

Appendix

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[DO NOT PUBLISH]

In the

United States Court of Appeals
For the Eleventh Circuit

No. 22-13873

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAUL PEREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cr-20127-JLK-1

Before ROSENBAUM, GRANT and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Raul Perez appeals his 217-month total imprisonment sentence for carjacking that resulted in serious bodily injury, in violation of 18 U.S.C. § 2119(2), and brandishing or discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and (iii). He first argues the district court clearly erred by denying him an acceptance of responsibility adjustment under U.S.S.G. § 3E1.1(a) based on the finding that his inability to remember the crime, due to a car accident immediately after the offense that rendered him unconscious, was inconsistent with accepting responsibility. Perez further argues the district court abused its discretion and imposed a substantively unreasonable sentence because it failed to give due weight to his remorsefulness and mitigating personal history. Having read the parties' briefs and reviewed the record, we affirm Perez's sentence.

I.

We review for clear error a district court's findings regarding an acceptance of responsibility reduction under U.S.S.G. § 3E1.1. *United States v. Tejas*, 868 F.3d 1242, 1247 (11th Cir. 2017). We will not disturb a district court's findings under clear error review "unless we are left with a definite and firm conviction that a mistake has been committed." *United States v. Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016) (quotation marks omitted). Further, we rarely find clear error when the basis of the district court's decision is

supported by the record and does not misapply the law. *United States v. De Varon*, 175 F.3d 930, 945 (11th Cir. 1999) (*en banc*).

Because the sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility, the determination of the sentencing judge is "entitled to great deference on review." *Tejas*, 868 F.3d at 1247; *see* U.S.S.G. § 3E1.1, comment. (n.5). The district court's decision on acceptance of responsibility will not be overturned unless the facts in the record clearly establish that the defendant accepted personal responsibility. *United States v. Sawyer*, 180 F.3d 1319, 1323 (11th Cir. 1999). The defendant bears the burden of proving he clearly accepted responsibility. *Id.* Further, while a district court's decision to grant or deny an adjustment is subject to great deference, the district court errs if it believes it lacks authority to grant the adjustment as a matter of law. *United States v. Mathews*, 874 F.3d 698, 709-10 (11th Cir. 2017).

A two-level decrease to the offense level applies "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). An additional one-level decrease applies if the defendant qualifies for a decrease under § 3E1.1(a), the offense level determined before application of such a decrease is 16 or greater, and the government has filed a motion stating that the defendant "has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." *Id.* § 3E1.1(b).

“Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 . . . will constitute significant evidence of acceptance of responsibility” *Id.*, comment. (n.3). However, “significant evidence” of acceptance may be outweighed by conduct that is inconsistent with accepting responsibility, and a defendant must present more than just a guilty plea to meet his burden of establishing acceptance of responsibility. *Id.*

Ultimately, § 3E1.1 “is intended to reward those defendants who affirmatively acknowledge their crimes and express genuine remorse for the harm caused by their actions.” *United States v. Carroll*, 6 F.3d 735, 740 (11th Cir. 1993). The commentary provides a non-exhaustive list of factors to be considered when determining if a defendant accepted responsibility, including whether he has voluntarily paid restitution before adjudication of guilt, voluntarily surrendered to authorities promptly after committing the offense, affirmatively denied relevant conduct, or voluntarily withdrew from criminal conduct. U.S.S.G. § 3E1.1, comment. (n.1). The district court may consider a wide range of evidence in determining if the defendant recognizes the wrongfulness of his conduct, has remorse for the consequences, and is willing to turn away from that conduct. *United States v. Scroggins*, 880 F.2d 1204, 1215-16 (11th Cir. 1989).

Perez contends on appeal that the district court clearly erred by failing to grant him an acceptance of responsibility adjustment. Perez entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S. Ct. 160, 167-68 (1970) (a guilty plea where the defendant maintains a claim of innocence to the underlying criminal conduct charged but admits that sufficient evidence exists to convict him of the offense). Perez claims that he entered the *Alford* plea because, due to the memory loss he sustained from the brain injury he suffered following a car accident that occurred after the commission of the carjacking offense, he could not recall the specifics of the offense. Perez argues that despite the memory loss, he did not dispute the government's factual allegations and conceded that the government could prove the elements of the offense at trial, and he did not put the government to its burden of proof at trial. For these reasons, and the fact that he expressed remorse for his actions at sentencing, Perez contends that the district court should have granted him an adjustment for acceptance of responsibility.

The government responds that the district court did not clearly err, and this court should give great deference to the district court's determinations. The government notes that Perez's story changed from his first forensic evaluation where he admitted to the crime to his change of plea hearing where he claimed not to remember the facts of the crime. Although an *Alford* plea does not preclude a finding of acceptance of responsibility, it is a relevant factor in the determination. *See United States v. Rodriguez*, 905 F.2d 372, 374 (11th Cir. 1990) (noting that nothing in the Guidelines

precludes a district court from considering whether a defendant entered a qualified guilty plea when analyzing whether he or she accepted responsibility). *See also United States v. Coe*, 79 F.3d 126, 127-28 (11th Cir. 1996) (recognizing that a defendant's failure to admit to relevant offense conduct because of a lack of memory can preclude the award of an acceptance of responsibility reduction). Thus, the government claims that Perez cannot satisfy his burden of demonstrating that he clearly accepted responsibility for his crimes.

We conclude from the record that the district court did not clearly err when it denied the acceptance-of-responsibility adjustment under U.S.S.G. § 3E1.1(a). The district court based its decision on Perez's inability to concede to the facts of the crime fully and completely and the legal arguments presented by the parties and discussed at length during the sentencing hearing. Although Perez pled guilty, he did not admit to discharging a firearm in public and causing a severe accident by leading police on a car chase. Even though he expressed remorse during his allocution, Perez only apologized for his inability to remember the incident. Further, Perez's guilty plea did not entitle him to an acceptance of responsibility reduction as a matter of right, and there is no indication that the district court believed it did not have the authority to grant the adjustment, *Mathews*, 874 F.3d at 709-10.

Perez had the burden of demonstrating that he had clearly accepted responsibility beyond just his guilty plea. *Sawyer*, 180 F.3d at 1323. On this record, we cannot say that the district court clearly

erred in finding that Perez did not qualify for an acceptance of responsibility reduction, and we affirm as to this determination.

II.

We review the substantive reasonableness of sentencing decisions under the deferential abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 597 (2007). The party challenging the sentence bears the burden of showing that the sentence is unreasonable based on the record, the factors listed in § 3553(a), and the substantial deference afforded sentencing courts. *United States v. Rosales-Bruno*, 789 F.3d 1249, 1256 (11th Cir. 2015). Under this standard, we may affirm a sentence even though we would have imposed a different sentence had we been in the district court's position. *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (*en banc*). A district court abuses its discretion at sentencing when it "(1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *Id.* (quotation marks omitted).

We will vacate a district court's sentence "only if we are left with the 'definite and firm' conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that is outside the range of reasonable sentences dictated by the facts of the case." *United States v. Goldman*, 953 F.3d 1213, 1222 (11th Cir. 2020) (citing *Irey*, 612 F.3d at 1190). Although this Court does not presume sentences within the

guideline range are reasonable, we ordinarily expect they will be. *United States v. Perkins*, 787 F.3d 1329, 1342 (11th Cir. 2015).

The “overarching” instruction to sentencing courts in 18 U.S.C. § 3553 is that any sentence, whether within the guideline range or through a variance, must be sufficient but not greater than necessary to comply with the purposes listed in § 3553(a)(2). *Kimbrough v. United States*, 552 U.S. 85, 101, 128 S. Ct. 558, 570 (2007); 18 U.S.C. § 3553(a). The proper factors as set out in § 3553(a) include the nature and circumstances of the offense, the personal history and characteristics of the defendant, the seriousness of the crime, and the need for the sentence to promote respect for the law, provide just punishment, and afford adequate deterrence. 18 U.S.C. § 3553(a)(1)-(2). The court must also consider the applicable guideline range, any pertinent policy statements from the Sentencing Commission, and the need to avoid unwarranted sentencing disparities between similarly situated defendants and provide restitution to any of the defendant’s victims. *Id.* § 3553(a)(3)-(7).

The district court need not account for every § 3553(a) factor, nor must it discuss each factor and the role that it played in sentencing. *United States v. McBride*, 511 F.3d 1293, 1297 (11th Cir. 2007). Failure to discuss mitigating evidence does not indicate that the court “erroneously ignored or failed to consider this evidence.” *United States v. Amedeo*, 487 F.3d 823, 833 (11th Cir. 2007).

Perez argues on appeal that the district court imposed a substantively unreasonable sentence because the sentence is greater than necessary to achieve the considerations set forth in § 3553(a).

He claims the district court did not properly consider his youth at the time of the offense, his lack of adult criminal history, and his family support. In response, the government argues that the district court properly weighed Perez's age and mental health, as well as the facts of the case, the violence offense conduct, Perez's criminal history, and the need to protect the public in concluding that a sentence at the low end of the guideline range was appropriate. The government contends that the district court gave a sufficient explanation for the imposed sentence and did not abuse its discretion.

We conclude that the record demonstrates that Perez cannot show the district court abused its discretion and that his 217-month total imprisonment sentence is substantively unreasonable because the record demonstrates the district court adequately weighed the § 3553(a) factors in concluding a sentence within Perez's guideline range was appropriate. After hearing the parties' arguments, the district court noted its consideration of Perez's mitigating circumstances, the advisory guideline range, and the § 3553(a) factors. The district court denied Perez's requested downward variance because it found that Perez committed the offense while he was on probation and the offense involved a carjacking. The district court also stated that a sentence at the low end of the guideline range would reflect the seriousness of the offense and Perez's criminal history, deter recidivism, and protect the public. Further, although we do not automatically presume that a sentence within the guideline range is reasonable, we conclude that the 217-month total sentence is substantively reasonable, in part,

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because the 97-month sentence for Count One was at the low end of the guideline range and the 120-month sentence for Count Two was the mandated minimum statutory term. *See Perkins*, 787 F.3d at 1342. Accordingly, based on the aforementioned reasons, we affirm Perez's sentence.

AFFIRMED.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

RAUL PEREZ

§ JUDGMENT IN A CRIMINAL CASE

§

§

§ Case Number: 1:21-CR-20127-KING (1)

§ USM Number: 41766-509

§

§ Counsel for Defendant: Stewart Glenn Abrams

§ Counsel for United States: Elena Smukler

THE DEFENDANT:

<input checked="" type="checkbox"/>	pleaded guilty to count(s)	Count I and II of the Superseding Indictment
<input type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:U.S.C. §2119(2) Carjacking	02/11/2021	1s
18:U.S.C. §924(C)(1)(A)(ii) And (iii) Brandishing and Discharging A Firearm In Furtherance Of A Crime Of Violence	02/11/2021	2s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)
 Count(s) is are dismissed on the motion of the United States

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

November 16, 2022

Date of Imposition of Judgment

Signature of Judge

JAMES LAWRENCE KING

SENIOR UNITED STATES DISTRICT JUDGE

Name and Title of Judge

November 16, 2022

Date

DEFENDANT: RAUL PEREZ
CASE NUMBER: 1:21-CR-20127-KING (1)

IMPRISONMENT

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

Ninety-seven (97) months as to count 1; One Hundred-twenty (120) months as to count 2; count 2 to be served consecutively to count 1. Sentence to run concurrently with State case F21-5165.

The court makes the following recommendations to the Bureau of Prisons: **Defendant to be housed at a South Florida facility and or Florida Department of Corrections facility.**

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: RAUL PEREZ
CASE NUMBER: 1:21-CR-20127-KING (1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Five (5) years term to run concurrently with counts I and II.**

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

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 (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which 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 additional conditions on the attached page.

DEFENDANT: RAUL PEREZ
 CASE NUMBER: 1:21-CR-20127-KING (1)

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. I understand additional information regarding these conditions is available at the www.flsp.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: RAUL PEREZ
CASE NUMBER: 1:21-CR-20127-KING (1)

SPECIAL CONDITIONS OF SUPERVISION

Mental Health Treatment: The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

Permissible Search: The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment: The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

Unpaid Restitution, Fines, or Special Assessments: If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: RAUL PEREZ
 CASE NUMBER: 1:21-CR-20127-KING (1)

CRIMINAL MONETARY PENALTIES

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	\$200.00	\$0.00	\$0.00	\$0.00	

The determination of restitution is deferred until **February 15, 2023**. An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

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

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. 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 the schedule of payments page 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:

<input type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **\$0.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of \$25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.

** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.

*** 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: RAUL PEREZ
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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 payments of \$200.00 due immediately

It is ordered that the Defendant shall pay to the United States a special assessment of \$200.00 for Counts 1s and 2s , which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

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

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

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

C The defendant shall forfeit the defendant's interest in the following property to the United States:
FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.