08-1305-cr

To Be Argued By:
BRIAN P. LEAMING

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-1305-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

SANTOS ACEVEDO-GARCIA,
also known as Bacalao,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

Statement of Jurisdiction

This is an appeal from a judgment entered on March 13, 2008, in the United States District Court for the District of Connecticut (Thompson, J.), after the defendant pleaded guilty to engaging in the business of dealing firearms without a license, in violation of 18 U.S.C. § 922(a)(1)(A), and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The defendant was sentenced to 135 months of imprisonment. DA 91.[1] The district court had subject matter jurisdiction over this federal criminal prosecution pursuant to 28 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on March 18, 2008, and this court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

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[1] The defendant's appendix is referred to herein as "DA."

Statement of the Issue Presented

I. Whether the district court clearly erred by denying the defendant a two-level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1 where he used a false name during his plea colloquy before the district court and during his presentence interview with his probation officer, thereby concealing portions of his criminal history.

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Preliminary Statement

Santos Acevedo Garcia is a convicted felon who unlawfully possessed multiple firearms and then sold those firearms to a government witness. He was indicted and pleaded guilty under what turned out to be the false name "Victor Beltran" a.k.a. "Bacalao." During his pre-sentence investigation, the defendant re-affirmed his identity as "Victor Beltran." Subsequently, the government received evidence that the defendant's true

identity was Santos Acevedo Garcia. Confronted with this evidence, the defendant admitted his falsehood. The U.S. Probation Office then determined that, under his true name, the defendant had additional criminal convictions that raised his criminal history score under the guidelines, and that he was a fugitive from Puerto Rico. Based on these falsehoods, the district court increased the defendant's offense level by two points for obstruction of justice and denied him a downward adjustment for acceptance of responsibility. The court sentenced the defendant to 135 months in prison, which was the bottom of the advisory guidelines range.

The defendant appeals his sentence. His only claim is that the district court failed to adequately examine whether he was entitled to a two-level reduction for acceptance of responsibility. For the reasons set forth below, the defendant's claim is without merit and the judgment of conviction should be affirmed.

Statement of the Case

On June 29, 2006, a federal grand jury sitting in the District of Connecticut returned a six-count indictment charging "Victor Beltran" with various firearms violations. Count One charged the defendant with engaging in the business of dealing firearms without a license, in violation of 18 U.S.C. § 922(a)(1)(A). The remaining five counts charged the defendant with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The case was assigned to U.S. District Judge Alvin W. Thompson.

On September 11, 2006, the defendant entered guilty pleas to Counts One and Three. DA 48.

On February 29, 2008, Judge Thompson sentenced the defendant to 60 months of imprisonment on Count One and 75 months of imprisonment on Count Three, to run consecutively for a total effective sentence of 135 months in prison. DA 91. Judgment entered on March 13, 2008.

On March 18, 2008, the defendant filed a timely notice of appeal. He is presently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Law enforcement agents arrange to make controlled purchases of firearms from the defendant, who goes by the name "Victor Beltran" and the street name "Bacalao."

In April 2006, special agents from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") and detectives from the City of Willimantic Police Department began an investigation involving the unlawful possession and distribution of firearms and narcotics.[2] DA 26. With the assistance of a cooperating witness, officers coordinated the controlled purchase of seven firearms from the defendant during five transactions between April

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[2] Two of the controlled firearm purchases also involved the defendant's contemporaneous sale and distribution of controlled substances to a government witness. DA 26-28.

26 and June 1, 2006. DA 26-28. The cooperating witness knew the defendant only by the street name "Bacalao." DA 26. Investigators determined that "Bacalao" was also known as "Victor Beltran," with a date of birth of February 12, 1963, and who was identified by the cooperating witness in a Willimantic Police photo array. DA 26, 28. Under the name of "Victor Beltran," the defendant had been convicted, on October 7, 2003, of Sale of Hallucinogens/Narcotics, in Connecticut Superior Court, for which he received a sentence of seven years of imprisonment, suspended after three years, and five years of probation. *Id.*

On June 15, 2006, the defendant was arrested on a federal criminal complaint charging him with possession of a firearm by a convicted felon and engaging in the business of dealing firearms without a license. DA 29. He was later indicted as more particularly described above.

B. The defendant gives a false name when he pleads guilty to two firearms offenses, but his true identity is discovered before sentencing.

On September 11, 2006, the defendant entered guilty pleas to Counts One and Three of the indictment. Before entering his pleas, the defendant was placed under oath. DA 64. The defendant was asked to state his name and whether he used any other names. *Id*. The defendant falsely stated his name as "Victor Beltran" and falsely omitted that his true name was Santos Acevedo Garcia. *Id.* Based on the defendant's sworn statements, the district

court accepted the defendant's guilty pleas and entered a finding of guilty. DA 49.

The defendant's guilty plea was offered pursuant to an agreement with the government, the terms of which were set forth in a letter dated September 11, 2006. In the plea letter, the parties agreed that based on the information known to the parties, the defendant's criminal history placed him in Criminal History Category III. DA 1-10. The parties further agreed that the sentencing range recommended by the Sentencing Guidelines was 70 to 87 months of imprisonment. DA 5. The sentencing calculation was premised on the government's understanding that the defendant was "Victor Beltran" and that he had only one prior criminal conviction. The plea letter also included the government's recommendation of a three-level reduction for the defendant's acceptance of responsibility. DA 3. This recommendation was conditioned on "the defendant's full, complete, and truthful disclosure to the Probation Office of information requested, of the circumstances surrounding his commission of the offense, and of his financial condition by submitting a complete and truthful financial statement." *Id.* The plea letter also acknowledged that the parties' calculations regarding the defendant's criminal history were subject to final determination by the court. DA 5.

The United States Probation Office was charged with preparing a presentence report ("PSR"). On September 15, 2006, the defendant was interviewed at the Hartford Correctional Center by U.S. Probation Officer Otto Rothi. During the interview, the defendant re-affirmed his name

as "Victor Beltran." DA 29. The investigation by the probation officer revealed only one criminal conviction under the name of Victor Beltran, which was for Sale of Hallucinogens/Narcotics from October 2003. *Id*. This determination was consistent with the plea letter. DA 5.

In November 2006, ATF obtained information from Puerto Rico that the defendant's true name was Santos Acevedo Garcia. Under his true name, the defendant had a significant criminal history from Puerto Rico and had been a fugitive from justice since 1999. DA 32. The government provided this information to the defendant and the probation officer. DA 29. Based on this new information, the probation officer requested permission to re-interview the defendant. *Id*.

On January 25, 2007, the district court convened a status conference. DA 29. At the hearing, the defendant admitted that he gave the court and the Probation Office false information regarding his identity, that his true name was Santos Acevedo Garcia, and that his date of birth was March 23, 1966. *Id.* In the subsequent presentence investigation, the probation officer determined that the defendant had the following criminal convictions:

As Victor Beltran, in Connecticut:

- Sale of Hallucinogens/Narcotics in Connecticut Superior Court on October 7, 2003, for which he received a sentence of seven years in prison, suspended after three years, and five years of probation. DA 32.

As Santos Acevedo Garcia, in Puerto Rico:

- Attempted Homicide and unspecified violations of Puerto Rico's Weapons Law, on November 6, 1987, for which he received a total effective sentence of three years in prison and three years of probation. DA 32.

- Spousal Abuse, on April 9, 1990, for which he received a fine. DA 32.

- Possession of a Controlled Substance, on November 15, 1993, for which he received a sentence of two years of imprisonment. DA 32.

The probation officer also determined that the defendant had been declared a fugitive on March 4, 1999, after fleeing Puerto Rico following an arrest on February 8, 1995, for controlled substance offenses. DA 32-33. Based on the newly discovered criminal convictions, the probation officer concluded that the defendant's criminal history category increased from III to IV.

In the PSR's guidelines calculation, the probation officer recommended that the defendant's offense level be increased by two levels for obstruction of justice pursuant to U.S.S.G. § 3C1.1 because "the defendant willfully obstructed or attempted to obstruct the administration of justice with respect to the investigation of the instant offense by lying to the Government, and to the probation officer about his true identity," when he affirmatively stated his true name as "Victor Beltran" during the

September 15, 2006, interview at the Hartford Correctional Center. DA 29. The probation officer also recommended that the defendant not receive any reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1, because of the defendant's dishonesty with the court and probation. DA 30. The re-calculated total offense level was determined to be 30.[3] With a revised Criminal History Category IV, the Sentencing Guidelines recommended an advisory range of 135 to 168 months of imprisonment.

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[3] The PSR also noted the possible application of additional enhancements based on the number of firearms involved and the defendant's trafficking of firearms. DA 31. The district court did not apply the enhancement under U.S.S.G. § 2K2.1(b)(1)(B), which would have required a four-level enhancement if at least eight, but fewer than 24, firearms were involved, or under U.S.S.G. § 2K2.1(b)(5), which would have required a four-level enhancement if the defendant engaged in trafficking of firearms. At sentencing, the government confirmed that the relevant conduct involved only seven firearms, and relayed its belief that the trafficking enhancement did not apply to offense conduct occurring after November 1, 2006. DA 51. Based on the parties' understanding of the law at the time of sentencing, it was assumed that application of a later Sentencing Guidelines Manual might implicate ex post facto concerns. DA 65. *But see United States v. Johnson*, No. 08-2296-cr, 2009 WL 466146, at *1 n.1 (2d Cir. Feb. 26, 2009) (per curiam) (noting open question in this Circuit of whether "transformation of the Sentencing Guidelines from a mandatory regime to one that is purely advisory affect[s] its ex post facto analysis").

C. After learning of the defendant's true identity, the sentencing court increases his criminal history, imposes an obstruction enhancement, and denies a reduction for acceptance of responsibility

At sentencing, the defendant initially objected to the PSR's recommendation of a two-level enhancement for obstruction of justice and of no reduction for acceptance of responsibility. DA 49-50. The defendant eventually withdrew his objection to the obstruction enhancement, because he conceded having willfully given a false name to the court and the probation officer. DA 51, 53, 55. Counsel acknowledged that the district court was "clearly within the bounds of giving him the obstruction of justice charge" and that he "can't technically object to the enhancement because I think the requirement has been met . . . ." DA 55.

The defendant nevertheless argued that he was entitled to a two-level reduction for acceptance of responsibility. In particular, he maintained that his use of a false identity was immaterial given that he promptly admitted to the instant offense, "didn't put the government to its proof," and "ultimately the inconvenience [was] minimal." DA 56, 62. The defendant argued further that Application Note 4 of U.S.S.G. § 3E1.1 – which provides that conduct warranting an obstruction enhancement generally precludes a reduction for acceptance of responsibility – should not apply in his case, and that his obstructive conduct fits into the category of "extraordinary cases"

where acceptance is not negated.[4] The defendant suggested that his lie was insignificant because while "[h]e's technically violated to get it . . . I don't know what you could do less . . . ." DA 57. The defendant also argued that to deny a downward adjustment for acceptance of responsibility while simultaneously adding an enhancement for obstruction of justice would essentially punish the defendant twice for the same conduct. DA 62. Lastly, the defendant intimated that the probation officer might bear partial responsibility for the defendant's dishonesty by not confronting him with its suspicion that Beltran was not his true name. DA 61.

The district court overruled the defendant's objection to the two-level enhancement for obstruction of justice and to the probation officer's recommendation against a reduction for acceptance of responsibility. After examining appellate decisions dealing with similar conduct, the district court explained: "[W]hen I finished reading the cases, I really saw the defendant's conduct as much more serious than it struck me as being before . . . ." DA 62-63. As to the seriousness of Acevedo Garcia's dishonesty, the district court explained:

When we asked what was the result, the result, for

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[4] The Application Note provides: "Conduct resulting in an enhancement under § 3C1.1 (obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustment under both §§ 3C1.1 and 3E1.1 may apply."

one thing, was a plea agreement that I think misstated his Criminal History Category, which made his offense level lower. The result also was a failure for the Court from the beginning to be aware of the fact that here's somebody who was a fugitive, here's somebody who's got a conviction for attempted homicide, a violation of weapons law and possession of a controlled substance, one other spousal abuse charge as well.

So I think the result was a serious result. There are cases where I might be inclined to agree, no, it really wasn't such a serious step for the defendant to fail to disclose his identity, but here he really kept from the Court and from the Probation Office information that was very important information.

You say it's a second slap across the face. I think it's intended to be. And that's the message I got from reading these cases. One of the cases is United States vs. Wilson, which is a Sixth Circuit case. Another one is Magana-Guerrero, that's a Ninth Circuit case. And there are others.

And I think looking at – having my thinking and analysis informed by reading these cases, I do think the defendant, who has the burden here on acceptance, has failed to demonstrate that he clearly accepted responsibility. And I don't think it's the burden of the Probation Officer to keep the defendant from hanging himself, as you put it. I thought it was very clear at the guilty proceeding

> when I told the defendant that he was under oath and that he could be prosecuted if he made statements that weren't true, and that was just before I asked him the questions as to what his name is and whether he had used any other names.

DA 63-64.

Having rejected the defendant's arguments on obstruction of justice and acceptance of responsibility, the district court calculated the total offense level to be 30, the defendant's Criminal History Category to be IV, and the resulting range to be 135 to 168 months of imprisonment. DA 68. Before imposing sentence, the district court advised the parties of the specific factors under 18 U.S.C. § 3553(a) it had considered in arriving at the defendant's sentence. DA 80. After considering the arguments of counsel, as well as the statutory sentencing factors, the court imposed a total effective sentence of 135 months of imprisonment, to be followed by three years of supervised release. DA 83-84.

Summary of Argument

The district court did not clearly err in determining that the defendant did not sustain his burden of clearly establishing his acceptance of responsibility for the offense. On the contrary, the district court acted well within its discretion in denying the downward adjustment when the defendant falsely stated his name to the district court and the probation officer, thereby concealing his status as a fugitive and the full extent of his criminal

history. If the defendant had succeeded in his deception, the court would have sentenced him in light of a lower advisory guidelines range. The court's holding was consistent with Application Note 4 to U.S.S.G. § 3E1.1, which generally provides that when a defendant's conduct merits an enhancement for obstruction of justice, he should not receive credit for accepting responsibility. Because the defendant's falsehood could have had a real impact on his sentencing, his case does not pose any "extraordinary" circumstances that might take it outside that usual rule. Accordingly, the defendant's appeal should be denied, and the judgment affirmed.

Argument

I. The district court did not clearly err in denying a two-level downward adjustment for acceptance of responsibility when the defendant gave a false name during his plea colloquy and his presentence interview with the probation officer, thereby concealing part of his criminal history

A. Governing law and standard of review

The Sentencing Guidelines provide for a two-level reduction of the offense level "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense . . . ." U.S.S.G. §§ 3E1.1(a). The burden is on the defendant to establish that he deserves a reduction under this provision. *See United States v. Fischer*, 551 F.3d 751, 754 (8th Cir. 2008); U.S.S.G. § 3E1.1 comment. (n.3) ("A

defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right."); *see generally United States v. Smith*, 174 F.3d 52, 55-56 (2d Cir. 1999) (holding that the party who seeks to take advantage of an adjustment in the guidelines bears the burden of proof; dealing with safety-valve provision of U.S.S.G. § 5C1.2).

This Court has recognized that "it is rare that a defendant should be granted a reduction in offense level for acceptance of responsibility when the court has deemed it appropriate to increase her offense level for obstruction of justice." *United States v. Defeo*, 36 F.3d 272, 277 (2d Cir. 1994) (denying acceptance reduction because defendant continued to use drugs while on release, failed to report to probation office, and tried to cheat on drug test); *see* U.S.S.G. § 3E1.1 comment. (n.4) (except in "extraordinary cases," conduct resulting in an enhancement for obstructing the administration of justice "indicates that the defendant has not accepted responsibility for his criminal conduct"). A court may deny credit for acceptance of responsibility if, for example, the defendant "has engaged in continued criminal conduct that bespeaks 'a lack of sincere remorse.'" *Defeo*, 36 F.3d at 277 (quoting *United States v. Cooper*, 912 F.2d 344, 346 (9th Cir. 1990)).

In *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004), this Court explained that when reviewing a district court's ultimate application of the guidelines to the facts, it takes an "either/or approach," under which the Court reviews "determinations that primarily involve issues of

law" *de novo* and reviews "determinations that primarily involve issues of fact" for clear error. *See also United States v. Gotti,* 459 F.3d 296, 349 (2d Cir. 2006) (re-affirming that "primarily factual" determinations under the guidelines are reviewed for clear error), *cert. denied sub. nom*. *Ciccone v. U.S.*, 127 S. Ct. 3001 (2007). When a district court relies on the "particular facts" of a case to deny an adjustment for acceptance of responsibility, that conclusion is viewed as a "factual one." *United States v. Taylor*, 475 F.3d 65, 70 (2d Cir. 2007) (per curiam) (holding that such a determination can be reversed only if "without foundation"); *see also United States v. Reyes*, 9 F.3d 275, 280 (2d Cir. 1993). "[A] sentencing court's evaluation of whether a defendant has accepted responsibility 'is entitled to great deference on review' because of the court's 'unique position to evaluate a defendant's acceptance of responsibility.'" *United States v. Remini*, 967 F.2d 754, 761 (2d Cir. 1992) (quoting U.S.S.G. § 3E1.1 comment. (n.5)). Such factual determinations are therefore reversible only if the district court has clearly erred. To reject a finding of fact as "clearly erroneous," this Court must, "upon review of the entire record," be "left with the definite and firm conviction that a mistake has been committed." *United States v. Garcia*, 413 F.3d 201, 222 (2d Cir. 2005).

B. Discussion

Acevedo Garcia provided materially false information to the district court and the probation officer about his identity. By not revealing his true name, the defendant concealed the full extent of his criminal history and his

status as a fugitive from Puerto Rico. Had he been successful in his scheme of deceit, the court would have calculated a lower advisory sentencing range, and likely would have imposed a lower sentence. As the background commentary to U.S.S.G. § 3E1.1 explains, the downward adjustment for acceptance of responsibility is designed to reward a defendant who "has accepted responsibility in a way that ensures the certainty *of his just punishment* in a timely manner . . . ." U.S.S.G. § 3E1.1, background note (emphasis added). A defendant who minimizes his sentencing exposure by lying about his identity has made his own "just punishment" less likely, not more likely. Moreover, by continuing to hide behind a false name, the defendant would have ensured that in the future, his criminal history would be divided between his true identity and his alias. Having properly found that the defendant obstructed justice by lying about his true identity, the district court also appropriately denied a reduction for acceptance of responsibility. *See United States v. Case*, 180 F.3d 464, 468 (2d Cir. 1999) (affirming imposition of obstruction enhancement and denial of acceptance adjustment absent extraordinary circumstances). Indeed, the fact that the defendant lied under oath during his plea proceeding constituted perjury, and the criminal nature of such conduct would alone justify a denial of credit for acceptance of responsibility. *See Puckett v. United States*, No. 07-9712, 2009 WL 763354, at *9 (U.S. Mar. 25, 2009) (holding that when defendant engaged in criminal conduct between his plea hearing and sentencing, "receipt of a sentencing reduction for *acceptance of responsibility* would have been so ludicrous as itself to compromise the public reputation of judicial proceedings").

Despite the defendant's argument to the contrary, there was nothing extraordinary about the circumstances of his claimed acceptance, and the district court did not err in finding that the defendant did not sustain his burden of demonstrating acceptance of responsibility. The district court properly concluded that the defendant's deceit was particularly serious and explained its decision as follows:

> One of the consequences of the research was that I came across a whole stack of cases where courts analyze, courts of appeal analyze the situation and concluded that giving the enhancement obstruction and not giving acceptance of responsibility was entirely appropriate. Some of these cases are cases where what the defendant did was give an alias. And when I finished reading the cases, I really saw the defendant's conduct as much more serious than it struck me as being before I read the cases.
>
> And as I sit here today, I have a change in my perception, the seriousness of his giving this – or failing to give his true identity. When we asked what was the result, the result, for one thing, was a plea agreement that I think misstated his Criminal History Category, which made his offense level lower. The result also was a failure for the Court from the beginning to be aware of the fact that here's somebody who was a fugitive, here's somebody who's got a conviction for attempted murder, a violation of weapons law and possession of a controlled substance, one other spousal abuse charge as well.

> So I think the result was a serious result. There are cases where I might be inclined to agree, no, it really wasn't such a serious step for the defendant to fail to disclose his identity, but here he really kept from the Court and from the Probation Office information that was very important information.

DA 62-63. In declining to award the two-level reduction, the district court observed that it was not the duty of the probation officer to "keep the defendant from hanging himself" and that it was "very clear" at the change of plea hearing that the defendant was "under oath and that he could be prosecuted if he made statements that weren't true, and that was just before I asked him the questions as to what his name was and whether he had used any other names." DA 64.

The district court's determination that the defendant did not sustain his burden of proof on earning a reduction for acceptance of responsibility is entitled to "great deference." *United States v. Remini*, 967 F.2d 754, 761 (2d Cir. 1992) (citing U.S.S.G. § 3E1.1, comment. (n.5)). In denying the reduction for acceptance, the district court noted that the defendant's dishonesty allowed him to conceal convictions for offenses involving drugs, weapons and attempted murder, and to conceal his status as a fugitive from Puerto Rico.

The district court properly relied on the Ninth Circuit's decision in *United States v. Magana-Guerrero,* 80 F.3d 398, 402 (9th Cir. 1996), when it concluded that the defendant's concealment of his identity, and consequently

his complete criminal record, appropriately disqualified him from receiving an adjustment for acceptance of responsibility. There were two defendants in *Magana-Guerrero*. The first, Magana, had at least 18 aliases and falsely told his pretrial services officer that he had no prior convictions; in fact, he had nine. *Id.* at 399-400. He refused to discuss his criminal history during his presentence interview, effectively letting his earlier false denial stand uncorrected. *Id.* at 400. The second defendant, Santana, falsely told her probation officer during the presentence interview that she had never used an alias, and that she had first entered the United States shortly before her arrest. *Id.* In fact, Santana had used four aliases, had been deported four times, and had been convicted twice for illegal entry. *Id.* The district court enhanced both defendants' offense levels for obstruction of justice, and denied them both reductions for acceptance of responsibility. *Id.*

The Ninth Circuit affirmed in all respects. By denying his criminal history, the court held, Magana could have improperly limited his sentencing exposure:

> Had his deception prevailed, he would have been entitled to a significantly lower sentence. Lying with the hope of avoiding a degree of culpability or punishment is the very antithesis of acceptance of responsibility.

Id. at 402 (citation omitted).

The defendant tries to distinguish away *Magana-*

Guerrero on the grounds (1) that defendant Magana's deceit occurred with regard to the investigation of a pre-plea event – namely, an investigation concerning release, and (2) that the supposedly later timing of the deception is significant here because was no evidence that "significant time and effort were expended by the government in determining" the defendant's true identity. Def. Br. at 8. These distinctions fail for a number of reasons.

First, the defendant simply misreads the facts and holding of *Magana-Guerrero*. The Ninth Circuit based its ruling on the fact that Magana had not only lied during his pretrial release interview, but had also failed to correct that lie during his presentence interview – an event that occurred after the plea hearing. 80 F.3d at 402. Moreover, the defendant overlooks the fact that defendant Santana likewise was denied an acceptance-of-responsibility reduction based solely on her false statements during a presentence interview. *Id.* In other words, the denial of acceptance credit in *Magana-Guerrero* was justified by misleading conduct by the defendants during their presentence investigations – precisely the situation here.

Second, the defendant misrepresents the facts of his own case. His failure to give his true identity was not solely "post-plea," as he seems to suggest. Def. Br. at 8. By contrast, the defendant here gave a false name to Judge Thompson during the Rule 11 colloquy in open court, after he had been placed under oath, and before he entered his guilty plea. Again, the timing of the defendant's misconduct is not far from that of defendant Magana.

Third, and perhaps most importantly, it made no difference in *Magana* whether the defendants' misrepresentations were before or after the plea. Nor did the court discuss whether the Government had expended "significant time and effort" in determining the defendants' true identities. Instead, what mattered is that the defendants' lies preceded their *sentencings*, and were calculated to minimize their exposure to lengthy prison terms. Regardless of when the falsity was initiated, "[l]ying with the hope of avoiding a degree of culpability or punishment is the very antithesis of acceptance of responsibility." 80 F.3d at 402. That is precisely what happened here: The defendant hid behind a false identity through his plea and presentence interview. Had his deceit succeeded, he would have faced a lower advisory guidelines range and likely a lower sentence.

It is the defendant's burden to clearly demonstrate acceptance of responsibility, and that his circumstances fall within the category of "extraordinary." The defendant has utterly failed to show there was anything extraordinary about his guilty plea or the admission of his relevant conduct. Acevedo Garcia claims that the district court failed to consider the fact that he saved the government and court time and resources by admitting to the offense conduct and committing to a plea agreement in a timely fashion. The timely entry of a guilty plea, however, does not entitle a defendant to a downward adjustment "as a matter of right." U.S.S.G. § 3E1.1 comment. (n.3); *see also United States v. Wilson*, 197 F.3d 782, 787 (6th Cir. 1999) (defendant "not entitled to a reduction simply because of his timely plea"). Indeed, there is some irony to

the defendant's related claim that he saved time and trouble by admitting his true identity "more than one year prior to [s]entencing." Def. Br. at 13. This overlooks the fact that when the defendant lied during his presentence interview on September 15, 2006, DA 29, sentencing was originally scheduled for November 29, 2006, DA 25. The defendant hardly deserves credit for early disclosure when it was his lie that caused his sentencing to be postponed for over a year, and required the probation office to re-open the presentence investigation.

In support of his claim of "extraordinary" circumstances, the defendant urges the adoption of the test embraced by the Eighth Circuit in *United States v. Honken,* 184 F.3d 961 (8th Cir. 1999). In *Honken*, the court explained the test as follows:

> To determine whether a case is "extraordinary," the district court should have taken into account the totality of the circumstances, including the nature of the appellee's obstructive conduct and the degree of appellee's acceptance of responsibility. Among other things, the district court should have considered whether, for example, the obstruction of justice was an isolated incident early in the investigation or an on-going effort to obstruct the prosecution. It should have considered whether appellee voluntarily terminated his obstructive conduct, or whether the conduct was stopped involuntarily by law enforcement. The district court should have noted whether appellee admitted and recanted his obstructive conduct, or whether he

> denied obstruction of justice at sentencing. Moreover, in our opinion the district court should have also weighed not only whether the defendant pleaded guilty to the underlying offense but also whether he assisted in the investigation of his offense and the offenses of others. We observe and note that there is no magic formula for defining an "extraordinary case," but we hold it was error for the district court to hold as a matter of law that mere cessation of obstructive conduct coupled with a guilty plea to the underlying offense necessarily makes a case extraordinary for purposes of § 3E1.1, application note 4.

Id. at 968-69. What is clear from this decision, however, is that there is no "magic formula," and the district court is afforded wide discretion in determining when an obstructing defendant is also entitled to a reduction for acceptance. Even applying the *Honken* factors to the present case, the district court's finding is amply supported by the record.

As the defendant's false statement concealed the full extent of his criminal history and his status as a fugitive, it was unquestionably serious. DA 63. Furthermore, the defendant's dishonesty was not an isolated incident. The defendant knew he had been charged by complaint and later by indictment under the false name, yet never sought to correct it. At the change of plea hearing, he affirmatively lied about his name. Months later, he lied to probation during the presentence investigation interview. In fact, the defendant only admitted to the falsity when he

was confronted with evidence confirming his true identity. The mere fact that he was honest about his obstructive conduct *after* its discovery does not overcome the other factors weighing against a finding that this is an "extraordinary case."

The district court thoroughly examined the circumstances surrounding Acevedo Garcia's obstructive conduct and properly determined that it was inconsistent with acceptance of responsibility. The defendant did not then, and cannot now, establish that the circumstances of his acceptance of responsibility was extraordinary such that he is entitled to a two-level reduction in his guidelines calculation. Accordingly, the district court did not clearly err in calculating the defendant's advisory guidelines range.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: April 3, 2009

Respectfully submitted,
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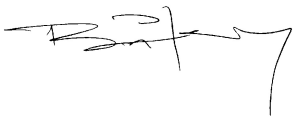

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ADDENDUM

U.S.S.G. § 3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

Commentary

Application Notes:

. . . .

4. *Examples of Covered Conduct.– The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies: . . . (f) providing materially false information to a judge or magistrate;. . . . (h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court[.]*

. . . .

U.S.S.G. § 3E1.1 Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

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

Commentary

Application Notes:

. . . .

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) (see Application Note 1(a)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of

Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.

5. *The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.*

. . . .

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Acevedo-Garcia

Docket Number: 08-1305-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 4/3/2009) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: April 3, 2009

CERTIFICATE OF SERVICE

08-1305-cr US v. Garcia

I hereby certify that two copies of this Brief for the United States of America were sent by Regular First Class Mail delivery to:

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on this 3rd day of April 2009.

Notary Public:

Sworn to me this

April 3, 2009

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Notary Public, State of New York
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