No.

IN THE SUPREME COURT OF THE UNITED STATES

DARREL KIETH HIGGINBOTHAM,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does the Law Require that Higginbotham's Sentence be Reversed Because the Government Breached the Plea Agreement?

PARTIES TO THE PROCEEDING

Petitioner is Darrel Kieth Higginbotham, an individual who was the defendant-appellant in this case. Respondent is United States of America, who was the plaintiff-appellee in this case. None of the parties listed above are a corporation. Accordingly, no party has a stock ticker symbol to report under Rule 14.1(b)(i).

CORPORATE DISCLOSURE STATEMENT

Since petitioner Higginbotham is an individual, no corporate disclosure statement is required under this Court's Rule 29.6.

RELATED PROCEEDINGS

United States Court of Appeals (9th):

> *United States of America v. Darrel Kieth Higginbotham*, Case No. 24-4074 (August 4, 2026)

United States District Court, Eastern District:

> *United States of America v. Darrel Kieth Higginbotham*, Case No. 2:19-cr-00214-KJM (July 2, 2024)

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No.

DARREL KIETH HIGGINBOTHAM,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, DARREL KIETH HIGGINBOTHAM, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Memorandum affirming his conviction. (Appendix A)

OPINION BELOW

On August 4, 2026, the Ninths Circuit Court of Appeals entered a Memorandum affirming Higginbotham's conviction and sentence. (Appendix A)

JURISDICTION

The Court has jurisdiction. 28 U.S.C. § 1254(1) because Higginbotham appealed his guilty plea, and on August 4, 2026, the Ninth Circuit Court of Appeals entered a Memorandum affirming the district court's judgment. (Appendix A)

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

18 U.S.C. § 3353(a).

CUSTODY STATUS OF PETITIONER

Higginbotham is serving 120 months at Victorville Medium I FCI.

STATEMENT OF THE CASE

The Charges

On December 5, 2019, the government charged Higginbotham with three violations of 18 U.S.C. 922(g)(1) [Ex-felon with a gun]. (2-ER-310-314) Count 1 alleged that Higginbotham possessed a single .45 caliber semi-automatic handgun. (2-ER-310-311) Count 2 alleged that, on February

28, 2019, Higginbotham possessed 10 firearms in a Nissan Titan pickup truck. (2-ER-310-311) Count 3 alleged that, on March 2, 2019, Higginbotham possessed 14 firearms in a storage unit. (2-ER-310-312)

The Plea

On March 13, 2023, 56-year-old Higginbotham pleaded guilty to one charge of ex-felon in possession of a firearm. (Ct.1; 18 U.S.C. 922(g).) (2-ER-287-308) The plea agreement allowed Higginbotham to challenge whether he possessed the firearms in the truck and the storage unit. (2-ER-279, 283 fn. 4 ["The parties reserve the right under this agreement to argue at sentencing who possessed the firearms found in Higginbotham's truck]; 284 fn. 5 ["The parties reserve the right under this agreement to argue at sentencing who possessed the firearms in the storage unit."])

On May 6, 2024, the district court held an evidentiary hearing. (2-ER-82-273)

On June 24, 2024, the district court found that

Higginbotham obstructed justice, failed to accept responsibility, and imposed the maximum sentence of 120 months in federal prison and three years of supervised release. (1-ER-2-8, 43-47)

*

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REASON TO GRANT CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE IF HIGGINBOTHAM'S SENTENCE SHOULD BE REVERSED BECAUSE THE GOVERNMENT BREACHED THE PLEA AGREEMENT

A. Introduction

The government charged Higginbotham with three counts of ex-felon with a gun. (Cts. 1, 2, 3) 18 U.S.C. 922(g). (2-ER-310-314) The parties reached a plea agreement and Higginbotham pleaded guilty to the crime of ex-felon in possession of a firearm. (Ct. 1) 18 U.S.C. 922(g). The plea agreement allowed the parties to challenge the number of firearms Higginbotham possessed. (2-ER-287-308) The plea agreement allowed Higginbotham to challenge whether he possessed the firearms in the truck and the storage unit. (2-ER-279, 283 fn. 4, 284 fn. 5)

In the plea agreement, the government agreed to recommend, inter alia, that Higginbotham "be sentenced to the low end of the applicable guideline range. . . ." (2-ER-277,

III, B, 1) and to "recommend a two-level reduction (if the offense level is less than 16) or a three-level reduction (if the offense level reaches 16) in the computation of defendant's offense level if he clearly demonstrates acceptance of responsibility for his conduct as defined in U.S.S.G. § 3E1.l. (2-ER-277, III, ¶ B, 2) The plea agreement also allowed the government to move for a departure or adjustment based on defendant's post-plea obstruction of justice (§3Cl.1). (2-ER-279, VI, B.)

On May 6, 2024, the district court held an evidentiary hearing to decide how many guns Higginbotham possessed. (2-ER-82-273) At the hearing, Higginbotham denied that he possessed the guns in the Nissan truck or the storage unit. (2-ER-216-251) The trial court found Higginbotham's testimony not credible and linked the firearms to Higginbotham because he had "at least constructive possession" and had control over the truck and the storage unit. (1-ER-24)

The government knew that Higginbotham challenged his possession of the guns in the truck and the storage unit. But, at the sentencing hearing, the government argued, and the district court agreed, that Higginbotham not only obstructed justice, but failed to accept responsibility. (1-ER-27-32)

Based on the government's argument, the district court imposed the enhancement for obstruction of justice and refused to reduce the sentence for acceptance of responsibility. (1-ER-32-33) The district imposed the statutory maximum sentence of 120 months (10 years) for Higginbotham's possession of the single firearm alleged in Count one. (1-ER-43)

The plea agreement contained a waiver of any post-conviction remedies including an appeal. (2-ER-280) But, this Court can consider Higginbotham's appeal because the government breached the plea agreement by arguing that Higginbotham obstructed justice and failed to accept

responsibility. (1-ER-32-33) *Santobello v. New York,* 404 U.S. 257, 262, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971).

Relief should be granted.

B. Standard of Review

"Generally, [appellate courts] review a defendant's claim that the government has breached its plea agreement de novo." *United States v. Mondragon,* 228 F.3d 978, 980 (9th Cir. 2000).

C. Applicable Law

"The integrity of our judicial system requires that the government strictly comply with its obligations under a plea agreement." *Mondragon*, 228 F.3d at 981.

"When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello,* 404 U.S. at 262.

And, "in order to comply with the plea agreement, the government cannot rely upon a 'rigidly literal construction of

the language' of the agreement, nor may it accomplish 'through indirect means what it promised not to do directly.'" *United States v. Hand,* 913 F.2d 854, 856 (10th Cir. 1990) (quoting *United States v. Shorteeth*, 887 F.2d 253, 256 (10th Cir. 1989)).

"Plea agreements are essentially contracts between the government and a defendant." *United States v. Myers,* 32 F.3d 411, 413 (9th Cir. 1994) (per curiam). Contract principles govern plea agreements. See *id*; *United States v. Keller*, 902 F.2d 1391, 1393 (9th Cir. 1990) ("Plea agreements are contractual in nature and are measured by contract law standards.")

"In construing an agreement, the court must determine what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty." *United States v. De la Fuente,* 8 F.3d 1333, 1337 (9th Cir. 1993) (footnotes omitted); see *United States v. Anderson,* 970 F.2d 602, 607 (9th Cir. 1992), amended, 990 F.2d 1163 (1993); *United*

States v. Packwood, 848 F.2d 1009, 1011 (9th Cir. 1988).

Courts hold the government to "the literal terms of the agreement," *Myers*, 32 F.3d at 413 (quoting *United States v. Escamilla*, 975 F.2d 568, 571 (9th Cir. 1992)), and "construe any ambiguities in the defendant's favor." *United States v. Morales Heredia,* 768 F.3d 1220, 1230 (9th Cir. 2019) As with other contracts, provisions of plea agreements are occasionally ambiguous; the government "ordinarily must bear responsibility for any lack of clarity." *Id.*; cf. *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985) ("A responsible public servant who recognizes the desirability of clarity in agreements would avoid . . . use" of vague language in plea agreements), cert. denied, 479 U.S. 835, 93 L. Ed. 2d 75, 107 S. Ct. 131 (1986).

Construing ambiguities in favor of the defendant makes sense in light of the parties' respective bargaining power and expertise…." *De La Fuente,* 8 F.3d at 1337-1338.

D. The Government's Breach of the Plea Agreement Renders an Appeal Wavier Unenforceable

"The government may not breach any term of a plea agreement which induced the defendant to plead guilty."

Panzardi-Alvarez v. United States, 879 F.2d 975, 986 (1st Cir. 1989) citing *Santobello*, 404 U.S. at 262. If the government breaches the plea agreement, the waiver may be unenforceable. For example, if the government fails to uphold its obligations under the agreement, the defendant may challenge the waiver. See, *United States v. Minasyan,* 4 F.4th 770 (9th Cir. 2020)

The government breaches its agreement by "implicitly arguing for a sentence greater than the terms of the plea agreement specified that the prosecution would recommend." *United States v. Whitney*, 673 F.3d 965, 971 (9th Cir. 2012). "Although a sentencing recommendation need not be made enthusiastically, when the government obligates itself to make a recommendation at the low end of the guidelines

range, it may not introduce information that serves no purpose but to influence the court to give a higher sentence." *Id.*

E. The Plea Agreement Allowed Higginbotham to Challenge, at the Evidentiary Hearing, the Number of Firearms

The parties agreed that "Apart from the reserving the right to argue the number of firearms involved in the charged conduct, as relevant to U.S.S.G. § 2K2.l(b)(l), the parties agree that they will not seek or argue in support of any other specific offense characteristics. [fn]" (2-ER-279, VI, B.)

The Factual Basis for [the] Plea Agreement stated, "Higginbotham asserts that his wife was the actual owner of the firearms in the storage unit and disputes that he had access to them or control over them. *The parties reserve the right under this agreement to argue at sentencing who possessed the firearms in the storage unit.* (2-ER-284, fn.) (Italics added.)

The plea agreement also stated, "Higginbotham asserts that his wife was the actual owner of the firearms found in the truck and Higginbotham disputes that he had control over them. The parties reserve the right under this agreement to argue at sentencing who possessed the firearms found in Higginbotham's truck. (2-ER-283, fn. 4)

The written plea agreement contained the complete agreement between the United States Attorney's Office for the Eastern District of California (the "government") and the defendant regarding this case." (2-ER-74) The plea agreement allowed Higginbotham to challenge whether he possessed the firearms in the truck and the storage unit.

The plea agreement did not state that, if the court found Higginbotham's testimony not credible, the government would be relieved of its plea obligations. The plea agreement failed to state that Higginbotham could lose his reduction for acceptance of responsibility and be subject to an enhancement for obstructing justice depending how he

testified at the evidentiary hearing.

The government knew, and the plea agreement stated, that Higginbotham contested the number of firearms he possessed. The government should have, but failed, to state, that if Higginbotham provided false, misleading, or materially incomplete testimony *at the evidentiary hearing*, he would be subject to an obstruction of justice enhancement and lose his acceptance of responsibility reduction.

F. Higginbotham Reasonably Believed He Could Challenge Possession of the Firearms and the Storage Unit

At sentencing, on June 24, 2024, trial counsel argued that Higginbotham had the right to contest whether he possessed the firearms in the truck and the storage unit:

> MR. COZENS: Your Honor, a part of the Plea Agreement is also that there were guns found in a pickup truck, and guns found in a storage unit in Marysville. *My client has the right to contest whether he had possession of those firearms in this case.* (Italics added.)
>
> THE COURT: Is it your position that that's reflected in the written agreement?

MR. COZENS: Yes, it's my position, yes.

THE COURT: So you agree with that?

MR. CONOLLY: Yes, Your Honor. We have adjusted the Factual Basis to make allowance for the fact that Mr. Higginbotham is not agreeing with the government that certain of the firearms that make up Counts 2 and 3 were possessed by him, but that is all made clear in the Factual Basis. (2-ER-296)

1. Higginbotham's Obligations Under the Plea Agreement

The plea agreement allowed Higginbotham and his counsel at sentencing to "recommend whatever sentence they deem appropriate under 18 U.S.C. § 3553(a)." (2-ER-275)

The plea agreement stated that Higginbotham would violate the plea agreement if he ". . . . provide[s] any statement or testimony which proves to be knowingly false, misleading, or materially incomplete. Any post-plea conduct by a defendant constituting obstruction of justice will also be a violation of the agreement . . ." (2-ER-276)

2. The Government's Obligations

The government agreed to "recommend an incarceration at the low end of the applicable guideline range for his offense" "whatever it deems appropriate as to all other aspects of sentencing." (2-ER-277)

The government also agreed to "recommend a two-level reduction (if the offense level is less than 16) or a three-level reduction (if the offense level reaches 16) in the computation of defendant's offense level if he clearly demonstrates acceptance of responsibility for his conduct as defined in U.S.S.G. § 3El.l." (2-ER-277)

The reduction for acceptance of responsibility required that Higginbotham meet with and assist the probation officer in the preparation of the pre-sentence report, be truthful and candid with the probation officer, and not engage in conduct that constitutes obstruction of justice within the meaning of U.S.S.G. § 3Cl.1, either in the preparation of the pre-sentence report or during the

sentencing proceeding." (2-ER-65, fn. 8)

3. The Plea Agreement's Waiver Clause

The plea agreement contained a waiver clause:

> The defendant understands that the law gives the defendant a right to appeal his guilty plea, conviction, and sentence. The defendant agrees as part of his plea/pleas, however, to give up the right to appeal the guilty plea, conviction, and the sentence imposed in this case. The defendant understands
> that this waiver includes, but is not limited to, any and all constitutional and/or legal challenges to the defendant's conviction and guilty plea, including arguments that the statutes to which defendant is pleading guilty are unconstitutional, and any and all claims that the statement of facts attached to this
> agreement is insufficient to support the defendant's plea of guilty. (2-ER-279-280)

G. Higginbotham's Evidentiary Hearing Testimony

On February 7, 2019, Higginbotham drove his blue Dodge Ram pickup to work and arrived at 5:45 a.m. Later that day, Higginbotham suffered a head injury during an industrial accident. He blacked out and required hospitalization. (2-ER-218-219, 245) His boss drove him back

to work and his wife [Katherine Bond] picked him up in her white Nissan truck. (2-ER- 220) Because Higginbotham had trouble with his truck's alternator, he asked a co-worker to drive his [Higginbotham's] truck to his [Higginbotham's] friend and mechanic Monty.[1] (2-ER- 221)

Paul a.k.a. "Pops" drove Higginbotham in Bond's truck to pick up his truck at Monty's house. (2-ER- 222). During the ride, at Pops request, Higginbotham loaned "Pops" a wrench to fix an "AR" gun[2] inside the white Nissan pickup truck. (2-ER-224, 226) Higginbotham did not know how many other guns were in the white Nissan pick up truck. (2-ER-227, 260)

They arrived at Monty's house, but Monty had not repaired Higginbotham's blue Dodge Ram. (2-ER-228) Pops left and never returned. (2-ER-229) Higginbotham found the

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[1] After Higginbotham's release from the hospital, he continued to have blackouts. (2-ER-221, 253)

[2] At this time, Higginbotham "would get in these manic phases, like, occasionally, . . ." (2-ER-222)

keys to Bond's Nissan truck.[3] (2-ER-228-229)

On March 19, 2019, after inadvertently knocking on the wrong door at someone's house, Higginbotham apologized and left. (2-ER-230) As Higginbotham left, he discovered a gun and put it in his pocket. (2-ER-230-232) Deputy Mallory detained Higginbotham, found the gun and arrested Higginbotham. (2-ER-236, 250, 251) After his arrest, Higginbotham consented to a search of the truck for the AR rifle. (2-ER-237-238)

Higginbotham denied he knew about the firearms in the truck or storage unit. He said that others, including his co-worker, a prison friend, and his boss had access to his storage unit. (2-ER-244-245) Higginbotham denied he had entered the storage unit on the alleged February dates, but admitted he returned from Nevada for a few hours to appear in court on February 21, 2019. (2-ER-244, 21, 253)

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[3] Higginbotham blacked out "most of the time [he] was there." (2-ER-230)

H. The Government's Agreement to Recommend a Reduction for Acceptance of Responsibility Did Not Include Higginbotham's Evidentiary Hearing Testimony

The government agreed to recommend a two or three level reduction if he accepted responsibility. (2-ER-277, III, B, 2) The plea agreement stated, "The reduction for acceptance of responsibility required that Higginbotham "meet[] with and assist[ed] the probation officer in the preparation of the pre-sentence report, being truthful and candid with the probation officer, and not otherwise engaging in conduct that constitutes obstruction of justice within the meaning of U.S.S.G. § 3Cl.1, either in the preparation of the pre-sentence report or during the sentencing proceeding." (2-ER-277, III, B, 2)

The plea agreement never stated that, if Higginbotham provided false, misleading, or materially incomplete statements *at the evidentiary hearing*, he would be subject to an obstruction of justice enhancement. (2-ER-276) And the

record shows that Higginbotham met with and assisted the probation officer's preparation of the pre-sentence report. Higginbotham had been truthful and candid with the probation officer, and did not obstruct justice under U.S.S.G. § 3Cl.1, either in the preparation of the pre-sentence report or at sentencing. The pre-sentence report even recommended a 92 month sentence in light of his "reported head injury and long term substance abuse." (PSR at 1, 2)

The plea agreement failed to state that, if Higginbotham provided what the government believed to be false information at the evidentiary hearing, Higginbotham would be barred from any downward departure. See, *United States v. Winston,* 34 F.3d 574, 580 (7th Cir. 1994) (Plea agreement stated that defendant could be prosecuted for giving a false statement, or testifying falsely . . .)

The plea agreement failed to include a reference to the Application Note 1 to U.S.S.G. § 3E1.l [Acceptance of Responsibility] which stated in part, "A defendant who

falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous . . . " 18 UCS Appx § 3E1.1

I. Higginbotham Cooperated with Law Enforcement, Accepted Responsibility and Did Not Obstruct Justice

In the Factual Basis for [the] Plea, Higginbotham admitted he "knowingly possessed the Para 23 Ordinance Warthog .45 caliber semi-automatic handgun (Serial #Pl47690) that deputies found on his person at the time of his arrest." (2-ER-282) Higginbotham admitted he was an ex-felon and that an AR rifle was in the Nissan Titan pick-up truck that he drove from Nevada to California. (2-ER-283)

The Factual Basis for [the] Plea shows that Higginbotham cooperated with law enforcement during the

truck search. He admitted he was a conviction felon and should not have possessed a firearm. Higginbotham gave the deputies permission to search the white Nissan truck. (2-ER-283)

The Factual Basis of [the] Plea shows that someone told law enforcement that Higginbotham rented a storage unit and someone used Higginbotham pass code to enter the unit. The police found 15 firearms in the storage unit. (2-ER-284)

Higginbotham accepted responsibility when he pleaded guilty:

> THE COURT: All right. Mr. Higginbotham, how then do you plead to the charge in Count 1 of the indictment, violation of 18 U.S. Code Section 922(g)(1), felon in possession of firearm; guilty or not guilty?
>
> MR. HIGGINBOTHAM: Guilty. (2-ER-307)

J. Higginbotham Accepted Responsibility at Sentencing

Higginbotham recognized and affirmatively accepted "personal responsibility for his criminal conduct." U.S.S.G. §

3E1.1(a) (1991); cf. *United States v. Gonzalez*, 6 F.3d 1415, 1420-21 (9th Cir. 1993) (stating that § 3E1.1 requires a defendant only to recognize and accept personal responsibility for his criminal conduct and not to tell authorities truthfully the reasons he committed his crimes)

Higginbotham did not intentionally or willfully obstruct justice; he took responsibility for his conduct. At sentencing, Higginbotham accepted responsibility for his conduct and admitted it was all his fault. (1-ER-42) He denied he knew the guns were in the truck or the storage room, but understood if the district court found that he possessed them. (1-ER-42)

At sentencing, Higginbotham accepted responsibility and contritely apologized for his conduct:

> BY HIGGINBOTHAM: [W]hat looks like obstruction of justice, was all my fault because I couldn't communicate correctly at the time, *and it's my fault. I mean, I should -- I should have been able to say, "I can't talk to you about that," or I should have been able to communicate it to somebody.* I was trying to hide what was wrong with me, especially from my boss, because I was

> trying to take over -- I was trying to take over a shop at work, and nobody let's somebody get to head up a division that can't find his way home from the store. So it is my fault, all of it is my fault, and I know that.
>
> *I didn't know those guns were in the truck. I didn't look in storage when I opened the door, but if you say that I was in possession of them, I understand that, and I'm okay with doing with whatever I have to do to clear up whatever happened during that month, two months . . .*
>
> *I'm sorry, but it is all my fault. And if you feel like you need whatever price you think I need to pay I'm okay with it. I'm not angry about anything anymore, and honestly, if I never see another firearm or talk to another gang member or meet another drug addict, I am fine with that.* I'm not in any way -- I'm not the same person I was in January of '19, and I'm sure not the same person I was in February. I have changed a lot in the five and a half years. It's been a hard five and a half years, I'm sorry. I'm not angry about anything anymore. I could do this, so whatever you think is best is okay. It is. I'm sorry. (1-ER-41-43) (Italics added.)

K. At Sentencing, the District Court Relied on the Government's Argument that Higginbotham Obstructed Justice (§ 3C1.1)

The district court made no independent findings of an obstruction of justice. The district court overlooked that U.S.S.G. § 3C1.1 ¶2 sets "Limitations on Applicability of

Adjustment."

U.S.S.G. § 3C1.1 ¶2 states, "This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. *In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.*…" (Italics added.)

Instead, the district court based their findings on the government's representations.

> THE COURT: *I don't think I've ever done this before, but I actually think Mr. Conolly has nailed it with regard to summarizing the evidentiary record here. So, I'm prepared to adopt*

his characterization of the record so that it's clear as set forth in his post-evidentiary hearing brief at Docket 92. In terms of the credibility determinations, I would make those determinations.

Mr. Higginbotham is all over the map in terms of the various stories he's told along the way. I don't believe there is a "Pops." It does appear Mallory introduced that and then Mr. Higginbotham seized on that. And in the recording and in the discussions with his wife is trying to come up with some way to cover his tracks.

This is not just a case of mere proximity and access and association with other persons. It's not clear the other persons exist, except for Mr. Higginbotham's wife on whom he tried to pin this. She may have been on the truck, but he was sleeping in the truck. Her name might have been on the deed for the truck, but he was sleeping in the truck with firearms everywhere. (1-ER-23)

It's clear he was at the storage unit through direct evidence and circumstantial evidence, and just from seeing what was in the storage unit with the door open, firearms everywhere and indicia tied to him. He is the person who owned the -- who leased the unit and had access to the code.

So, I think all 26 firearms clearly are appropriately linked to Mr. Higginbotham. He had at least constructive possession. I actually think there is a very strong record that he had exclusive control over the truck and over the storage unit, and so his knowledge and control is supported by the evidence.

So, I'm overruling any objection to the

> *scoring at Paragraph 24. It is the 26 firearms -- well, the base offense level is correct. The additional enhancement at Paragraph 25 is correct.* (1-ER-24) (Italics added.)

L. At Sentencing, the District Court Relied on the Government's Argument that Higginbotham Refused to Accept Responsibility

The district court relied on the government's argument that Higginbotham refused to accept responsibility:

> THE COURT: . . . . . So then the question is whether or not Mr. Higginbotham should get acceptance of responsibility. *At the time probation prepared the presentence report in August of 2023, based on the plea agreement, probation found acceptance should apply.*[4] The government now argues it should not . . .
>
> THE COURT: So what is your response to that?

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[4] The PSR found that Higginbotham "clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. U.S.S.G. § 3E1.1 (a)." (PSR 7)

Higginbotham met with the probation officer, assisted the probation officer to prepare the PSR, was truthful and candid with the probation officer and did not obstruct justice within the meaning of U.S.S.G. § 3Cl.1, "either in the preparation of the pre-sentence report or during the sentencing proceeding." (See PSR 6)

MR. COZENS: Well, Your Honor, you have to go back to the plea agreement. The plea agreement was that my client agreed that he had one firearm, that he possessed one firearm, and we specifically said we want to contest the possession of the other firearms because my client knew that other people had access to and did things with regard to those firearms. So that he -- he has never said that he did not have that particular firearm that was found on his person, and the other ones were contested as we said in the original plea agreement. Now, the plea agreement, I think that pretty much concisely tells what our position is with regard to that. (1-ER-26)

* * *

THE COURT: I mean, for the Court to apply the third level off for acceptance of responsibility there needs to be a government motion. There is no government motion. So we're only talking about the two-level reduction, and doesn't Mr. Higginbotham say that even with respect to the one firearm, well, he. picked that up off the ground so it wouldn't be lying around. (1-ER-28)

MR. COZENS: He had possession of it.

THE COURT: So, respond to Mr. Conolly based on what you just heard.

MR. COZENS: The plea agreement was for him to plead to one count of possession of the firearm, the one that was found upon him. He has agreed from the beginning that he had the possession of that firearm. How he came into possession of it really is not an issue because he is

an ex-felon in possession of a firearm. So he said and he stood from the beginning and when he testified, he testified that he possessed that firearm. I mean, he did everything that was required of him there.

He specifically withheld agreeing to the possession of the guns in the pickup truck and the guns in the firearms in the storage unit, and he wanted to contest that because he knew other people had access to them and how other people did those -- had those things, possessed those things . . .

MR. CONOLLY: The Application Notes for Section 3E1.1[5], the section that governs the

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[5] U.S.S.G. §3E1.1. ACCEPTANCE OF RESPONSIBILITY states in part:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels. The qualifications for the offense decrease requires that the defendant enter a plea of guilty to save the government time for *preparing for trial* and allowing the government and the court to allocate their resources and use them daily.

The term "preparing for trial" means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial. *"Preparing for trial" [means] actions taken close to trial, such as preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. . "* (Italics added.)

reduction for acceptance of responsibility, does say that a defendant may remain silent in respect to relevant conduct beyond the offensive conviction without affecting his ability to retain a reduction under this subsection. But it goes on to say a defendant who falsely denies or frivolously contests relevant conduct that the Court determines to be true, has acted in a manner inconsistent with acceptance of responsibility.[6] And on that, Your Honor, we would say that is on all fours with this case.

Mr. Higginbotham didn't simply remain silent as to his possession of the guns in the truck and storage unit, he made an affirmative misrepresentation about them in his plea agreement and has continued to do so ever since. (1-ER-28-29)

THE COURT: All right. Anything more on this, Mr. Cozens?

MR. COZENS: Just a moment.
(Counsel and defendant confer.)

MR. COZENS: Well, I don't think any misrepresentation was made at the plea agreement. All he wanted to do was contest those

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[6] The plea agreement never stated that Application Note 1 to §3E1.11 stated: In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following: ¶ (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

things. The misrepresentation, if made, was probably during the testimony, as the Court has found, but my client wanted to contest those things, and it was specifically omitted from the plea agreement, and essentially Mr. Conolly says what happens to a person when he admits one, one crime, he's stuck with all of the crimes, and we get to whatever we want out of the plea agreement. The government has essentially such huge power over compelling the defendant to accept or acquiesce to facts that he might want to contest.

THE COURT: The Court certainly understands that, and I know that from the beginning -- we continued the plea colloquy because Mr. Higginbotham was being clear about what he wanted to contest, but at this point the government is correct that even some of what's in his Factual Basis he's contradicted in his representation to the Court and what he testified to. You have to concede that, right?

MR. COZENS: Yes, I do.

THE COURT: So it's not -- of course no defendant is punished for vigorously contesting charges, but here having decided to contest, Mr. Higginbotham has dug himself quite a deep hole.

So, before I resolve the acceptance of responsibility on obstruction of justice, which is tied, I mean, the government's taking the position no acceptance is tied to the same facts that lead it to argue obstruction of justice. Anything more to say on that, Mr. Cozens? (1-ER-30-31) (Italics added.)

* * *

THE COURT: I'm looking here at 3C1.1, the guideline with respect to obstruction of justice, which does read -- *the government's accurately set forth at least a portion of it*, "If, one, the defendant willfully obstructed or impeded or attempted to obstruct or impede the administration of justice with respect to the investigation, prosecution or sentencing," That's the relevant phrase here, "or sentencing of the instant offense of conviction, and, two, the obstructive conduct related to (a), the defendant's offense of conviction and any relevant conduct." It's the "and any relevant conduct" that has special force here, "increase the offense level by two levels."

I think the government has demonstrated that that enhancement does apply. Again, it's rare when this Court applies it, but I think this record supports it, so I'm granting the government's request to enhance by two levels for obstruction of justice. And based on the same part of the record, I'm also granting the government's request to not apply acceptance of responsibility. So the net effect is two levels added for obstruction, three levels not deducted for acceptance. . . . (1-ER-32-33) (Italics added.)

M. This Court Should Grant Certiorari Because the Government Breached the Plea Agreement by Arguing That Higginbotham Obstructed Justice and Failed to Accept Responsibility

Because Higginbotham's plea relied on the prosecutor's

representations dealing with acceptance of responsibility and obstruction of judgment, the prosecutor's agreement should be considered "part of the inducement or consideration, and be fulfilled." *Santobello*, 404 U.S. at 262. Because the plea agreement allowed Higginbotham to challenge the number of guns and the government agreed to an evidentiary hearing, Higginbotham reasonably understood that he could give his version of events about whether he possessed the firearms.

The plea agreement contained no provision referencing Higginbotham's anticipated testimony at the evidentiary hearing. The plea agreement allowed Higginbotham to challenge the number of guns and failed to advise Higginbotham that, if he testified falsely at the evidentiary hearing, or if the district court found he testified falsely, the government would be relieved of sentencing promises.

The government, in its post evidentiary hearing sentencing memorandum, argued that Higginbotham tried

to "obfuscate the facts in the investigation, plea, and sentencing of his case." (2-ER-49) The government argued that Higginbotham was responsible for all the firearms and his conduct merited an enhancement for obstruction of justice and disqualified him from receiving a reduction for accepting responsibility. (2-ER-49)

The government argued that the government's evidence at the evidentiary hearing proved Higginbotham possessed the 26 firearms found in the Nissan Titan truck and the storage unit, that Higginbotham lied about "Pops" and failed to present any evidence that anyone else possessed the firearms. (2-ER-49-67) The government argued that, not only should the court apply the two level enhancement for obstruction of justice, the court should also not award Higginbotham the two or three level reduction for acceptance of responsibility.[7] (2-ER-65)

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[7] Evidently, when the district court sentenced him, Higginbotham had already served five and a half years in prison on his state charges and while the federal government delayed prosecuting him. (1-ER-37-39)

CONCLUSION

Mr. Higginbotham respectfully requests that this Court grant Certiorari.

DATED: October 27, 2026

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

Fay Arfa, Attorney for Appellant

At sentencing, Higginbotham stated, "It's been five and a half years since I've hugged my mom or my kids or held my wife's hand. That's not how you are supposed to do time. A lot of this is just because of COVID and county jails." (2-ER-42)

APPENDIX

NOT FOR PUBLICATION

FILED

AUG 4 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DARREL KIETH HIGGINBOTHAM, AKA Darrel Higginbotham, Defendant - Appellant.	No. 24-4074 D.C. No. 2:19-cr-00214-KJM-1 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Argued and Submitted May 21, 2026
San Francisco, California

Before: COLLINS, JOHNSTONE, and DE ALBA, Circuit Judges.

Darrel Kieth Higginbotham appeals the district court's imposition of a 120-month sentence following his guilty plea to one count of possessing a firearm in violation of 18 U.S.C. § 922(g)(1). We have jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and we dismiss the appeal.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

APPENDIX A

We review for plain error whether the government breached the plea agreement because Higginbotham did not raise this issue before the district court. *See Puckett v. United States*, 556 U.S. 129, 133, 135 (2009).

The government did not breach the plea agreement. The agreement conditioned the government's recommendation for a three-level sentencing reduction on Higginbotham "clearly demonstrat[ing] acceptance of responsibility for his conduct as defined in U.S.S.G. § 3E1.1." *See United States v. Cannel*, 517 F.3d 1172, 1176–77 (9th Cir. 2008). Because the district court found that Higginbotham testified falsely at a post-plea evidentiary hearing about the number of uncharged firearms he owned and possessed for purposes of calculating his offense level, he failed to accept responsibility as contemplated by the agreement. *See* U.S. Sent'g Guidelines Manual § 3E1.1 cmt. n.1(A), n.4 (U.S. Sent'g Comm'n 2023). As a result, the government was not obligated to recommend acceptance of responsibility credit and did not breach the plea agreement by advocating against it. *See Cannel*, 517 F.3d at 1176–77.

Nor did the government breach the agreement by arguing for a two-level obstruction enhancement because the agreement allowed it to do so. Thus, the district court did not plainly err in failing to find that the government breached the plea agreement. *See Puckett*, 556 U.S. at 143. We enforce the agreement's appellate waiver and dismiss this appeal. *See United States v. Plancarte*, 147 F.4th

APPENDIX A

908, 912 n.2, 916 (9th Cir. 2025).

DISMISSED.

APPENDIX A