No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Eric De Jesus-Torres,
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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Gall v. United States* 536 U.S. 38, 51 (2007) and *Rita v. United States*, 551 U.S. 338, 347 (2007) this Court held that sentencing courts must make an individualized assessment based on the facts presented. Furthermore, the judge "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentence."

In *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) the Court further elaborated, citing *Rita,* that a "district court's decision to vary from the advisory guideline may attract the greatest respect when the sentencing judge finds a particular case 'outside the heartland' to which the Commission intends individual Guidelines to apply".

The logical consequence of the above opinions is that when a defendant presents a properly preserved *Kimbrough* argument the sentencing court must evaluate the same individually, deny or accept the same and explain the chosen sentence to allow for meaningful appellate review.

Here the district court failed to explain a rejection of the arguments made by Mr. De Jesus-Torres for the sentencing court to follow the parties' recommendation. Then the First Circuit assumed, without any discussion of the record, that the sentencing court had evaluated and rejected Mr. De Jesus-Torres' argument under *Kimbrough*. This action by the First Circuit Court of Appeals is contrary to the letter and spirt of *Gall* and *Kimbrough* and thus, requires that the Judgment issued by said court be vacated.

The question is presented as follows:

Whether a sentencing court must provide a reasonable explanation, on the record, as to why it is not considering a sentencing factor, particularly an argument advanced by a defendant during sentencing to reject the automatic application of a sentencing enhancement based on policy considerations.

STATEMENT OF RELATED PROCEEDINGS

This case commenced with the filing of an indictment in *United States v. Erick De Jesus-Torres*, 20-026 (FAB). An appeal followed in *United States v. Erick De Jesus-Torres*, 21-1916.

PARTIES TO THE PROCEEDING

Erick De Jesus-Torres, petitioner on review, was the movant/appellant below.

The United States of America, respondent on review was the respondent/appellee below.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Erick De Jesus-Torres respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit, which denied his direct appeal of judgment imposed by the United States District Court for the District of Puerto Rico

JUDGMENT BELOW

The opinion of the United States Court of Appeals for the First Circuit affirming the conviction and sentence of the Petitioner was handed down on March 31, 2023. The opinion can be found at *United States v. Erick De Jesus-Torres*, 21-1916 slip opinion of March 31, 2023. Also see published opinion at *United States v. De Jesus-Torres*, 64 F.4th 33 (1st. Cir. 2023). The Slip Opinion is attached as **Appendix A**.

JURISDICTION

The Petitioner requests review of the Judgment of the United States Court of Appeals for the First Circuit entered on March 31, 2023. Accordingly, the Petition is timely filed within 90 days as required by Rule 13, Rules of the Supreme Court.

This Court has statutory jurisdiction under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This Petition concerns the interpretation of sentencing factors contained at 18 U.S.C. §3553(a). The relevant portions of the referenced statute are attached in **Appendix B**.

STATEMENT OF THE CASE

This Petition seeks review of the United States First Circuit Court of Appeals holding that rejected Mr. De Jesus-Torres' request for review of the sentence imposed by the district court, which ignored the repeated requests made by him to consider the elements of his specific participation in certain carjackings for a variance sentence under this High Court's holding in *Kimbrough v. United States*, 552 U.S. 85 (2007). The district court, as well as the First Circuit Court, refused to properly apply the holding in *Kimbrough* by refusing to consider why the upward firearm enhancement, not included in the plea agreement, unfairly overrepresented Mr. De Jesus-Torres' relevant conduct and thus increased his sentencing exposure beyond to what was agreed by the parties in the plea agreement in this case.

While the parties agreed to jointly recommend a sentence

pursuant to a Total Offense Level (TOL) of 24, the first amended Presentence Investigation Report (PSR) provided the district court a recommendation to sentence Mr. De Jesus-Torres to a TOL of 28. (See slip opinion at Pages 4-5). The gist of the controversy regarding the increase in the TOL in the amended PSR was the application of a four-level enhancement for the "use of a dangerous weapon" under U.S.S.G. §2B3.1(b)(2)(D). (**Slip Opinion at Page 5**).

As Mr. De Jesus-Torres explained in his brief before the First Circuit Court, "the automatic application of a weapon enhancement [by the district court"] as a result of the use of a pellet gun by other participants in the carjacking events significantly increased Mr. De Jesus-Torres' sentencing guideline exposure and allowed the sentencing judge to impose a 50% higher sentence than the one recommended by all parties to the case". (**See Mr. De Jesus-Torres' brief at page 23**).

Mr. De Jesus-Torres further explained that the guidelines failed "to take into consideration multiple issues surrounding the use of the pellet gun, like, for example, who obtained the gun, who brought it to the site of the carjacking events, and who brandished it". (**Id**.).

The First Circuit rejected Mr. De Jesus-Torres' *Kimbrough*

argument incorrectly finding that the district court had "found that the facts adumbrated in the amended PSI Report (PSR) brought this case squarely within the purport of the enhancement." (Slip Opinion at Page 12). The First Circuit further explained that the district court logic was unassailable as "[i]n determining that the dangerous weapon enhancement should apply equally to those who aid and abet the use of a dangerous weapon, the Sentencing Commission took aim at the precise type of conduct that the defendant now seeks to place on the outer periphery of the enhancement."

While the First Circuit concludes by recognizing Mr. De Jesus-Torres' argument that the district court had discretion to vary in response to a policy argument, it concludes that the district court was not forced to do so. (**Slip Opinion 12-13**). The evident problem with this holding is that it hides the district court's refusal to consider its own discretion in this case. The point of Mr. De Jesus-Torres' arguments was precisely that the district court automatically applied the four-level enhancement without consideration of the facts surrounding the application of the enhancement, thus forfeiting its inherent discretion to vary downward.

A. The Sentencing Proceedings

Pursuant to the plea agreement, all six charged counts provide a proposed advisory TOL of twenty-four. (Slip Opinion at Page 4). Both parties agreed to recommend a sentence at the lower end of the guideline sentencing range. (**Slip Opinion at Page 5**). Mr. De Jesus-Torres as a true first-time offender, had a Criminal History Calculation (CHC) of I. (**Id**.). This CHC with a TOL of twenty-four yields a lower-end guideline calculation of 51 months.

At the Sentencing Hearing, both the government and Mr. De Jesus-Torres stood by the agreed joint recommendation in the plea agreement for a sentence of 51 months. (**Id.**). The district court, however, adopted the guideline calculation proposed by the Probation Officer in the amended PSR, which increased the TOL to twenty-eight. The district court rejected the parties' request and sentenced Mr. De Jesus-Torres to serve seventy-eight months of imprisonment. (**Id.**). To justify the imposition of a sentence of over 27 months higher than what was requested by the parties, the district court explained that "the parties' recommended sentence did not 'reflect the seriousness of the offenses, … promote respect for the law, …. protect the public from ….

additional crimes by Mr. De Jesus, [or] address the issues of deterrence and punishment,' particularly considering the 'violent nature of the six carjacking crimes in which victims were led to believe that their life was threatened by a firearm.'" (**Slip Opinion at Page 6**).

The trial court did not give any weight to the arguments presented by Mr. De Jesus-Torres and mainly ignored the argument that asked the district court to consider that Mr. De Jesus-Torres did not possess or use any firearm. (**Slip Opinion at Page 11**). While Mr. De Jesus-Torres repeatedly objected to the imposition of a higher-than-recommended sentence based on the possession of a pellet gun by other defendants, the district court refused to hear such objection.

B. Mr. De Jesus-Torres appeals.

The direct result of the district court's determination to ignore Mr. De Jesus-Torres' arguments related to the improper application of the sentencing factor was a significant increase in his sentencing exposure as he was sentenced to a much higher sentence than what the parties recommended to the district court.

Mr. De Jesus-Torres explained to the appeals court how the district court's refusal to consider his arguments for the improper application of

a four-level upward enhancement for him constituted a deviation of this Honorable Court's precedent in *Kimbrough*.

The First Circuit Court of Appeals denied Mr. De Jesus-Torres' request for relief, giving *Kimbrough* a very narrow interpretation that allows district courts to reject a policy disagreement argument without any discussion on the sentencing record. Such an interpretation of *Kimbrough* is not only incorrect but contrary to the intent of this High Court.

REASONS FOR GRANTING THE WRIT

This Petition presents the opportunity for the Court to examine and provide guidance to lower courts on an important and recurring question regarding the interpretation of its holding in *Kimbrough* regarding properly preserved arguments related to policy disagreement that affect a relevant guideline application.

This issue is essential for the legal community, which would benefit from this High Court's guidance regarding what should be the proper application and the lower court's implementation of the mandate to explore individualized sentencing of each person instead of the automatic

application of sentencing enhancement with total disregard of the applicative facts of each case.

A. Whether the sentencing court, in this case, deviated from this High Court's precedents by refusing to consider the arguments made by Mr. De Jesus-Torres regarding a downward variance due to the unfair policy application of an aiding and abetting upward sentencing enhancement for possessing a dangerous weapon under U.S.S.G. §2B3.1(b)(2)(D) and the failure of the sentencing court to provide a reasonable explanation, on the record, as to why it disagreed with Mr. De Jesus-Torres.

It is well-settled law that the sentencing judge must consider all of the §3553 factors to determine whether they support the sentence requested by a party. *Rita v. United States*, 551 U.S. 338, 347 (2007). In *Gall v. United States*, 552 U.S. 38, 50 (2007), this Court further explained that the sentencing judge "must make an individualized assessment based on the facts presented." Furthermore, the judge "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentence." *Gall*, Id, citing *Rita*.

In *Gall* at 51, this High Court instructed appellate courts to review, under an abuse-of-discretion standard, any sentence imposed, regardless of whether such sentence was imposed inside or outside the Guideline range. The Court emphasized that one potential procedural error that

an appellate court must examine is whether the sentencing court failed to consider any §3553(a) factor.

Lower courts, however, have considered the above standard to be very loose and flexible, where a sentencing judge's mere reference to the statutory sentencing factors found in §3553(a) is sufficient to satisfy the abuse of discretion standard. The same has been applied to an analysis of policy under the guidelines under *Kimbrough*. For example, in the opinion issued by the First Circuit Court of Appeals in this case, the panel explained that such court had repeatedly held that "district court has discretion to vary downwardly from a sentence on the basis of policy disagreements with the relevant guideline." (**Slip Opinion at Page 11**).1

While in *Kimbrough,* the matter at hand was the district court's disagreement with the sentencing enhancement caused by the 100-1 ratio for crack cocaine vs. powder cocaine, here the issue is the difference between a defendant that actually possesses a dangerous weapon and

1 Citing *United States v. Lewis*, 963 F.3d 16, 26 (1st. Cir. 2020); *United States v. Clogston*, 662 F.3d 588, 592 (1st. Cir. 2011); *United States v. Rodríguez*, 527 F. 3d 221, 231(1st. Cir. 2008) and *United States v. Eksala*, 596 F.3d 74, 76 (1st. Cir. 2010).

uses it to commit a felony vs. a defendant who doesn't but to whom the upward sentencing enhancement is wholly applied as if he had possessed and used the dangerous weapon during the commission of the offense.

Here it is undisputed that Mr. De Jesus-Torres did not possess nor ever used the dangerous weapon (pellet gun) used by others during the commission of the charged felonies. It is likewise undisputed that the Government and Mr. De Jesus never stipulated any enhancement for his possession of a dangerous weapon. (**See plea agreement at Page 6, AFC2. 23**). The plea agreement stipulated, however, that "Defendant Eric De Jesus Torres further acknowledges adding (sic) and abetting in the brandishing and possession of a "fake" firearm during the six robberies." (**Id. at Page 14, Ap. 31**).

The aiding and abetting statement in the plea agreement is the basis for the upward enhancement in Mr. De Jesus-Torres' PSR. At Sentencing, Mr. De Jesus urged the district court to consider that Mr. De Jesus-Torres did not possess or brandished the "fake" gun and that other

2 "AFC" stands for Appendix before First Circuit.

defendants brandished the same and committed violent acts against the robbery victims.

Likewise, Mr. De Jesus-Torres urged the appeals court to revoke the district court determination as it failed to consider "the guidelines, however, fail to take into consideration multiple issues surrounding the use of the pellet gun, like, for example, who obtained the gun, who brought it to the site of the carjacking events, and who brandished it. Mr. De Jesus-Torres did not commit any of the above actions; however, he pays as equal to the individual who did". (**Mr. De Jesus-Torres' Brief at Page 23**).

Furthermore, as explained in his brief, Mr. De Jesus-Torres' trial counsel explained to the district court that "the guidelines certainly do not consider the tragic circumstances surrounding the early loss of his family and liberty while a local social services investigation dragged on for 5-6 years. Mr. De Jesus-Torres will become of legal age (21 under Puerto Rico Law) while serving time for this case. The matter of his removal from his home and separation from his family will become moot. However, the passage of time does not cover the dire consequences inflicted on him. He never had a father, then lost a mother when he was

13 years of age. He lost at the same time the safety of his house and the companionship of his brother and sister. All of this without ever having a day in court, without ever being properly made aware of a reason that will justify his separation from this family and his detention in foster facilities." (**Id. at Page 24**).

Notwithstanding Mr. De Jesus-Torres' pleas at sentencing, the sentencing judge ignored and gave no weight to such requests. It seems evident from a reading of the sentencing transcript that while the sentencing judge gave lip service to §3553(a) considerations, he failed to consider such concerns.

Notwithstanding all the arguments included in Mr. De Jesus-Torres' brief and with the record at sentencing, the First Circuit Court confirmed the sentence issued in this case, holding that the district court overruled Mr. De Jesus-Torres' argument and that it found that the facts "brought this case squarely within the purport of the enhancement." (**Slip Opinion at Page 12**).

The sentencing judge, however, did not do the apparent analysis the First Circuit found in its abuse of discretion review. When Mr. De Jesus-Torres objected to the plain application of the dangerous weapon

enhancement by the judge simply stated, "[w]ell, aiding and abetting, sentencing guidelines are the same." (**Sent. T. at page 24 L. 7-8, AFC 88**). Previously, in passing sentence, the district court explained the application of upward enhancement, stating that "[b]ecause Mr. De Jesus has been convicted of a robbery, because a dangerous weapon, a pellet gun, was used, pointed at the driver's head as part of the offense, the base offense level is increased by four levels pursuant to Sentencing Guidelines Section 2B3.1.(b)(2)(D)." (**Id. at pages. 10 L. 22-25, 11, L. 1, AFC 74-75**).

The sentencing record, thus, is devoid of any discussion or explanation that could inform the appellate court whether the sentencing judge had properly considered and rejected Mr. De Jesus-Torres' argument that the automatic application of the four (4) level upward enhancement for aiding and abetting the possession and brandishing of a dangerous weapon with other codefendants resulted in an unfair guideline sentence.

This High Court has repeatedly held that "It has been uniform and constant in the federal judicial tradition for the sentencing judge 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* at 52.

The First Circuit, however, dismisses Mr. De Jesus-Torres' argument under *Kimbrough* expanding the district court parse explanation with the incorrect assumption that the sentencing judge duly considered the argument and rejected it. The First Circuit's conclusion that aiders and abettors are to equally face the sentencing enhancement for possessing a dangerous weapon runs afoul of this Court's holding in *Kimbrough* that allowed parties to provide the sentencing court information to justify a rejection on policy grounds of a particular sentencing enhancement. The First Circuit's automatic application of the sentencing enhancement is not only incorrect but will give lower courts the impression that they need not consider and explain a rejection of the type of policy argument that was validated by this Court in *Kimbrough*.

Only this Court can correct the miscarriage of justice in this case. Only this Court can guide the legal community, including sentencing judges and appellate courts, as to the minimum level of explanation

required at the sentencing level as to the adoption or rejection of a sentencing factor presented by one of the parties at sentencing.

To allow the current practice of repeated generic references to sentencing factors and enhancements, without any explanation runs counter to this Court's repeated admonition that sentencing judges "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentence." *Gall*, at 50.

Accordingly, it is respectfully requested that the Certiorari Petition be granted, and the judgment issued by the United States Court of Appeals for the First Circuit Court be reversed, with Judgment issued directing the United States District Court for the District of Puerto Rico to resentence Mr. De Jesus-Torres in accordance with the Law and this High Court's precedents.

CONCLUSION

For the reasons expressed above, this Court should grant this Petition for Certiorari and provide the relief herein requested.

Respectfully submitted,

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Date: June 29, 2023

CERTIFICATE OF SERVICE

I, Raúl S. Mariani Franco, certify that on June 29, 2023, copies of the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI were served to each party to the above proceeding or to that party's counsel, and on every other person required to be served, pursuant to Supreme Court Rules 29.3 and 29.4, by depositing an envelope containing the above documents in the United States mail, properly addressed to them with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

In San Juan, Puerto Rico today June 29, 2023.

S/Raúl S. Mariani Franco
RAUL S. MARIANI FRANCO

CERTIFICATION OF WORD COUNT AND FONT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,834 words, in Century Schoolbook font, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 29, 2023.

S/Raul S. Mariani Franco
RAUL S. MARIANI FRANCO

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 21-1916

UNITED STATES OF AMERICA,

Appellee,

v.

ERICK DE JESÚS-TORRES,

Defendant, Appellant.

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

[Hon. Francisco A. Besosa, U.S. District Judge]

Before

Barron, Chief Judge,
Selya and Kayatta, Circuit Judges.

Raúl S. Mariani Franco on brief for appellant.
W. Stephen Muldrow, United States Attorney, Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, and Gregory B. Conner, Assistant United States Attorney, on brief for appellee.

March 31, 2023

SELYA, Circuit Judge. Uber is a ride-hail company, through which prospective riders summon drivers electronically (by means of a specially designed app). Defendant-appellant Erick De Jesús-Torres and his two accomplices devised a way to use the Uber app as a latchkey to open the doors for serial carjackings. After these antics came to an inglorious end, the defendant entered a guilty plea to a number of charges and was sentenced to serve a seventy-eight-month prison sentence. In this appeal, he challenges both his sentence and the concomitant restitution order. After careful consideration, we reject his claims of sentencing error. As to the restitution order, we find merit in one — but only one — of his claims. Consequently, we affirm the defendant's sentence; direct modification of the restitution order as specified herein; and affirm the modified restitution order.

I

We briefly rehearse the relevant facts and travel of the case. Where, as here, a sentencing appeal follows a guilty plea, "we draw the facts from the non-binding plea agreement . . . , the change-of-plea colloquy, the undisputed portions of the [amended] presentence investigation report (PSI Report), and the transcript of the disposition hearing." United States v. Bermúdez-Meléndez, 827 F.3d 160, 162 (1st Cir. 2016).

A

This case arises from a carjacking spree that occurred during a time frame that extended from late 2019 into early 2020. The first three carjackings (which took place on December 20, December 23, and December 31) each followed the same pattern: the defendant and his two accomplices requested an Uber; when the Uber arrived, the defendant sat in the front passenger seat and the accomplices sat in the back seat; upon reaching their designated destination, the defendant switched off the ignition; one of the accomplices ordered the driver out of the vehicle; and once the driver had complied, the trio drove the vehicle away. In each instance, one of the accomplices brandished a pellet gun. These three carjackings went according to plan.

The carjackers, however, came a cropper on their fourth try. During the evening of January 2, the Uber driver who had responded to their request refused to exit the vehicle when the defendant's accomplice pointed the pellet gun at her. She continued to balk despite being struck several times. Exasperated, the three miscreants robbed the driver but fled without the vehicle once the driver began sounding the horn.

The carjackers' work on that evening was not done. They repaired to a nearby bowling alley, where an acquaintance requested another Uber for them. Employing their signature method, the trio

carjacked that vehicle. Later that same evening, they carjacked yet another Uber.

The carjackers' spree ended the next morning (around 12:30 a.m.), when an off-duty police officer — with the assistance of the Uber driver who had refused to capitulate to the carjackers — apprehended them. What happened next is disputed. According to the amended PSI Report,[1] the off-duty officer seized the defendant and, during the ensuing scuffle, the defendant "grabbed [the officer]'s firearm, which fired a round that struck [the defendant] in his torso." The defendant, however, claimed that he had no way of knowing that the man wielding a firearm was a police officer. He also claimed that the man shot him in the back as he fled. In any event, the defendant was arrested soon after the shooting.

B

As relevant here, a federal grand jury sitting in the District of Puerto Rico returned a superseding indictment charging the defendant with five counts of carjacking and one count of attempted carjacking. See 18 U.S.C. § 2119. The defendant pleaded guilty to all six counts pursuant to a plea agreement that forecast a total offense level (TOL) of twenty-four but left open the

[1] For present purposes, the amended PSI Report is the operative version of the presentence investigation report. Although the probation office later filed a second amended PSI Report, that report is identical to the amended PSI Report except for the presence of an addendum (which we have duly considered).

defendant's criminal history category (CHC). Both sides agreed to recommend a sentence at the lower end of the guideline sentencing range (GSR) to be determined by the district court.

In the first iteration of the PSI Report, the probation office calculated a TOL of thirty, noting that the plea-agreement calculation had not taken into account, among other things, applicable enhancements for bodily injury and the use of a dangerous weapon. See USSG §2B3.1(b)(2)(D), (b)(3)(A). The report also provided a restitution recommendation, which included — as expense items incident to the carjackings — the cost of replacing a cellphone belonging to one of the victims ($1,170.74), the cost of auto-body work for damage to a carjacked vehicle ($4,209.77), and the cost of transmission repairs to the same vehicle ($3,914.52). The probation office based these loss calculations on receipts for the cellphone and transmission repairs, an estimate for the body work, and a victim-impact statement.

The defendant interposed several objections to the PSI Report (objections which, as we discuss below, were untimely). In response, the probation office filed an amended PSI Report. The probation office did not change the restitution calculations, but the probation office sent defense counsel copies of receipts for some cost items and a copy of the estimate for the auto-body work. Moreover, the amended PSI Report deleted the proposed bodily injury enhancement but retained the recommended dangerous weapon

enhancement, resulting in a TOL of twenty-eight. That TOL, coupled with the defendant's placement in CHC I, yielded a GSR of seventy-eight to ninety-seven months.

The district court convened the disposition hearing on October 18, 2021. Both sides argued for a fifty-one-month incarcerative sentence (based on the plea agreement and the defendant's mitigating circumstances, including the fact that he had just turned eighteen at the time of the carjacking spree). The district court demurred. It adopted the guideline calculations limned in the amended PSI Report. Then, the court found that the parties' recommended sentence did not "reflect the seriousness of the offenses, . . . promote respect for the law, . . . protect the public from . . . additional crimes by Mr. De Jesus, [or] address the issues of deterrence and punishment," particularly considering the "violent nature of the six carjacking crimes in which victims were led to believe that their life was threatened by a firearm." Having laid this foundation, the court proceeded to impose a within-the-range term of immurement of seventy-eight months. Finally, the court adopted the amended PSI Report's restitution calculations and ordered the defendant to pay $9,295.03 in restitution (comprising the aggregate cost of a new cellphone, the auto-body work, and the transmission repairs).

The defendant unsuccessfully sought reconsideration of both the sentence and the restitution award. This timely appeal followed.

II

The defendant argues that his sentence is both procedurally infirm and substantively unreasonable. In addition, he argues that the restitution order is lacking in evidentiary support.

Our "review of a criminal defendant's claims of sentencing error involves a two-step pavane." United States v. Miranda-Díaz, 942 F.3d 33, 39 (1st Cir. 2019). Under this framework, "we first determine whether the sentence imposed is procedurally reasonable and then determine whether it is substantively reasonable." United States v. Clogston, 662 F.3d 588, 590 (1st Cir. 2011). At both steps of this pavane, "our review of preserved claims of error is for abuse of discretion." United States v. Díaz-Lugo, 963 F.3d 145, 151 (1st Cir. 2020). Within the abuse of discretion rubric, we review findings of fact for clear error and questions of law de novo. See United States v. Carrasquillo-Vilches, 33 F.4th 36, 41 (1st Cir. 2022).

Against this backdrop, we turn first to the defendant's claims of sentencing error. Restitution is a separate matter — and we discuss it separately. See infra Part II(D). That discussion incorporates the applicable standards of review.

A

There is a threshold question as to the timeliness of the defendant's objections to the amended PSI Report's version of the relevant events. We start there.

Under Federal Rule of Criminal Procedure 32(f)(1), a defendant has fourteen days to object to inaccuracies in a presentence investigation report.[2] Here, the defendant's objections were not submitted until twenty-four days after the PSI Report issued. Typically, an untimely objection would work a forfeiture, limiting the objecting party to plain error review. See United States v. Carbajal-Váldez, 874 F.3d 778, 783 (1st Cir. 2017). But when — as in this case — neither the government nor the district court questioned the timeliness of belated objections to a presentence investigation report, "a colorable argument can be made that the objections sufficed to preserve the claim of error." Id. Thus, we assume — favorably to the defendant — that his objections to the PSI Report were preserved.

B

The defendant's claim of procedural error is bound up in his contention that the district court erred by relying on disputed facts within the amended PSI Report regarding his struggle with

[2] This fourteen-day period is mirrored in a local rule promulgated by the United States District Court for the District of Puerto Rico. See D.P.R. Crim. R. 132(b)(3)(A).

the off-duty police officer. When a fact in the PSI Report is disputed, a district court must resolve the dispute so long as the fact may affect the court's sentencing determinations. See Fed. R. Crim. P. 32(i)(3)(B). In such an event, we ordinarily would review the district court's finding on the disputed fact for clear error. See Carbajal-Váldez, 874 F.3d at 783.

The case at hand, though, does not fit that mold. When the defendant objected during the disposition hearing to the amended PSI Report's description of his interaction with the off-duty police officer (urging that the district court "should not give any weight to those facts"), the court responded that it had not considered the encounter for sentencing purposes. We have no reason to doubt that the district court meant what it said, and its statement disposes of any need for us to resolve the defendant's claim of error. We have held before — and today reaffirm — that when a sentencing court determines that a disputed fact will not be considered for sentencing purposes, a ruling on that disputed fact becomes unnecessary. See United States v. Pinet-Fuentes, 888 F.3d 557, 560 (1st Cir. 2018); see also Fed. R. Crim. P. 32(i)(3)(B).

To be sure, the district court — earlier in the disposition hearing — mentioned the defendant's encounter with the off-duty police officer. But we conclude that the district court's later disavowal of any reliance on the disputed encounter was

sufficient to render the defendant's claim of procedural error moot. When a sentencing court specifically disavows any reliance on a particular circumstance, a reviewing court should give credence to that disavowal absent some contradictory indication in the record. See, e.g., United States v. García-Mojica, 955 F.3d 187, 194 (1st Cir. 2020) (rejecting claim of procedural error when district court "expressly disavowed any reliance on facts" not properly before it); cf. United States v. Londono-Quintero, 289 F.3d 147, 155 (1st Cir. 2002) (giving credence to district court's disavowal of any reliance on police report when it made aggravated-felony determination). There is no such contradictory indication in the record here.

C

We next turn to the defendant's contention that his sentence is substantively unreasonable. Our review is for abuse of discretion. See Holguin-Hernandez v. United States, 140 S. Ct. 762, 766 (2020); Carrasquillo-Vilches, 33 F.4th at 44.

When evaluating the substantive reasonableness of a challenged sentence, "the key inquiry is whether the sentencing court has articulated a plausible rationale and reached a defensible result." United States v. Coombs, 857 F.3d 439, 452 (1st Cir. 2017). In undertaking this inquiry, we remain mindful that "reasonableness is a protean concept." United States v. Martin, 520 F.3d 87, 92 (1st Cir. 2008). "There is no one

reasonable sentence in any given case but, rather, a universe of reasonable sentencing outcomes." Clogston, 662 F.3d at 592.

In this instance, the district court adopted the guideline calculations recommended in the amended PSI Report (including the recommended GSR). On appeal, the defendant has not mounted any viable challenge to the GSR. Where, as here, a sentence is within a properly calculated guideline range, challenging its substantive reasonableness involves a "heavy lift." United States v. Cortés-Medina, 819 F.3d 566, 572 (1st Cir. 2016).

1

The defendant strives to persuade us that he can make this heavy lift. He first suggests that, although the dangerous weapon enhancement may literally apply, its application here — in circumstances in which the pellet gun was neither procured by him nor wielded by him — is not aligned with the Sentencing Commission's intent. In support, the defendant cites the Supreme Court's decision in Kimbrough v. United States, 552 U.S. 85 (2007).

Fairly read, Kimbrough is of little help to the defendant. We have described Kimbrough as holding that "district courts have discretion to vary downwardly from a sentence on the basis of a policy disagreement with the relevant guideline." United States v. Lewis, 963 F.3d 16, 26 (1st Cir. 2020) (citing Kimbrough, 552 U.S. at 109-10). Taking this description into

account, we find the defendant's Kimbrough-based contention unconvincing. When he raised this objection below, the district court overruled it. The court found that the facts adumbrated in the amended PSI Report brought this case squarely within the purport of the enhancement. It noted that although the defendant's accomplices held the pellet gun, the guidelines for aiding and abetting the use of a dangerous weapon made the defendant equally responsible for its deployment. See USSG §1B1.3(a)(1)(A).

The district court's logic seems unassailable. In determining that the dangerous weapon enhancement should apply equally to those who aid and abet the use of a dangerous weapon, the Sentencing Commission took aim at the precise type of conduct that the defendant now seeks to place on the outer periphery of the enhancement.

We add, moreover, that Kimbrough does not require a downward variance every time a defendant can articulate a colorable policy disagreement with a guideline provision. See Clogston, 662 F.3d at 592 (observing that "the discretion to vary under Kimbrough is not tantamount to an obligation to do so"); United States v. Rodríguez, 527 F.3d 221, 231 (1st Cir. 2008) (noting that although sentencing court may consider a Kimbrough-related argument, it is "not obligated to deviate from the guidelines based on" that argument). Although the Kimbrough Court affirmed a sentencing court's discretion to vary downward in response to policy

arguments, "the mere fact that a sentencing court has the discretion to disagree with the guidelines on policy grounds . . . does not mean that it is required to do so." United States v. Ekasala, 596 F.3d 74, 76 (1st Cir. 2010). Consequently, we reject the defendant's suggestion that a downward variance was necessary here.

2

The defendant also attacks the substantive reasonableness of his sentence from a different angle. He complains that the district court did not give adequate weight to certain mitigating factors that, in his view, warranted a lower sentence. He specifically notes his youth at the time of the carjackings, the years he spent in the foster care system, his first-time-offender status, and his lack of any involvement with controlled substances.

Even so, the district court did not overlook these factors. The court commented specifically that it had considered the defendant's "age, mental health condition, mental disability, first time offender status, and his allocution." But the court weighed these mitigating factors against "the violent nature of the six carjacking crimes in which victims were led to believe that their life was threatened by a firearm." Based on its analysis, the court struck a different balance than the parties had reached in the plea agreement: to the court's way of thinking,

the proposed fifty-one-month sentence failed to "reflect the seriousness of the offenses."

When all is said and done, this aspect of the defendant's challenge rests mainly on the district court's alleged failure to weigh certain mitigating factors as heavily as the defendant would have preferred. But the mere fact "[t]hat the sentencing court chose not to attach to certain of the mitigating factors the significance that the [defendant] thinks they deserved does not make the sentence unreasonable." Clogston, 662 F.3d at 593.

Of course, the district court's sentencing rationale is not a textbook model. Much of it is boilerplate — and we have twice remarked on its flaws in recent opinions. See United States v. Flores-Nater, __ F.4th __, __ (1st Cir. 2023) [Nos. 21-1856, 21-1979, slip op. at 8] (concluding that similar, non-case-specific language "scarcely constitutes a plausible rationale sufficient to justify a steep upward variance"); United States v. Muñoz-Fontanez, 61 F.4th 212, 214-15 (1st Cir. 2023) (concluding that similar, non-case-specific language was inadequate to explain upward variance). Here, however, there are two notable differences. First, the court went beyond the boilerplate to single out a case-specific aggravating factor: it commented specifically on the especially violent nature of the offenses of conviction. See Flores-Nater, __ F.4th at __ [slip op. at 9] (explaining that "a sentencing court's rationale need not always

be explicit" but, in some instances, that "rationale may be teased from the sentencing record"). Second, the sentence was within the GSR and, as such, the burden of explanation was considerably diminished. See United States v. Montero-Montero, 817 F.3d 35, 37 (1st Cir. 2016). After all, "when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation." Rita v. United States, 551 U.S. 338, 356-57 (2007). Given this low bar, we deem the district court's rationale to be both plausible and sufficient to support the defendant's sentence.

Nor is the sentencing outcome in this case an outlier. In virtually all cases, a within-guidelines sentence will be a defensible outcome. See United States v. Torres-Landrúa, 783 F.3d 58, 69 (1st Cir. 2015) (concluding that sentence "at the very bottom" of applicable GSR "was within the universe of reasonable outcomes and, thus, defensible"); cf. United States v. Turbides-Leonardo, 468 F.3d 34, 41 (1st Cir. 2006) ("It will be the rare case in which a within-the-range sentence can be found to transgress the parsimony principle."). This case falls within the sweep of that general rule, not within the long-odds exception to it. It follows that a bottom-of-the-range sentence — such as the sentence that the defendant challenges in this case — represents a defensible outcome.

We add a coda. Though advisory, the sentencing guidelines are "the initial benchmark" from which to make an individualized assessment. Gall v. United States, 552 U.S. 38, 49-50 (2007). That the court declined to vary below the guideline range is not an abuse of discretion and does not render the defendant's sentence substantively unreasonable. See Clogston, 662 F.3d at 593.

D

This leaves the defendant's challenge to the restitution order. Under the Mandatory Victims Restitution Act (MVRA), defendants convicted of certain federal crimes — such as carjacking — must make victims whole for their actual losses. See 18 U.S.C. § 3663A. For this purpose, the MVRA limits a victim's "actual loss" to the "pecuniary harm that would not have occurred but for the defendant's criminal activity." Carrasquillo-Vilches, 33 F.4th at 45 (quoting United States v. Simon, 12 F.4th 1, 64 (1st Cir. 2021)); see 18 U.S.C. § 3663A(b)(1)(B).

Before us, the defendant attempts to challenge the restitution order as to all three of its component parts (the cost of a new cellphone, the cost of the auto-body work, and the cost of the transmission repairs). But he has bitten off more than he can chew. We have said that "[w]aiver typically occurs when a party intentionally relinquishes a known right," United States v. Alphas, 785 F.3d 775, 784 (1st Cir. 2015), and at the disposition

hearing, the defendant expressly abandoned his previous objections to the restitution order in so far as those objections concerned compensation for replacement of the stolen cellphone and for the auto-body work. His claims of error with respect to those portions of the restitution order are, therefore, waived. See United States v. Orsini, 907 F.3d 115, 119-20 (1st Cir. 2018); Alphas, 785 F.3d at 784.

The issue narrows, then, to the defendant's challenge to that part of the restitution order dealing with reimbursement for transmission repairs (totaling $3,914.52). "We review restitution orders for abuse of discretion, examining the court's subsidiary factual findings for clear error and its answers to abstract legal questions de novo." United States v. Chiaradio, 684 F.3d 265, 283 (1st Cir. 2012). The government bears "the burden of demonstrating a proximate, but-for causal nexus between the offense of conviction and the actual loss." United States v. Padilla-Galarza, 990 F.3d 60, 92 (1st Cir. 2021). It must carry this burden by a preponderance of the evidence. See 18 U.S.C. § 3664(e). "This standard is relatively modest in application, as 'a modicum of reliable evidence' may suffice both to establish the requisite causal connection and to justify a dollar amount." Padilla-Galarza, 990 F.3d at 92 (quoting United States v. Flete-Garcia, 925 F.3d 17, 37 (1st Cir. 2019)).

Such reliable evidence can be derived from a presentence investigation report, which "generally bears 'sufficient indicia of reliability to permit the district court to rely on it at sentencing.'" United States v. Prochner, 417 F.3d 54, 65-66 (1st Cir. 2005) (quoting United States v. Cyr, 337 F.3d 96, 100 (1st Cir. 2003)). A defendant may object to the PSI Report's restitution figure, but if the objections "are merely rhetorical and unsupported by countervailing proof, the district court is entitled to rely on the facts in the [PSI Report]." Id. at 66 (quoting Cyr, 337 F.3d at 100).

In the case at hand, the defendant asserts that the district court awarded restitution for the transmission repairs notwithstanding the absence of any evidence showing either the cost of the transmission repairs or a causal connection between those repairs and the carjacking. As to the repair cost, his claim is baseless. The repair cost ($3,914.52) was specified in the amended PSI Report and (corroborated by a receipt furnished to defense counsel).[3] Without any contradictory factual showing, it was within the district court's discretion to rely on the repair-cost figure displayed in the amended PSI Report. See United States v. Sánchez-Maldonado, 737 F.3d 826, 828 n.2 (1st Cir. 2013)

[3] Although a copy of the receipt is not contained in the sentencing record, defense counsel has not denied either that he received the receipt or that the receipt was in the amount that the sentencing court awarded.

(explaining — in restitution context — that "an uncontradicted loss amount does not give rise to a dispute"); Prochner, 417 F.3d at 66 ("In the absence of rebuttal evidence beyond defendant's self-serving words, we cannot say the court clearly erred in accepting the [PSI Report's] calculation of the restitution amount.").

But there is a fly in the ointment. To recover any item of loss, the government must show a causal connection between the offense of conviction and that item. See Padilla-Galarza, 990 F.3d at 92. Here, however, the record is barren of any smidgen of evidence indicating a causal connection between the carjacking and the transmission damage. The amended PSI Report does not speak to causation at all, and there is not even a statement from the victim to that effect in the record.[4] What is more, the district court did not identify any factual basis sufficient to support a finding of causation. Causation cannot simply be assumed and — in light of this evidentiary void — the portion of the restitution award

[4] The victim-impact statement that mentions the transmission repairs is not part of the district court record and — for aught that appears — was never reviewed by the district court. In an abundance of caution, we have tracked down that statement and have learned that it was part of the probation office's file. But it is a Spanish-language document, which was never translated into English. Reliance on it in a federal court proceeding is therefore proscribed. See 48 U.S.C. § 864; see also United States v. Román-Huertas, 848 F.3d 72, 76 n.4 (1st Cir. 2017) ("The Jones Act applies with equal force to any material that a probation officer wants the district court to consider at sentencing.").

relating to transmission repairs ($3,914.52) cannot stand. On remand, therefore, the district court must modify the restitution order by subtracting $3,914.52, resulting in a modified award of $5,380.51.

III

We need go no further. For the reasons elucidated above, we affirm the defendant's sentence; direct modification of the restitution order as specified herein; and affirm the modified restitution order.

So Ordered.

APPENDIX B

18 USC §3553(a)

(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;