No. _____

# IN THE

# SUPREME COURT OF THE UNITED STATES

BENANCIO CASTANEDA,

*Petitioner*

v.

UNITED STATES OF AMERICA

*Respondent*

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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## QUESTIONS PRESENTED FOR REVIEW

Question 1:

Narcotics agents were surveilling a house based on unidentified "concerned citizen" calls of a high volume of short-stay traffic. Without corroborating the anonymous tips, agents followed the first vehicle they witnessed leaving the house, and an officer ultimately stopped the vehicle for a traffic violation. Upon completion of the reason for the stop, the officers delayed the detention to wait for a drug dog.

The question presented is whether the Fifth Circuit erred by holding reasonable suspicion existed for the continued detention based on the narcotics agents' initial surveillance and on evidence that the driver was nervous, corrected himself when stating his previous location, did not reveal that he had stopped at the surveilled house, and had a prior license suspension for failure to complete a drug-education program.

Question 2:

The canine sniff went beyond an open-air sniff when the dog put its nose in the interior of the vehicle upon the canine handler's prompting. At the suppression hearing, the canine handler testified that the dog first alerted under the front of the car before intruding into the vehicle.

The question presented is whether the Fifth Circuit erred by viewing the one-minute sniff/search in piecemeal to uphold the intrusion and by deferring to the handler's testimony when his own testimony, the videotape, and other evidence cast grave doubts on its reliability.

Question 3:

The defendant stipulated to the facts to support his conviction, accepting responsibility for the offense, and the Government and the probation department agreed he was entitled to a reduction for acceptance of responsibility.

The question presented is whether the district court erred by denying appellant's request for a two-level reduction for acceptance of responsibility because he, at one point and for ten days, changed his mind and requested a jury trial.

## PARTIES

Benancio Castaneda is the petitioner, who was the defendant-appellant below.

The United States of America is the respondent, who was the plaintiff-appellee below.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Benancio Castaneda, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Castaneda*, No. 22-10844, 2023 U.S. App. LEXIS 19154, (5th Cir. July 26, 2023), and is provided in the Appendices to the Petition. Appx. A. The judgment of conviction and sentence was entered by the district court on August 25, 2022, and this judgment is included in the Appendices as well. Appx. B.

## JURISDICTIONAL STATEMENT

The Fifth Circuit affirmed the district court's judgment on July 26, 2023. Appx. A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## FEDERAL CONSTITUTIONAL PROVISIONS, RULES, AND SENTENCING GUIDELINES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

USSG §3E1.1 provides:

> **Acceptance of Responsibility**
>
> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

## STATEMENT OF THE CASE

### A. Factual Background

In September 2020, the Taylor County Sheriff's Department received a call from a concerned citizen that a house in Abilene, Texas had a high volume of traffic that only stayed for a short period of time. ROA.51. The caller was concerned that illegal drugs were being sold from the residence. ROA.51. Narcotics officers conducted surveillance on the residence but did not see anything to substantiate the caller's concern. ROA.273–75, 293.

The following month, the sheriff's department received another anonymous tip of the same sort, and Agents Brandon Adames and Marvin Patterson again conducted surveillance. ROA.51, 275. A vehicle pulled up, and the male driver and female passenger went inside the house. ROA.51, 275–76. The man carried a lunchbox. Less

than ten minutes later, the two exited the residence; the male again carried a lunchbox. ROA.51, 276.

Agents Patterson and Adames followed the vehicle. ROA.51. The paper tag on the car was not properly secured and was "flapping"; the officers could see a metal license plate underneath the paper tag. ROA.51. They radioed to Deputy Dwight Montgomery, who performed a traffic stop. ROA.51–52. One of the narcotics officers called for a K-9 unit. ROA.267–68.

The male driver—identified as Castaneda—told Deputy Montgomery that he did not have a valid driver's license. ROA.54, 303. Castaneda said he was coming from his friend's house on Sayles, but corrected himself and said he actually met his friend at the Cash Saver. ROA 430 (Ex 1 @ 13:53). According to Deputy Montgomery's testimony from the suppression hearing, Castaneda was "pretty visibly nervous, jittery," and did not make eye contact. ROA.305.

Deputy Montgomery returned to his unit to check license and registration with dispatch, and Agent Patterson informed him that the K-9 unit was on its way. ROA 430 (Ex 1 @ 13:58:24). Approximately eight minutes into the stop, dispatch confirmed that Castaneda's license was invalid and advised that neither he nor the passenger had any warrants. ROA.54, 430 (Ex 1 @ 14:02:23). Dispatch also advised that Castaneda's driver's license had been suspended for failure to complete a required drug-education program.

Nine and a half minutes into the stop, Deputy Montgomery got out of his vehicle and asked Castaneda and the female passenger some questions to complete

the field-interview form. Appx. C, p. 6. Deputy Montgomery returned to his vehicle and put his clipboard inside the vehicle; he did not write a citation at that time, but instead he walked back to the passenger side of Castaneda's vehicle and engaged in small talk with him and the passenger. Appx. C, p. 6. In fact, at the suppression hearing, Deputy Montgomery agreed that he and the other officers were "lingering around" at that point. ROA.328.

When the female passenger asked what they were waiting on, Deputy Montgomery said they were waiting on the canine unit to arrive. Appx. C, p. 6. He testified at the suppression hearing that he had not decided whether or not to cite Castaneda for driving without a license, and that writing a citation was not "a time-sensitive thing" because "they weren't going to be able to drive away from the scene." ROA.313–14. He said they would either have to call a tow truck or a friend to drive the vehicle, but he agreed that he did not do either. ROA.328–29.

Approximately thirteen minutes into the stop, Agent Adames asked Deputy Montgomery if he was going to write a ticket. ROA.430 (Ex 1 @ 14:06:28). Deputy Montgomery testified at the suppression hearing that this is what prompted him to go ahead and write the ticket. ROA.329. He called dispatch to again ask the expiration of the vehicle registration because he did not write it down the first time. Appx. C, p. 6. He received that information, for the second time, twenty minutes after the stop. ROA.430 (Ex 1 @ 14:13:38).

The canine unit arrived approximately twenty-one minutes into the stop. ROA.430 (Ex 2 @ 14:15). The handler, Deputy Waddle, started at the front of the

vehicle and walked the dog from the front to the back of the driver's side twice, for approximately one minute in total. ROA.340, 430 (Ex 2 @ 14:14–14:16). Deputy Waddle testified that the dog pulled hard under the front of the vehicle and wanted to go back under it. ROA.342. Both times he passed the dog by the driver's door, Deputy Waddle raised his hand in a high command, and the dog jumped up onto the door frame, sticking its nose inside the open driver's side window. A subsequent search of the vehicle revealed narcotics.

### B. Procedural Background

Castaneda filed a motion to suppress the search of his vehicle. After a hearing, the district court denied the motion with a written Memorandum Opinion and Order Denying Motion to Suppress Evidence. Appx. C, p. 8.

Castaneda initially signed a Bench Trial Stipulation, but at the bench trial, he said he desired a jury trial. ROA.74, 381–85. The district court set the case for a jury trial for the following month, but ten days later, Castaneda changed his mind and filed a second motion for a nonjury trial, which the district court granted. ROA.208, 391–92, 399. Castaneda signed a second Bench Trial Stipulation, stipulating to the facts necessary for conviction, while expressly reserving his right to appeal the adverse suppression ruling. ROA.208, 212, 400–03.

The PSR assigned a base offense level of 30, and also assigned a two-level reduction for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a), for a total offense level 28. ROA.441. The PSR stated that Castaneda "has clearly demonstrated

acceptance of responsibility for the offense." ROA.441. The PSR also stated that the Government would not be moving for the additional one-level reduction pursuant to U.S.S.G. § 3E1.1(b). ROA.441.

Castaneda filed four objections to the PSR, and all were either accepted by the Government or granted by the court. ROA.414–15, 459–67. At the sentencing hearing, the Government not only did not oppose the two-level reduction for acceptance of responsibility, but also requested the additional one-level reduction of U.S.S.G. § 3E1.1(b). ROA.419. However, the district court refused to apply the acceptance-of-responsibility reduction and denied the Government's motion. ROA.468. The court reasoned that Castaneda's behavior in requesting a bench trial, changing his mind on the day of the trial, and then changing his mind again was behavior not consistent with acceptance of responsibility and evidence of gamesmanship. ROA.417, 419–20. The court also said that the timeliness of the stipulation—four days prior to trial—warrants denial of the reduction. ROA.417.

The district court adjudged Castaneda guilty of conspiracy to distribute and possess with intent to distribute 50 grams or more of methamphetamine and possession with intent to distribute 50 grams or more of methamphetamine. Appx. B, p. 1. The district court determined a total offense level of 30 and criminal history category of V, yielding a guideline range of 151–188 months' imprisonment. ROA.420. The court sentenced Castaneda to 180 months in prison for each count, to run concurrently, and ordered that each sentence be followed by a five-year term of

supervised release, to run concurrently. ROA.232, 426–27. The court ordered a special assessment of $100 per count but did not impose a fine. ROA.236, 427.

### C. The Appeal

Castaneda argued on appeal that the district court erred by denying his motion to suppress the search of his vehicle. He argued that the officer intentionally delayed writing a citation and concluding the stop for the sole purpose of waiting for the canine unit to arrive, and that the continued detention was not supported by reasonable suspicion of criminal activity. He further argued that the dog sniff unlawfully went beyond an open-air sniff.

Castaneda also argued that the district court erred by refusing to grant the two-level reduction for acceptance of responsibility and by denying the Government's motion for an additional one-level reduction for acceptance of responsibility. He argued that he clearly demonstrated acceptance of responsibility for the offenses by entering a bench trial stipulation to the facts necessary for his convictions.

The Fifth Circuit rejected these claims. The Court did not address whether the traffic stop was impermissibly delayed to await a canine sniff and held that the continued detention was justified based on reasonable suspicion. Appx. A, p. 3. The Court reasoned:

> Deputy Montgomery knew that narcotics agents had been surveilling Castaneda after seeing him leave a house they had been monitoring. Moreover, during the traffic stop, Castaneda gave inconsistent and untruthful stories about where he had been coming from. In addition, Castaneda's driver's license was invalid, and his driver's license had been suspended due to his failure to complete a drug-education program.

> Castaneda also was "pretty visibly nervous, jittery," avoided eye contact, and "couldn't sit still."
>
> Agent Marvin Patterson testified that, just prior to the traffic stop, he and another narcotics agent were conducting surveillance on a house where neighbors had complained about short-stay traffic consistent with drug trafficking. Agent Patterson testified that he observed Castaneda enter that house carrying a lunchbox and leave with that lunchbox after less than 10 minutes, and that small containers like the lunchbox can be used to carry narcotics. Agent Patterson's knowledge can be imputed to Deputy Montgomery because they were in communication with each other, and Agent Patterson participated in the traffic stop in coordination with Deputy Montgomery. Viewing the evidence in the aggregate and in the light most favorable to the Government, the district court did not err in concluding that the officers had developed reasonable suspicion of additional criminal activity that justified extending the stop to wait for the canine unit.

*Id.* at 2–3 (internal citations omitted).

The Court also refused to address whether the canine handler impermissibly prompted the canine to unlawfully search the interior of the vehicle through the rolled-down window. *Id.* at 3. In doing so, the Court relied on the canine handler's testimony that the dog had already alerted to the front driver's-side wheel when it climbed under the vehicle. *Id.* at 3–4.

As for the requested acceptance-of-responsibility sentencing reduction, the Court held that the denial "was not 'without foundation'" due to Castaneda's actions. *Id.* at 4.

## REASONS FOR GRANTING THE PETITION

### I. THE FIFTH CIRCUIT ERRED BY HOLDING THE CONTINUED DETENTION TO AWAIT THE DOG SNIFF WAS SUPPORTED BY REASONABLE SUSPICION.

A dog sniff is not fairly characterized as part of a police officer's mission during a traffic stop and must be supported by reasonable suspicion. *Rodriguez v. United States*, 575 U.S. 348, 349, 135 S. Ct. 1609 (2015). The Fifth Circuit incorrectly determined that reasonable suspicion existed here to justify the continued detention to await the dog stiff. The Fifth Circuit's opinion on this important and recurring Fourth Amendment question about "judgments and inferences" that law enforcement officers make every day allows a seizure based on a mere hunch, rather than the requisite reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673 (2000).

As this Court has explained, reasonable suspicion requires "'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) (quoting *United States v. Cortez*, 449 U. S. 411, 417–418, 101 S. Ct. 690 (1981), and citing *Terry v. Ohio*, 392 U. S. 1, 21–22, 88 S. Ct. 1868 (1968)). The standard for reasonable suspicion is less demanding than probable cause or a preponderance of the evidence, but it requires more than a "mere hunch." *Id.* (citations omitted). Reasonable suspicion "depends on the factual and practical consideration of everyday life on which *reasonable and prudent men*, not legal technicians, act." *Id.* (quoting *Prado Navarette v. California*, 572 U. S. 393, 397, 134 S. Ct. 1683 (2014)). The standard allows for "commonsense judgments and

inferences about human behavior" to be made by reasonable and prudent officers. *Id.* (quoting *Wardlow*, 528 U. S. at 125, 120 S. Ct. 673).

The circumstances relied upon by the Fifth Circuit for reasonable suspicion here fail to satisfy that standard. As for Deputy Montgomery's knowledge that narcotics officers saw Castaneda leaving a house they were monitoring, that surveillance was based only on calls from one or two unidentified "concerned citizens" about the amount of traffic at the residence. Appx. A, p. 2; ROA.381. The narcotics agents had conducted surveillance on the residence at least twice following the anonymous tips and saw nothing to corroborate them; in fact, Castaneda's vehicle was the first one the officers saw visit the residence. ROA.51, 275–76.

As *Florida v. J.L.* explains, "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'" 529 U.S. 266, 120 S. Ct. 1375 (2000) (internal citations omitted). An anonymous tip that is suitably corroborated may sometimes exhibit "sufficient indicia of reliability to provide reasonable suspicion," *id.*, but such is not the case here. Without some corroboration, the narcotics surveillance does nothing to support a finding of reasonable suspicion that Castaneda was in possession of drugs.

The Fifth Circuit also relied on the officer's testimony about Castaneda's apparent "inconsistent and untruthful stories about where he had been coming from." Appx. A, p. 2–3. Deputy Montgomery testified that Castaneda lied when he said he

had been at a Cash Saver store and that he changed his story about his prior location. ROA.334–35. But the officers knew only that Castaneda had not stopped at a Cash Saver during the five or six miles that the officers had followed him. ROA.266, 304. They did not know where Castaneda had been prior to his brief stop at the house under surveillance, and his answer does not establish that he "lied" about where he had been. Further, the "inconsistency" relied upon by the Fifth Circuit was simply that Castaneda immediately corrected himself—without any further questioning from the officer or any delay—when asked where he had been; he initially said he had been at his friend's house on Sayles and then said, "Well, actually I met him at the Cash Saver." ROA 430 (Ex 1 @ 13:53). This is not the type of inconsistent statement that supports reasonable suspicion of possession of drugs.

The Fifth Circuit also relied on the officer's knowledge that Castaneda's license had at some point been suspended for failing to complete a drug-education program. Appx. A, p. 3. But the officer did not know why or when Castaneda was ordered to complete this program, or any other information about the license suspension. Further, knowledge of a person's prior criminal involvement (certainly, the failure to complete a drug-education program) is insufficient to give rise to reasonable suspicion that he is currently in possession of drugs. *See, e.g.*, *U.S. v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000) (noting that officer's knowledge that defendant had prior arrest for crack cocaine did not amount to reasonable suspicion); *U.S. v. Lee*, 73 F.3d 1034, 1040 (10th Cir. 1996) (holding that knowledge of defendants' extensive criminal histories was insufficient to support reasonable suspicion).

What remains is the officer's testimony that Castaneda was nervous and jittery, "couldn't sit still," and avoided eye contact. Appx. A, p. 3. Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion, *see Wardlow*, 528 U.S. at 124, 120 S. Ct. 673, but nervousness alone is insufficient to create reasonable suspicion of criminal activity. And as the Fifth Circuit has repeatedly stated, the court often gives "little or no weight to an officer's conclusional statement that a suspect appeared nervous." *United States v. Monsivais*, 848 F.3d 353, 359 (5th Cir. 2017) (quoting *United States v. Portillo-Aguirre*, 311 F.3d 647, 656 n.49 (5th Cir. 2002)); *see United States v. Macias*, 658 F.3d 509, 520 (5th Cir. 2011) (holding that defendant's "extreme nervousness" was insufficient to support the extended detention).

Finally, the Fifth Circuit's opinion is in conflict with its own opinion in a very similar case, *United States v. Spears*, 636 Fed. Appx. 893 (5th Cir. 2016). In an unpublished opinion, the Fifth Circuit held that officers lacked reasonable suspicion that an individual possessed drugs when an officer witnessed the individual leave a house linked to drug activity and the officer testified that, upon stopping the individual, he "appeared nervous, was not giving straight answers, was evasive in responding to questions, and was very non-compliant." *Id.* According to the Fifth Circuit in *Spears*, the officer only had reasonable suspicion for a traffic violation and his "subsequent actions must have been reasonably related in scope to [the] traffic violation." *Id.* at 901.

In the present case, the officers at best had a "hunch"—based on anonymous, unverified tips—that the house they were surveilling was being used for illegal activity. Despite multiple surveillances of the residence, officers had been unsuccessful in corroborating the tips. The information officers learned during the stop—Castaneda's nervousness, his invalid driver's license, his correcting himself about where he had been, and the officers' knowledge that he had not stopped at the Cash Saver in the five or six miles that they followed him—does not support reasonable suspicion that he was in possession of drugs. There are no additional articulable facts that would justify reasonable suspicion outside of the traffic violations. Yet, Deputy Montgomery prolonged the traffic stop because in his words, "We are waiting on the dog to get here." ROA.430 (Ex 1 @ 14:05:43).

Because the stop violated the Fourth Amendment, the Fifth Circuit should have reversed the district court's ruling on Castaneda's motion to suppress.

## II. THE FIFTH CIRCUIT ERRED BY UPHOLDING THE CANINE'S SEARCH OF THE INTERIOR OF THE VEHICLE.

When the Government obtains information "'by physically intruding'" on an individual or his effects, a Fourth Amendment search has "undoubtedly occurred." *Florida v. Jardines*, 569 U.S. 1, 5, 133 S. Ct. 1409 (2013) (citations omitted). In the context of a drug dog sniff of a vehicle, *Illinois v. Caballes* holds that such action, when "performed on *the exterior of* [an individual's] car while he was lawfully seized for a traffic violation*"* does not implicate legitimate privacy interests. 543 U.S. 405,

409, 125 S. Ct. 834 (2005) (internal citation omitted). But the interior of an individual's vehicle is undoubtedly protected by the Fourth Amendment. When an officer facilitates, encourages, or prompts a drug dog to enter a vehicle, the Fourth Amendment is implicated. *See United States v. Shen*, 749 Fed. Appx. 256, 262 (5th Cir. 2018).

In this case, a Fourth Amendment search occurred when the canine handler twice prompted the canine to put its nose in the open driver's window during an open-air sniff that lasted approximately one minute. However, the Fifth Circuit circumvented the Fourth Amendment protections by relying on the canine handler's testimony that the drug dog alerted prior to the handler directing the dog to jump up on the open driver's window. *See* Appx. A, pp. 3–4. This case presents an ideal vehicle for this Court to provide guidance on this important issue of canine sniffs. Rather than reviewing the handler and drug dog's actions in piecemeal, plucking out those that do not implicate constitutional privacy interests from those that do, courts should view the canine sniff as a singular event that either does, or does not, implicate the Fourth Amendment.

Review is also warranted due to the Fifth Circuit's blind application of the well-worn rule that deference must be given to the district court's credibility determination. Such deference must still be "supported by the record," *U.S. v. Gibbs*, 421 F.3d 352, 357 (5th Cir. 2005) (citing *United States v. Giacomel*, 153 F.3d 257, 258 (5th Cir. 1998)), and here, the evidence casts grave doubts on that determination.

Initially, Officer Waddle did not describe the dog's actions under the vehicle as an alert. He testified that he started at the front of the vehicle and that the dog went up under the front of the car and pulled. ROA. 343. Officer Waddle said this indicated that "she's in the odor of narcotics" and that she was trying to source. ROA.343. He said sourcing meant the dog was "trying to figure out what's in there, you know, odor-wise." ROA.342. He said his dog uses active alerts—a scratch, a bite, or a bark, and passive alerts—sitting down, looking at him, turning, or freezing. ROA.352. Critically, however, he did not identify the dog's actions as either a passive or active alert; he simply said the dog pulled and went under the car to source. Upon further questioning, he described the act of going up under the vehicle as an alert, and when district court asked if it was an active or passive alert, Officer Waddle said—for the first time—that he could hear the dog scratching. ROA.357–58. When the court asked why he continued the search after that initial alert, Officer Waddle said he was trying to source where the odor was the strongest; he said, "[I]f it's really, really strong in the engine and then I call the alert, I say she alerts, you know, here." ROA.358.

Not only does Officer Waddle's own testimony show the unreliability of his testimony about the "first alert," but the video of the stop does not corroborate his testimony. The video shows that after starting at the front driver's side of the vehicle, no more than ten seconds pass before Officer Waddle directs the dog into the open window by raising his hand at the window. ROA.430 (Ex 2 @ 14:14). On the second pass, while at the front of the vehicle, the dog became distracted by a puppy the female passenger was holding, and Officer Waddle had to redirect the dog; upon

redirection, mere seconds pass before Officer Waddle again encourages the dog to breach the open window. ROA.346, 430 (Ex 2 @ 14:14–14:16). Even if a piecemeal review of the dog's actions during this one-minute search was proper, the timing of the dog's actions on the video cannot support that it alerted prior to breaking the plane into the vehicle's interior.

Finally, no drugs were found in the engine, under the hood, or in the vicinity of where Officer Waddle said the dog first alerted, casting further doubt on Officer Waddle's testimony that the dog immediately and initially alerted on the front driver's side.

As Justice Souter cautioned in his dissent in *Caballes*, "[t]he infallible dog . . . is a creature of legal fiction." 543 U.S. at 411, 125 S. Ct. 834 (Souter, J., dissenting). "[T]heir supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine." *Id.* (collecting cases). Adding to the fallibility of canine sniffs in this case is the court's reliance on the handler's uncorroborated and contradicted testimony as to the exact moment when the dog "alerted" in a search that undoubtedly went beyond an open-air sniff.

## III. THE FIFTH CIRCUIT INCORRECTLY CONCLUDED THAT THE DISTRICT COURT'S DENIAL OF AN ACCEPTANCE-OF-RESPONSIBILITY REDUCTION WAS "NOT WITHOUT FOUNDATION."

When, as here, a defendant demonstrates acceptance of responsibility for his offense," his offense level should be adjusted downward by two levels. U.S.S.G. § 3E1.1(a). And when, as here, the defendant qualifies under subsection (a) and his offense level prior to application of that subsection is 16 or greater, a further one-level reduction may be applied upon the government's motion "stating that the defendant . . . timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." U.S.S.G. § 3E1.1(b). The failure to depart downward for acceptance of responsibility constitutes reversible error when that decision is made without any foundation. *See United States v. Lord*, 915 F.3d 1009, 1017 (5th Cir. 2019); *United States v. Patino-Cardenas*, 85 F.3d 1133 (5th Cir. 1996).

Castaneda stipulated to the facts to support his convictions, fully admitting to the conduct comprising the offenses, well in advance of trial. The Government and the probation department both agreed that he was entitled to a two-level reduction for acceptance of responsibility. ROA.419, 441. That he at one point (and for only ten days) changed his mind and requested a jury trial does not change this fact. The record shows that when he briefly requested a jury trial, he was confused about what the trial court was asking, concerned that the court would bind him to his waiver of a jury trial, and frustrated at the procedural process. It does not support that he was

acting in a manner inconsistent with acceptance of responsibility. The Government filed a few documents in those ten days but never indicated that those ten days caused it to prepare for trial or allocate its resources inefficiently. *See* U.S.S.G. § 3E1.1(b). To the contrary, that the Government moved for a subsection (b) reduction indicates that it did not.

Even if Castaneda had remained steadfast in his desire for a jury trial, nothing in the record shows whether he wanted a jury trial to put the Government to its burden or for some other reason that does not relate to his factual guilt. *See United States v. Washington*, 340 F.3d 222, 228 (5th Cir. 2003) (explaining that the Guidelines allow acceptance of responsibility when a defendant denies *legal* guilt, rather than *factual* guilt). As the Guideline comments note, a defendant may still accept responsibility even though he exercises his constitutional right to a trial. U.S.S.G. §3E1.1, comment. n. 2.

Because the district court lacked foundation to refuse to apply the acceptance-of-responsibility adjustment and to deny the Government's motion for an additional subsection (b) reduction, the Fifth Circuit should have reversed and remanded for resentencing on this issue.

## CONCLUSION

Petitioner respectfully prays that this Honorable Court grant *certiorari* and ultimately reverse the judgment below, so that the case may be remanded to the district court for a new trial. Petitioner prays alternatively for such relief as to which he may be justly entitled.

Respectfully submitted this 18th day of October, 2023.

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