

No. _____

IN THE
Supreme Court of the United States

SERVANDO BENITEZ-REYNOSO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

First, whether data contained in a cellphone constitutes “derivative evidence,” and is therefore admissible at trial, where the very location of the cellphone was voluntarily disclosed by the accused during a Rule 11 proffer session; *and*

Second, whether the facts in this case establish a “rare situation” under U.S.S.G. §3E1.1 where an accused proceeds to trial but nevertheless qualifies for acceptance of responsibility under the Sentencing Guidelines.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the trial court and the appellate court below are named in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI

PETITIONER HEREIN, SERVANDO BENITEZ-REYNOSO, now respectfully petitions this Court for a WRIT OF CERTIORARI to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit herein.

OPINION BELOW

The Court of Appeals filed its judgment and decision in this matter on February 26, 2018, under Case No. 16-51425. The court invoked Local Rule 47.5 and determined that its per curiam opinion should not be published. Petitioner has included a copy of the opinion of the Court of Appeals in *Appendix A*, attached hereto.

JURISDICTION

Petitioner invokes the jurisdiction of this Court as provided under the provisions of 28 U.S.C. §1254(1). The Appeals Court entered its decision of record in this case on February 26, 2018. This PETITION FOR WRIT OF CERTIORARI is being filed prior to the expiration of the 90-day period set forth in SUPREME COURT RULE 13(1).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner contends that his Fifth Amendment right to due process of law was violated at trial when the district court admitted evidence obtained from his cellphone which was voluntarily proffered under a FED. R. CRIM. PROC. 11 agreement, *and*, further, where the trial court failed to give credit for acceptance of responsibility under facts clearly establishing entitlement thereto.

RULES OF EVIDENCE, RULES OF CRIMINAL PROCEDURE AND SENTENCING GUIDELINES INVOLVED

Rule of Criminal Procedure 11. Pleas.

* * *

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

Rule of Evidence 410. Pleas, Plea Discussions, and Related Statements.

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

* * *

(3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure

Guidelines Provision U.S.S.G. §3E1.1 (Reduction for Acceptance of Responsibility), Commentary, Application Note 2.

Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial.

STATEMENT OF THE CASE

1. Summary of the Issues: Admissibility of Cellphone Data. In 2014, Petitioner SERVANDO BENITEZ-REYNOSO was found guilty of felony drug trafficking charges by a federal district court jury sitting in the Western District of Texas. During the course of trial and again at his 2016 sentencing hearing, Petitioner objected to the introduction of evidence that was obtained from his cellphone, specifically a list of calls to and from his alleged co-conspirators.

He was sentenced to serve a term of 17 and-a-half years in prison. At the time of his arrest he was 19 years old and a citizen of the United States.¹ There was no evidence adduced at trial placing him in possession of any narcotics or in the actual importation or transportation thereof. The only direct evidence of his participation in the alleged conspiracy came in the form of testimony from known felons and a co-defendant who were themselves convicted of drug trafficking in this case.

MR. BENITEZ-REYNOSO was arrested by U.S. Customs and Border Patrol agents a few miles from the border with Mexico on suspicion of being involved in an on-going drug smuggling operation. Upon being taken into custody, he was placed in the back seat of a Border Patrol pickup truck and transported to a nearby Border Patrol station for interrogation. The arresting officer noted that Petitioner was in possession of a cellphone when he was put in the truck. During a subsequent search at the Border Patrol station, however, it was discovered that he was no longer in possession of the phone. When investigating agents asked where it was, Petitioner stated truthfully that it was in the truck.

¹ There were several references in trial testimony suggesting that Petitioner's uncle was the leader of the Mexican drug trafficking network that organized and controlled the distribution of narcotics involved in this case, and that other family members had been drawn into the gang at an early age.

Border Patrol agents thereupon undertook a thorough examination of the interior of the truck, but the cellphone was never recovered. After being indicted on conspiracy and possession charges, Petitioner agreed to participate in a debriefing session with investigators and defense counsel in anticipation of reaching a plea agreement. Prior to meeting with the agents, Petitioner, through counsel, signed a standard proffer agreement that provided as follows:

First, no statements made by your client during the “off the record” proffer will be used against your client in the case-in-chief portion of a criminal case against your client. The Government agrees that, pursuant to the United States Sentencing Guidelines (U.S.S.G.) §1B1.8, any information provided by your client during the proffer, to the extent that it was unknown to the Government, should not be used in the calculation of your client's sentencing guideline range.

Second, the Government may make derivative use of any investigative leads suggested by any statements made by your client. This provision is necessary in order to eliminate the necessity for a *Kastigar* hearing, wherein the Government would have the burden of proving the evidence was derived from a source independent of your client's statements.

During the course of the Rule 11 debriefing,² the investigators once again inquired regarding the whereabouts of the missing cellphone. After conferring with counsel, and in reliance upon the plain language of the proffer agreement, Petitioner revealed the fact that he had placed the cellphone behind a certain air conditioning vent in the rear-seat area of the pickup truck. On the basis of this information, agents were able at last, and with much effort, to retrieve the phone and subject it to forensic examination.

As matters developed, the parties did not agree to a plea deal and the case proceeded to a trial by jury. The defense filed a pretrial motion in limine seeking to exclude any and all evidence recovered from the cellphone. The district court summarily dismissed the motion prior

² As indicated above, the combined effect of FED. R. CRIM. PROC. 11 and FED. R. EVID. 410 is to prevent the introduction at trial of evidence procured during plea discussions.

to the introduction of evidence. The defense objected again when the Government moved to admit call logs and other material retrieved from the phone. Defense counsel argued strenuously that the data was not in any sense derivative, that it was not obtained from a wholly independent source, but that, on the contrary, the data inside the cellphone was indistinguishable from the cellphone itself. The only authority cited during trial on this issue was provided by the Government: *United States v. Barnes*, 3 F.3d 437 (5th Cir. 1993). A careful reading of that decision provides no guidance concerning what constitutes derivative evidence in the Fifth Circuit, nor the extent to which there might be limitations on the scope thereof.

In the absence of any analysis or discussion of the meaning of the term “derivative” or the proper scope of derivative use as used in the Rule 11 proffer agreement, the district court pronounced offhandedly that the evidence was “quintessentially a derivative use.” On that basis, the court ruled the phone logs and other data were fully admissible. In short order, the jury returned a verdict of guilty on all charges related to the possession and transport of narcotics.³

MR. BENITEZ-REYNOSO appealed his conviction to the Fifth Circuit Court of Appeals. Following the submission of briefs and oral argument by counsel before a three-judge panel, the court issued a 14-page opinion affirming the conviction and sentence. To petitioner’s dismay, the Fifth Circuit declined to make a definitive ruling on the issue of whether the cellphone data was protected under the terms of the proffer agreement, or whether, in fact, it was admissible under the rubric of derivative use. After extensive discussion, the court affirmed the conviction and sentence on the basis that, although it may have been error to admit the cellphone data, any such error was “harmless” and did not provide grounds for reversal.

³ The jury also returned a verdict of not guilty on two money-laundering charges that were set forth in the superseding indictment.

2. Summary of the Issues: Entitlement to Sentencing Adjustment for Acceptance

of Responsibility. During the sentencing hearing in this case, the trial court announced it was accepting the findings and conclusions set forth in the Presentence Investigation Report (PSR) prepared by federal probation authorities. The PSR contained the following statement:

52. Adjustment for Acceptance of Responsibility. As evidenced by the fact that Servando Benitez-Reynoso pled not guilty and went to trial, he is thereby denied the essential factual elements of guilt, and does not qualify for a downward adjustment for acceptance of responsibility. U.S.S.G. § 3E1.1.

Petitioner contends that the Government, the probation authorities and the trial court failed to take into account the fact that he was acquitted by the jury on two of the four counts in his indictment, *to wit*: the bulk cash smuggling charges. MR. BENITEZ-REYNOSO maintains it cannot be said that his decision to go to trial *ipso facto* amounted to a “denial” of guilt. Indeed, it is just as likely that his decision to go to trial was based on a good-faith belief that the Government would be unable to prove his guilt on all four counts beyond a reasonable doubt, as was eventually the case. In that circumstance, the presumption that there was a wrongful denial of guilt is effectively rebutted. The Commentary to U.S.S.G. §3E1.1 provides as follows in Application Note 2:

Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial.

In Petitioner’s case, it can fairly be said that he and defense counsel accurately calculated the weight and effect of the Government’s evidence on the two bulk cash smuggling charges in arriving at the decision to proceed with a trial. As noted above, the jury delivered not-guilty verdicts on both of those counts. A defendant in MR. BENITEZ-REYNOSO’S position has a difficult choice to make. On the one hand, a two or three-level reduction for acceptance of responsibility is an attractive prospect, but it may well be outweighed by the possibility of

conviction and sentencing on two Class D felonies carrying prison terms of five years each. There was no realistic opportunity for Petitioner to go to trial on one set of charges instead of the other. Accordingly, he was foreclosed from demonstrating a good-faith partial acceptance of responsibility on the two drug smuggling counts.

The defense made no objection to the denial of an adjustment during sentencing or otherwise. Consequently, Petitioner's appeal was subject to review under a plain error standard. The Fifth Circuit concluded in its decision that the high threshold for reversal under the plain error standard was not met in this case. In the course of its opinion, however, the court flatly stated that "a defendant who goes to trial to preserve an issue unrelated to factual guilt is not entitled to the adjustment if the defendant also disputes factual guilt, or tries to prove an affirmative defense." *See Appendix A* at page 12 [emphasis in original; citations omitted]. Consequently, the Fifth Circuit found that Petitioner was rightly denied the adjustment principally on the grounds that he disputed his factual guilt at trial.

The flaw in the lower court's reasoning is readily apparent. In this case, both the money-laundering charges and the drug conspiracy charges involved an identical set of facts. MR. BENITEZ-REYNOSO was therefore compelled to dispute his guilt both on both sets of charges. It cannot be said that Petitioner's challenge to any given assertion of fact was related exclusively to one set of charges and not the other. As the jury's not-guilty verdicts on the two counts of money laundering showed, MR. BENITEZ-REYNOSO correctly determined it was clearly in his interest to challenge the Government's assertions of guilt on the money-laundering charges, in addition to the drug trafficking charges. In the Fifth Circuit's view, Petitioner would have had to abandon all active questioning of the evidence introduced relative to the drug charges in order to preserve his right to receive consideration on the issue of acceptance of responsibility.

If this were carried to its logical extreme, Petitioner would be compelled to offer no defense whatsoever to the more serious charges in the indictment in order to preserve the right to receive credit for extending voluntary cooperation during the proffer session regarding the location of the cellphone. The Fifth Circuit focused exclusively on the fact that MR. BENITEZ-REYNOSO moved for a judgment of acquittal on the drug charges *after* the jury delivered its verdict on the two money-laundering counts. This was construed by the court as contradicting any claim that his decision to go to trial was based solely on his belief that there was insufficient evidence to convict him on the money-laundering charges.

The true test, however, should be whether the facts in this particular case amount to a “rare situation” as that term is used in U.S.S.G. §3E1.1, Application Note 2. The court should have made specific findings regarding whether a “rare situation” existed in this case. It is submitted that the Fifth Circuit placed far too much emphasis on the mere fact that the defense called for a judgment of acquittal after the verdicts were read, without inquiring whether the case involved a “rare situation” calling for an adjustment for acceptance of responsibility.

To say that a motion for acquittal necessarily amounts to a denial of guilt and a refusal to accept responsibility in every case is fallacious, at best. For one thing, the defense might be seeking to argue in favor of acquittal on all but a lesser-included offense, which would not automatically involve a denial of guilt. What’s more, it is well understood that making a motion for acquittal at the end of trial is axiomatic and is expected to be done in every case. Failure to move for a judgment of acquittal can prove to be fatal on appeal, and, in certain situations, might be construed as professional malpractice.

When a motion for acquittal is being made, neither the defense, nor certainly the Government, is focused on whether such a motion will have a major impact on sentencing at a

later time. It is unreasonable to permit critical sentencing factors to be so easily forfeited, and it can surely be said that due process of law requires far greater deliberation on the part of trial judges and appellate courts in determining whether a given set of facts constitutes a “rare situation.”

3. Arguments and Disposition on Appeal. The central issue in this case is whether the introduction of evidence taken from Petitioner’s cellphone was prohibited under the terms of the subject proffer agreement, or whether the evidence was obtained under the “derivative use” exception set forth in the parties’ agreement. Although the Fifth Circuit affirmed the conviction and sentence of the trial court, it declined to rule squarely on the question of whether the cellphone data was seized by the Government as a result of the “derivative use” of information provided by Petitioner during his proffer session with investigators. Petitioner maintains that a definitive ruling on this matter from the Supreme Court is essential to insure that similarly situated criminal defendants will be accorded a full measure of constitutional due process of law at sentencing.

For purposes of this appeal, Petitioner contends that the use at trial of electronic data taken by the authorities from his cellphone constitutes a flagrant violation of the parties’ Rule 11 agreement. It simply cannot be said that the information contained inside the phone is in any sense itself “derivative” of something else. On the contrary, the disclosure provided during the proffer enabled the Government to secure the evidence contained within the phone in the first instance; it did not lead to the discovery of some otherwise separate evidence a step or two removed.

It is important to recognize that the cellphone itself has no evidentiary value in this case apart from the data stored within it. To say that the contents of the phone were *derived* from the

phone is entirely specious, since the phone and its contents are inseparable parts of a single whole. By analogy, it would be like saying that in the case of a written document produced under a proffer agreement, the paper itself would be inadmissible, but the words written thereon would be treated as derivative and therefore freely admissible. An item of evidence is “derivative” only if there is an intermediate step between one thing and another; in the case of the instant cellphone, the device itself and the data inside are inseparable. If the item is intrinsic, like the data in this case, it simply cannot be derivative.

In determining whether a specific item of evidence is derivative or not, the Fifth Circuit, in the context of immunized testimony, has stated that “the government has the burden of proving by a preponderance of the evidence ‘that the evidence it proposes to use is derived from a legitimate source *wholly independent* of the compelled testimony.’” *United States v. Cantu*, 185 F.3d 298, 301, 302 (5th Cir. 1999), *quoting Kastigar v. United States*, 406 U.S. 441, 460 (1972). *See also United States v. Taylor*, 277 F.3d 721 (5th Cir. 2001). Thus, for evidence to be derivative, it must be shown to be extraneous and secondary to the protected evidence and not a component thereof, like data stored in a cellphone.⁴

On the basis of consistent rulings by the Supreme Court and the Fifth Circuit, MR. BENITEZ-REYNOSO contends that evidence directly obtained from a Rule 11 proffer cannot itself constitute derivative evidence. The distinction between the phone and its contents is simply too attenuated to be given legal significance in the context of this case. Accordingly, it is submitted that the trial court erred in overruling Petitioner’s motion in limine on the matter of the proffered

⁴ In *United States v. Lopez*, 605 F. Supp.2d 852 (D. Tex. 2009), a district court stated that “[t]he Government in this case has failed to provide any evidence indicating that the use made of the information provided by Defendant was sufficiently indirect to constitute ‘derivative’ or ‘investigative’ use rather than the direct use precluded by the proffer agreement. In light of the ‘special due process concerns’ implicated by proffer agreements, the Court cannot uphold the use of this information against Defendant in this case. For these reasons, the Court grants Defendant’s objection.” *Id.* at 859.

information regarding the location of the cellphone, and that the consequent admission of evidence contained in the cellphone is reversible error.

(a) Harmless Error. Despite the logic of this analysis, the Fifth Circuit chose to avoid deciding the fundamental legal question involving derivative evidence. Instead, the court, citing FED. R. CRIM. P. 52(a), concluded that “even if it was error to admit the cellphone records at trial, any such error was harmless.” The court acknowledged that even if harmless, the error in question may nevertheless require appellate intervention if “there is a reasonable probability that the improperly admitted evidence contributed to the conviction.” See Fifth Circuit Opinion, Appendix at page 6, citing *United States v. Lewis*, 774 F.3d 837, 844 (5th Cir. 2014), quoting *United States v. Heard*, 709 F.3d 413, 422 (5th Cir. 2013); *United States v. Lowery*, 135 F.3d 957, 959 (5th Cir. 1998) (the court’s inquiry must focus on whether the evidence had a “substantial and injurious effect or influence” on the verdict.)

In every case, however, the determination of whether the disputed evidence had such an impact is entirely subjective and not susceptible to proof of any kind. It is simply impossible to ascertain the effect that any single item of evidence had on a jury, and so there is no standard that can be applied to gauge with certitude that a given bit of “harmless” evidence “contributed to the conviction.” In this connection, however, Petitioner notes that a transcript of the phone logs and other data on his cellphone was given to the jurors to review during their deliberations. In fact, these logs were the only physical evidence that was permitted in the jury room. As such, it might reasonably be assumed that the jurors gave heightened attention to the phone logs, and they very likely regarded the logs as a critical element to take into account in reaching a verdict.

It must be noted that the phone logs were an essential part of the Government’s case at trial. The prosecution had no other evidence directly connecting MR. BENITEZ-REYNOSO to the

actual transportation or possession of drugs, and so the phone logs were heavily relied upon to link him to the individuals who were shown to have been part of the alleged conspiracy. the Fifth Circuit went into considerable detail describing how the cell phone records were used to tie Petitioner to several admitted conspirators in the drug trafficking operation and to show how he allegedly used the phone to relay instructions, arrange for rental cars, monitor shipments, etc.⁵ Having thus established that the cellphone played a key role in the Government’s case, the Fifth Circuit blatantly contradicted itself by concluding that, in the end, the cellphone evidence actually had no “substantial and injurious effect or influence” whatsoever on the jury’s verdict.

Thus, it simply cannot be assumed – as the Fifth Circuit has done – that the phone records wholly lacked any and all “substantial and injurious effect or influence” on the verdict. The Fifth Circuit simply had no facts before it that formed a rational basis for reaching such a conclusion and thereby denying Petitioner’s claim of entitlement to appellate relief.

(b) Kastigar Analysis. Curiously enough, at no point in its opinion did the Fifth Circuit make mention of the *Kastigar* case, which was decided by the Supreme Court in 1972. *Kastigar v. United States*, 406 U.S. 441 (1972). *Kastigar* presented the question of whether testimony can be compelled where there has been a grant of immunity from prosecution, notwithstanding the witness’s assertion of Fifth Amendment privilege against self-incrimination. In deciding that a grant of “use and derivative use” immunity will enable the Government to compel a witness’s testimony, the Court ruled that the prosecution has the burden of proving affirmatively that evidence which it seeks to use in a subsequent proceeding has been derived from a legitimate source, wholly independent of the compelled testimony.

⁵ See Fifth Circuit Opinion, Appendix A, *infra*, at pages 7-9.

Although *Kastigar* is distinguishable on its facts from the present situation, the point remains that in a case involving protected disclosure the Supreme Court felt it necessary to adopt a policy requiring the Government to prove in a formal hearing that any evidence it claims to have secured derivatively was actually obtained separately and independently from the original statement.⁶ Whether the protected matter arose in the form of a testimonial statement or as a disclosure of information to be used for investigative purposes, should be irrelevant. The fact is that the determination of what constitutes derivative evidence is subject to heightened scrutiny and requires that the trial court make specific findings regarding whether the evidence was from a truly separate and independent source unconnected to the substance of the disclosure itself.

Petitioner's principal contention on this appeal is that the standard applied in a *Kastigar* hearing for determining the scope of derivative use should be applied with equal effect under the facts of this and other cases involving Rule 11 proffer agreements. Thus, the proper inquiry should be whether the cellphone data was obtained from a source other than the cellphone itself, which is the only way such data could honestly be said to have come from a "wholly independent" source.

Under that test, it is inescapably apparent that the data contained in a cellphone has no wholly independent existence apart from the cellphone itself, and is therefore in no sense derivative. On that basis, Petitioner argues that the trial court, as well as the Fifth Circuit, grievously erred by ruling that the cellphone data in this case was properly admitted into evidence at trial.

⁶ The Court's ruling has given rise to what is commonly referred to as a "*Kastigar* hearing."

REASONS FOR GRANTING THE PETITION

Petitioner SERVANDO BENITEZ-REYNOSO seeks review by this Court in accordance with SUP. CT. R. 10 (c), which states that Certiorari is appropriate in cases where “a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.” That is precisely the situation presented here.

The facts in MR. BENITEZ-REYNOSO’S case involve the same type of proffer agreement that is used in countless federal criminal prosecutions each year. It is notable that neither the Fifth Circuit, nor the Government in its appeal brief below, was able to cite a single authoritative case that thoroughly construed the meaning and scope of what constitutes “derivative evidence” in the context of a Rule 11 proffer. In most instances, courts reach a conclusion without anything approaching the degree of analysis required in a *Kastigar* hearing, where the Government is compelled to carry the burden of proof on the issue of derivative use. Petitioner contends that this case presents an opportunity for the Supreme Court to extend its holding in *Kastigar* to all Rule 11 proffer cases.

The Supreme Court has placed a burden on the prosecution to show affirmatively that a given statement was derived from a “wholly independent” source having no direct connection to the substance of the statement. Petitioner now urges this Court to apply that policy to cases involving proffered evidence as well as statements being introduced at trial. There is no compelling distinction between a statement offered under a grant of immunity or the disclosure of information protected under a “derivative use” agreement. In both instances, due process requires that the Government establish the precise origin of the evidence at issue to insure that a miscarriage of justice does not occur, as it has in MR. BENITEZ-REYNOSO’S case.

CONCLUSION

Upon the foregoing, the Petitioner requests that his PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit be granted, and that he be accorded all further relief to which he may be justly entitled.

RESPECTFULLY SUBMITTED,

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FOR THE FIFTH CIRCUIT**

No. 16-51425

United States Court of Appeals
Fifth Circuit

FILED

February 26, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

SERVANDO BENITEZ-REYNOSO

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:13-CR-1131-2

Before KING, ELROD, and GRAVES, Circuit Judges.

PER CURIAM:*

Defendant Servando Benitez-Reynoso was arrested on drug-trafficking charges. The Government knew he had a cellphone in his pocket when he was arrested, but, try as it might, it was unable to locate the phone. During a proffer session, Benitez-Reynoso told the Government where he concealed it, and the Government was finally able to retrieve the phone. After the parties' cooperation negotiations fell through, the Government tried to use the cellphone records against him at trial. Benitez-Reynoso cried foul. He argued

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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that the use of the cellphone's contents at trial violated the parties' proffer agreement, which forbade the Government from using any statements he made during the proffer session to prove his guilt. But the district court held that the cellphone and its contents were "derivative" evidence that the Government could use against Benitez-Reynoso under the proffer agreement. On appeal, he contends that the Government violated the proffer agreement and the cellphone evidence should have been excluded. He also raises, for the first time on appeal, a challenge to his sentence. We find that the admission of the cellphone evidence, even if error, was harmless, and that Benitez-Reynoso's challenge to his sentence does not surmount the high bar of plain error. Accordingly, we AFFIRM his conviction and sentence.

I.

A.

Servando Benitez-Reynoso's uncle ran a drug trafficking organization that smuggled marijuana into the United States from Mexico. Benitez-Reynoso represented his uncle in the United States and directed the organization's operations here. A series of run-ins with law enforcement over an 11-month period led to Benitez-Reynoso's arrest, indictment, and, ultimately, conviction.

In September 2012, Austin police officers executed a warrant at a suspected marijuana "stash house." Inside the residence, officers found guns, large amounts of cash, drug paraphernalia, sales records, a small amount of marijuana, and—among it all—Benitez-Reynoso. Although there was little marijuana in the stash house, officers discovered over 100 kilograms of marijuana in a car parked across the street. Benitez-Reynoso was arrested, but the charges against him were dismissed.

Next, in February 2013, Brookshire police officers stopped Benitez-Reynoso and a passenger for speeding. They searched the car and uncovered

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tens of thousands of dollars in cash inside. Benitez-Reynoso was again arrested and again released.

In July 2013, Benitez-Reynoso twice attracted the attention of the U.S. Customs and Border Patrol ("CBP"). On July 12, CBP agents found him standing next to another man trying to dig out a truck that had sunk into a dirt road after a flood. Suspicious of the two men, the agents followed footprints leading away from the truck for 200 yards to the Rio Grande. There, they saw a group of men across the river sitting on large duffel bags that the agents believed to contain marijuana. Despite the suspicious circumstances, they did not arrest Benitez-Reynoso at that time. On July 31, CBP agents were monitoring Benitez-Reynoso and his cousin Alejandro Benitez at a hotel in Eagle Pass. The cousins left the hotel separately in the morning. CBP agents later stopped Alejandro in Eagle Pass after he had picked up several hundred pounds of marijuana. At the same time, another CBP agent was shadowing Benitez-Reynoso. When CBP pulled over Alejandro, that agent saw Benitez-Reynoso make an abrupt U-turn, speed toward the scene of the stop, and drive by slowly. That led the agent to stop and arrest Benitez-Reynoso. He then frisked Benitez-Reynoso and felt a cellphone in his pocket, though he did not remove it at that time.

After the July 31 arrest, Benitez-Reynoso was taken to a CBP station for questioning. Unable to find Benitez-Reynoso's cellphone, an agent asked him where it was. Benitez-Reynoso responded that it was in the truck used to transport him, but CBP could not find it. CBP electronically tracked the phone to the transport truck, but, despite knowing that the phone was somewhere in the truck, CBP still could not unearth it.

B.

In August 2013, a grand jury returned a two-count indictment charging Benitez-Reynoso with possession of 100 kilograms or more of marijuana with

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intent to distribute and conspiracy to do the same. *See* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846.

Shortly after his indictment, Benitez-Reynoso tried to strike a deal with the Government in exchange for his cooperation. In September 2013, the Government sent a letter to Benitez-Reynoso's counsel laying out the "ground rules" for an initial proffer to gauge the value of his cooperation. The letter, in relevant part, provided as follows:

First, no statements made by your client during the "off the record" proffer will be used against your client in the case-in chief [sic] portion of a criminal case against your client. . . .

Second, the Government may make derivative use of any investigative leads suggested by any statements made by your client. This provision is necessary in order to eliminate the necessity for a *Kastigar* hearing, wherein the Government would have the burden of proving the evidence was derived from a source independent of your client's statements.

Benitez-Reynoso and his counsel both signed the letter, indicating that they had "read the letter and underst[ood] and agree[d] to the terms contained [t]herein." During the proffer, Benitez-Reynoso explained that he hid the phone behind an air-conditioning vent in the truck used to transport him to the CBP station. Agents then tracked down the truck, dismantled the air-conditioning vent, and retrieved Benitez-Reynoso's phone.

C.

The parties' negotiations fell through, and the case went to trial.

In April 2014, the Government secured a superseding indictment. That indictment increased the quantity of marijuana charged to 1000 kilograms or more, and charged Benitez Reynoso with bulk cash-smuggling and conspiracy to do the same. *See* 31 U.S.C. § 5332; 18 U.S.C. § 371.

Before trial, Benitez-Reynoso sought to exclude any evidence recovered from the cellphone. He filed a motion in limine arguing that the Government's

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use of such evidence would violate the proffer agreement. In response, the Government argued that the proffer agreement only protected Benitez-Reynoso's statements and not evidence found as a result of those statements. The district court ultimately determined that the use of the statements to find the cellphone was "quintessentially a derivative use." As a result, it denied Benitez-Reynoso's motion in limine. The court later denied Benitez-Reynoso's motion for a mistrial based on the introduction of evidence from the cellphone.

The trial lasted three days. The Government presented testimony from four of Benitez-Reynoso's coconspirators, all of whom implicated him in marijuana smuggling. State and federal law enforcement officers testified about Benitez-Reynoso's multiple run-ins with law enforcement. And the Government presented documentary evidence connecting Benitez-Reynoso to several marijuana- and cash-smuggling incidents, including some of the information found on his cellphone. The jury returned guilty verdicts on the drug counts and not guilty verdicts on the cash-smuggling counts. Benitez-Reynoso moved for a post-verdict judgment of acquittal based on the sufficiency of the evidence. The court denied his motion.

D.

Benitez-Reynoso's presentence report ("PSR") assessed an offense level of 40 and criminal history category of I. That yielded a recommended sentence of 292 to 365 months' incarceration. As relevant to this appeal, the PSR concluded that Benitez-Reynoso was not eligible for an adjustment for acceptance of responsibility because he pleaded not guilty and denied his factual guilt at trial. Benitez-Reynoso did not object to that paragraph. The court ultimately reduced the offense level to 39, resulting in a recommended sentence of 262 to 327 months' incarceration. The court concluded that a downward departure was warranted and sentenced Benitez-Reynoso to

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concurrent sentences of 210 months' incarceration on the two counts of conviction. Benitez-Reynoso now appeals his conviction and sentence.

II.

Benitez-Reynoso first argues that the district court erred by admitting electronic records from the cellphone at trial. He contends that the Government's use of these records during its case-in-chief violated the proffer agreement. According to Benitez-Reynoso, his statement during the proffer was not a mere "investigative lead," but instead told the Government exactly where to find the cellphone. Further, in his view, the cellphone has no evidentiary value apart from its contents. Thus, he contends that the contents are not "derivative" evidence.

The Government, by contrast, argues that the immunity granted in the proffer agreement was narrow: it only forbade using Benitez-Reynoso's proffer statements to prove his guilt. In this case, the Government contends that it merely used Benitez-Reynoso's statement as an "investigative lead" to track down his cellphone. In the Government's view, its use of the cellphone records at trial was derivative.

We need not resolve this dispute because, even if it was error to admit the cellphone records at trial, any such error was harmless.

A.

On appeal, we must disregard "[a]ny error, defect, irregularity, or variance that does not affect substantial rights." Fed. R. Crim. P. 52(a). Benitez-Reynoso argues that the Government violated a contractual, not constitutional, right. Thus, any error in admitting the cellphone evidence is harmless unless "there is a reasonable probability that the improperly admitted evidence contributed to the conviction." *United States v. Lewis*, 774 F.3d 837, 844 (5th Cir. 2014) (per curiam) (quoting *United States v. Heard*, 709 F.3d 413, 422 (5th Cir. 2013)); see *United States v. Lowery*, 135 F.3d 957, 959

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(5th Cir. 1998) (per curiam) (characterizing inquiry as whether the error had a “substantial and injurious effect or influence” on the verdict (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))). This court makes that assessment in light of all the evidence introduced at trial. *See United States v. El-Mezain*, 664 F.3d 467, 526 (5th Cir. 2011). “It is well established that error in admitting evidence will be found harmless when the evidence is cumulative, meaning that substantial evidence supports the same facts and inferences as those in the erroneously admitted evidence.” *Id.* (collecting authorities).

B.

Assuming without deciding that it was error to admit the cellphone records, any such error was harmless. Benitez-Reynoso argues that the Government used the cellphone records to show close coordination between him and his coconspirators. In actuality, the Government made limited use of the cellphone records at trial. And the Government put forward substantial evidence beyond the cellphone records to show the close coordination between Benitez-Reynoso and each of his coconspirators. That evidence rendered the cellphone records “cumulative” and their admission harmless. *See id.*

The Government introduced the cellphone records largely through FBI Special Agent Jarrett Doss.¹ The district court admitted six photographs of various records on the phone into evidence. Those records linked Benitez-Reynoso to three coconspirators: Poppy Dossat, Alejandro Benitez, and Nicholas Dush.

The Government first established that the cellphone belonged to Benitez-Reynoso. It showed Doss a screenshot with the caption “My Number.” Doss verified that the cellphone and the number were Benitez-Reynoso’s.

¹ The day before Doss testified, the Government had introduced one photograph showing the cellphone’s number only in order to establish that the cellphone found in the CBP truck belonged to Benitez-Reynoso.

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Two photographs of the cellphone's call history showed multiple calls with a contact named "Poppy," including one on July 31, 2013, the day CBP arrested Benitez-Reynoso. Another photograph showed three contacts from the cellphone's address book, including "Poppy." Doss identified "Poppy" as Poppy Dossat. He described Poppy Dossat "as a person who has rented vehicles for the Xavier Benitez organization."² The Government went on to show Doss a screenshot of a text message from "Poppy" on July 31, 2013, though the contents of the text message were hidden. Doss testified that, in all, Poppy and Benitez-Reynoso exchanged 52 calls and text messages between July 28 and 31, 2013.

The Government also used the cellphone to show contact between Benitez-Reynoso and his cousin Alejandro. The Government showed Doss a photograph of three contacts in the cellphone's address book, including one named "Alex." Doss testified that "Alex" was Alejandro Benitez. Doss went on to explain that he discovered over 200 calls between Benitez-Reynoso and Alejandro from July 28 to 31, 2013. Doss had compared Benitez-Reynoso's phone to Alejandro's and found that some contacts between the two did not appear on Benitez-Reynoso's phone. According to Doss, those contacts had been "deleted" from Benitez-Reynoso's phone.³

Finally, the Government used Doss's testimony to establish contact between Benitez-Reynoso and two coconspirators on July 12, 2013, the date of his first run-in with CBP. Doss testified that between July 9 and 12, 2013, there were roughly 61 calls and text messages between Benitez-Reynoso and Nicholas Dush, the man he was found with on July 12. During that same time

² Alejandro Benitez testified that "Poppy" had rented the truck that he and Benitez-Reynoso used to smuggle marijuana on July 31, 2013.

³ Defense counsel did not object to Doss's characterization of the records as "deleted."

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period, Doss testified that there were about 40 calls and text messages between Benitez-Reynoso and Poppy Dossat.

This evidence did give the impression of close coordination between Benitez-Reynoso and several of his coconspirators. But the jury would have gotten that impression anyway. The Government presented significant evidence beyond the cellphone records that established Benitez-Reynoso's close coordination with Alejandro, Dossat, and Dush.

First, as we have already explained above, Doss examined Alejandro's phone. He told the jury that after July 28, 2013, there were very few calls or text messages on Benitez-Reynoso's phone. However, he was able to identify over 200 calls and text messages between Alejandro and Benitez-Reynoso based on records downloaded from Alejandro's phone. *Cf. United States v. Escamilla*, 852 F.3d 474, 486–87 (5th Cir.) (finding error in admitting illegally obtained cellphone records harmless where the Government introduced evidence from another, legally obtained phone showing reciprocal contacts), *cert. denied*, 138 S. Ct. 336 (2017). Because information had been deleted from Benitez-Reynoso's phone, Alejandro's phone actually showed more extensive contact between the two. And Doss was not the only witness the Government brought forward to show the close contact between Benitez-Reynoso and Alejandro. Alejandro himself testified. He told the jury that he stayed in close contact with Benitez-Reynoso during the July 31 smuggling attempt and that he called Benitez-Reynoso after he loaded the marijuana into his truck.

Second, other testimony and documentary evidence connected Benitez-Reynoso to Dossat. Doss testified that he had interviewed Dossat and that she regularly rented vehicles for the Xavier Benitez organization. He testified that she had rented the trucks that Nicholas Dush was digging out of the dirt road on July 12 and that Alejandro Benitez was driving on July 31. The Government introduced vehicle rental records to substantiate that testimony.

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Third, CBP agents testified that they found Benitez-Reynoso standing at the front of the truck that Dush was trying to dig out of the dirt road. Benitez-Reynoso told the agents that he was driving by looking for work in an oil field and stopped to help. But that story proved implausible. Benitez-Reynoso was not helping Dush in any way and would not have been able to see the truck from where he claimed he was driving. Nor was there any oil field work in the area. When the agents tried to speak to Dush, Benitez-Reynoso repeatedly interrupted and tried to answer for Dush. Furthermore, documentary evidence established that Dossat rented the truck Dush was trying to free from the same rental company in Austin that she used to rent the truck Alejandro drove on July 31—and from which Benitez-Reynoso had also rented vehicles on occasion.

In short, the Government's use of the cellphone records at trial was limited and largely cumulative of other evidence not challenged on appeal. There was significant evidence beyond the cellphone records to show the close coordination and numerous contacts between Benitez-Reynoso and his coconspirators during the July 12 and 31 incidents. Accordingly, even if it was error to admit the cellphone records, that error was harmless.

III.

Benitez-Reynoso next contends that he should have received credit at sentencing for acceptance of responsibility. *See* U.S.S.G. § 3E1.1(a).

A.

Benitez-Reynoso concedes that he did not request an acceptance-of-responsibility adjustment in the district court. As a result, our review is for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009). Benitez-Reynoso must demonstrate a plain error that affected his substantial rights. *See id.* In order for an error to be plain, it must be obvious and beyond reasonable dispute. *See Puckett v. United*

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States, 556 U.S. 129, 135 (2009) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)). An error generally affects substantial rights only if it affected the outcome of the district court proceedings. *See id.* (quoting *Olano*, 507 U.S. at 734). Even if Benitez-Reynoso can satisfy these requirements, we retain discretion to remedy the error. *See id.* (quoting *Olano*, 507 U.S. at 736). A forfeited error will be corrected only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (alteration in original) (quoting *Olano*, 507 U.S. at 736). This is a “stringent and difficult” standard. *See United States v. Escalante-Reyes*, 689 F.3d 415, 422 (5th Cir. 2012) (en banc).

B.

As an initial matter, Benitez-Reynoso failed to brief the final two elements of the plain error standard. Benitez-Reynoso had the burden of proving each element of plain error. *See United States v. Ruiz-Arriaga*, 565 F.3d 280, 282–83 (5th Cir. 2009). His failure to argue the final two elements alone justifies affirming his sentence. *See, e.g., United States v. Caravayo*, 809 F.3d 269, 273 (5th Cir. 2015) (per curiam) (“We have . . . refused to correct plain errors when, as here, the complaining party makes no showing as to the fourth prong.” (alteration in original) (quoting *United States v. Rivera*, 784 F.3d 1012, 1018 n.3 (5th Cir. 2015))).

Even considering his argument on the merits, it fails. The Sentencing Guidelines presume that a defendant who goes to trial will be ineligible for an adjustment for acceptance of responsibility. *See* U.S.S.G. § 3E1.1, comment. (n.2). But in “rare situations,” a defendant may be eligible for the adjustment despite electing to go to trial. *Id.* The Guidelines give just one example of such a situation: “where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a

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statute or a challenge to the applicability of a statute to his conduct).”⁴ *Id.* Even so, a defendant who goes to trial to preserve an issue unrelated to factual guilt is not entitled to the adjustment if the defendant *also* disputes factual guilt, see *United States v. Rudzavice*, 586 F.3d 310, 316–17 (5th Cir. 2009), or tries to prove an affirmative defense, see *United States v. Spires*, 79 F.3d 464, 467 (5th Cir. 1996). But a defendant who goes to trial merely to preserve an issue unrelated to factual guilt must still prove entitlement to the adjustment. That entitlement depends solely on the defendant’s “pre-trial statements and conduct,” not the defendant’s post-conviction expressions of remorse. See U.S.S.G. § 3E1.1, comment. (n.2).

Benitez-Reynoso claims the district court erred by ruling that he was categorically ineligible for the adjustment because he went to trial. Such a ruling would indeed be erroneous, as the Guidelines themselves contemplate that defendants who go to trial will sometimes be eligible for the adjustment. See U.S.S.G. § 3E1.1, comment. (n.2); *United States v. Fells*, 78 F.3d 168, 171–72 (5th Cir. 1996). Yet, the district court made no such error because Benitez-Reynoso never requested the adjustment. He instead points to a paragraph in the PSR that merely concluded that he was ineligible because he went to trial and denied his factual guilt. But the PSR concluded that he was ineligible because he both went to trial *and* disputed his factual guilt—a conclusion

⁴ Compare, e.g., *United States v. Sam*, 467 F.3d 857, 863–64 (5th Cir. 2006) (holding that insanity and other “affirmative defenses ordinarily challenge factual guilt and therefore make a defendant ineligible for an acceptance-of-responsibility reduction”), and *United States v. Cordero*, 465 F.3d 626, 631 (5th Cir. 2006) (holding that defendant who went to trial to preserve suppression issue but did not stipulate to all facts necessary for conviction was not entitled to adjustment), with *United States v. Washington*, 340 F.3d 222, 230 (5th Cir. 2003) (holding that defendant was eligible for adjustment where he went to trial only to preserve suppression issue, waived jury trial, and stipulated to all facts necessary for conviction), and *United States v. Fells*, 78 F.3d 168, 171–72 (5th Cir. 1996) (holding that defendant was eligible for adjustment where he “admitted the operative facts from the beginning” and went to trial solely to challenge venue).

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consistent with the relevant Guidelines section and the caselaw interpreting it. *See, e.g., Rudzavice*, 568 F.3d at 316–17.

Moreover, Benitez-Reynoso would not have been entitled to the adjustment even if he had requested it. At trial, his sole defense was that the Government could not prove his guilt beyond a reasonable doubt. He sought to undermine the credibility of the Government’s cooperating witnesses, characterizing them as “snitches” and “liars” who struck deals in exchange for their testimony. After the jury delivered its verdict, Benitez-Reynoso moved for a judgment of acquittal based on the sufficiency of the evidence. Benitez-Reynoso’s repeated denials of guilt throughout the trial would be sufficient to affirm his sentence even if plain error review did not apply. *Cf. Rudzavice*, 586 F.3d at 316–17 (affirming sentence where defendant “moved for a judgment of acquittal at the end of the trial on the grounds that there was insufficient evidence to establish the elements of the offense”); *United States v. Cordero*, 465 F.3d 626, 631–32 (5th Cir. 2006) (holding that district court did not abuse its discretion by refusing to award an acceptance-of-responsibility reduction where defendant moved for judgment of acquittal based on sufficiency of the evidence).

None of Benitez-Reynoso’s arguments to the contrary compels a different result. He argues that he faced a “cruel Hobson’s choice” in pleading guilty because it was impossible to plead guilty to the drug charges without also pleading guilty to the cash-smuggling charges, of which he was acquitted. There are multiple problems with this argument. The Government did not obtain the superseding indictment until April 2014. Benitez-Reynoso could have pleaded guilty to the original indictment, which did not charge him with cash smuggling and alleged lesser quantities of marijuana. Besides, there is no requirement that a defendant plead guilty to the entire indictment. *See, e.g., United States v. Neal*, 509 F. App’x 302, 308–09 (5th Cir. 2013); *United States*

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v. Johnson, 89 F.3d 778, 783 (11th Cir. 1996), *abrogation on other grounds recognized by United States v. Davila*, 569 U.S. 597 (2013). The district court even offered to allow Benitez-Reynoso to plead guilty to the drug charges at sentencing and told him that it would consider an “equitable argument” for acceptance of responsibility. He declined to take the court up on that offer and cannot now complain on appeal that he was denied the opportunity to plead guilty.

Benitez-Reynoso further contends that his assistance in finding his cellphone warrants an adjustment. Whatever the value of his cooperation, it does not offset his repeated denials of guilt at trial, which rendered him ineligible for the adjustment. *See* U.S.S.G. § 3E1.1, comment. (n.2); *cf. Rudzavice*, 586 F.3d at 316 (holding that district court properly denied adjustment even though defendant cooperated with police twice before he was indicted). And Benitez-Reynoso’s later efforts to obstruct justice undercut any argument that his early cooperation merits an adjustment. Except in “extraordinary cases,” a defendant who obstructs justice is ineligible for an acceptance-of-responsibility adjustment. U.S.S.G. § 3E1.1, comment. (n.4). Here, the district court found at sentencing that Benitez-Reynoso told his sister not to cooperate with authorities and to hide a gun. His early assistance in finding his cellphone—evidence he deliberately concealed from the Government after being arrested—is not so obviously “extraordinary” as to qualify him for an acceptance of responsibility adjustment despite his obstruction of justice.

Thus, we find no error—plain or otherwise—in the district court’s denial of an adjustment for acceptance of responsibility.

IV.

For the foregoing reasons, we AFFIRM Benitez-Reynoso’s conviction and sentence.