No. _____

In The Supreme Court of the United States

GABRIEL GALINDO-SERRANO

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

COVER PAGE

APPENDIX A – Judgment – 1st Cir. Court of Appeals May 30, 2019

United States Court of Appeals
For the First Circuit

No. 16-2505

UNITED STATES OF AMERICA,

Appellee,

v.

GABRIEL GALINDO-SERRANO,

Defendant, Appellant.

JUDGMENT

Entered: May 30, 2019

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Gabriel Galindo-Serrano's convictions and sentence are affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:
Mauricio Hernandez Arroyo
Gabriel Galindo-Serrano
Mariana E. Bauza Almonte
Kelly Zenon-Matos
Daynelle Maria Alvarez-Lora
Billie Kathryn Debrason

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APPENDIX B – Opinion & Order –
1st Cir. Court of Appeals, May 30, 2019

United States Court of Appeals
For the First Circuit

No. 16-2505

UNITED STATES OF AMERICA,

Appellee,

v.

GABRIEL GALINDO-SERRANO,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan M. Pérez-Giménez, U.S. District Judge]

Before

Howard, Chief Judge,
Lipez and Barron, Circuit Judges.

Mauricio Hernandez Arroyo, for defendant-appellant.
B. Kathryn Debrason, Assistant United States Attorney, with whom Rosa Emilia Rodríguez-Vélez, United States Attorney, and Mariana E. Bauzá-Almonte, Assistant United States Attorney, were on brief, for appellee.

May 30, 2019

BARRON, **Circuit Judge**. Gabriel Galindo-Serrano ("Galindo") appeals his convictions for various federal carjacking and firearm offenses relating to two incidents of carjacking in June and July of 2014 as well as his 600-month prison sentence. We affirm the convictions and the sentence.

I.

On July 24, 2014, a federal grand jury in the District of Puerto Rico indicted Galindo and co-defendant Jean Morales-Rivera ("Morales") for carjacking, in violation of 18 U.S.C. §§ 2119(1) and (2) ("Count One"), and use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) ("Count Two"). Those counts described an incident that allegedly occurred on June 16, 2014. During the incident, Galindo and Morales allegedly approached a man ("J.F.M.") and a woman ("M.R.N.") standing near a car and threatened them with a revolver unless they handed over their car keys. Galindo then allegedly drove away in their car.

The indictment also charged Galindo with separate counts of carjacking "resulting in serious bodily injury, that is: sexual assault," in violation of 18 U.S.C. § 2119(2) ("Count Three"), use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) ("Count Four"), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) ("Count Five"). Those counts described an incident that allegedly occurred on July

8, 2014, in which Galindo allegedly pointed a gun at a woman ("N.A.M.") stopped at a traffic light, entered her car (which was registered to her mother) and took over the wheel. He then allegedly drove her to a basketball court, where he raped her and left her bleeding.

Galindo proceeded to trial on all five counts. Two days into the trial, he moved to suppress statements that he had made to Federal Bureau of Investigation ("FBI") agents following his arrest. In those statements, he confessed to both carjackings and to the sexual assault. The government objected that the motion to suppress was untimely. The District Court noted that the motion had "been filed belatedly," but decided to "have a [suppression] hearing anyway." The District Court denied the motion.

At trial, the government presented testimony from M.R.N. and N.A.M. In that testimony, they recounted the carjackings and positively identified Galindo as the perpetrator. The government also presented testimony from the operator who took M.R.N.'s 911 call, the individual who assisted N.A.M. after she had been abandoned on the basketball court, the doctor who treated N.A.M. at the hospital and performed her rape kit, and the DNA specialist who tested the rape kit and determined that the DNA samples from the rape kit matched Galindo's DNA.

In addition, the government presented testimony from police officers. They testified that they had heard Galindo's

confession following his arrest and observed Galindo driving N.A.M.'s mother's car while in possession of a firearm. The defense did not present any evidence. A jury convicted Galindo of all counts.

At the beginning of Galindo's sentencing hearing on July 6, 2016, defense counsel pointed out that Galindo had signs of self-inflicted injury and moved for a continuance so that a competency evaluation could be undertaken. The District Court, noting a lack of evidence of psychological problems in the record, responded that it would go forward with the sentencing that day but indicated that it would order a post-sentencing competency evaluation. Based on "the report from the evaluation," the District Court would "[re]consider the matter [of competency]" and might "resentence [Galindo] . . . or proceed accordingly, depending on the evaluation, what it says."

The District Court then sentenced Galindo to concurrent 120-month prison sentences for Counts One, Three, and Five to be served consecutive to a seven-year prison sentence for Count Two and a thirty-three-year prison sentence for Count Four. In total, the District Court sentenced Galindo to 600 months in prison.

After the District Court announced the sentence, defense counsel again objected that Galindo "may or may not be competent to understand what the proceedings have been here today." Defense

counsel did not, at that time, make any other objection to Galindo's sentence based on the state of his mental health.

On July 7, 2016, defense counsel filed a motion for "an extension of time within which to file the notice of appeal or an appeal until 15 days after the mental health report is filed by the [Bureau of Prisons]." The District Court granted the motion on July 27, 2016.

The competency evaluation was filed with the District Court on November 23, 2016. The evaluation concluded that Galindo did not present with a mental disease or defect that rendered him incompetent to be sentenced. Galindo then appealed his convictions and sentence on November 29, 2016.

On January 3, 2017, we issued an order to show cause why Galindo's appeal should not be dismissed as untimely. Federal Rule of Appellate Procedure 4(b) requires that a criminal "defendant's notice of appeal . . . be filed within 14 days of the entry of . . . the judgment . . . being appealed." Fed. R. App. P. 4(b)(1)(A)(i). "Although the [D]istrict Court may extend the time for filing a notice of appeal by up to 30 additional days upon a showing of excusable neglect or good cause [under Federal Rule of Appellate Procedure 4(b)(4)]," we explained, "the [D]istrict [C]ourt does not have authority" -- as it did here -- "to extend the time to appeal beyond that point [under Federal Rule of Appellate Procedure 26(b)(1)]."

On January 17, 2017, the government filed a response to our show-cause order in which it "request[ed] that the instant appeal be dismissed as untimely." On January 20, 2017, Galindo filed a response to our show-cause order and cross-moved for a stay of his appeal pending the resolution of a separate motion to vacate his sentence that he had filed with the District Court on January 19, 2017.

On June 29, 2017, the government moved to withdraw its motion to dismiss the appeal as untimely. On July 13, 2017, we granted the government's motion to withdraw its motion to dismiss and denied Galindo's motion to stay his appeal. We have "h[e]ld that Rule 4(b)'s time limits are not 'mandatory and jurisdictional' in the absence of a timely objection from the government." United States v. Reyes-Santiago, 804 F.3d 453, 458 (1st Cir. 2015) (quoting Fed. R. Crim. P. 37(a)(2)). Our jurisdiction to consider this appeal is therefore secure.

The separate January 19, 2017 motion to vacate Galindo's sentence was filed with the District Court on the understanding that "[t]he appeal st[ood] to be dismissed." In the motion, Galindo contended that, pursuant to 18 U.S.C. § 4241 (providing that a "court shall grant" a "motion for a hearing to determine the mental competency of the defendant" "if there is reasonable cause to believe that the defendant may presently be . . . mentally incompetent"), the July 6, 2016 judgment "should

not have been entered without the competency of the defendant being assured."[1] Galindo did not otherwise object to his sentence. On August 30, 2017, the District Court dismissed the motion "as moot" following our order allowing Galindo to go forward with his appeal.

II.

We begin with Galindo's challenge to the District Court's denial of his motion to suppress his confession. "In considering a challenge to a district court's denial of a motion to suppress, we review the court's legal conclusions de novo and its findings of fact for clear error." United States v. Jacques, 744 F.3d 804, 809 (1st Cir. 2014) (citing United States v. Mejía, 600 F.3d 12, 17 (1st Cir. 2010)).

Galindo premises his motion to suppress on the fact that he made his confession after he had been held in custody for more than eighteen hours without first having been presented to a magistrate judge. He contends that, contrary to the District Court's finding, this substantial delay in presenting him to a magistrate judge was neither reasonable nor necessary. He thus contends that the District Court erred in denying his motion to suppress.

[1] Although Galindo points out on appeal that the District Court acted prematurely by imposing his sentence before it had received and reviewed the competency report, he does not make any developed argument to explain why his sentence should be vacated on this basis. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

Under Federal Rule of Criminal Procedure 5(a)(1), a defendant who has been "arrest[ed] within the United States" is entitled to be brought "without unnecessary delay before a magistrate judge." Fed. R. Crim. P. 5(a)(1)(A) (emphasis added). The Supreme Court has explained -- in a line of precedent that begins with McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957) -- that this right to prompt presentment "avoids all the evil implications of secret interrogation of persons accused of crime," McNabb, 318 U.S. at 344, and ensures that the defendant "may be advised of his rights" "as quickly as possible" and that "the issue of probable cause may be promptly determined," Mallory, 354 U.S. at 454. To protect this right, "the rule known simply as McNabb–Mallory 'generally render[s] inadmissible confessions made during periods of detention that violat[e] the prompt presentment requirement of Rule 5(a).'" Corley v. United States, 556 U.S. 303, 309 (2009) (quoting United States v. Alvarez–Sanchez, 511 U.S. 350, 354 (1994)) (alteration in original).

There is, however, another provision of federal law that is relevant. "Following the Supreme Court's articulation of the McNabb–Mallory exclusionary rule, Congress enacted 18 U.S.C. § 3501 to create a safe harbor period for certain voluntary confessions [that are given within six hours of a defendant's

arrest]."[2] Jacques, 744 F.3d at 813 (citing Corley, 555 U.S. at 309).

Notwithstanding the safe harbor that § 3501 establishes, the statute also provides that, if a confession is made more than six hours after a defendant's arrest and before his presentment to a magistrate judge, the "trial judge" is required to "find[]" that "the delay in bringing [the defendant] before [a] magistrate judge . . . is . . . reasonable" before admitting the confession. 18 U.S.C. § 3501(c). The Supreme Court has interpreted "§ 3501 [to have] modified McNabb–Mallory without supplanting it." Corley, 556 U.S. at 322. "Under the rule as revised by § 3501(c), . . . [i]f the confession came within [six hours of arrest], it is admissible, subject to the other Rules of Evidence, so long as it was 'made voluntarily and . . . the weight to be given [it] is left to the jury.'" Id. (quoting 18 U.S.C. § 3501(c)). "If the confession occurred before presentment and beyond six hours," as was the case here, "the court must decide whether delaying that long was unreasonable or unnecessary under the McNabb–Mallory cases, and if it was, the confession is to be suppressed." Id.

[2] Specifically, if a "confession was made or given by [a] person within six hours immediately following his arrest or other detention," the confession "shall not be inadmissible solely because of [the] delay in bringing such person before a magistrate judge." 18 U.S.C. § 3501(c) (emphasis added).

There is one other provision of federal law that is relevant to Galindo's motion to suppress. Federal Rule of Criminal Procedure 12(b)(3)(C) provides that any "objections" concerning the "suppression of evidence" "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(C). Federal Rule of Criminal Procedure 12(c)(3), however, sets forth an exception to this requirement. The exception provides that "a court may consider [an untimely] objection . . . if the party shows good cause." Fed. R. Crim. P. 12(c)(3). "We have interpreted the good cause standard to require a showing of both cause (that is, a good reason for failing to file a motion on time) and prejudice (that is, some colorable prospect of cognizable harm resulting from a failure to allow the late filing)." United States v. Santana-Dones, 920 F.3d 70, 81 (1st Cir. 2019) (citing United States v. Arias, 848 F.3d 504, 513 (1st Cir. 2017); United States v. Santos Batista, 239 F.3d 16, 19 (1st Cir. 2001)).

Here, defense counsel moved to suppress Galindo's confession two days after his trial had already begun. Because the motion was untimely, the government argues that we should consider Galindo's motion waived under Federal Rule of Criminal Procedure 12(c)(3). See, e.g., United States v. Sweeney, 887 F.3d 529, 534 (1st Cir.), cert. denied, 139 S. Ct. 322 (2018); United

States v. Walker-Couvertier, 860 F.3d 1, 9 n.1 (1st Cir. 2017), cert. denied sub nom. Lugo-Diaz v. United States, 138 S. Ct. 1303 (2018), and cert. denied, 138 S. Ct. 1339 (2018); United States v. Casey, 825 F.3d 1, 21 (1st Cir. 2016).

When the District Court asked defense counsel why he had not "submit[ted] a motion to suppress before [trial]," he responded, "I don't know why I didn't. I overlooked it[.]" On appeal, Galindo offers no explanation for his failure to timely file the motion.[3] Moreover, the government represented below -- and defense counsel did not deny -- that in August 2014 it had provided to defense counsel "the information regarding when his client was arrested, when he was taken into MDC, by whom, at what time, [and] what the FBI did on July 9th and July 10th."[4] The

[3] Defense counsel states in his reply brief, without any further explanation, that "[t]here was a series of undue delay[s] in bringing this case for trial by the Government as the record clearly indicates that attributed to delays."

[4] Defense counsel did represent to the District Court that the government filed its designation of evidence expressing its intent to offer evidence of the "[d]efendant's statements" only eight days before the start of trial. But, the government explained, "even though the government formally filed the designation in 2016, the truth is that in the discovery letter given to Brother Counsel in 2014, in the second page, the United States specifies that we are designating every item on that discovery letter under [Federal Rule of Criminal Procedure] 12(b)(4)(A)[,] [which] means we are designating all that discovery like we're going to use that discovery on trial." Defense counsel did not respond to the government's explanation at the suppression hearing, nor does he raise that issue on appeal.

government argued that there thus was "no reason why, a year and a half later, the defense is filing this motion to suppress."

The District Court did not make any express finding as to whether Galindo had shown "good cause" for the untimeliness of the motion to suppress. The District Court stated only that it was "going to have a [suppression] hearing anyway" and went on to address the merits.

The fact that the District Court addressed the merits of the suppression motion does not cure the defendant's waiver. A District Court "may opt to address a waived claim simply to create a record in the event that the appellate court does not deem the argument waived." Walker-Couvertier, 860 F.3d at 9. Thus, "[e]ven when the [D]istrict [C]ourt rules on an untimely motion, as the [C]ourt did here, an untimely motion to suppress is deemed waived unless the party seeking to suppress can show good cause as to the delay," which defense counsel has not. Sweeney, 887 F.3d at 534.

We are nonetheless troubled by the District Court's explanation for why it found that the eighteen-hour delay in bringing Galindo before a magistrate judge "was not unreasonable" and "was necessary" for the FBI "to be able to complete . . . the booking [and] the other matters that the FBI was doing to obtain their case to be able to present it to the magistrate judge," which included "prepar[ation] [of the] search warrant." Thus,

notwithstanding the waiver, we explain the source of our concern in order to clarify the law in this area.

The District Court made its findings regarding the nature of the delay based on the following undisputed facts. Galindo was arrested by Puerto Rico Police Department officers "around 7:00 p.m., at a public housing project," on July 9, 2014. The Puerto Rico Police immediately turned over custody of Galindo to the FBI. Galindo was detained at the Metropolitan Detention Center ("MDC") Guaynabo overnight.

That night, FBI agents prepared and obtained a warrant from a magistrate judge to search Galindo's mother's residence. FBI agents executed the search warrant from 1:30 a.m. to 2:00 a.m. and then "recessed" for the night.

The next day, on July 10, 2014, FBI agents took Galindo to the federal building to "process[]" him around 11:00 a.m. The FBI agents then read Galindo his rights around 1:30 p.m. and began his interview around 1:58 p.m. During the interrogation, Galindo confessed to both carjackings and to sexually assaulting N.A.M. Shortly after the FBI questioning, Galindo was brought before a federal magistrate judge.

Delay "for the purpose of interrogation" "is the epitome of 'unnecessary delay.'" Corley, 556 U.S. at 308 (quoting Mallory, 354 U.S. at 455-56); see also Jacques, 744 F.3d at 815 n.4; United States v. Garcia-Hernandez, 569 F.3d 1100, 1106 (9th Cir. 2009).

The District Court found that Galindo "w[as] not subjected to any interviews by anyone" while he was "under custody at MDC Guaynabo" and was not interrogated until the following afternoon shortly before presentment.

But, under McNabb-Mallory, "unexplained delays, despite being in close proximity to an available judge can be considered unreasonable." United States v. Thompson, 772 F.3d 752, 761 (3d Cir. 2014) (citing United States v. Wilson, 838 F.2d 1081, 1085 (9th Cir. 1988)); see also United States v. Boche-Perez, 755 F.3d 327, 336 (5th Cir. 2014) ("A non-existent explanation (i.e., delay for delay's sake) is unacceptable under McNabb–Mallory because a delay for delay's sake is, by definition, unnecessary to any legitimate law enforcement purpose.").

Thus, notwithstanding the District Court's finding that Galindo was not interrogated until shortly before his presentment to a magistrate judge, the critical question remains: what explains the delay at issue? The District Court found that the delay could be attributed to legitimate administrative concerns. See Jacques, 744 F.3d at 814 (noting that "a delay may be reasonable if caused by administrative concerns, such as the unavailability of a magistrate following an arrest, or by a shortage of personnel" (citations omitted)). We doubt, though, that the administrative concerns that the District Court identified -- or any other

"legitimate law enforcement purpose," Boche-Perez, 755 F.3d at 336 -- made the delay in presentment reasonable or necessary here.

The undisputed record shows that "there were, approximately, seven to 10 people" "participating in th[e] investigation." See, e.g., United States v. Perez, 733 F.2d 1026, 1035 (2d Cir. 1984) (finding no "shortage of manpower" where "more than six agents were assigned to the case, and . . . one of them could have taken [the defendant] to the then available magistrate"). The District Court noted some agents may have been committed to assisting the Puerto Rico Police in containing the "real threat that a riot would take place" at the housing project where Galindo was arrested. But, no agent testified at the suppression hearing as to how many FBI agents were in fact involved in containing -- or needed to contain -- any impending riot or as to how long they were in fact there.

The District Court also noted that some FBI agents were occupied with "prepar[ing] a search warrant" for Galindo's mother's residence, which involved "prepar[ing] the Affidavit, the Complaint, talk[ing] to the Assistant U.S. Attorney on duty, and thereafter go[ing] to the magistrate judge who is on duty to request for the search warrant." The record again does not show how many agents were involved in that process. See United States v. Valenzuela-Espinoza, 697 F.3d 742, 752 (9th Cir. 2012) (noting that "the fact that one officer out of nine was fulfilling his

responsibility to obtain a search warrant did not make the delay reasonable under McNabb–Mallory").

Moreover, the fact that the FBI agents went to a magistrate judge within six hours of Galindo's arrest to obtain the search warrant raises a question as to "why [Galindo could] not [have] accompanied [the agents] to [the same magistrate] for arraignment at that time." Perez, 733 F.2d at 1036; cf. United States v. Wilson, 838 F.2d 1081, 1085 (9th Cir. 1988) (finding the delay unreasonable where "arraignments were being conducted one flight upstairs from the room where [the defendant] was being questioned, and the magistrate was open for business while [the defendant] was being questioned").

In any event, the search warrant and impending riot can at most explain the overnight delay in bringing Galindo before a magistrate judge. See Thompson, 772 F.3d at 762-63. There remains the question why -- as the undisputed record shows -- Galindo was not brought before a magistrate judge until after 2 p.m. the day after his arrest, especially given that the undisputed record shows that an available magistrate judge was only fifteen minutes away from where the defendant was detained.

The District Court noted that Galindo had to be taken to and "processed at the FBI office." But, "[t]he government presented no evidence as to . . . why [Galindo] had to be processed at the [FBI] prior to presentment." Id. at 763 (emphasis added).

Nonetheless, even if the confession should have been suppressed pursuant to McNabb-Mallory, we have no occasion to consider whether Galindo was prejudiced thereby because, as we have noted, his "suppression claim was waived -- and having waived it, [he] is not entitled to any appellate review."[5] Walker-Couvertier, 860 F.3d at 9. We therefore must affirm the District Court's denial of Galindo's suppression motion. See United States v. George, 886 F.3d 31, 39 (1st Cir. 2018) ("We are at liberty to affirm a district court's judgment on any ground made manifest by the record . . . .").

III.

Galindo next contends that his convictions and sentence must be vacated because the District Court erred in refusing to admit a Facebook photo of one of Galindo's friends. Galindo concedes that his unpreserved evidentiary objection must be reviewed only for plain error. See United States v. Reda, 787 F.3d 625, 628 (1st Cir. 2015). Galindo thus must show that the District Court's exclusion of the Facebook photo was "(1) an error (2) that is clear and obvious, (3) affecting Galindo's substantial

[5] For the same reason, we must also reject Galindo's challenges -- raised for the first time on appeal -- to the admission of his confession based on his limited mental capacity and the government's failure to record the interrogation.

rights, and (4) seriously impairing the integrity of judicial proceedings." Id. We conclude that Galindo has failed to do so.

Galindo's only defense at trial to the July 2014 carjacking was that N.A.M. consented to letting Galindo into her car and to having sexual intercourse with him. In support of that defense, defense counsel asked N.A.M. during cross-examination whether, prior to the carjacking, she had met Galindo or Erick Joel Estrada Morales ("Estrada"), whom Galindo sought to show was a mutual acquaintance. N.A.M. denied knowing either Galindo or Estrada. Defense counsel then sought to ask N.A.M. whether she recognized Estrada in a Facebook photograph. The District Court refused to admit the photograph on the ground that it had not been properly authenticated. Six months after the trial, defense counsel made a proffer under Federal Rule of Evidence 103(a)(2) regarding the photo, which the District Court denied at sentencing as untimely.

Under Federal Rule of Evidence 901, "the proponent [of an item of evidence] must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Here, defense counsel had proposed to introduce the photograph at issue only by "turn[ing] the computer on and show[ing] [the photograph] to [the Court] on Facebook." Defense counsel did not -- during his initial offer or in his subsequent untimely proffer -- point to any evidence that was "extrinsic to

the document or item itself" or to "elements of the document itself," which would provide "enough support . . . to warrant a reasonable person in determining that the evidence is what it purports to be." United States v. Blanchard, 867 F.3d 1, 5-6 (1st Cir. 2017), cert. denied, 138 S. Ct. 2691 (2018) (citing Fed. R. Evid. 901(b)(1) & 901(b)(4)) (internal quotation marks omitted). Nor does Galindo contend that the photograph was self-authenticating. See Fed. R. Evid. 902.

Galindo does contend that the District Court's refusal to admit the photograph wrongly precluded him from "develop[ing] th[e] line of questioning" concerning whether N.A.M. knew Galindo or his friend, which was "crucial to the defense theory of consent." But, that contention fails because "[the defendant's] . . . right to present a complete defense . . . do[es] not create an auxiliary right to have all . . . evidentiary rulings turn in his favor." United States v. Gemma, 818 F.3d 23, 35 (1st Cir. 2016).

IV.

We turn, then, to Galindo's challenge to his 600-month prison sentence, which he contends was procedurally and substantively unreasonable. We review a preserved claim of sentencing error for abuse of discretion. See United States v. Cortés-Medina, 819 F.3d 566, 569 (1st Cir. 2016). "[W]hen an objection is not preserved in the court below[,] . . . review is

for plain error." Id. (citing United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001)).

A.

Galindo contends that the District Court erred in failing to reconsider -- under 18 U.S.C. § 3553(a) -- Galindo's sentence in light of the information presented in the post-sentencing competency evaluation. But, Galindo did not raise this objection to his sentence below. We therefore review this challenge to the sentence only for plain error. See id. We find none.

Galindo points to no authority to support his assertion that a District Court must redo its § 3553(a) analysis sua sponte after having received the results of a post-sentencing competency evaluation. See United States v. Morosco, 822 F.3d 1, 21 (1st Cir. 2016) (explaining that "plain error" is "an 'indisputable' error by the judge, 'given controlling precedent'" (quoting United States v. Correa-Osorio, 784 F.3d 11, 22 (1st Cir. 2015))). Nor has Galindo shown that there is a "reasonable probability that, but for the error, the [D]istrict [C]ourt would have imposed a different, more favorable sentence." United States v. Mangual-Garcia, 505 F.3d 1, 15 (1st Cir. 2007) (internal quotation marks omitted).

The competency evaluation included more detailed medical information concerning Galindo's history of personality disorders,

ADHD, and various drug and alcohol abuse disorders. But, the District Court had already specifically noted at sentencing that Galindo had "abandoned school in seventh grade and has received no further educational or vocational training," "was classified under special education and diagnosed with attention deficit disorder with hyperactivity," "has a history of aggressive and impulsive behavior for which he has received treatment, but abandoned it at the age of 16," and "has a history of poly drug use since age 15." Galindo does not point to any specific mental health issue noted in the competency evaluation that had not been raised to the District Court by the PSR or the other materials that the District Court considered at sentencing. Cf. United States v. Alvarez-Cuevas, 210 F. App'x 23, 24 (1st Cir. 2007) (affirming the denial of a motion for a new PSR because the defendant had not "identified any new information not already considered by the sentencing judge which a new or revised PSR would have provided").

To the extent that Galindo means to argue that the District Court erred by not considering these mitigating features concerning his mental health at all in sentencing him, the record does not support that conclusion. In fact, the District Court explicitly stated that it "ha[d] considered the . . . sentencing factors as set forth in 18 U.S.C. § 3553(a)." See United States v. Santiago-Rivera, 744 F.3d 229, 233 (1st Cir. 2014) ("Such a statement is entitled to significant weight . . . ."); United

States v. Arroyo-Maldonado, 791 F.3d 193, 199 (1st Cir. 2015) (same).

The District Court did not expressly reference 18 U.S.C. § 3553(a)(2)(D) in its balancing of the § 3553(a) factors. But, "we do not require an express weighing of mitigating and aggravating factors or that each factor be individually mentioned." United States v. Lozada-Aponte, 689 F.3d 791, 793 (1st Cir. 2012) (citing United States v. Arango, 508 F.3d 34, 46 (1st Cir. 2007)).

Finally, to the extent that Galindo means to argue that the District Court erred in not assigning enough weight to his mental health history, he "face[s] an uphill battle." United States v. Caballero-Vázquez, 896 F.3d 115, 120 (1st Cir. 2018). "Decisions [that involve weighing the § 3553(a) factors] are within the sound discretion of sentencing courts, and we 'will not disturb a well-reasoned decision to give greater weight to particular sentencing factors over others.'" Id. (quoting United States v. Santini-Santiago, 846 F.3d 487, 492 (1st Cir. 2017)) (alteration in original).

Here, the record shows that the District Court found the aggravating factors -- specifically, Galindo's criminal history, "the violence inflicted upon the victims," and "the nature and circumstances of the offense" -- to be more compelling than the mitigating factors that it previously had noted. See id. at 121;

United States v. Martins, 413 F.3d 139, 154 (1st Cir. 2005). Thus, we conclude that "the sentencing transcript, read as a whole, evinces a sufficient weighing of the section 3553(a) factors." United States v. Dávila-González, 595 F.3d 42, 49 (1st Cir. 2010).

B.

Galindo separately contends that the sentence imposed was unreasonable because the District Court failed to account for "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Galindo did not make this particular objection below, despite the fact that his co-defendant had been sentenced a full year before him. We therefore review for plain error. See Cortés-Medina, 819 F.3d at 569.

"We have said that § 3553(a)(6) is primarily concerned with national disparities," but we will also "examine[] arguments . . . that a sentence was substantively unreasonable because of the disparity with the sentence given to a co-defendant." United States v. Reverol-Rivera, 778 F.3d 363, 366 (1st Cir. 2015) (citing Dávila–González, 595 F.3d at 49; United States v. Mateo–Espejo, 426 F.3d 508, 514 (1st Cir. 2005)). Here, Galindo argues that the District Court erred in giving him a 204-month prison sentence for Counts One, Two, Three, and Five because his co-defendant Morales received only a 93-month prison sentence for Counts One and Two.

We "have routinely rejected disparity claims" where "complaining defendants . . . fail to acknowledge material differences between their own circumstances and those of their more leniently punished confederates." Reyes-Santiago, 804 F.3d at 467; see also United States v. Rivera-Gonzalez, 626 F.3d 639, 648 (1st Cir. 2010). Here, "only [Galindo] went to trial, while [Morales] . . . pleaded guilty," United States v. Bedini, 861 F.3d 10, 21-22 (1st Cir. 2017); see also United States v. Mena-Robles, 4 F.3d 1026, 1035 n.9 (1st Cir. 1993), Galindo had a higher Criminal History Category than Morales, see United States v. Graciani-Febus, 800 F.3d 48, 52 (1st Cir. 2015) (citing United States v. Pierre, 484 F.3d 75, 90 (1st Cir. 2007)); United States v. Saez, 444 F.3d 15, 18 (1st Cir. 2006), and Galindo was sentenced for more serious offense conduct than Morales,[6] see Mena-Robles, 4 F.3d at 1035 n.9; United States v. Butt, 955 F.2d 77, 90 (1st Cir. 1992). Yet, Galindo does not adequately account for these "material differences" in pressing his challenge. Reyes-Santiago, 804 F.3d at 467.

[6] Morales's sentence encompassed only his participation in the first carjacking and the lesser included offense of carrying and using a firearm in relation to a crime of violence. In contrast, Galindo's sentence encompassed the more serious offense of brandishing a firearm in relation to a crime of violence as well as his participation in both the first and second carjackings, the resulting bodily harm inflicted by him in sexually assaulting N.A.M., and the felon-in-possession offense.

V.

For the foregoing reasons, we affirm Galindo's convictions and sentence.

No. _____

In The Supreme Court of the United States

GABRIEL GALINDO-SERRANO

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

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APPENDIX C – Judgment – U.S. District Court for the District of Puerto Rico July 6, 2016

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

JUDICIAL DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA
v.
Gabriel GALINDO-SERRANO

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:14-CR-00456-002 (PG)

USM Number: 44282-069

AFPD Victor J. Gonzalez-Bothwell, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) 1, 2, 3, 4, and 5 on January 15, 2016
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 2119(1), and 2	Taking of a motor vehicle by force, intimidation with the intent to cause death or serious bodily harm, and aiding and abetting.	June 16, 2014	One (1)
18 USC § 924(c)(1)(A)(ii)	Use of a Firearm During and in Relation to a Crime of Violence, and aiding and abetting.	June 16, 2014	Two (2)
18 USC § 2119(2)	Carjacking by force and intimidation, resulting in serious bodily	July 8, 2014	Three (3)

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 6, 2016
Date of Imposition of Judgment

S/ Juan M. Perez-Gimenez
Signature of Judge

Juan M. Perez-Gimenez Senior, U.S. District Judge
Name and Title of Judge

July 6, 2016
Date

DEFENDANT: Gabriel GALINDO-SERRANO
CASE NUMBER: 3:14-CR-00456-002 (PG)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
	injury, that is sexual assault.		
18 USC § 924(c)(1)(A)(ii) & 2	Use of a Firearm During and in Relation to a Crime of violence.	July 8, 2014	Four (4)
	Carrying, Use and Brandishing of a Firearm during and in relation to a crime of violence.		
18 USC § 922(g)(1)(a)	Prohibited person in possession of a firearm.	July 8, 2014	Five (5)

DEFENDANT: Gabriel GALINDO-SERRANO
CASE NUMBER: 3:14-CR-00456-002 (PG)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 months as to Counts 1, 3, and 5, to be served concurrently with each other, but consecutively to 84 months of imprisonment as to Count 2 and consecutively to 396 months of imprisonment as to Count 4 for a total imprisonment term of 600 months.

☑ The court makes the following recommendations to the Bureau of Prisons:

It is recommended that this defendant be designated to FCI Loretto, PA to serve the term of imprisonment. Before designation is made, the defendant shall be sent to FMI Butner in order that a mental evaluation be performed.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Gabriel GALINDO-SERRANO
CASE NUMBER: 3:14-CR-00456-002 (PG)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

3 years as to counts 1, 3, and 5, and 5 years as to counts 2, and 4 to be served concurrently with each other. Under the following terms and conditions.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Gabriel GALINDO-SERRANO
CASE NUMBER: 3:14-CR-00456-002 (PG)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in an approved mental health treatment program for evaluation including a psychosexual evaluation and/or treatment services determination. If deemed necessary, the treatment will be arranged by the officer in consultation with the treatment provider; the modality, duration, and intensity of treatment will be based on the risks and needs identified. The defendant will contribute to the costs of services rendered by means of co-payment, based on his ability to pay or the availability of third party payment.

2. The defendant shall participate in transitional and reentry support services, including cognitive behavioral treatment services, under the guidance and supervision of the Probation Officer. The defendant shall remain in the services until satisfactorily discharged by the service provider with the approval of the Probation Officer.

3. The defendant shall participate in an approved substance abuse monitoring and/or treatment services program. The defendant shall refrain from the unlawful use of controlled substances and submit to a drug test within fifteen (15) days of release; thereafter, submit to random drug testing, no less than three (3) samples during the supervision period and not to exceed 104 samples per year accordance with the Drug Aftercare Program Policy of the U.S. Probation Office approved by this Court.

4. The defendant shall participate in a program or course of study aimed at improving educational level and/or complete a vocational training program. In the alternative, he shall participate in a job placement program recommended by the Probation Officer.

5. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.

6. The defendant shall submit to a search of his person, property, house, residence, vehicles, papers, computer, other electronic communication or data storage devices or media, and effects (as defined in Title 18, U.S.C., Section 1030(e)(1)), to search at any time, with our without a warrant, by the probation officer, and if necessary, with the assistance of any other law enforcement officer (in the lawful discharge of the supervision functions of the probation officer) with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The probation officer may seize any electronic device which will be subject to further forensic investigation/analyses. Failure to submit to such a search and seizure, may be grounds for revocation. The defendant shall warn any other residents or occupants that their premises may be subject to search pursuant to this condition. In consideration of the Supreme Court's ruling in Riley v. California, the court will order that any search of the defendants phone by probation, while the defendant is on supervised release, be performed only if there is reasonable articulable suspicion that a specific phone owned or used by the defendant contains evidence of a crime or violation of release conditions, was used in furtherance of a crime, or was specifically used during the actual commission of a crime.

7. The defendant shall cooperate in the collection of a DNA sample as directed by the Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code Section 3563(a)(9).

8. Pursuant to the provisions of Title 18, U.S. Code, Section 3663, the Court imposed an order of restitution. Restitution is ordered to be paid to victim N.A.M, in the amount of $ 19,100, and to the other victims M.R.N. and J.F.N., pending receipt. Restitution payments are payable forthwith and directly to the U.S. Clerk of Court, District of Puerto Rico for eventual transfer to the victim which are to be identified by the Assistant U.S. Attorney's Office. If the defendant believes that he is unable to make restitution, he must submit a detailed financial affidavit to the court within thirty (30) days for further consideration on the restitution order imposed.

9. The defendant shall forfeit to the United States any firearms and ammunition involved or used in the commission of the offense, pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

DEFENDANT: Gabriel GALINDO-SERRANO
CASE NUMBER: 3:14-CR-00456-002 (PG)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 500.00	$ 0.00	$ 19,100

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
N.A.M.		$19,100.00	
M.R.N.			
J.F.N		Not determined	
		Not determined	

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Gabriel GALINDO-SERRANO
CASE NUMBER: 3:14-CR-00456-002 (PG)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 500.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
Since the defendant was convicted for violations of Title 18, United States Code, Section 2119(1) and 924(c), set forth in Counts Two and Four of the Indictment, he shall forfeit to the United States any firearms and ammunition involved or used in the commission of the offense, pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461 (c).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

No. _____

In The Supreme Court of the United States

GABRIEL GALINDO-SERRANO

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

COVER PAGE

APPENDIX D – Order – 1st Cir. Court of Appeals - Denying Petition for Rehearing En Banc – July 19, 2019

United States Court of Appeals
For the First Circuit

No. 16-2505

UNITED STATES

Appellee

v.

GABRIEL GALINDO-SERRANO

Defendant - Appellant

Before

Howard, Chief Judge,
Torruella, Lynch, Lipez,
Thompson, Kayatta and Barron,

Circuit Judges.

ORDER OF COURT

Entered: July 19, 2019

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Mauricio Hernandez Arroyo
Mariana E. Bauza Almonte
Kelly Zenon-Matos
Daynelle Maria Alvarez-Lora
Billie Kathryn Debrason