that the Defendant  
2       intended to commit a crime of possession with intent to  
3       distribute cocaine; and, second, that the Defendant  
4       engaged in a purposeful act that, under the  
5       circumstances as he believed them to be, amounted to a  
6       substantial step toward the commission of that crime  
7       and strongly corroborated his criminal intent.

8           Your Honor, should the matter have proceeded to  
9       trial, the Government was prepared to prove that, on  
10       April 18th of 2013, the Defendant and Geronimo Ramos,  
11       also known as Gerry Ramos, met with a cooperating  
12       witness and an undercover DEA Task Force Officer  
13       Lizzette Estevez, E-s-t-e-v-e-z, for the purpose of  
14       purchasing cocaine.

15           This purchase was previously arranged by Ramos  
16       through telephone communications with two cooperating  
17       witnesses. In these conversations, Ramos discussed the  
18       purchase of multi-kilograms of cocaine. The recorded  
19       conversations detailed the negotiations of the amount  
20       of the cocaine to be purchased and the location of the  
21       transaction.

22           Eventually, despite attempts by investigators to  
23       have the transaction occur in New Jersey, Ramos told  
24       the cooperating witness that his partner wanted the  
25       deal to happen in Rhode Island.

1                   On April 18th, 2013, the cooperating witness and  
2 Officer Estevez arrived at a restaurant in Warwick,  
3 Rhode Island, to meet with the Defendant and Ramos. As  
4 part of the investigation, Officer Estevez's undercover  
5 vehicle contained five kilograms of cocaine, as was  
6 negotiated by Ramos.

7                   A surveillance team monitored Ramos earlier that  
8 morning drive to the Broadway's Barber Shop in  
9 Pawtucket in a green Mercury Mountaineer. The Barber  
10 Shop is the property rented by the Defendant, and Ramos  
11 was believed to have worked there. Ramos was seen  
12 entering the Barber Shop and subsequently exiting with  
13 the Defendant. Ramos and the Defendant then entered  
14 the Mountaineer and left. This time the Defendant was  
15 driving.

16                  A short time later, they arrived at the  
17 Warwick restaurant where the cooperating witness and  
18 Officer Estevez were waiting. The first meeting  
19 between Ramos and the Defendant, the cooperating  
20 witness and Officer Estevez occurred inside the  
21 restaurant. And during the meeting, Ramos and the  
22 Defendant discussed the purchase of two kilograms of  
23 cocaine at \$28,000 per kilogram. The parties discussed  
24 an additional three kilograms, which would be provided  
25 to the Defendant and Ramos but would be paid for at a

1 later time.

2 The Defendant inquired about the purity of the  
3 cocaine product during these conversations. This  
4 conversation was in Spanish and recorded.

5 The meeting concluded, and Ramos and the  
6 Defendant left to obtain the purchase money. It was  
7 agreed that the money would be retrieved by the  
8 Defendant and Ramos and they would return to the  
9 restaurant in Warwick.

10 Further surveillance of the Mountaineer  
11 determined that, after leaving the restaurant in  
12 Warwick, Ramos and the Defendant returned to Broadway's  
13 Barber Shop. Both men exited the Mountaineer and  
14 entered the Barber Shop. After waiting for  
15 approximately one hour, the cooperating witness called  
16 Ramos to find out why there was a delay. Ramos told  
17 the cooperating witness that he only had enough money  
18 for one kilogram of cocaine and was trying to find a  
19 friend who had the money for the second kilogram.

20 During a subsequent call, Ramos told the  
21 cooperating witness that his friend was in New York and  
22 that he could only pay \$28,000. The cooperating  
23 witness told Ramos to return to Warwick, Rhode Island,  
24 with that money and Ramos agreed.

25 The surveillance team observed Ramos and the

1       Defendant leave the Barber Shop and return to the  
2       Warwick location in the Mountaineer. The second  
3       meeting between Ramos, the Defendant, the cooperating  
4       witness and Officer Estevez occurred in the parking lot  
5       of the Warwick Mall.

6                   Officer Estevez and the cooperating witness were  
7       waiting in her vehicle, and the Defendant parked the  
8       Mountaineer a short distance behind her. The  
9       cooperating witness exited the vehicle and walked over  
10      to the Mountaineer and opened the driver's side rear  
11      door. The cooperating witness observed Ramos remove  
12      approximately \$28,000 from the vehicle's glove box and  
13      place it on the rear seat of the Mountaineer. The  
14      cooperating witness opened the bag and quickly examined  
15      the money. He then told Officer Estevez that it was  
16      all there.

17                  The cooperating witness told Ramos and the  
18       Defendant that they would go to the Barber Shop to  
19       complete the transaction, which would be the  
20       transference of the money for the cocaine.

21                  When the Defendant began to drive the  
22       Mountaineer from the scene, the investigation team  
23       members approached the Mountaineer. The Defendant  
24       attempted to flee the scene at a high rate of speed,  
25       but Officers stopped the vehicle a short distance from

1 the second meeting site.

2 A subsequent search of the Mountaineer resulted  
3 in the seizure of a plastic bag containing \$28,990  
4 located on the rear seat of the vehicle. An additional  
5 \$6,000 in US currency was also seized from the glove  
6 box of the Mountaineer.

7 THE COURT: Thanks, Ms. Chin.

8 MS. CHIN: Thank you, Your Honor.

9 THE COURT: Mr. Aceituno, you heard the elements  
10 of the two charges that the Government has brought  
11 against you. Do you understand that those are the  
12 elements of the charge and that the Government would  
13 have to prove each and every one of those elements as  
14 to either or both counts in order for you to be found  
15 guilty of either or both counts? Do you understand  
16 that?

17 THE DEFENDANT: Yeah.

18 THE COURT: Okay. You also heard the facts that  
19 the Government would prove if this case went to trial.  
20 Do you admit those facts as true?

21 THE DEFENDANT: Yeah.

22 THE COURT: You do?

23 THE DEFENDANT: Yeah.

24 THE COURT: Okay.

25 MR. CONNORS: He just had a question, basically

1       it's relaying some of the statements of Mr. Ramos on a  
2       phone that my client wasn't present at, but we have no  
3       reason to disagree that that is true. But he just  
4       can't say that, obviously, that that happened. That  
5       was the issue he had, Your Honor.

6               THE COURT: Understood. But as to the facts  
7       that go to the essential elements of the charge that  
8       Ms. Chin set forth, you have no problem accepting those  
9       as true; correct?

10              THE DEFENDANT: Yes, I was there that day.

11              THE COURT: Okay, great. Before I ask you about  
12       your change of plea, do you have any questions for the  
13       Court, or do you want to confer with your lawyer about  
14       any matter?

15              THE DEFENDANT: Yeah, I just want to ask him a  
16       question.

17              THE COURT: Feel free.

18              (Pause)

19              THE COURT: You all set?

20              THE DEFENDANT: Yes.

21              THE COURT: Do you have any -- do you need to  
22       confer with your lawyer any further?

23              THE DEFENDANT: No, thanks.

24              THE COURT: Okay. How do you now plead to the  
25       charges, the two counts contained in the information

1                   against you, guilty or not guilty?

2                   THE DEFENDANT: Guilty.

3                   THE COURT: The Court has heard from the  
4                   Government the evidence it would present if this matter  
5                   were to go to trial. The Court has questioned the  
6                   Defendant regarding his understanding of the nature of  
7                   the proceedings and the consequences of entering a plea  
8                   of guilty to the charges.

9                   It is, therefore, the finding of this Court, in  
10                  the case of the United States v. Walter Aceituno, that  
11                  the Defendant is fully competent and capable of  
12                  entering an informed plea; that the Defendant is aware  
13                  of the nature of the charges and the consequences of  
14                  the plea and that the plea of guilty is a knowing and  
15                  voluntary plea supported by an independent basis in  
16                  fact containing each of the essential elements of the  
17                  charge. And, therefore, the plea is accepted, and the  
18                  Defendant is now adjudged guilty of that offense.

19                  Sentencing will be set down for Tuesday,  
20                  March 25th, 2014, at 11:00 a.m. Tuesday, March 25th,  
21                  2014, at 11:00 a.m.

22                  Ms. Chin, anything further for the Government?

23                  MS. CHIN: No, Your Honor. Thank you.

24                  THE COURT: Great, thanks. Mr. Connors,  
25                  anything further for Mr. Aceituno?

1                   MR. CONNORS: No, Your Honor. Thank you.  
2                   THE COURT: Okay, great. Thanks. We'll stand  
3 adjourned. Thank you.  
4                   (Adjourned at 2:25 p.m.)

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9                   I, Debra D. Lajoie, RPR-FCRR-CRI-RMR, do  
10 hereby certify that the foregoing pages are a true and  
11 accurate transcription of my stenographic notes in the  
12 above-entitled case.

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18                   /s/ Debra D. Lajoie

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23                   9/11/2020

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