

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FERNANDO AGUILERA, AKA
Fernando Aguilera,

Defendant - Appellant.

No. 25-3366

D.C. No.
3:23-cr-00217-
WHA-1

OPINION

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted December 1, 2025
San Francisco, California

Filed August 24, 2026

Before: Johnnie B. Rawlinson and Gabriel P. Sanchez,
Circuit Judges, and Jennifer G. Zipps, Chief District
Judge.*

Opinion by Judge Zipps;
Partial Dissent by Judge Rawlinson

* The Honorable Jennifer G. Zipps, United States Chief District Judge for the District of Arizona, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed Fernando Aguilera's conviction following a bench trial for being a felon in possession of ammunition under 18 U.S.C. § 922(g)(1), vacated his sentence, and remanded for resentencing.

Affirming the district court's denial of Aguilera's motion to suppress, the panel held that the district court properly found that Aguilera's seizure was supported by reasonable suspicion that Aguilera was the shooter who fired a gun outside a bar, where the district court considered officers' collective knowledge, and the totality of the circumstances, including that the officers apprehended Aguilera based on reports of specific criminal activity and the fact that Aguilera closely matched an eyewitness description in physical aspects and temporal proximity to the gunshots.

The panel vacated the sentence because the district court applied the wrong legal standard and relied on impermissible factors in denying Aguilera a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a). It is apparent from the record that the district court believed either that a defendant must unconditionally plead guilty to be eligible for the reduction, or that it could consider and hold against Aguilera his constitutionally protected conduct—i.e., his motion to suppress, motions to dismiss the indictment, and decision to go to trial to preserve those issues for appeal. This reflects a misapprehension of the

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

legal standard. The panel held that the error was not harmless.

Judge Rawlinson dissented from the portion of the opinion vacating the sentence and remanding for resentencing. In her view, the district court did not misapprehend the law or hold Aguilera's constitutionally protected conduct against him in denying his request to reduce his sentence for acceptance of responsibility, and disagreed with the majority that the declared error was not harmless.

COUNSEL

Elizabeth R. Berenguer (argued) and Kelsey Davidson, Assistant United States Attorneys; Sophia Cooper, Attorney; Merry J. Chan, Assistant United States Attorney, Chief, Appellate Section; Criminal Division; Craig H. Missakian, United States Attorney; Office of the United States Attorney, United States Department of Justice, San Francisco, California; for Plaintiff-Appellee.

Lisset M. Pino (argued), Taylor Fatherree, and Daniel P. Blank, Assistant Federal Public Defenders; Jodi Linker, Federal Public Defender; Office of the Federal Public Defender, San Francisco, California; for Defendant-Appellant.

OPINION

ZIPPS, Chief District Judge:

This case arises from a police encounter following reports of an active shooter in San Francisco’s Mission District. Defendant-Appellant Fernando Aguilera was convicted of being a felon in possession of ammunition under 18 U.S.C. § 922(g)(1). His appeal raises two issues. First, Aguilera appeals the district court’s denial of his motion to suppress the ammunition evidence, asserting officers did not have reasonable suspicion to conduct a warrantless seizure of his person. Second, Aguilera appeals his sentence, arguing the district court erred by denying him a offense level reduction for acceptance of responsibility and relying on impermissible sentencing factors.¹ We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. We affirm Aguilera’s conviction but vacate his sentence and remand for resentencing.

I. Factual Background

Shortly before 2:00 a.m. on April 7, 2023, the San Francisco Police Department received two SpotSpotter alerts of multiple gunshots in the Mission District.² The alerts originated near the El Trebol Bar, located on the corner

¹Aguilera acknowledges that our precedent forecloses his appeal of the district court’s denial of his motions to dismiss the indictment on constitutional grounds. *See United States v. Duarte*, 137 F.4th 743, 748 (9th Cir. 2025) (en banc); *United States v. Latu*, 479 F.3d 1153, 1156 (9th Cir. 2007) (collecting cases). Accordingly, we summarily affirm the district court’s denial of these motions. We discuss these motions only as they pertain to Aguilera’s sentencing challenge.

² ShotSpotter is a service that detects gunshots and alerts local police to the precise coordinates where the gunshots were detected.

of 22nd and Capp Streets. Several officers arrived near the El Trebol bar around 2:00 a.m., within minutes of receiving the reports of gunshots at that location. A witness, later identified as Briseno, said he saw the shooter—a Hispanic male wearing a blue jacket—fire into the air and head westbound down 22nd Street. A second person outside El Trebol pointed officers in the same direction and said, “they went that way.” Officers Hurtado and Frisk saw a person walking away in that direction, and Officer Frisk saw the suspect turn left onto Mission Street.

Officers Grech and Hurtado took off after the suspect in their police vehicle. When they turned left onto Mission, Officer Hurtado confirmed that one of the two people within view matched the description provided by Briseno. Officer Grech stopped her vehicle near the suspect, and the two exited and ordered the suspect to stop and get on the ground. The suspect took off running, and Hurtado chased after him. During the chase, the suspect turned towards Officer Hurtado and “punched his arm out” in what Hurtado believed to be a shooting motion. Hurtado ducked behind a trashcan briefly, losing sight of him. Officer Hurtado then resumed the chase, following the suspect down 23rd Street until again losing sight of him at the intersection of 23rd and Bartlett.

Officer Hurtado broke off the chase outside of a restaurant on the southeast corner of the intersection and re-entered Officer Grech’s vehicle, which had caught up with him. As they drove up Bartlett Street, Officer Grech broadcast that the suspect was hiding on Bartlett Street, somewhere between 22nd and 23rd. Officer Hurtado provided an expanded description of the fleeing suspect—“Hispanic male, dark skin, long hair, blue jacket, and jeans,

and black shoes,” which was broadcast to the rest of the officers.

Several officers were in the area searching for the suspect. Around 2:08 a.m., Officer Frisk approached a person standing in the doorway of the restaurant on the southeast corner of the intersection of Bartlett and 23rd and asked if she saw where “the guy that was running went to.” She told Officer Frisk and Officer Hurtado that she saw him run to the intersection, attempt to hide by a parked car, and then relocate behind the white fence at the northeast corner of the intersection. The person confirmed the man was still hidden there.

A few seconds later, Officer Frisk peered through a large gap in the fence, shined his flashlight directly at Aguilera, and spotted him lying in a narrow strip of weeds. Officer Frisk pointed his firearm at Aguilera and yelled, “Hands!” Aguilera was detained at 2:08 a.m., roughly two blocks from the location of the alerts.

In the course of Aguilera’s detention, officers found the gun at issue in this case. The gun had a bullet jammed in the chamber, a malfunction caused by the gun attempting to fire the wrong-sized ammunition. Officers also found ammunition in a bag Aguilera was carrying across his body and found a magazine in his pocket. Aguilera fit the description of the suspect provided by Officer Hurtado, except that Aguilera was wearing tan boots, not black shoes. Aguilera also wore a bright red and white bandana around his neck.

Aguilera subsequently filed motions to suppress the evidence obtained from his stop and to dismiss the indictment against him. After the district court denied both, Aguilera offered to enter a conditional plea and proposed a

stipulated-testimony bench trial so he could preserve his right to appeal the denial of the three pretrial motions. Aguilera stated he intended to “stipulate to the testimony of all the witnesses that the Government may wish to call,” and stated he was “not intending to contest his guilt in any way.” At the bench trial, the Government called two witnesses. Aguilera did not cross-examine the witnesses and did not present a defense. The trial lasted 48 minutes, and the court found Aguilera guilty.

At a presentence interview, Aguilera cooperated with the probation officer and submitted a statement, through counsel, “tak[ing] full responsibility for this offense.” The probation officer calculated Aguilera’s offense level as 18 and the Guidelines sentencing range as 51 to 63 months. The calculation did not include a two-level reduction for acceptance of responsibility. The probation officer concluded Aguilera had “not clearly demonstrated acceptance of responsibility,” under U.S.S.G. § 3E1.1(a), but acknowledged that “the Court is in the best position to make the determination as to whether or not a reduction for Acceptance of Responsibility is applicable.” The probation officer recommended a sentence of 41 months.

At his sentencing hearing, Aguilera argued that he was entitled to a two-point reduction in his Guidelines calculation for his acceptance of responsibility and that the applicable range was 41 to 51 months. After considering arguments, the district court found Aguilera was not entitled to the reduction because he had gone to trial and sentenced Aguilera based on the original 51 to 63 months range. The court ultimately imposed a sentence of 45 months.

II. Discussion

A. Aguilera's Motion to Suppress

Aguilera challenges the district court's denial of his motion to suppress, arguing that officers lacked reasonable suspicion to detain him before he was seized. "We review the denial of a motion to suppress de novo, and any underlying findings of fact for clear error." *United States v. Vandergroen*, 964 F.3d 876, 879 (9th Cir. 2020) (citing *United States v. Torres*, 828 F.3d 1113, 1118 (9th Cir. 2016)). We may affirm on any basis fairly supported by the record. See *United States v. Mayer*, 560 F.3d 948, 956 (9th Cir. 2009).

Under the Fourth Amendment, law enforcement officers must have reasonable suspicion to conduct an investigatory stop of an individual. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). "Reasonable suspicion is defined as 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013) (en banc) (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)). Courts measure reasonable suspicion "by what the officers knew before they conducted their search [or seizure]," *Florida v. J.L.*, 529 U.S. 266, 271 (2000), and assess the totality of the circumstances, rather than certain factors in isolation, see *United States v. Valdes-Vega*, 738 F.3d 1074, 1078–79 (9th Cir. 2013) (en banc) (citing *United States v. Arvizu*, 534 U.S. 266, 273–74 (2002)). Reasonable suspicion requires more than a hunch, but "considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Glover*, 589 U.S. 376, 380 (2020) (citation omitted).

The district court properly found Aguilera's seizure was supported by reasonable suspicion. The court considered the collective knowledge of the officers, *see United States v. Ramirez*, 473 F.3d 1026, 1032 (9th Cir. 2007), and the totality of the circumstances, in concluding the officers reasonably suspected that Aguilera was the shooter who fired a gun outside El Trebol. Eyewitnesses identified the shooter to the responding officers, and Officer Hurtado visually identified a person matching the suspect's description, location, and direction of travel. At one point, Officer Hurtado was as little as five feet from the suspect.

When officers caught up and ordered the suspect to stop, he fled.³ A few minutes later, officers found Aguilera hiding behind a fence, in close proximity to where Officer Hurtado had last seen the suspect, and a witness stated she saw the "running" man hide in that exact location. This is sufficient evidence to trigger reasonable suspicion that Aguilera had committed a crime. Before conducting the seizure, the officers had far more than a hunch that the person hiding behind the fence was the shooter. *See Glover*, 589 U.S. at 381 (citing *Arvizu*, 534 U.S. at 274) ("The reasonable suspicion inquiry 'falls considerably short' of 51% accuracy.").

Aguilera argues police lacked reasonable suspicion to stop him for three reasons: (1) Briseno's tip that the shooter was a Hispanic male wearing a blue jacket was unreliable

³ We do not consider whether reasonable suspicion existed to stop the suspect before he fled, as Aguilera urges, because no seizure had occurred at that point in time. *See United States v. Hamilton*, 131 F.4th 1087, 1093 (9th Cir. 2025) (reasoning an attempted seizure, where a defendant flees "before the officers could do anything other than order him to stop," does not trigger the Fourth Amendment).

and lacked particularity; (2) the pedestrian's flight was insufficient because it was not in a high-crime area and was provoked by the officers; and (3) police did not confirm whether Aguilera matched the description of the shooter until after seizing him. Aguilera's arguments are unpersuasive.

Briseno's initial tip was reliable because it was provided directly to Officer Hurtado and was based on a contemporaneous eyewitness account of recent gunfire. *See United States v. Terry-Crespo*, 356 F.3d 1170, 1176–77 (9th Cir. 2004) (reasoning first-hand information under stress of recent excitement contributes to reliability); *United States v. Palos-Marquez*, 591 F.3d 1272, 1275–76 (9th Cir. 2010) (reasoning in-person tips provide substantial indicia of reliability when officers are able to observe the informant's demeanor and “determine whether the informant seems credible enough to justify immediate police action without further questioning”). While Aguilera claims Briseno had a drunken demeanor and that there was no evidence of an excited utterance, Briseno appears coherent in the body-worn camera footage and asks Hurtado to act quickly to prevent the suspect from getting away.

The particularity of Briseno's description further supports a finding of reasonable suspicion. Contrary to Aguilera's claims that a description of a Hispanic male in a blue jacket was too general to allow officers to pick such a person out of an area with a high concentration of Hispanic residents that was “bustling” with nightlife, the officers' body-worn camera footage reveals nearly empty streets and

few open businesses.⁴ And before attempting to stop the pedestrian on Mission Street, Officer Hurtado confirmed that the pedestrian either was, or matched the description of, the individual on 22nd Street that witnesses pointed to and that Officer Hurtado had seen.

Aguilera's argument that the suspect's flight on Mission Street did not warrant reasonable suspicion because it was provoked and did not occur in a high-crime area relies in large part on an assumption that flight was the only factor contributing to the officers' reasonable suspicion here. *See Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (holding officers had reasonable suspicion to stop suspect based on an unprovoked flight in “an area of heavy narcotics trafficking”). As discussed above, officers apprehended Aguilera based on reports of specific criminal activity, an eyewitness description and visual of the suspect, and the fact that Aguilera closely matched the description in physical aspects and temporal proximity to the gunshots. Aguilera's flight was simply an additional factor supporting the officers' reasonable suspicion, not the sole factor. *See id.* (“[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.”).

Aguilera suggests that, prior to seizing the individual hiding behind the fence, officers should have (1) provided the witness at the restaurant with Hurtado's description of the pedestrian, and (2) confirmed the hiding person's

⁴ Aguilera identifies 12 pedestrians who are seen in body-worn camera footage during the entire pursuit. Police talk to seven of them when they arrive on scene. Three are later seen in the restaurant where police receive the tip that Aguilera is hiding behind the white fence. Two are not seen on camera footage until after Aguilera was arrested. This was far from a situation where police arbitrarily picked one of many pedestrians wearing a blue jacket out of a crowd.

appearance matched the description. Neither course of action is required under our caselaw to establish reasonable suspicion. In light of the totality of the circumstances described above and the officers' collective belief that the suspect had a loaded firearm, it is clear the officers had reasonable suspicion to detain the individual hiding behind a white fence in a manner that did not jeopardize their safety. *See Wardlow*, 528 U.S. at 124–25 (citing *Cortez*, 449 U.S. at 418) (“[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.”). Contrary to what Aguilera suggests, Officer Frisk had a clear view of Aguilera’s clothing through “a large gap in the fence, and pointed his flashlight directly at defendant before detaining him,” and therefore, he would have been able to see if Aguilera matched the eyewitness descriptions. Thus, we agree with the district court’s findings that officers possessed adequate reasonable suspicion to detain Aguilera.

B. Sentencing Reduction for Acceptance of Responsibility

Aguilera argues his sentence should be vacated because the district court applied the wrong legal standard and relied on impermissible factors in denying the acceptance of responsibility reduction. “We review *de novo* whether the district court misapprehended the law with respect to the acceptance of responsibility reduction.” *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 990 (9th Cir. 2020) (quoting *United States v. Garrido*, 596 F.3d 613, 617 (9th Cir. 2010)). “Whether or not the defendant has accepted responsibility . . . is a factual finding that we review for clear error.” *Id.* Because we conclude the district court applied the wrong legal standard, we remand for resentencing.

The Sentencing Guidelines allow for a two-level reduction to a defendant's offense level, "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). The defendant has the burden of proving he is entitled to a reduction. *United States v. Innis*, 7 F.3d 840, 848 (9th Cir. 1993). In deciding whether the reduction should apply, "[t]he focus . . . must be 'on the defendant's personal contrition, rather than on his exercise of his constitutional rights.'" *Tuan Ngoc Luong*, 965 F.3d at 991 (quoting *United States v. McKinney*, 15 F.3d 849, 853 (9th Cir. 1994)). "When a defendant's 'statements and conduct make it clear that his contrition is sincere, he is entitled to the reduction.'" *United States v. Green*, 940 F.3d 1038, 1042 (9th Cir. 2019) (cleaned up) (quoting *United States v. Cortes*, 299 F.3d 1030, 1038 (9th Cir. 2002)). Although "there can be a fine line between putting on a defense at trial, and expressing contrition at sentencing," this determination "is not a binary, 'either/or' proposition." *United States v. Hernandez*, 894 F.3d 1104, 1111 (9th Cir. 2018).

A defendant's decision to go to trial does not preclude him from receiving this offense-level decrease. U.S.S.G. § 3E1.1 cmt. 2. As explained in comment 2 of the United States Sentencing Guidelines:

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. This may occur, for example, 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 statute

or a challenge to the applicability of a statute to his conduct).

Id. Like the decision to go to trial or a constitutional challenge to a criminal statute, a motion to suppress evidence under the Fourth Amendment “is an assertion of a constitutional right.” *United States v. Vance*, 62 F.3d 1152, 1157 (9th Cir. 1995). In *Vance*, the panel noted that a district court erred by “holding it against [the defendant] that he moved to suppress evidence before pleading guilty.” *Id.* We have repeatedly emphasized that “a sentencing court cannot consider *against* a defendant any constitutionally protected conduct.” *Hernandez*, 894 F.3d at 1109 (citation omitted) (emphasis in original). Indeed, “a judge cannot rely upon the fact that a defendant refuses to plead guilty and insists on his right to trial as the basis for denying an acceptance of responsibility adjustment.” *Id.* (citing *United States v. Ochoa-Gaytan*, 265 F.3d 837, 842 (9th Cir. 2001) (internal quotation marks and citation omitted)).

In the full context of the proceedings, it is apparent that the district court misapprehended the law regarding the acceptance of responsibility reduction and held Aguilara’s constitutionally protected conduct against him. The record does not support the Government’s contention that the context of the district court’s comments shows its denial was based on Aguilara’s conduct and statements as a whole. At the sentencing hearing, the district court repeatedly focused on Aguilara’s constitutionally protected conduct, i.e., Aguilara’s motion to suppress, motions to dismiss the indictment, and decision to go to trial to preserve those issues for appeal. At the outset, the district court expressed skepticism that Aguilara could receive a reduction for acceptance of responsibility while preserving his right of

appeal. When defense counsel stated Aguilera tried to accept responsibility, the court responded: “He hasn’t. He has not. He insisted on taking an appeal, and it’s like a conditional acceptance of responsibility. . . . he’s picking and choosing the things that he wants to contest, and he made two motions to dismiss -- so one to suppress, one to dismiss.” The district court suggested that a conditional plea of guilty could not be treated the same as an unconditional guilty plea because, by pleading guilty conditionally, “you’re still hoping to stay out of prison by getting the Ninth Circuit to say that . . . all the evidence should be suppressed, and he walks free.”

The district court subsequently made statements acknowledging a lack of certainty about the applicable legal standard. When defense counsel mentioned the Guidelines commentary which states a defendant, who goes to trial to preserve for appeal issues that do not relate to factual guilt, may qualify for the reduction (U.S.S.G. § 3E1.1 cmt. n.2), the district court stated, “I didn’t realize that.”⁵ The Government argued that the court should deny acceptance based in part on Aguilera’s exercise of his constitutional rights. For example, in its sentencing memorandum, the Government asserted Aguilera “never admitted guilt and is appealing a motion to suppress and two motions to dismiss.” At the sentencing hearing, the Government emphasized that Aguilera did not unconditionally plead guilty and a bench

⁵ When the discussion returned to this commentary, the district court stated, “That doesn’t call out suppression motions, does it?” and inquired from counsel whether a defendant’s entry of a conditional guilty plea to preserve their right to appeal a motion to suppress should count as acceptance of responsibility. Government counsel replied that they had not found Ninth Circuit guidance on point. Later, the district court again stated, “I don’t see where the contrition is,” in Aguilera’s offer to conditionally plead guilty.

trial took place, and the district court appeared to echo the government's incorrect interpretation of the standard. When the court denied Aguilera a reduction for acceptance of responsibility, the district court specifically identified Aguilera's exercise of his rights as the basis for the denial:

[T]o me, acceptance of responsibility is somebody comes in and says: I did it. I'm sorry. I'm going to make amends. I want to get on with my life and the victims' lives, and I don't have any quibbles.

But when somebody comes in and says, "I want to suppress under the Fourth Amendment," lose, and now, "I want to dismiss because I don't think the statute applies to me," or "It's unconstitutional." And then they lose, and then they come in and say, "Well, I want to preserve all that for appeal, but I otherwise will plead guilty." It's not acceptance of responsibility. So all of this is denied. He gets no acceptance of responsibility, period.

The court never acknowledged the correct legal standard—that it could not hold Aguilera's constitutionally-protected conduct against him.

The district court also did not state that it was relying on other, permissible factors to deny the reduction.⁶ Nor did the

⁶ The Guidelines commentary sets out a non-exhaustive list of factors courts may consider in evaluating whether to grant the reduction. *See* U.S.S.G. § 3E1.1 cmt. n.1. We have explained that pursuing "less

court address any of Aguilera's personal conduct or statements, such as his statement to Probation, although defense counsel raised it as evidence of contrition. *See Hernandez*, 894 F.3d at 1111 (reversing denial of reduction where "the district court's comments regarding [the defendant]'s decision to go to trial comprised virtually the entirety of the explanation for the sentence").⁷

rigorous avenues of preserving legal challenges," including entering a conditional guilty plea, agreeing to a bench trial, or stipulating to facts at trial, are ways a defendant may demonstrate their sincerity in accepting factual responsibility while advancing a legal challenge. *United States v. Gambino-Ruiz*, 91 F.4th 981, 991 (9th Cir. 2024). Here, Aguilera did all of these things, and he did not put on a defense at trial or cross-examine any of the government's witnesses.

⁷ The dissent, relying on *Hernandez*, suggests "a district court does not commit reversible error simply because it notes the fact that the defendant went to trial, so long as the court bases its final decision on the facts of the case and record as a whole." *Dissenting Opinion* at 23 (quoting *Hernandez*, 894 F.3d at 1111). But the dissent fails to consider whether the district court correctly calculated the Guidelines range when it denied the acceptance of responsibility reduction. Instead, the dissent reviews only whether the district court based its final sentencing decision on the facts of the case and record as a whole. *Dissenting Opinion* at 23. We have held that we must analyze "whether the district court correctly calculated the Guidelines range as the first step in our review of criminal sentences." *United States v. Ramos-Medina*, 706 F.3d 932, 941 (9th Cir. 2013) (emphasis added); *see also United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (explaining that "[o]n appeal, we first consider whether the district court committed significant procedural error," e.g., "fail[ure] to calculate—or to calculate incorrectly—the Guidelines range," before "consider[ing] the substantive reasonableness of the sentence"). And our case law is clear "that a judge cannot rely upon the fact that a defendant refuses to plead guilty and insists on his right to trial as the basis for denying an acceptance of responsibility adjustment." *Hernandez*, 894 F.3d at 1111; *see also, e.g., Ramos-*

It is apparent from the record that the district court believed either that a defendant must unconditionally plead guilty to be eligible for the reduction, or that it could consider Aguilera's constitutional motions and decision to go to trial against him. As discussed above, this reflects a misapprehension of the relevant legal standard. *See Gambino-Ruiz*, 91 F.4th at 991.⁸

C. The Error Was Not Harmless

Given that the two-point acceptance of responsibility reduction would change Aguilera's Guidelines range and may have resulted in a shorter sentence, we find this error to

Medina, 706 F.3d at 942 n.4 (“[A] district court may deny the reduction after ‘balancing all relevant factors,’ . . . but—in doing so—it ‘may not consider against the defendant any constitutionally protected conduct.’” (internal citations & brackets omitted)). Here, the district court misapprehended the law in denying the reduction for acceptance of responsibility when it calculated the Guidelines range. The fact that the district court subsequently—in a separate analysis of the length of the final sentence—considered other § 3553(a) factors, such as Aguilera's impoverished upbringing and the seriousness of the offense, does not affect our holding.

⁸ Under the circumstances present here, the court also improperly penalized Aguilera for exercising his constitutional rights to trial and against self-incrimination by relying on his decision not to stipulate to all the facts and elements underlying his conviction. The Government consistently argued that the reduction was not warranted because Aguilera did not stipulate to all facts underlying the offense of conviction and the Government had to prepare for trial. The district court agreed. But Aguilera is correct that a defendant's stipulation to all elements of his crime would render an appeal of a suppression ruling moot. *See United States v. Larson*, 302 F.3d 1016, 1019–20 (9th Cir. 2002). To avoid this outcome and ensure the appellate court retains jurisdiction, a defendant may seek a conditional guilty plea or stipulate to the admission of testimony and evidence at trial. *Id.* at 1019 & n.1 (citing Fed. R. Crim. P. 11(a)(2)). That is precisely what Aguilera did.

be prejudicial. “To establish harmlessness, the Government must show that ‘it is more probable than not’ that the error did not affect the sentence.” *United States v. Dominguez-Caicedo*, 40 F.4th 938, 963 (9th Cir. 2022) (quoting *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc)). “When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant’s ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.” *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016). If the district court acknowledges the correct Guidelines range is in dispute and analyzes both the correct and incorrect ranges, the sentencing error may be harmless. *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 n.5 (9th Cir. 2011).

Here, the district court acknowledged what the Guidelines range would have been with the reduction, 41 to 51 months, and without it, 51 to 63 months, but analyzed only the 51- to 63-month range. The court considered the standard sentencing factors and imposed a below-range sentence of 45 months. Because the district court did not conduct a separate analysis of the alternative Guidelines range, it did not satisfy the requirements for harmless error. *See Munoz-Camarena*, 631 F.3d at 1031. A court “must explain . . . the reason for the *extent* of a variance” which “necessarily is different when the range is different.” *Id.* Contrary to our dissenting colleague’s position, a district court’s mere acknowledgement of an alternative Guidelines range or “mere statement that it would impose the same above-Guidelines sentence no matter what the calculation” is not sufficient to establish harmless error. *Id.* Additionally, the probation office’s recommended sentence, 41 months, was at the low end of the lower range. Thus, a reasonable

probability exists that the court may have imposed a lower sentence had it started from the 41 to 51-month range. *See Dominguez-Caicedo*, 40 F.4th at 963–64. The Government has not shown that the error was harmless under the circumstances.

Because this error was not harmless, we vacate Aguilera’s sentence and remand for resentencing. *See Tuan Ngoc Luong*, 965 F.3d at 992–93.

III. Conclusion

We affirm the district court’s denial of Aguilera’s motion to suppress and motions to dismiss the indictment, and we affirm Aguilera’s conviction. We vacate Aguilera’s sentence and remand for resentencing consistent with this opinion.

Rawlinson, Circuit Judge, dissenting in part:

I respectfully dissent from the portion of the opinion vacating the sentence imposed and remanding for resentencing. In my view, the district court did not “misapprehend[] the law” or “[hold] [Fernando] Aguilera’s constitutionally protected conduct against him” in denying Aguilera’s request to reduce his sentence based on acceptance of responsibility. *Majority Opinion*, p. 14.

As noted by the majority, Aguilera filed a motion to suppress evidence and motions to dismiss the indictment. Aguilera went to trial to preserve these issues for appeal. *See id.*

At sentencing, the district court referenced these actions in denying the request for a sentencing reduction based on acceptance of responsibility.

The district court observed that in its view:

[A]cceptance of responsibility is somebody comes in and says: I did it. I'm sorry. I'm going to make amends. I want to get on with my life and the victims' lives. . . .

But when someone says, "I want to suppress under the Fourth Amendment," lose, and now, "I want to dismiss because I don't think the statute applies to me," or "It's unconstitutional." And then they lose, and then they come in and say "Well, I want to preserve all that for appeal, but I otherwise will plead guilty." It's not acceptance of responsibility.

The district court also noted that the prosecution was put to its burden of proving Aguilera's guilt beyond a reasonable doubt. Nevertheless, the district court clarified that even though it was denying a sentence reduction based on acceptance of responsibility, that didn't mean that the court wouldn't go below the guideline range in imposing sentence. The court described the possibility of sentencing below the guideline range as "a different thing altogether." The court thus limited its comments regarding going to trial solely to the determination of "the starting point."

Before imposing sentence, the district court discussed at some length the factors it considered in imposing the sentence, remarking that:

[I]t is true that his upbringing and his life was very shameful; not so much for him, I'm

talking about the circumstances under which he was raised.

But here's the thing: I can understand somebody stealing a loaf of bread out of the grocery [store] because their family is hungry and they have had [a] terrible upbringing. But I don't understand why a terrible upbringing—that brings somebody to a state of a mind that they feel like they can take a gun, as a convicted felon, knowing they cannot—and shoot it up in the air and endanger people. There's nothing about that poverty and that terrible upbringing that should excuse that. So I don't buy that argument.

The court, however, stated further:

But what I do buy [as] a reduction is . . .—I'm taking into account the seriousness of—the standard factors. I think 51 months is too harsh for what he did here and for the needs of deterrence. But 45 months is the lowest sentence that will take into account the statutory factors.

Finally, the district court referenced the lack of contrition, stating that: “I don't see where the contrition is. He still thinks he should walk free.” In sum, the facts of this case significantly undermine the majority's reliance on *United States v. Hernandez*, 894 F.3d 1104 (9th Cir. 2018).

Unlike the facts in this case, in *Hernandez* the “district court's comments regarding Hernandez's decision to go to

trial comprised virtually the entirety of the explanation for the sentence.” *Id.* at 1111. Unlike the facts in this case, the district court did not “specify which factors it considered . . . or whether it considered any facts at all beyond Hernandez’s decision to exercise his constitutional rights.” *Id.* Indeed, we explained that our decision in *Hernandez* is limited to the unique circumstance when the court “[e]nhanc[es] a sentence *solely* because a defendant chooses to go to trial.” *Id.* at 1112 (emphasis added). We observed that “[i]t does not appear that the court based its final decision on the facts of this case and on this particular record as a whole.” *Id.* at 1111 (citation and internal quotation marks omitted). We clarified that “a district court does not commit reversible error simply because it notes the fact that the defendant went to trial, so long as the court bases its final decision on the facts of the case and record as a whole.” *Id.* (quoting *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1270 (9th Cir. 2013)) (internal quotation marks omitted). The facts of this case fit squarely within our holding in *Rojas-Pedroza*, cited with approval in *Hernandez*.

To summarize, unlike the circumstances in *Hernandez*, the district court in this case discussed the circumstances of the offense, Aguilera’s background, its consideration of the sentencing factors, and the lack of contrition. These facts confirm that the district court “base[d] its final [sentencing] decision on the facts of the case and record as a whole,” *Hernandez*, 894 F.3d at 1111 (citations omitted), and not solely on Aguilera’s election to proceed to trial. *See id.* at 1112.¹

¹ The majority accuses me of “fail[ing] to consider whether the district court correctly calculated the Guidelines range when it denied the

Finally, the majority opines that the declared error was not harmless because the district “court did not conduct “a separate analysis” of the 41 to 51-month range.” *Majority Opinion*, p. 19. I disagree. The district court explicitly stated that “45 months is the lowest sentence that will take into account the statutory factors.” The court could have not been any plainer regarding its view of the appropriate sentence considering the facts of this case. *See Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016) (explaining that a sentencing error may be harmless despite an incorrect guidelines calculation if the record shows that “the district court thought the sentence it chose was appropriate irrespective of the Guidelines range”).

I respectfully dissent.

acceptance of responsibility reduction.” *Majority Opinion*, p. 17 n.7. However, this reasoning assumes that the district court erred in denying the acceptance of responsibility reduction, an assumption I do not share.