No. _____

In the Supreme Court of the United States

HECLOUIS NIEVES-DÍAZ, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

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

APPENDIX

Appendix A

United States Court of Appeals
For the First Circuit

No. 21-1519

UNITED STATES OF AMERICA,

Appellee,

v.

HECLOUIS NIEVES-DÍAZ, a/k/a Egloy, a/k/a Eloy,

Defendant, Appellant.

No. 21-1520

UNITED STATES OF AMERICA,

Appellee,

v.

HECLOUIS JOEL NIEVES-DÍAZ,

Defendant, Appellant.

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

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

Before

Barron, Chief Judge,
Hamilton, Circuit Judge,*
and Thompson, Circuit Judge.

Ivan Santos-Castaldo, with whom Eric Alexander Vos, Federal

* Of the Seventh Circuit, sitting by designation.

Appendix A

Public Defender, Franco L. Pérez-Redondo, Assistant Federal Public Defender, Supervisor, Appeals Division, and Alejandra Bird Lopez, Research and Writing Specialist, were on brief, for appellant.

Gregory B. Conner, Assistant United States Attorney, with whom W. Stephen Muldrow, United States Attorney, and Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

April 17, 2024

Appendix A

BARRON, Chief Judge. While on supervised release for a federal drug conviction, Heclouis Nieves-Díaz was convicted of (i) possession of ammunition while being a convicted felon, 18 U.S.C. §§ 922(g)(1) and 924(a)(2); (ii) illegal possession of a machine gun, 18 U.S.C. §§ 922(o) and 924(a)(2); and (iii) possession with intent to distribute cocaine, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). He received an 84-month prison term for each conviction, with the sentences to be served concurrently. Based on this same criminal conduct, he also had his supervised release revoked and received an 18-month prison term for the revocation sentence, which was to be served consecutively to his 84-month sentences. Nieves now challenges both the 84-month sentences, which we vacate, and the revocation sentence, which we affirm.

I.

On April 11, 2013, Nieves pleaded guilty to one count of drug conspiracy in violation of 21 U.S.C. §§ 846, 841(b)(1)(A), and 860. He was sentenced for that conviction to 80 months of imprisonment and 96 months of supervised release, though the prison sentence was later reduced to a term of 57 months.

Nieves's term of supervised release was twice revoked. After then having been released for the third time in May 2020, but while still on supervised release, Nieves went to live at his grandmother's home in Naranjito, Puerto Rico. Months later, in October 2020, Puerto Rico police officers executed a search warrant

at an apartment in San Juan, Puerto Rico, where Nieves was residing at the time. Prior to the search, Puerto Rico police officers had surveilled the apartment and observed individuals approach the property on various occasions and subsequently leave it with what appeared to be controlled substances. The search of the property turned up cocaine, marijuana, approximately 149 rounds of .223 caliber ammunition, and a drop-in auto-sear device -- also known as a "chip" -- which is a device that, when installed on a Glock pistol, renders it capable of operating as a fully automatic weapon.

Nieves was arrested at the property following the search. Soon thereafter, Nieves was indicted in the United States District Court for the District of Puerto Rico. The indictment alleged that he had committed the following offenses: (i) possession of ammunition while being a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); (ii) illegal possession of a machine gun in violation of 18 U.S.C. §§ 922(o) and 924(a)(2); and (iii) possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C).

Nieves entered a straight plea of guilty to each of the charged offenses. The U.S. Probation Office notified the District Court that Nieves had violated the terms of his supervised release for committing a new offense; possessing controlled substances;

and possessing a firearm, ammunition, destructive device, or dangerous weapon.

The Probation Office's Presentence Investigation Report (PSR) stated that, for each offense, Nieves's base offense level was 22 under the United States Sentencing Guidelines. The PSR determined that a base offense level of 22 applied for each offense because each had involved a "firearm that is described in 26 U.S.C. § 5845(a)," U.S.S.G. § 2K2.1(a)(3)(A)(ii), and because Nieves "had committed any part" of each offense "subsequent to sustaining one felony conviction of . . . a controlled substance offense," id. § 2K2.1(a)(3)(B).

The PSR further stated that, for each offense, a four-level enhancement applied under U.S.S.G. § 2K2.1(b)(6)(B). That provision provides that a four-level enhancement applies "[i]f the defendant . . . used or possessed any firearm or ammunition in connection with another felony offense." Id. The PSR explained that Nieves possessed ammunition "in connection with another felony offense, to wit: possession with intent to distribute a controlled substance."

The PSR then determined that, pursuant to U.S.S.G. §§ 3E1.1(a) and 3E1.1(b), the resulting adjusted offense level of 26 for each offense had to be reduced by three levels for acceptance of responsibility. Thus, the PSR calculated the total offense level for each offense to be 23. Because the PSR

identified Nieves's criminal-history category as III, the PSR calculated his Guidelines Sentencing Range (GSR) to be 57 to 71 months' imprisonment for each offense.

At the sentencing hearing, the District Court adopted the PSR's sentencing range. Nieves proposed a prison sentence for each offense of 37 months, while the government argued for a prison sentence for each offense of 66 months. The District Court ultimately imposed an upwardly variant prison sentence of 84 months for Nieves's conviction on each count, with each sentence to be served concurrently but consecutively to the sentence to be imposed on revocation of his supervised release.

The applicable GSR for the revocation sentence was 12 to 18 months of imprisonment. The government and Nieves each argued for a revocation sentence of 12 months of imprisonment. The District Court imposed a revocation sentence of 18 months of imprisonment.

Nieves timely appealed from the concurrent 84-month prison sentences as well as the 18-month revocation sentence. The appeals were then consolidated.

II.

Nieves challenges his 84-month prison sentences on the ground that the District Court improperly calculated his GSR for each of the underlying offenses. See United States v. Pupo, 995 F.3d 23, 28 (1st Cir. 2021) ("A sentence is procedurally

unreasonable when the district court commits a procedural error such as 'failing to calculate (or improperly calculating) the Guidelines range . . . .'" (quoting United States v. Díaz-Rivera, 957 F.3d 20, 25 (1st Cir. 2020))). Specifically, Nieves contends that the District Court incorrectly calculated the GSR by: (i) assigning him a base offense level for each offense of 22 under U.S.S.G. § 2K2.1(a)(3); and (ii) applying for each offense the four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B).

"We review federal criminal sentences imposed under the advisory Guidelines for abuse of discretion." United States v. Vélez-Soto, 804 F.3d 75, 77 (1st Cir. 2015). "Within this framework, we review a district court's factual findings for clear error, and its interpretation and application of the Guidelines de novo." Id. Any "error of law underlying a sentencing court's decision constitutes an abuse of discretion." Id. at 78.

A.

We begin with Nieves's contention that the District Court erred in determining, pursuant to U.S.S.G. § 2K2.1(a)(3), Nieves's base offense level to be 22 for each offense. Section 2K2.1(a)(3) establishes a base offense level of 22 where the offense "involved a . . . firearm that is described in 26 U.S.C. § 5845(a)," id. § 2K2.1(a)(3)(A)(ii), and where the "defendant committed any part of the . . . offense subsequent to sustaining

one felony conviction of either a crime of violence or a controlled substance offense," id. § 2K2.1(a)(3)(B).

Nieves contends that the District Court erred in relying on his prior conviction for conspiracy to possess with intent to distribute controlled substances in violation of 21 U.S.C. § 846 to determine that, under U.S.S.G. § 2K2.1(a)(3)(B), he had committed "any part of" each of his offenses "subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." That is so, he contends, because a conspiracy offense does not constitute a "controlled substance offense" for purposes of that provision of the Guidelines. Id.

We have repeatedly construed the term "controlled substance offense" as it appears elsewhere in the Guidelines, however, to encompass conspiracy offenses. Id.; see United States v. Rodríguez-Rivera, 989 F.3d 183 (1st Cir. 2021) (holding that a violation of 21 U.S.C. § 846 constitutes a "controlled substance offense" within the meaning of U.S.S.G. § 4B1.2); United States v. Lewis, 963 F.3d 16, 21 (1st Cir. 2020) ("'[C]ontrolled substance offenses' under § 4B1.2 include so-called inchoate offenses . . . ."); see also United States v. Guerrero, 19 F.4th 547, 552 (1st Cir. 2021) (describing the law-of-the-circuit

doctrine). Because Nieves identifies no reason for our concluding otherwise here, we reject this aspect of Nieves's challenge.[1]

Nieves also contends that the District Court erred in concluding that each of his offenses triggered the application of § 2K2.1(a)(3)(A)(ii), which applies only when an "offense involved a . . . firearm that is described in 26 U.S.C. § 5845(a)." In pressing this argument, Nieves contends that the District Court -- like the PSR -- erred in treating the "chip" found in the San Juan apartment as if it were a "firearm that is described in 26 U.S.C. § 5845(a)." Id. Nieves acknowledges that 26 U.S.C. § 5845(a) defines "firearm" to include "a machinegun" and that 26 U.S.C. § 5845(b) goes on to define "machinegun" to include "any part designed and intended solely and exclusively . . . for use in converting a weapon into a machine gun." He also concedes that a "chip" constitutes a "machinegun" under § 5845(b), such that it is a "firearm" under 26 U.S.C. § 5845(a). But he contends that a "chip" is nonetheless not a "firearm" for purposes of U.S.S.G.

[1] Nieves admits that he raises this issue "solely to preserve it for possible further review." The government responds that "Nieves contends that he raises [this issue] for preservation [purposes], but it is not clear he even does that. He argues that the Guidelines' commentary went too far but he does not, for example, argue why this Court's decision in [United States v. Rodríguez-Rivera, 989 F.3d 183 (1st Cir. 2021)] was incorrect." We disagree with the government's intimation that Nieves did not preserve this issue for further review. Nieves's opening brief succinctly but sufficiently sets forth his grounds for disagreeing with Rodríguez-Rivera's reasoning. Nothing more is required of Nieves.

§ 2K2.1(a)(3)(A)(ii) because of Application Note 1 of the commentary to § 2K2.1.

Nieves points out that the Note states that, for purposes of § 2K2.1, "[f]irearm" has "the meaning given that term in 18 U.S.C. § 921(a)(3)." Id. § 2K2.1 cmt. n.1. He also points out that 18 U.S.C. § 921(a)(3) defines "firearm" as "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." He then goes on to assert that 18 U.S.C. § 921(a)(3)'s definition of a "firearm" does not itself include a "chip" -- an assertion that the government does not dispute. He thus contends that, given the Note, § 2K2.1(a)(3)(A)(ii) cannot be construed to apply based on the "chip."

This contention has merit, however, only if Application Note 1 does not "conflict[]" with § 2K2.1(a)(3)(A)(ii) in defining a "firearm" to exclude a "chip." United States v. Walker, 89 F.4th 173, 181 n.5 (1st Cir. 2023). And, as the government explains, § 2K2.1(a)(3)(A)(ii) expressly defines "firearm" to be a "firearm" "described in 26 U.S.C. § 5845(a)," and 26 U.S.C. § 5845 includes, as Nieves himself acknowledges, a "chip" in its definition of "firearm." Thus, because the Note defines "firearm" to exclude what the Guideline expressly includes, the Note does conflict with

the relevant Guideline provision and so provides no support for Nieves's position. Accordingly, the District Court did not err in determining that § 2K2.1(a)(3)(A)(ii) of the Guidelines applies.

B.

Having identified no error in the District Court's base-offense-level determination, we move on to Nieves's challenge to the District Court's application of a four-level enhancement based on U.S.S.G. § 2K2.1(b)(6)(B) for each of his offenses. That enhancement applies "[i]f the defendant . . . used or possessed any firearm or ammunition in connection with another felony offense." Id. As we will explain, this challenge fares better.[2]

1.

The District Court applied the enhancement solely based on the ammunition found at the San Juan apartment. Nieves points out, however, that the commentary to the Guideline that sets forth

[2] The parties disagree about what standard of review applies to this issue. "We review the district court's interpretation and application of the Guidelines de novo and its factual findings for clear error." United States v. Bailey, 405 F.3d 102, 113 (1st Cir. 2005) (internal quotations and citations omitted). "[A] district court's determination of the relationship between ammunition and another offense is most usually a factual finding." United States v. Eaden, 914 F.3d 1004, 1007 (5th Cir. 2019) (citing United States v. Coleman, 609 F.3d 699, 708 (5th Cir. 2010)). "[A factual] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In re The Bible Speaks, 869 F.2d 628, 630 (1st Cir. 1989) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1946)).

the enhancement provides that it applies only "if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively." Id. § 2K2.1 cmt. n.14(A). Thus, Nieves contends, and the government does not dispute, the enhancement applies here only if the record shows that it is more likely than not that the ammunition had such a facilitative or potentially facilitative effect. See United States v. Burgos-Figueroa, 778 F.3d 319, 320 (1st Cir. 2015) ("It is common ground that a sentencing enhancement must be supported by a preponderance of the evidence.").

In urging us to reject this challenge, the government first contends that we must apply a presumption akin to the one that Application Note 14(B) of the commentary to § 2K2.1 sets forth. The Note states in that regard that "[s]ubsection[] (b)(6)(B) . . . appl[ies] . . . in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia," and "[i]n these cases, application of subsection[] (b)(6)(B) . . . is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively." Id.

The government recognizes that ammunition is not itself a "firearm." But the government argues that the reasons that support the application of a presumption of a potentially

facilitative effect in the case of a firearm also support the application of the same presumption in the case of ammunition, just as the Sixth Circuit held in United States v. Coleman, 627 F.3d 205, 212 (6th Cir. 2010).

It is not evident that the District Court relied on the presumption on which the government now asks us to rely to apply the enhancement. But that wrinkle aside, we do not agree that the application of the requested presumption is warranted, largely for the reasons set forth in the dissent in Coleman, see id. at 215-18 (Gilman, J., concurring in part and dissenting in part), and the Fifth Circuit's decision in United States v. Eaden, 714 F.3d 1004 (5th Cir. 2019).

The firearm-based presumption that the Note describes rests on the assessment that a firearm's presence on the scene in and of itself would embolden the defendant -- and thereby facilitate the defendant's commission of the offense -- even if that firearm were not loaded. See United States v. Rhind, 289 F.3d 690, 695 (11th Cir. 2002) ("[W]e agree with the district court that enough evidence existed to justify finding that the defendants possessed the firearms 'in connection with' the underlying felony. The fact that the guns were not loaded or inoperable is not dispositive since criminals frequently use unloaded guns to execute crimes."); United States v. Zais, 711 F. App'x 338, 341 (7th Cir. 2017) ("An unloaded firearm may be used as a threat just

as effectively as a loaded one because it is difficult, if not impossible, to tell whether a firearm is loaded when one is staring down its barrel."). The notion is that because a defendant would know that an observer of the firearm would have no way of determining whether the firearm was loaded or not, it is fair to presume that any defendant engaged in a drug-trafficking offense with a firearm -- even an unloaded one -- at the scene would be emboldened by its presence in committing the offense, as it is fair to presume the firearm would provide that defendant with a ready means of instilling fear, if needed, in others on the scene. See United States v. Sneed, 742 F.3d 341, 345 (8th Cir. 2014) ("[A]n unloaded firearm retains the potential to facilitate a drug crime because those who come in contact with the defendant may be unaware it cannot be fired at them.").

We do not see why the mere presence of ammunition on the scene, however, would similarly warrant a presumption that the defendant would be emboldened. The circumstances in which a defendant could use even an unloaded firearm to assert control over the scene are self-evident. But ammunition cannot -- on its own -- cause harm. We thus do not see how we may conclude that the reasons that support the presumption in the case of a firearm equally support the presumption in the case of ammunition. See Coleman, 627 F.3d at 215-18 (Gilman, J., concurring in part and dissenting in part).

Moreover, we note that the circumstances in which the display of ammunition -- in and of itself -- would affect an observer in a way akin to how the display of a firearm would are necessarily quite fact-dependent. For example, it is hard to see how one could presume an observer would react to the display of a single bullet on a table in the way one could presume an observer would react to a similar display of a single firearm. Thus, we do not see the basis for making a similar presumption to the one set forth in Application Note 14(B) of the commentary to § 2K2.1 for firearms when the item possessed is merely ammunition.

Accordingly, we must follow the usual course in determining whether an enhancement applies under the Guidelines and so assess whether, considering the record as a whole, the government can meet its burden to show that the evidence in the record makes it more likely than not that the ammunition in this case had the required potentially facilitative effect. See Eaden, 914 F.3d at 1009 ("Stripped of a presumption of facilitation, the government must present facts or circumstances demonstrating that the possession of ammunition facilitated or had the potential to facilitate the other offense."). And, while the government argues that it can meet this burden, we do not agree.

The record suffices to show only that the ammunition in question was found in a Ziplock bag atop a tall kitchen cabinet, close to the ceiling of the apartment in San Juan where the arrest

occurred. In fact, the photographs of the apartment in the record reveal that the ammunition was not being displayed in a manner that might induce fear in observers, and the District Court made no factual findings to the contrary.

Thus, even accepting that in some circumstances "[a]mmunition has the potential to facilitate a trafficking operation when it is . . . in plain sight to purchasers or others involved in the trafficking," there is no basis in this record for finding that the ammunition here was in "plain sight" of any such persons. Id. At most, the ammunition was -- to use the government's phrase -- in "plain view" to law-enforcement officers conducting a search. But those persons are hardly the ones whose attention a drug trafficker, emboldened by the ammunition's presence, would be seeking to attract as a means of facilitating drug trafficking. Nor is there any basis on this record for finding that the ammunition played any other facilitative role in the predicate offense. See Coleman, 627 F.3d at 217 (Gilman, J., concurring in part and dissenting in part) ("The four-level enhancement under U.S.S.G. § 2K2.1(b)(6) could apply to the possession of ammunition alone, for example, where two conspirators plan to rob, say, a bank, with one to bring a gun and the other to bring the ammunition for the gun. In this hypothetical, the one possessing the ammunition could clearly be found to have facilitated the crime of bank robbery, and thus be

subject to the four-level enhancement."). Accordingly, we see no basis for concluding that the record supports the determination that § 2K2.1(b)(6)(B) applies here.

2.

The government does argue, in the alternative, that we may affirm the enhancement's application based on the presence of the "chip." In making this fallback argument, the government emphasizes that -- although the District Court did not rely on the presence of the "chip" in applying the enhancement -- there is no dispute that the "chip" was present in the apartment. The government then goes on to contend that the "chip" is itself a "firearm" for purposes of the Application Note that sets forth the firearm-based presumption described above. Thus, the government argues, the "chip" that was found in the apartment directly triggers that presumption. See United States v. Rodriguez, 630 F.3d 377, 383 n.26 (5th Cir. 2011) ("We can affirm a sentence on any ground that finds support in the record."); United States v. Varela, 138 F.3d 1242, 1244 (8th Cir. 1998) (same).

In support of this argument, the government emphasizes that § 2K2.1(b)(6)(B) refers to "any firearm" and that § 2K2.1(b)(6)(B) appears in the same provision of the Guidelines, § 2K2.1, that addresses "firearm[s] described in 26 U.S.C. § 5845(a)," as discussed above. So, the government argues, it follows that "any firearm" would include a "chip," and thus that

the reference to "firearm" in the Application Note that sets forth the presumption in question is similarly referring to a "chip."

This argument fails to account, however, for Application Note 1 of the commentary to § 2K2.1. That Note states that "[f]or purposes of [§ 2K2.1]: . . . 'firearm' has the meaning given that term in 18 U.S.C. § 921(a)(3)." As we explained above, § 921(a)(3) does not include a "chip" in its definition of "firearm." Moreover, while the government is right that a "chip" is a "firearm" for purposes of some subsections of the Guideline, such as § 2K2.1(a)(3)(A)(ii), which defines a "firearm" by reference to what "is described in 26 U.S.C. § 5845(a)," § 2K2.1(b)(6)(B) does not use the same "is described in 26 U.S.C. § 5845(a)" language or even analogous language. It states instead: "If the defendant . . . used or possessed any firearm . . . in connection with another felony offense . . . increase by 4 levels." Id. (emphasis added).

To be sure, Application Note 1's seeming restriction on the scope of the Guideline provision to only certain firearms must give way if that restriction is in conflict with § 2K2.1(b)(6)(B). Walker, 89 F.4th at 181 n.5. But 18 U.S.C. § 921(a)(3) refers to multiple types of firearms, rather than a single type. Thus, the words "any firearm" in § 2K2.1(b)(6)(B) do not necessarily conflict with the restriction set forth in the Note about the types of firearms encompassed by that provision of the Guidelines, as

those words reasonably may be understood to be describing merely "any firearm" that is described in 18 U.S.C. § 921(a)(3). As a result, the phrase "any firearm" in § 2K2.1(b)(6)(B), though expansive, reasonably may be understood not to be so expansive as to include even a device that § 921(a)(3) does not deem to be a "firearm" at all. And, as we have explained, the government does not dispute that § 921(a)(3) excludes a "chip" from its definition of "firearm."

We note, too, that, insofar as it is not clear whether the Note and the Guideline provision "conflict[]," Walker, 89 F.4th at 181 n.5, we see no reason to opt for the more expansive construction of the Guideline provision and thus one that would treat that provision as conflicting with the Note. For, in the event there is ambiguity as to whether the Guideline provision and the Note conflict, we conclude that the nature of the ambiguity would be such that we then would have to apply the rule of lenity. See United States v. Luna-Díaz, 222 F.3d 1, 3 n.2 (1st Cir. 2000) (noting that the rule of lenity applies to the interpretation of the Guidelines).

3.

For these reasons, we conclude that the District Court did err in applying the four-level enhancement to Nieves.

Accordingly, we vacate the District Court's sentences and remand for resentencing not inconsistent with this opinion.[3]

[3] Nieves also argues that the District Court "did not justify a significant 13 to 27-month upward variance, rendering the sentence procedurally and substantively unreasonable." In so arguing, Nieves points to aspects of the sentencing hearing in which the District Court made statements about the unusually dangerous nature of machine guns and expressed concerns about the Sentencing Commission's treatment of machine-gun offenses. Because we conclude that the District Court committed procedural error by improperly calculating Nieves's Guidelines Sentencing Range, such that the 84-month sentences must be vacated in any event, we need not address this argument. However, we note that the District Court, in handing down its sentence, tied the upwardly variant term to the factors set out in 18 U.S.C. § 3553(a) and expressly stated that Nieves, who had committed the offenses while on supervised release, "has established a notable pattern of conduct, which is represented by an utter disregard for the law and the mandates that this Court has previously imposed on him," without explicitly relying on any Kimbrough-based policy disagreement as its reason to vary upward. See United States v. Stone, 575 F.3d 83, 89 (1st Cir. 2009) ("Kimbrough 'makes manifest that sentencing courts possess sufficient discretion under section 3553(a) to consider requests for variant sentences premised on disagreement with the manner in which the sentencing guidelines operate.'" (quoting United States v. Rodríguez, 527 F.3d 221, 231 (1st Cir. 2008))). Indeed, the District Court did not mention Kimbrough during sentencing and also left unchecked, on its Statement of Reasons form, the box for "Policy Disagreement with the Guidelines (Kimbrough v. U.S., 552 U.S. 85 (2007))" while checking off the box for a § 3553(a) variance. We thus caution that, insofar as the District Court does not intend to support a decision to vary upward even in part under Kimbrough based on a policy disagreement with the Guidelines, it must provide, on remand, a case-specific explanation for the upward variance, if any. See United States v. Rodriguez, 525 F.3d 85, 109 (1st Cir. 2008).

III.

Finally, we address Nieves's contention that his revocation sentence was both procedurally and substantively unreasonable. We consider each challenge in turn.

A.

Nieves contends that his revocation sentence was procedurally unreasonable because "it was driven by punitive considerations which are assigned minimal weight in a sentence on revocation." Nieves roots this argument in 18 U.S.C. § 3583(e), which explicitly incorporates by reference some -- but not all -- of the sentencing factors described in 18 U.S.C. § 3553(a).

The enumerated factors include the nature and circumstances of the offense, id. § 3553(a)(1); the history and characteristics of the offender, id.; the need for adequate deterrence, id. § 3553(a)(2)(B); the need to protect the public, id. § 3553(a)(2)(C); and certain needs of the offender, such as the need for medical care or educational training, id. § 3553(a)(2)(D). The enumerated factors do not include such § 3553(a) factors as "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." Id. § 3553(a)(2)(A).

Nieves correctly notes that the District Court expressly stated in this case that the factors in § 3553(a)(2)(A) were part

of the reason that it handed down the revocation sentence that it did. As Nieves concedes, however, we have previously held that § 3583(e) "does not forbid [the] consideration of other pertinent section 3553(a) factors." United States v. Vargas-Dávila, 649 F.3d 129, 132 (1st Cir. 2011). And while Nieves argues that Vargas-Dávila (and cases following it) "held only that a revocation court is not prohibited from considering the 18 U.S.C. § 3553(a) factors that are omitted from 18 U.S.C. § 3583(e)(3)" (emphasis added), and so "did not consider whether it would be error to consider those omitted factors to the practical exclusion of other enumerated factors," the District Court here did not refer to only "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense" in explaining the revocation sentence. 18 U.S.C. § 3553(a)(2)(A).

To that point, the District Court noted that this was "the third occasion of [Nieves's] revocation of his supervised release term" and that "he needs to be closely monitored in order to protect the community from his recurrent high-risk behavior." The District Court further noted that the revocation sentence was needed "to afford adequate deterrence, and to protect the public from further crimes by [Nieves]." See United States v. Tanco-Pizarro, 892 F.3d 472, 481 (1st Cir. 2018) ("As for Tanco-Pizarro's claim that the district court punished him for his new criminal

conduct, not for his breach of trust, the record shows otherwise. Among other things, the court noted that Tanco-Pizarro has shown zero ability to comply with the law and with his supervised-release conditions.").

Thus, we see no basis for concluding that the District Court relied on the § 3553(a)(2)(A) factors to the exclusion of the § 3583(e) factors. Accordingly, we discern no procedural error.

B.

Nieves appears to base his challenge to the substantive reasonableness of his revocation sentence in part on the fact that it is at the higher end of the applicable GSR and was imposed alongside sentences for his new offenses that were above the Guidelines range. But we conclude that this challenge also is without merit.

In reviewing whether a sentence imposed is substantively reasonable, we look to "the totality of the circumstances and ask whether the sentence is the product of a plausible rationale and a defensible result." United States v. Gaccione, 977 F.3d 75, 84 (1st Cir. 2020) (cleaned up). Here, Nieves's revocation sentence "is within the applicable Guidelines range . . . and so is presumptively reasonable." United States v. Reyes-Torres, 979 F.3d 1, 9 (1st Cir. 2020). Moreover, we have previously affirmed revocation sentences that were imposed alongside a sentence for

new offenses in which both sentences were above the Guidelines range. See, e.g., United States v. Flores-Quiñones, 985 F.3d 128, 132-35 (1st Cir. 2021).

Nieves separately contends that his revocation sentence is substantively unreasonable because "[t]he court's sentence took no consideration of [certain] circumstances" like the fact that "[i]t was not established that [Nieves] was in exclusive control of the premises that were searched," "[t]here is no evidence that [Nieves] ever had a firearm that could be used with the ammunition or with the chip," and that "[t]here is no indication that [Nieves] planned to use or had a realistic possibility of using that chip, or the ammunition." But, "as long as we discern a plausible explanation for the sentence and a defensible overall result, we will not second-guess the district court's informed judgment." Rodriguez, 525 F.3d at 110 (cleaned up).

Here, the District Court provided a plausible sentencing rationale based on this being the third revocation of Nieves's supervised-release term. The revocation sentence also was a defensible result, given the stated need to "closely monitor[Nieves] in order to protect the community from his recurrent high-risk behavior, to reflect the seriousness of the offense, to promote respect for the law, provide just punishment for the offense, to afford adequate deterrence, and to protect the public from further crimes by [Nieves]." "That the sentencing court chose

not to attach to certain of the mitigating factors the significance that the appellant thinks they deserved does not make the sentence unreasonable." United States v. Clogston, 662 F.3d 588, 593 (1st Cir. 2011). Nor does the fact that the sentencing court did not sentence him "according to his counsel's recommendation." United States v. Mulero-Algarín, 866 F.3d 8, 13 (1st Cir. 2017) (quoting United States v. Butler-Acevedo, 656 F.3d 97, 101 (1st Cir. 2011)). Rather, the District Court made plain that it had considered Nieves's arguments and the relevant § 3553(a) mitigating factors because it expressly stated that it did. See United States v. Alejandro-Rosado, 878 F.3d 435, 439 (1st Cir. 2017) (affording weight to a District Court's explicit statement that it considered the § 3553(a) factors and heard the defendant's arguments).

IV.

For the reasons stated above, Nieves's prison sentences on his new offenses are **vacated**, and his revocation sentence is **affirmed**. The case is **remanded** for further proceedings consistent with this opinion.

Appendix B

United States Court of Appeals

For the First Circuit

No. 21-1519

UNITED STATES OF AMERICA,

Appellee,

v.

HECLOUIS NIEVES-DÍAZ, a/k/a Egloy, a/k/a Eloy,

Defendant, Appellant.

No. 21-1520

UNITED STATES OF AMERICA,

Appellee,

v.

HECLOUIS JOEL NIEVES-DÍAZ,

Defendant, Appellant.

JUDGMENT

Entered: April 17, 2024

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

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Heclouis Nieves-Díaz's revocation sentence is affirmed, his 84-month prison sentences on his new offenses are vacated, and the case is remanded for further proceedings consistent with this opinion.

By the Court:

Maria R. Hamilton, Clerk

Appendix B

cc:
Hon. Francisco A. Besosa, Ada Garcia-Rivera, Clerk, United States District Court for the District of Puerto Rico, Julia Meconiates, José A. Ruiz-Santiago, Timothy R. Henwood, Victor O. Acevedo-Hernández, Myriam Yvette Fernández–González, Mariana E. Bauzá-Almonte, Alberto R. López Rocafort, Teresa S. Zapata-Valladares, Jeanette M. Collazo-Ortiz, Cesar S. Rivera-Giraud, María L. Montañez-Concepción, Alexander Louis Alum, Jonathan L. Gottfried, Gregory Bennett Conner, Linet Suárez, Carmen Coral Rodríguez, Alejandra Ysabel Bird Lopez, Vivian I Torralbas-Halais, Melanie Matos-Cardona, Franco L. Pérez-Redondo, Ivan Santos-Castaldo, Jessica Ellen Earl, Heclouis Joel Nieves-Díaz

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

28a
Appendix C

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA
v.
Heclouis Joel NIEVES-DIAZ

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:20-CR-0353-01 (FAB)

USM Number: 41031-069

AFPD Ivan Santos-Castaldo, Esq.
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) One (1), Two (2), and Three (3) on March 11, 2021

☐ 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 USC § 922(g)(1) and 924(a)(2)	Prohibited person in possession of ammunition, a convicted felon.	10/13/2020	One (1)
18 USC § 922(o) and 924(a)(2)	Illegal possession of a machinegun.	10/13/2020	Two (2)
21 USC § 841(a)(1) and 841(b)(1)(C)	Possession with intent to distribute cocaine.	10/13/2020	Three (3)

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.

6/22/2021
Date of Imposition of Judgment

/S/ FRANCISCO A. BESOSA
Signature of Judge

FRANCISCO A. BESOSA, U.S. DISTRICT JUDGE
Name and Title of Judge

6/22/2021
Date

Appendix C

DEFENDANT: Heclouis Joel NIEVES-DIAZ
CASE NUMBER: 3:20-CR-0353-01 (FAB)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
Eighty-Four (84) months as to each count 1, 2, and 3 to be served concurrently to each other, and consecutively to the sentence imposed in the revocation in Cr. 12-426-35 FAB

☑ The court makes the following recommendations to the Bureau of Prisons:
That defendant be designated to Danbury, Otisville, or Ray Brook for him to be allowed to participate in vocational training courses of his interest; English as second language courses, and if he qualifies the 500 hours Residential Drug abuse program.

☑ 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

Appendix C

DEFENDANT: Heclouis Joel NIEVES-DIAZ
CASE NUMBER: 3:20-CR-0353-01 (FAB)

SUPERVISED RELEASE

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

Three (3) years as to Count One (1), and Two (2) and Five (5) years as to count Three (3) to be served concurrently to each other under the following mandatory, standard, and Special/Additional Conditions of Supervision.

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 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.

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DEFENDANT: Heclouis Joel NIEVES-DIAZ
CASE NUMBER: 3:20-CR-0353-01 (FAB)

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 _____

Appendix C

DEFENDANT: Heclouis Joel NIEVES-DIAZ
CASE NUMBER: 3:20-CR-0353-01 (FAB)

ADDITIONAL SUPERVISED RELEASE TERMS

1. He shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court and shall not commit another Federal, state, or local crime.

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

3. He shall participate in vocational training or a job placement program, as recommended by the U.S. Probation Officer.

4. He shall provide the Probation Officer access to any financial information upon request.

5. He 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).

6. He shall submit himself and his property, house, residence, vehicles, papers and effects, computers and other electronic communication or data storage devices or media to a search, at any time, with our without a warrant, by the probation officer, and if necessary, with the assistance of any other law enforcement officer but only in the lawful discharge of the supervision functions of the probation officer with reasonable suspicion of unlawful conduct or of a violation of a condition of supervised release. The probation officer may seize any electronic communication or electronic device or medium which will be subject to further forensic investigation or analysis. Failure to permit a search and seizure may be grounds for revocation of supervised release. He shall warn any other resident or occupant that the premises may be subject to searches pursuant to this condition.

7. He shall not use controlled substances unlawfully and shall submit to a drug test within fifteen (15) days of release from imprisonment; after his release, Mr. Nieves shall submit to random drug testing, not less than three (3) samples during the supervision period, but not to exceed 104 samples per year, in accordance with the Drug Aftercare Program Policy of the United States Probation Office as has been approved by this Court. If the illegal use of controlled substances is detected in any sample, Mr. Nieves shall participate in an inpatient or an outpatient substance abuse treatment program, for evaluation or treatment, as arranged by the U.S. Probation Officer; payment shall be based on his ability to pay or the availability of payments by third parties, as approved by the Court.

Appendix C

DEFENDANT: Heclouis Joel NIEVES-DIAZ
CASE NUMBER: 3:20-CR-0353-01 (FAB)

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 300.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

☐ 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.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** 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.

Appendix C

DEFENDANT: Heclouis Joel NIEVES-DIAZ
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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 $ 300.00 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

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	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:
any firearms and ammunitions involved in the commission of the offense, including, but not limited to: one hundred and forty-nine rounds of .223 caliber ammunition and a machinegun conversion device; any property constituting, or derived from, any proceeds obtained, directly or indirectly, as the result of such offenses and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the Commission of the offense.

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.

Appendix D

Statutory and Sentencing Guidelines Provisions Involved

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1. **18 U.S.C. § 371 provides:**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. **21 U.S.C. § 841 provides in pertinent part:**

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

3. **21 U.S.C. § 846 provides:**

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

4. **U.S.S.G § 4B1.1 (Nov. 1, 2018) provides in pertinent part:**

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

5. **U.S.S.G § 4B1.2 (Nov. 1, 2018) provides in pertinent part:**

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that-- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive

material as defined in 18 U.S.C. § 841(c). (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense. (c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

COMMENTARY

<Application Notes:>

<1. Definitions.--For purposes of this guideline-- >

<"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.>

Appendix D

<"Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.>

<"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.>

<Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense.">

<Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense.">

<Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense.">

<Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. §

843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense.">

<A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under § 4A1.2 (Definitions and Instructions for Computing Criminal History).)>

<"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).>

Appendix D

6. **U.S.S.G. § 2K2.1 (Nov. 1, 2018) provides in pertinent part:**

(a) Base Offense Level (Apply the Greatest):

(1) 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) 20, if--

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is

described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

COMMENTARY

<Application Notes:>

<1. Definitions.--For purposes of this guideline:>

<"Controlled substance offense" has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).>

<"Crime of violence" has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.>