

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GIEZI ARCE-CALDERON

PETITIONER

v.

UNITED STATES OF AMERICA

RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

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IN SAN JUAN, PUERTO RICO
July 1, 2020

ATTORNEY FOR PETITIONER
Giezi Arce-Calderon

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GIEZI ARCE CALDERON
PETITIONER

v.

UNITED STATES OF AMERICA
RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Giezi Arce-Calderon, pursuant to 18 United States Code 3006A(d)(7) and Rule 39 of the United States Supreme Court, asks leave to file the attached Writ of Certiorari without payment of costs, and to proceed *in forma pauperis*. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, Thomas Trebilcock-Horan, the undersigned counsel, was appointed to represent the Petitioner in the United States Court of Appeals for the First Circuit. Further, at the district court level he was also represented by CJA Attorney (Raymond Sanchez-Maceira).

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 1st day of July, 2020.

/S/Thomas Trebilcock Horan
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IN SAN JUAN, PUERTO RICO
July 1st, 2020

ATTORNEY FOR PETITIONER
Giezi Arce-Calderon

QUESTION PRESENTED

A. Whether the sentence imposed on Mr. Arce is substantively unreasonable, despite being a guideline sentence of six months, where the parties agreed to a lower end of the guideline sentence of zero months.

LIST OF PARTIES

All Parties appear in the caption of the case on the cover page.

All Parties do not appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

LIST OF PROCEEDINGS BELOW

I. United States District Court for the District of Puerto Rico

Crim. Case No. 16-199 (CCC)

United States v. Giezi Arce-Calderon

Judgment was issued on February 22, 2018.

II. United States Court of Appeals, First Circuit

Appeal Case No. 18-1193

United States v. Giezi Arce-Calderon

Judgment affirming the District Court was issued on April 1, 2020.

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BASIS FOR JURISDICTION

Petitioner Mr. Giezi Arce-Calderon (hereinafter “Mr. Arce”) seeks review from the April 1, 2020 judgment of the Court of Appeals for the First Circuit (“Court of Appeals”), in the case of *United States v. Giezi Arce-Calderon*, 18-1193. That judgment, reprinted at Appendix A to this Petition (“Pet. App.”) at P. 1, affirmed the District Court’s sentence, and states as follows: “[A]rce also argues that the sentence is unreasonable because the parties jointly recommended a sentence of zero months. Not so. We do not “accord any decretry significance to such non-binding recommendations – or even...require a sentencing court to explain why it decided to eschew those recommendations.” Mr. Arce believes the District Court should have considered the same.

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 3553(a), provides:

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing

Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

This case began on March 25, 2015, when a Criminal Complaint was filed against Mr. Arce. In broad terms, the complaint alleged that Puerto Rico Police Department (“PRPD”) officers performing a preventive patrol in Carolina, Puerto Rico, observed a white Toyota Corolla with tinted windows, which appeared to exceed the legal limits permitted for vehicle glass tinting under the Puerto Rico Vehicle and Transit Act. Suspecting such a violation, the officers stopped the vehicle and one officer proceeded to inspect its tags. There were three (3) occupants in the vehicle, Jose Cruz-Diaz (the driver), a female (the front side passenger) and Mr. Arce (the back seated passenger).

As the officer inspected the vehicle’s tags, he noticed a loaded pistol magazine near the driver’s seat. Thus, he proceeded to ask the driver if he had a firearm permit to carry the magazine. The driver responded by exiting the vehicle and stating that he did not have a driver’s license. A scuffle ensued, ending with the driver subdued and handcuffed behind the car. Meanwhile, another officer provided instructions to the female occupant and Mr. Arce with his firearm drawn. Ultimately, Mr. Arce was also arrested.

Upon searching the vehicle and Mr. Arce, the officers located two (2) loaded Glock pistols and a significant amount of marijuana and pills, all which were packaged for distribution. The pistols were: a (i) Glock, model 34, 9 mm caliber, serial number SCL608, and, a (ii) Glock, model 22, .40 caliber, bearing serial number NBB095. Both defendants carried two (2) magazines for each of their

pistols, both of which had been modified to fire automatically.

Once at the police station, one of the officers alleged that Mr. Arce, making reference to the Glock pistol attributable to him stated: “I was waiting for the opportunity, because I was going to make you feel the pressure of the powerful.” The officer concluded that “the powerful” meant that Glock pistol, because he asked Mr. Arce and the latter said “you know” and made a physical affirmative answer.

On March 30, 2016, a Grand Jury sitting in the District of Puerto Rico returned a three-count Indictment against Mr. Arce and his co-defendant. Counts One and Two alleged that Mr. Arce and the codefendants possessed firearms and/or machineguns in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 924(c)(1)(B)(ii). Count Three alleged that on or about March 25, 2016, Mr. Arce knowingly and intentionally possessed with intent to distribute a mixture containing a detectable amount of marijuana in violation of 21 U.S.C. § 841(a)(1).

The procedural track of the case was litigious from the start and Mr. Arce filed a motion to suppress all evidence seized upon the warrantless arrest and search of the white Toyota. After two (2) days of suppression hearings and engaging in simultaneous plea negotiations with the Government, Mr. Arce and his co-defendant struck a plea deal with the United States prior to the hearings concluding.

On June 30, 2017, a Change of Plea hearing took place and Mr. Arce pled guilty to Counts One and Three of the Indictment, pursuant to a Plea Agreement. Those counts were: (i) possessing a firearm in furtherance of a drug trafficking

crime in violation of 18 U.S.C. § 924(c)(1)(A); and, (ii) possessing with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). According to the version of facts stated during the Change of Plea Hearing, the arresting officers found a loaded black Glock pistol, Model 22, .40 caliber, with one round in the chamber, and two (2) magazines containing a total of forty-eight rounds of .40 caliber ammunition, and an assortment of packages of marijuana, along with paraphernalia and a gun clearing kit. On that same date, the Plea Agreement was entered to the record.

The Plea Agreement detailed that pursuant to (i) U.S.S.G. § 2K2.4(b), the guideline sentence for one convicted of violating 18 U.S.C. § 924(c)(1)(A), was equal to the statutory minimum term of imprisonment, *i.e.*, five years. However, the sentencing recommendation of the parties was the following: (i) considering the particular facts of the case, a sentence of between 84 and 108 month for Count One, regardless of Mr. Figueroa's Criminal History Category (CHC); and, (ii) "a term of imprisonment at the lower end of the applicable Guideline Sentencing Range for a total offense level of 4 when combined with defendant's [CHC] as determined by the court." The plea contained a waiver of appeal clause that would be triggered if sentenced to the recommended range of between 84 and 108 months for the firearm count and the lower end of the applicable guideline range for the drug count.

On August 16, 2017, the United States Probation Office ("USPO") filed a first version of the Pre-Sentence Investigation Report ("PSR"). And, on February 15, 2018, the USPO filed an Amended PSR. The Amended PSR mirrored the calculations of the parties as to Count One, that is, that the applicable guideline sentence

was the 5-year statutory minimum.

As to Count Three, it contained the following Offense Level Computation:

- Base Offense Level: The guideline for Title 21 U.S.C. § 841(b)(1)(D) offenses is found in U.S.S.G. § 2D1.1 of the guidelines. The base offense level for conspiracy to possess with intent to distribute less than one (1) kilogram of marihuana is 6 pursuant to U.S.S.G. § 2D1.1(c)(17);
- A 2-Level decrease, pursuant to U.S.S.G. § 3E1.1(a), for clearly demonstrating acceptance of responsibility;
- A Total Offence Level (“TOL”) of 4.

As to Mr. Arce’s criminal history points, the PSR indicated it was zero, finding that he had no prior convictions, although he had been arrested and charged on five (5) occasions between the years 2008 and 2016. All of those charges had been dismissed after a finding on the merits of no probable cause. Based on a TOL of 4 and a CHC of I, the Amended PSR determined that Mr. Arce’s guideline imprisonment range for Count Three was between 0 and 6 months.

That said, the Amended PSR did include a statement which Mr. Arce deemed unwarranted and untrue:

Arce-Calderon also told the PRPD agent that [he] remained watchful of him while the other agent was arresting Díaz-Cruz that “Yo estaba esperando la oportunidad, porque los iba a ser sentir la presión de la poderosa”, which means “I was waiting for the opportunity, because I was going to make you feel the pressure of the powerful”. A short time later, after the formal display of all items seize, the same agent picked up the Glock pistol that was next to Arce-Calderon and asked him if that was the “powerful” (poderosa) and Arce-Calderon responded “tu sabes”, which means “you know” and made a physical affirmative answer.

On August 21, 2017, Mr. Arce objected to those statements, denying that he had made them and arguing that they lacked indicia of reliability. Thus, it should be excluded. Ultimately, the court overruled that objection, ruling that it could consider such hearsay evidence at the time of sentencing and that the statements did provide sufficient indicia of reliability because they were memorialized in an affidavit supporting the Criminal Complaint in Mr. Arce's case.

Mr. Arce's Sentencing Hearing was held on February 22, 2018. At the time of sentencing, Mr. Arce's counsel again objected to the consideration of the statements regarding the "powerful," stating that the fact that the statement was contained in an affidavit did not make it reliable and Mr. Arce vehemently denied making such statement. The United States responded by discussing the statement in detail and arguing that it entailed reliable hearsay evidence which the court could consider at the time of sentencing.

The district court proceeded to correctly calculate the applicable statutory provisions, and noted that Mr. Arce had no prior convictions. The judge mentioned that Mr. Arce had been previously arrested on various occasions and that those charges had been dismissed. The Court then said that it had "also considered the other sentencing factors set forth in Title 18, United States Code section 3553(a)." It then proceeded to impose its sentence as follows:

THE COURT: Accordingly, it is the judgment of this Court that defendant be and is hereby committed to the custody of the Bureau of Prisons to be imprisoned for the term of 108 months as to Count 1 and 6 months as to Count 3, to be served consecutively to each other for a total term of imprisonment of 114 months.

Additionally, the district court imposed 5 years of supervised release upon Mr. Arce as to Count One and 3 years as to Count Three.

Mr. Arce appeal that Judgement and on April 1, 2020, the United States Court of Appeals for the First Circuit affirmed the same.

SUMMARY OF ARGUMENT

The district court was faced with a first-time offender with no criminal history, except for five (5) prior state level charges which had been dismissed. The parties had agreed on a variant sentence as to Count One, which took into consideration Mr. Arce's history and characteristics. Further, they agreed on a sentence as the "lower end" of the guideline range as to Count Three, which was related to marijuana charges. However, as to that last count, the district court imposed a sentence at the upper end of that guideline.

In sum, *and as is important for this Petition*, Mr. Arce was given an upward sentence as to Count Three based on what he believes was the district court's focus on the statement contained in the Amended PSR related to him "waiting for the opportunity" to "make [the officers] feel the pressure of the powerful," his machine gun according to the Amended PSR, since the court specifically mentioned that he posed a danger and treat to the safety of the community. That sentence imposed, 6 months over the parties' recommendation, is substantively unreasonable, and merits to be vacated, since the Court has already considered the pistol when sentencing him on Count 1.

ARGUMENTS

A. The Sentence imposed was substantively unreasonable

Mr. Arce believes that the district court erred when imposed a higher sentence than agreed upon by the parties due to considering the statement in the PSR related to him allegedly stating that he was “waiting for the opportunity” to “make [the officers] feel the pressure of the powerful,” in other words his machine gun. Said statement was unreliable, was objected to and should have been excluded.

Related to that alleged statement, it is noteworthy that the district court stated as following at the Sentencing hearing:

THE COURT: Considering that the defendant was found in possession of a machine gun at the time of his arrest after a traffic stop, as well as the capacity of the magazines that were seized in the vehicle, **the danger and the treat to the safety of the community that is posed by this defendant**, and the need to deter future criminal behavior of this nature by the defendant, the Court finds that a variant sentence on Count 1 is sufficient but not greater than necessary to meet objectives of punishment and of deterrence.

The district court did not directly state that it was imposing a sentence at the higher end of the guideline as to Count Three because of that statement, but it is reasonable to believe that it was considered in light of the fact that the district court issued an Order overruling Mr. Arce’s objection to the statement and the parties gave considerable attention to the issue during the sentencing hearing.

Deliberations by the sentencing judge are essential to ensure that the sentence is the result of an individual assessment of the defendant and the particulars of the case. *United States v. Madera-Ortiz*, 637 F.3d 26, 29-30 (1st Cir. 2011). This Court

has stated that “[i]n reviewing a sentence for substantive reasonableness, we consider the district court’s written statement of reasons, the district court’s oral explanation of the sentence, and implications that we can fairly draw through a comparison of the PSR’s recommendations and the actual sentence imposed.”

United States v. Glover, 558 F. 3d 71, 82 (1st Cir. 2009).

Mr. Arce recognizes the universe of sentences that are possible, and the authority of the district court to fashion what it considers to be the adequate punishment. However, it is respectfully submitted that the district court failed to adequately consider the arguments that were offered in favor of the 0-month months sentence recommended by the parties.

An individualized assessment requires the district court to, “consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Gall v. United States*, 552 U.S. 38, 51 (2007).

A review of the transcript shows that the district court focused inordinately on the firearms which were seized and possibly on the statements contained in the affidavit supporting the Criminal Complaint when imposing sentence as to Count Three, despite having addressed the matter of danger to the community as related to Count One.

Further, when addressing the nature and circumstances of the offense, the district court focused on the types of firearms, yet, failed to give weight to the fact that Count Three was merely a narcotics charge related to marihuana. Moreover, that the parties had specifically sought a sentence at the lower end to the applicable guideline

range, which amounted to zero months of imprisonment. Further, the district court did not offer any explanation as to the fact that the 108-month sentence imposed as to Count One, which took onto account the seriousness of Mr. Arce's conduct related to firearms. Such term of imprisonment, for a young man with no prior convictions, was considerable.

In sum, the district court failed to make an individualized assessment of the relevant sentencing factors and instead gave undue weight to the statements which had been challenged. Considering the particularities of this case. Those circumstances made the sentence imposed by the district court and then affirmed by the First Circuit Court of Appeals unreasonable, and it should be vacated.

CONCLUSION

It is not unreasonable to expect to not be forever defined by the worst moments of one's life. There are of course situations which might make this difficult, such as a particularly prolific criminal record, or a particularly heinous crime. But that is not Mr. Arce's case. A guideline sentence at the lower end of the guideline range as to Count Three would have been "sufficient, but not greater than necessary, to comply with" the purposes of sentencing. The district court erred when it imposed a sentence of 6-months for said count, rather than the term recommended by the parties. Thus, the sentence is substantively unreasonable and should be vacated.

WHEREFORE, Mr. Arce respectfully requests that his 6-month sentence as to Count Three be vacated and the case remanded for resentencing.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 1st day of July, 2020.

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CERTIFICATE OF CJA PANEL MEMBERSHIP

I, Thomas Trebilcock-Horan, certify that I am a member of the United States District Court for the District of Puerto Rico and the Court of Appeals for the First Circuit's CJA panels.

/S/Thomas Trebilcock Horan
THOMAS TREBILCOCK-HORAN, ESQ.
ATTORNEY AT LAW – CJA APPOINTED

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit was mailed on this 1st day of July, 2020, to the following:

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IN THE SUPREME COURT OF THE UNITED STATES

GIEZI ARCE-CALDERON
PETITIONER

v.

UNITED STATES OF AMERICA
RESPONDENT

DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I declare under penalty of perjury under the laws of the United States of America that the (i) Motion for Leave to Proceed *In Forma Pauperis* and the (ii) Petition for Writ of Certiorari filed on behalf of Mr. Giezi Arce-Calderon was mailed to the Clerk's Office of the United States Supreme Court in Washington, DC, postage and fees paid, at 1 First St., NE, Washington, DC 20543.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 1st day of July, 2020.

/S/Thomas Trebilcock Horan
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APPENDIX

- 1.** United States Court of Appeals for the First Circuit's Opinion dated April 1, 2020;
- 2.** United States Court of Appeals for the First Circuit's Judgment dated April 1, 2020; and,
- 3.** United Stated District Court for the District of Puerto Rico's Judgment dated February 22, 2018.

United States Court of Appeals For the First Circuit

No. 18-1193

UNITED STATES,

Appellee,

v.

GIEZI ARCE-CALDERON,

Defendant, Appellant.

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

[Hon. Carmen Consuelo Cerezo, U.S. District Judge]

Before

Howard, Chief Judge,
Selya and Lynch, Circuit Judges.

Thomas Trebilcock-Horan and Trebilcock & Rovira, LLC on brief
for appellant.

Antonio L. Perez-Alonso, Assistant U.S. Attorney, Rosa Emilia
Rodríguez-Vélez, United States Attorney, and Mariana E. Bauzá-
Almonte, Assistant U.S. Attorney, Chief, Appellate Division, on
brief for appellee.

April 1, 2020

LYNCH, Circuit Judge. Giezi Arce-Calderon ("Arce")

pledged guilty to possession of a firearm in furtherance of a drug trafficking crime and possession with intent to distribute a controlled substance. The district court sentenced Arce to 108 months' imprisonment for the firearm offense and an additional six months' imprisonment for the controlled substance offense.

Arce appeals only his sentence for the controlled substance offense. He argues that the sentence is procedurally unreasonable because the district court overruled his objection to a statement included in the Amended Pre-Sentence Investigation Report ("PSR"). Arce also argues that the sentence is substantively unreasonable because, in his view, the court did not consider certain information which showed a lower sentence would have sufficed. We find no error and so affirm.

I.

A. Facts

On March 25, 2016, in Carolina, Puerto Rico, two Puerto Rico Police Department ("PRPD") officers stopped a car for violating a traffic law. One of the officers saw a pistol near the driver and arrested him when he did not produce a weapons permit for the pistol.

The officers then ordered Arce, the backseat passenger, to step out of the car. When Arce got out of the car, the officers saw another pistol where Arce had been sitting. The officers

arrested Arce and found an extended magazine in his pocket. When the PRPD later searched the car at the police station, they found a five-gallon bucket filled with over 300 containers of marijuana.¹ The PRPD also discovered that both pistols had been converted into machineguns and so could fire automatically.

B. Procedural History

On March 30, 2016, a grand jury indicted Arce for possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) ("Count 1"); possession of a machinegun in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(B)(ii) ("Count 2"); and possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1) ("Count 3").

On June 30, 2017, Arce pleaded guilty to Counts 1 and 3. In exchange, the government agreed to dismiss Count 2. The plea agreement provided that Arce and the government would recommend a different upwardly variant sentence for Count 1. The agreement also provided that they would together recommend for Count 3 a

¹ These containers were "twenty two (22) assorted size pressure bags similar to zip-lock-type bags . . . , fifty five (55) small baggies . . . , eighty five (85) small cylindrical containers . . . [and] one hundred and fifty nine (159) medium size cylindrical containers." Law enforcement also found eighteen white pills, drug paraphernalia, and a gun cleaning kit in the car.

sentence "at the lower end of the applicable Guideline Sentencing Range."

The PSR included information from the affidavit supporting the criminal complaint against Arce that, after his arrest, Arce had told the officer guarding him that: "'Yo estaba esperando la oportunidad, porque los iba a ser sentir la presion de la poderosa', which means 'I was waiting for the opportunity, because I was going to make you feel the pressure of the powerful.'" When asked whether he was referring to the seized gun, Arce responded "'tu sabes', which means 'you know' and [Arce then] made a physical affirmative answer."

Arce objected to, and denied making, this statement. He argued that this statement was not "relevant conduct" and lacked sufficient indicia of reliability.

On February 22, 2018, the district court overruled Arce's objection. It ruled that the statement was not being used as "relevant conduct" and had sufficient indicia of reliability. The district court then calculated Arce's guidelines range as sixty months' imprisonment for Count 1 and zero to six months' imprisonment for Count 3. The court stated that it had "reviewed the applicable advisory guideline calculations and . . . ha[d] considered the 18 [U.S.C. §] 3553(a) factors." The district court considered the nature of the weapons seized from the car and the threat Arce posed to the community. It also considered that Arce

was twenty-eight years old, had two daughters, had obtained a high school diploma, and, at the time of his arrest, worked as a refrigeration technician. The court stated that Arce had a history of substance abuse, had no prior convictions, but did have many prior arrests.² The court sentenced Arce to 108 months' imprisonment for Count 1 and six months' imprisonment for Count 3, with the terms to be served consecutively. This appeal followed.

II.

On appeal, Arce challenges only his sentence for Count 3.³

A. Standard of Review

Our review of a sentencing appeal is bifurcated. "[W]e first determine whether the sentence imposed is procedurally reasonable and then determine whether it is substantively reasonable." United States v. Abreu-García, 933 F.3d 1, 4 (1st Cir. 2019) (alteration in original) (quoting United States v. Ruiz-Huertas, 792 F.3d 223, 226 (1st Cir. 2015)). We review for abuse of discretion the procedural reasonableness of Arce's sentence. United States v. Dávila-González, 595 F.3d 42, 47 (1st Cir. 2010).

² Arce does not argue, and the record does not indicate, that the district court improperly relied on Arce's past arrests.

³ Arce's plea agreement contains a Waiver of Appeal. This waiver bars an appeal of a Count 1 sentence "within the range of 84 to 108 months" and a Count 3 sentence at "the lower end of the applicable guideline range." In consequence, the Waiver barred Arce from appealing his Count 1 sentence.

We assume favorably to Arce that abuse of discretion review applies to his substantive reasonableness claim.⁴ United States v. Hinkley, 803 F.3d 85, 92 (1st Cir. 2015).

B. Procedural Reasonableness

Arce argues on appeal that his sentence is procedurally unreasonable because the district court should have excluded the statement in the PSR that Arce was "'waiting for the opportunity' to 'make [the officers] feel the pressure of the powerful,' that is, Arce's machinegun.⁵ This argument lacks merit.

"Generally, a PSR bears sufficient indicia of reliability to permit the district court to rely on it at sentencing." United States v. Cyr, 337 F.3d 96, 100 (1st Cir. 2003) (quoting United States v. Taylor, 277 F.3d 721, 724 (5th Cir. 2001)). If a defendant objects to information in the PSR, he or she must provide "countervailing proof." Id. If the

⁴ The parties dispute whether abuse of discretion or plain error review applies to the substantive reasonableness challenge. But we need not address this issue, because Arce's challenge fails under either standard. See United States v. Gierbolini-Rivera, 900 F.3d 7, 14-15 (1st Cir. 2018); see also Holguin-Hernandez v. United States, 140 S. Ct. 762, 767 (2020) (Alito, J., concurring) (stating that, although "a defendant who requests a specific sentence during a sentencing hearing need not object to the sentence after its pronouncement in order to preserve a challenge to its substantive reasonableness (*i.e.*, length) on appeal," the Court has not decided "what is sufficient to preserve any 'particular' substantive-reasonableness argument").

⁵ Arce does not challenge the district court's calculation of the applicable guidelines range.

defendant's objection is "merely rhetorical," the district court may rely on the contents of the PSR. Id.

Arce has provided no countervailing proof that the statement in the PSR was unreliable. He neither offered to testify nor provided an affidavit regarding the statement. Arce merely denied in his written objection that he made the statement, and claims that the PSR does not state how or from whom the affiant learned of the statement.

Moreover, the district court did not abuse its discretion in concluding that the contested statement bore sufficient indicia of reliability. First, as the district court stated, the statement was "memorialized in the affidavit attached to the Complaint . . . , which was made contemporaneous to the events."⁶ See United States v. Phaneuf, 91 F.3d 255, 262 (1st Cir. 1996) (holding that the district court properly relied on the "sworn affidavit" of the investigating officer at sentencing). Second, the statement was detailed. See United States v. Rodriguez, 336 F.3d 67, 71 (1st Cir. 2003) (approving of a district court's reliance at sentencing on an "uncorroborated" proffer that was "thorough and replete with details"). Finally, the affidavit

⁶ A district court may consider hearsay at sentencing as long as it "has sufficient indicia of trustworthiness to warrant a finding of probable accuracy." United States v. Rodriguez, 336 F.3d 67, 71 (1st Cir. 2003).

states the source of the affiant's knowledge: "discussions and interviews of other federal, state and local law enforcement agents."⁷

C. Substantive Reasonableness

Arce argues that his sentence was substantively unreasonable in that his sentence on Count 3 should have been zero months, and so the cumulative sentence of 114 months was too great. He argues the sentence was too much for a young man with no prior convictions.

"A sentence is substantively reasonable when . . . the sentencing court [gives] a plausible sentencing rationale and reached a defensible result." Abreu-García, 933 F.3d at 6 (internal quotation marks omitted) (quoting United States v. Rodríguez-Adorno, 852 F.3d 168, 177 (1st Cir. 2017)).

After stating that it considered all of the § 3553(a) sentencing factors, the district court gave a plausible sentencing rationale: that Arce posed a "danger and . . . threat to the safety of the community" and the sentence must "deter future criminal behavior of this nature by [Arce]."⁸ The court then reached a defensible result: a within-guidelines sentence of six months' imprisonment. See United States v. Cortés-Medina, 819

⁷ We need not address the government's argument that the district court did not rely on the contested statement because any consideration of the statement by the district court was proper.

F.3d 566, 572 (1st Cir. 2016) ("[A] reviewing court may apply 'a presumption of reasonableness' to a within-the-range sentence." (quoting Rita v. United States, 551 U.S. 338, 347, 351 (2007))).⁸

Arce also argues that the sentence is unreasonable because the parties jointly recommended a sentence of zero months. Not so. We do not "accord any decretory significance to such non-binding recommendations -- or even . . . require a sentencing court to explain why it decided to eschew those recommendations." Cortés-Medina, 819 F.3d at 573. Further, Arce argues that the district court put too much weight on the possession of a firearm even though Count 3 was a controlled substance offense. But the court properly considered Arce's possession of a firearm as part of the nature and circumstances of the offense, see 18 U.S.C. § 3553(a)(1), and the weighing of the relevant sentencing factors is largely within the broad discretion of a sentencing court, see United States v. Clogston, 662 F.3d 588, 593 (1st Cir. 2011).

In fact, in reaching this result, the district court did consider the evidence Arce claims supports a zero-month sentence for Count 3 and found it insufficient to warrant a lower sentence.

⁸ To overcome this presumption, Arce "must adduce fairly powerful mitigating reasons and persuade us that the district court was unreasonable in balancing pros and cons." United States v. Llanos-Falero, 847 F.3d 29, 36 (1st Cir. 2017) (quoting Cortés-Medina, 819 F.3d at 572). Arce has not done so.

It was not substantively unreasonable for the court to impose some time for the controlled substance offense.

III.

Affirmed.

United States Court of Appeals For the First Circuit

No. 18-1193

UNITED STATES,

Appellee,

v.

GIEZI ARCE-CALDERON,

Defendant, Appellant.

JUDGMENT

Entered: April 1, 2020

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Giezi Arce-Calderon's sentence is affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:

Mariana E. Bauza Almonte
Antonio Perez-Alonso
Thomas J. Trebilcock-Horan
Giezi Arce-Calderon

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA)	JUDGMENT IN A CRIMINAL CASE
v.)	
Giezi Arce-Calderon)	Case Number: 3:16-cr-00199-02 (CCC)
)	USM Number: 48761-069
)	Raymond L. Sanchez-Maceira
)	Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One (1) and Three (3) of the Indictment on 9/13/2017.

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

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:924(c)(1)(A)	POSSESSION OF FIREARMS IN FURTHERANCE OF DRUG TRAFFICKING OFFENSE	3/25/2016	1
21:841(a)(1) and 841(b)(1)(D)	POSSESSION WITH INTENT TO DISTRIBUTE CONTROLLED SUBSTANCES: MARIJUANA	3/25/2016	3

The defendant is sentenced as provided in pages 2 through 8 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) remaining 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.

2/22/2018
Date of Imposition of Judgment

S/ Carmen C. Cerezo
Signature of Judge

Carmen C. Cerezo, U.S. District Judge
Name and Title of Judge

2/22/2018
Date

DEFENDANT: Giezi Arce-Calderon
CASE NUMBER: 3:16-cr-00199-02 (CCC)

IMPRISONMENT

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

One hundred and eight (108) months as to Count One and six (6) months as to Count Three, to be served consecutively to each other for a total of one hundred and fourteen (114) months.

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

1. The defendant be designated to an institution in Miami, FL.

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 _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Giezi Arce-Calderon

CASE NUMBER: 3:16-cr-00199-02 (CCC)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Five (5) years as to Count One and three (3) years as to Count Three, to be served concurrently with each other.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must 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 the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: Giezi Arce-Calderon
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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Giezi Arce-Calderon
CASE NUMBER: 3:16-cr-00199-02 (CCC)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not commit another Federal, state, or local crime, and shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court.
2. The defendant shall not unlawfully possess controlled substances.
3. The defendant shall refrain from possessing firearms, destructive devices, and other dangerous weapons.
4. 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. If deemed necessary, the treatment will be arranged by the officer in consultation with the treatment provider. The defendant is required to contribute to the cost of services rendered (co-payment) in an amount arranged by the Probation Officer based on his ability to pay or availability of third party payments.
5. 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.
6. The defendant shall perform three hundred (300) hours of unpaid community service work during the supervision period at a private non-profit or public facility to be selected and under such arrangements as the Probation Officer of the court may determine.
7. 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.
8. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.
9. The defendant shall submit his person, property, house, vehicle, papers, computers (as defined in Title 18 U.S.C. Section 1030(e)(1)), other electronic communication or data storage devices, and media, to a search conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other residents or occupants that the premises may be subject to searches pursuant to this condition.
10. 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).

DEFENDANT: Giezi Arce-Calderon
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CRIMINAL MONETARY PENALTIES

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

Assessment JVTA Assessment* Fine Restitution
TOTALS \$ 200.00 \$ \$ \$

- 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.

- 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:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** 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: Giezi Arce-Calderon
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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 \$ 200.00 due immediately, balance due

not later than _____, or
 in accordance with 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 the period of 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:
See page no. 8.

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

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ADDITIONAL FORFEITED PROPERTY

1. A black-colored Glock pistol, model 22, .40 caliber, bearing serial number NBB095.
2. A 29 round capacity .40 caliber extended magazine.
3. A 22-round capacity magazine.
4. A 9 mm 31 round capacity magazine.
5. A black-colored Glock, model 34, caliber 9mm with serial number SCL608.
6. A 17-round capacity magazine.
7. One hundred and twenty five (125) rounds of ammunition.
8. All monies and/or property constituting, or derived from, proceeds obtained directly or indirectly, as a result of the offense, including approximately \$2,166.00 in United States currency.