

United States Court of Appeals For the First Circuit

No. 18-1418

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID LÓPEZ,
a/k/a CILINDRO, a/k/a VILLANO,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. F. Dennis Saylor IV, U.S. District Judge]

Before

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

Michael M. Brownlee and The Brownlee Law Firm, P.A., on brief
for appellant.

Andrew E. Lelling, United States Attorney, and Randall E.
Kromm, Assistant United States Attorney, on brief for appellee.

April 30, 2020

SELYA, Circuit Judge. The backdrop for this sentencing appeal is the government's relentless pursuit of a notorious criminal gang, famously known as MS-13. The appeal itself requires us to answer a question of first impression in this circuit: when a defendant is convicted of racketeering conspiracy under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d), does the imposition of a role-in-the-offense enhancement, see USSG §3B1.1, depend upon the defendant's role in the racketeering enterprise as a whole or, instead, upon his role in the discrete acts of racketeering activity that underpin the RICO conviction? We conclude that such an enhancement is dependent upon the defendant's role in the criminal enterprise as a whole. We further conclude that the court below supportably found that defendant-appellant David López occupied a managerial or supervisory role in the racketeering enterprise involved here. Accordingly, we affirm the challenged sentence.

I. BACKGROUND

"Because this appeal follows a guilty plea, we draw the facts from . . . the change-of-plea colloquy, the unchallenged portions of the presentence investigation report (PSI Report), and the transcript of the disposition hearing." United States v. Ocasio-Cancel, 727 F.3d 85, 88 (1st Cir. 2013). The MS-13 street gang is a Salvadorian-based, transnational criminal enterprise with a pervasive foothold in the United States, where it operates

a myriad of subgroups, called "cliques," in no fewer than forty-six states. MS-13 cliques hold meetings at which, among other things, they collect dues, plan criminal exploits, and hash out membership issues. Each clique typically has two chieftains: a "First Word," who is responsible for organizing and directing the clique, and a "Second Word," who serves as the First Word's alter ego and assumes those duties in the First Word's absence.

There is also what amounts to a caste system within each clique. Members, known as "homeboys," are on the upper rungs of the hierarchy. According to the government, an aspirant usually must "participate in the killing of a rival gang member or suspected informant" to achieve that status. Prospective members, called "paros," are allowed to "hang around" with members. Paros who are deemed to be adequately trustworthy are promoted to "chequeos," a status that affords them increased access to members.

In 2013 and 2014, several young chequeos and paros, including the appellant, began forming a new MS-13 clique in Chelsea, Massachusetts. This group, though, was without a leader. In the spring of 2014, centralized MS-13 command staff sent Rafael Leoner-Aguirre (Leoner), a homeboy, from Michigan to Massachusetts to organize the fledgling Chelsea group into a sanctioned clique. The appellant proved to be an active and trustworthy disciple, and he was promoted to chequeo as the clique evolved under Leoner's direction.

In April of 2014, federal authorities arrested Leoner and charged him with attacking members of a rival gang. See United States v. Leoner-Aguirre, 939 F.3d 310, 313-14 (1st Cir. 2019), cert. denied, 140 S. Ct. 820 (2020). Notwithstanding his immurement, the Chelsea clique continued to regard Leoner as its First Word. Meanwhile, the appellant took over as the de facto leader of the clique on the streets, directing the clique's illicit activities with Leoner's oversight.

On May 29, 2014, the appellant and a fellow clique member, Daniel Menjivar, attacked a member of a rival gang, Denys Perdomo Rodriguez (Perdomo), at a bus stop in Chelsea. Menjivar initiated the attack, stabbing Perdomo repeatedly. As Perdomo lay bleeding on the ground, the appellant shot him several times. Although grievously wounded, Perdomo survived.

Menjivar was subsequently arrested for his role in the Perdomo affair. Upon learning of Menjivar's arrest, the appellant fled to New Jersey. Once there, he was promoted to homeboy for his part in the assault on Perdomo.

We fast-forward to April of 2015. Around that time, the authorities learned that the Chelsea clique was planning to kill one of its own members, CW-2, premised on the mistaken belief that he was then a police informant. The investigators also learned of the clique's efforts to bring the appellant back from New Jersey to carry out the murder. In seeming confirmation of this

intelligence, investigators spotted the appellant seated in a car near CW-2's home on April 27. He was accompanied by another clique member and a government cooperator (CW-1). In a conversation recorded at that time, the appellant indicated that the clique had the "go ahead" to kill CW-2 and proposed alternative methods for carrying out the slaying (such as cutting his throat or strangling him with a wire).

On April 28, CW-2 — who by then had begun cooperating with the government — testified before a federal grand jury as part of its probe into MS-13. That same day, ongoing surveillance recorded a conversation between the appellant and another clique member, memorializing their attempts to find and murder CW-2.

In due course, the grand jury handed up a nineteen-count fifth superseding indictment charging sixty-one MS-13 associates (including the appellant) with a golconda of racketeering activities, firearms and drug offenses, and sundry other crimes. Pertinently, the grand jury charged the appellant with conspiracy to conduct enterprise affairs through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d). The indictment listed a number of specific racketeering acts undergirding the broader conspiracy. With respect to the appellant, the specified acts were the attack on Perdomo and the planned execution of CW-2.

Although he initially maintained his innocence, the appellant changed his plea to the sole count against him shortly before his scheduled trial. The district court accepted his guilty plea. The court then ordered the preparation of a PSI Report which, when received, led to a wrangle over a recommended three-level role-in-the-offense enhancement under USSG §3B1.1(b).

The appellant objected to the PSI Report's application of the role enhancement and, relatedly, to its calculation of the guideline sentencing range (GSR). He asserted that the government had not established that he was a manager or supervisor with respect to the assault on Perdomo because he was only a chequeo, not a homeboy, when that assault occurred. Therefore, the PSI Report had artificially inflated both his total offense level and GSR.

In its sentencing memorandum, the government agreed with the probation officer's conclusion that a three-level enhancement for the appellant's role in the offense was warranted. It disagreed, though, with the probation officer's methodology for arriving at the enhancement. The probation officer had analyzed the appellant's role in each of the predicate racketeering acts separately and concluded that the enhancement only applied to the plot to murder CW-2. The government countered that the role enhancement should apply across the board based on the appellant's managerial role in the overall conspiracy.

At the disposition hearing, the court acknowledged the appellant's objection to the conclusion that he "was a manager or supervisor." The court proceeded to overrule this objection because the unchallenged portions of the PSI Report adumbrated facts sufficient to support a finding that the appellant had acted as a manager or supervisor of the clique as a whole. The court also acknowledged that the government had raised a "subsidiary issue" concerning how the relevant guideline provision should be construed and applied. Even so, the court was content to say that the appellant was a manager or supervisor of the enterprise as a whole and, thus, it effectively adopted the government's interpretation of the relevant guideline. The appellant objected, noting that if his interpretation of the relevant guideline were to be employed, both the offense level and the corresponding GSR would be reduced.

After hearing arguments of counsel and the appellant's allocution, the court imposed the statutory maximum sentence of 240 months. See 18 U.S.C. § 1963(a). This timely appeal followed.

II. ANALYSIS

"Appellate 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 examine any claims of procedural error. See United States v. Matos-de-Jesús, 856 F.3d 174, 177 (1st Cir. 2017).

When examining such claims, we evaluate the district court's interpretation and application of the sentencing guidelines de novo. See United States v. Ruiz-Huertas, 792 F.3d 223, 226 (1st Cir. 2015). "If the sentence passes procedural muster, we then address any challenge to its substantive reasonableness." Matos-de-Jesús, 856 F.3d at 177. Here, however, the appellant does not challenge the substantive reasonableness of his sentence.

With this framework in mind, we tackle the appellant's contention that his sentence was procedurally unreasonable because the district court misinterpreted the sentencing guidelines when calculating his total offense level. His principal claim of error, which engenders de novo review, poses a question of first impression in this circuit: when a defendant is convicted of racketeering conspiracy under RICO, does the imposition of a role-in-the-offense enhancement depend upon the defendant's role in the racketeering enterprise as a whole or, instead, upon his role in the discrete acts of racketeering activity that underpin the RICO conviction? Answering this question requires us to explore the interplay between USSG §2E1.1 and USSG §3B1.1.

Section 2E1.1 provides a roadmap for calculating the offense level applicable to an offender convicted of RICO conspiracy. Specifically, it states that a defendant's base offense level should be the greater of nineteen or "the offense level applicable to the underlying racketeering activity." USSG

§2E1.1. This offense level may be adjusted upward if the defendant qualifies for one or more of various sentencing enhancements. See USSG §2E1.1 cmt. n.1.

In the case at hand, the district court determined that the appellant qualified for a role-in-the-offense enhancement under section 3B1.1(b), which provides for a three-level upward adjustment "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." There is an open question, though, as to how the foundation for the enhancement should be laid. Application Note 1, appended to section 2E1.1, furnishes some direction for resolving this quandary. That note states:

Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

USSG §2E1.1 cmt. n.1.

Relying on this language and advice from the Sentencing Commission's Office of Education and Practices (OEP), the probation officer examined the predicate acts underpinning the RICO conspiracy conviction (the attack on Perdomo and the planned attack on CW-2) independently to determine the applicability of

the putative role-in-the-offense enhancement. The district court was not so sanguine, observing that such an approach would lead to anomalous results: it "would actually put a person in a better position if [he was] a leader of a racketeering conspiracy but didn't personally participate in the individual acts or each of those acts involved five or fewer people." Thus, the court expressed its general agreement with the approach adopted by the Second and Seventh Circuits – an approach that assays a defendant's role in the overarching conspiracy to determine the applicability of any role-in-the-offense enhancement. See United States v. Ivezaj, 568 F.3d 88, 99-100 (2d Cir. 2009); United States v. Damico, 99 F.3d 1431, 1437-38 (7th Cir. 1996).

Although the court suggested that it would not definitively decide which interpretive approach was correct, it used the approach employed by the Second and Seventh Circuits to calculate the appellant's GSR. It found that the appellant was a manager or supervisor of the criminal enterprise as a whole and applied the three-level enhancement solely on that basis. According to the appellant, the district court's suggestion that it did not have to resolve this dispute about the proper interpretation of section 2E1.1 was procedural error because the two approaches resulted in different GSRs. Since the district court effectively adopted the government's interpretation of the relevant guideline and effectively rejected the appellant's

interpretation, the claim of procedural error is properly before us.

In this court, as below, the appellant urges us to adopt the interpretive modality fashioned by the probation officer. He submits that the plain language of Application Note 1 mandates that a role-in-the-offense enhancement must be calibrated according to a RICO defendant's role in the particular predicate acts underlying the charged conspiracy. The fact that the OEP endorsed this methodology, the appellant says, is a compelling indication that this is the better approach.

The government demurs, relying heavily on the Seventh Circuit's decision in Damico. There, Damico – having been convicted of RICO conspiracy – assigned error to the district court's application of a four-level enhancement under USSG §3B1.1(a) based upon his role in the RICO enterprise as a whole. See Damico, 99 F.3d at 1435. Much like the appellant, Damico pinned his hopes on Application Note 1. See id. at 1435-36. The Seventh Circuit rejected Damico's argument, noting that it failed to "account for the fact that section 2E1.1's sole purpose is to establish the base offense level for a RICO offense, not the adjusted offense level." Id. at 1437 (emphasis in original). Consequently, the court interpreted Application Note 1 as requiring that the underlying offenses be treated separately only for the purpose of determining the base offense level applicable

to the overarching RICO conspiracy. See id. In a nutshell, the court held "that the predicate-by-predicate approach of Application Note 1 applies . . . only for the purpose of establishing a RICO defendant's base offense level, and not for the purpose of applying the Chapter Three adjustments." Id. at 1438.

We find the reasoning in Damico persuasive. The weight of the appellant's attempt to walk a tightrope between the RICO conspiracy conviction itself and the underlying predicate acts is more than Application Note 1 can bear. Recognizing as much, other circuits have declined defendants' invitations to place their imprimatur on such an exercise in funambulism. Indeed, every court of appeals that has spoken to the issue has followed Damico's lead.¹ See Ivezaj, 568 F.3d at 99-100; United States v. Yeager, 210 F.3d 1315, 1317 (11th Cir. 2000) (per curiam); United States v. Coon, 187 F.3d 888, 899 (8th Cir. 1999).

A salient reason for this unanimity is that the Damico approach fits seamlessly with an important policy concern undergirding the RICO statute. When Congress enacted RICO in 1970,

¹ The OEP guidance to which the appellant adverts is not a significant counterweight to this unbroken chain of authority. The OEP guidance is merely advisory and not binding upon the courts. Cf. United States v. Carrozza, 4 F.3d 70, 78 n.6 (1st Cir. 1993) (explaining that instructions published by Sentencing Commission in informational booklet are not meant to bind the courts or the parties in any given case).

it was particularly concerned with bringing to justice leaders of organized crime syndicates (such as the Mafia and La Cosa Nostra), who were often able to avoid prosecution and "flout the best efforts of . . . law enforcement and judicial authorities" by hiding behind underlings. 116 Cong. Rec. 970 (1970). In light of this policy, it seems right as rain to conclude that a defendant's role in the overarching conspiracy, rather than his role in discrete predicate acts, constitutes the critical benchmark for determining whether a role-in-the-offense enhancement is warranted under section 3B1.1.

To seal the deal, the text of Application Note 1 directs courts to apply Chapter 3 adjustments – including enhancements for a defendant's role in the offense – "to both (a)(1) and (a)(2)." USSG §2E1.1 cmt. n.1 (emphasis supplied). Subsection (a)(1), though, does not require an examination of the defendant's underlying racketeering activities but, rather, simply assigns a base offense level of nineteen. In considering the applicability of a role-in-the-offense enhancement to this base offense level, a court must look to the defendant's role in an enterprise as a whole. It would defy common sense to take a different tack with respect to subsection (a)(2) and examine individual predicates instead of the enterprise as a whole.

Should more be needed – and we doubt that it is – the approach advanced by the appellant would lead to incongruous

results. If, say, the application of a role-in-the-offense enhancement depended upon assessing individual predicate acts in a vacuum, a defendant who served as the kingpin of even the most sprawling criminal enterprise could nonetheless escape a role-in-the-offense enhancement simply because each of the predicate acts underlying his conviction involved fewer than five participants and was not otherwise extensive. See Ivezaj, 568 F.3d at 99; Damico, 99 F.3d at 1437. We agree with the Second Circuit that "it makes little sense to allow a defendant who acts in a leadership capacity in a wide-ranging criminal enterprise to have his offense level adjusted on the basis of his participation in discrete racketeering acts." Ivezaj, 568 F.3d at 99.

To prattle on about this issue would serve no useful purpose. We hold that when a defendant is convicted of racketeering conspiracy under 18 U.S.C. § 1962(d), the imposition of a role-in-the-offense enhancement under USSG §3B1.1(b) depends upon his role in the racketeering enterprise as a whole, not upon his role in the discrete predicate acts that underpin the charged conspiracy.

This does not end our odyssey. The appellant argues, in the alternative, that even if we accept the approach endorsed by Damico and its progeny – as we do – the district court's conclusion that he served as a manager or supervisor of the overarching RICO

enterprise lacked record support.² It is to this argument that we now turn.

This claim of error is waived. After all, the appellant never raised it in his opening brief on appeal – and it is settled beyond hope of contradiction that arguments not made in an appellant's opening brief are deemed abandoned. See, e.g., United States v. Fraser, 388 F.3d 371, 377 (1st Cir. 2004) (per curiam); Sandstrom v. ChemLawn Corp., 904 F.2d 83, 86 (1st Cir. 1990). And even though the appellant challenged the sufficiency of the district court's factual findings regarding his role in the overall enterprise in his reply brief, that was too little and too late. By then, the claim of error had been waived.

Waiver aside, the claim of error lacks force. It hinges on the supportability of the district court's factual findings, but the appellant must pass over a higher-than-usual hurdle in order to set aside those findings. We explain briefly.

To begin, the appellant does not question that the racketeering enterprise (the clique), taken as a whole, involved five or more participants. Instead, he trains his fire on the

² As part of this argument, the appellant alleges that "the district court never made a finding regarding" the appellant's role in the enterprise as a whole. This allegation is belied by the record, as the court unequivocally stated that it was "easily satisfied" that the appellant was "a de facto manager" of the enterprise, given that he was "the only homeboy in the clique who was on the streets" during the pertinent time frame.

district court's factual finding that he was a manager or supervisor within the hierarchy of the clique. But there is a rub: he did not object below to the district court's factual finding that he occupied such a managerial or supervisory role.³ We therefore review his claim exclusively for plain error. See United States v. Flete-Garcia, 925 F.3d 17, 37 (1st Cir.), cert. denied, 140 S. Ct. 388 (2019); United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001).

Review for plain error is not appellant-friendly. It "entails four showings: (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." Duarte, 246 F.3d at 60. The proponent of plain error must carry the burden of establishing each of these four elements. See Miranda-Díaz, 942 F.3d at 39.

In this instance, the district court relied upon the facts disclosed in an unchallenged paragraph of the PSI Report.⁴

³ To be sure, the appellant objected to construing the relevant guideline in a way that made his role vis-à-vis the racketeering enterprise a critical determinant in the enhancement calculus. This objection, though, raised a claim of legal error, separate and apart from the claim of factual error that he now advances.

⁴ Although the appellant did object to certain portions of the PSI Report, the district court did not rely on those disputed

It is well-established that facts limned in uncontested portions of a PSI Report are "ordinarily 'considered reliable evidence for sentencing purposes.'" United States v. Carbajal-Váldez, 874 F.3d 778, 783 (1st Cir. 2017) (quoting United States v. Morillo, 8 F.3d 864, 872 (1st Cir. 1993)), cert. denied, 138 S. Ct. 2586 (2018). So it is here.

The facts gleaned from this undisputed paragraph in the PSI Report adequately support the district court's description of the appellant's role in the clique. Taking those facts as true, the court had a solid foundation for finding that the appellant served as a "de facto manager" of the clique after the incarceration of the clique's First Word in April of 2014 and acted in that capacity through the commission of the racketeering acts described in the count of conviction.

Although the appellant was not in full command of the clique – Leoner, even though imprisoned, remained the First Word – it does not follow that the appellant was ineligible for a role-in-the-offense enhancement under section 3B1.1(b). See United States v. Savoie, 985 F.2d 612, 616 (1st Cir. 1993). We have made pellucid that "[a] defendant need not be the highest ranking member of a criminal troupe in order to be a manager or supervisor" of that troupe. Id. Such an interpretation is entirely consistent

paragraphs in finding that the appellant acted in a managerial or supervisory capacity vis-à-vis the clique.

with the text of the relevant guideline: section 3B1.1 underscores that the managerial role enhancement, "as opposed to other upward role-in-the-offense adjustments, appl[ies] to defendants who were managers or supervisors, but not organizers or leaders." Id. (emphasis in original); see USSG §3B1.1(b).

Given the factual support made manifest in the record, we discern no clear or obvious error in the challenged ruling. Consequently, we hold that the district court's factual finding that the appellant played a managerial or supervisory role in the RICO conspiracy was not plainly erroneous. The role-in-the-offense enhancement was, therefore, appropriate.

III. CONCLUSION

We need go no further. For the reasons elucidated above, the sentence is

Affirmed.

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA

v.

DAVID LOPEZ

JUDGMENT IN A CRIMINAL CASECase Number: **1: 15 CR 10338 - 027 - FDS**

USM Number: 70400-050

Edward L. Hayden

Defendant's Attorney

THE DEFENDANT:☒ pleaded guilty to count(s) Count 2 of the Fifth Superseding Indictment☐ 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:

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|----------------------------|---|----------------------|--------------|
| 18 U.S.C. § 1962(d) | Conspiracy to Conduct Enterprise Affairs through a Pattern of Racketeering Activity | 01/26/16 | 2ss |

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) 2, 2s, 2ss ☐ 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.

4/26/2018

Date of Imposition of Judgment

/s/ F. Dennis Saylor

Signature of Judge

The Honorable F. Dennis Saylor IV
Judge, U.S. District Court

Name and Title of Judge

5/1/2018

Date

DEFENDANT: DAVID LOPEZ

CASE NUMBER: **1: 15 CR 10338 - 027 - FDS****IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **240** months.

Defendant shall receive credit for time served.

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

The Court makes a judicial recommendation that the defendant participate in substance abuse treatment while in Bureau of Prisons' custody.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DAVID LOPEZ

CASE NUMBER: **1: 15 CR 10338 - 027 - FDS****SUPERVISED RELEASE**

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

3 years.

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 cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ 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)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: DAVID LOPEZ

CASE NUMBER: 1: 15 CR 10338 - 027 - FDS

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

DEFENDANT: DAVID LOPEZ

CASE NUMBER: **1: 15 CR 10338 - 027 - FDS**

SPECIAL CONDITIONS OF SUPERVISION

1. You must not knowingly have any contact, direct or indirect, with the victims.
2. If ordered deported, you must leave the United States and not to return without prior permission of the Secretary of the Department of Homeland Security.

DEFENDANT: DAVID LOPEZ
 CASE NUMBER: **1: 15 CR 10338 - 027 - FDS**

CRIMINAL MONETARY PENALTIES

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

| | <u>Assessment</u> | <u>JVTA Assessment*</u> | <u>Fine</u> | <u>Restitution</u> |
|---------------|-------------------|-------------------------|-------------|--------------------|
| TOTALS | \$ 100.00 | \$ 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.

| <u>Name of Payee</u> | <u>Total Loss**</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|---------------------|----------------------------|-------------------------------|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| 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:

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

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

DEFENDANT: DAVID LOPEZ
CASE NUMBER: 1: 15 CR 10338 - 027 - FDS

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 \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

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

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

☐ Joint and Several

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

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS

3 UNITED STATES OF AMERICA)
4)
5 vs.) Criminal Action
6)
7 DAVID LOPEZ,) No. 15-10338-FDS
8 Defendant)
9)
10)
11)

12 BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

13 SENTENCING

14 John Joseph Moakley United States Courthouse
15 Courtroom No. 2
16 1 Courthouse Way
17 Boston, MA 02210

18 April 26, 2018
19 2:05 p.m.

20
21
22 Valerie A. O'Hara
23 Official Court Reporter
24 John Joseph Moakley United States Courthouse
25 1 Courthouse Way, Room 3204
Boston, MA 02210
E-mail: vaohara@gmail.com

1 APPEARANCES:

2 For The United States:

3 United States Attorney's Office, KUNAL PASRICHA,
4 ASSISTANT UNITED STATES ATTORNEY, 1 Courthouse Way, Suite 9200,
Boston, Massachusetts 02110;

5 For the Defendant:

6 EDWARD L. HAYDEN, ESQ., 7 Franklin Street, Lynn,
7 Massachusetts 01902.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

PROCEEDINGS

THE CLERK: All rise. This Honorable Court is now in session. You may be seated. Criminal matter 15-10338, United States vs. David Lopez.

MR. PASRICHA: Good afternoon, your Honor, Kunal Pasricha for the United States.

MR. HAYDEN: Good afternoon, your Honor, Edward Hayden for Mr. Lopez.

THE COURT: Would you please swear the interpreter.

02:05PM (The interpreter was sworn.)

THE COURT: All right. Good afternoon.

THE INTERPRETER: Good afternoon.

THE COURT: This is the sentencing of David Lopez. I've received and read the pre-sentence report as revised through March 13th, the defendant's sentencing memorandum, which contained a number of exhibits, including letters from supporters and the government's sentencing memorandum filed March 23rd, and there is no plea agreement.

To my knowledge, there are no other materials that have been submitted to the Court. Is there anything else I should have seen that I have not?

MR. PASRICHA: No, thank you, your Honor.

MR. HAYDEN: I'm sorry, I didn't hear your Honor.

THE COURT: Is there anything you filed?

MR. HAYDEN: I filed an objection to the PSR. That's

1 part of it.

2 THE COURT: Yes. Mr. Hayden, I know you have gone
3 over the pre-sentence report. Have you had an opportunity to
4 go over it with the defendant?

5 MR. HAYDEN: I have.

6 THE COURT: Is that correct, Mr. Lopez?

7 THE DEFENDANT: Yes.

8 THE COURT: All right. Mr. Pasricha, are there any
9 victims present who wish to participate?

02:06PM 10 MR. PASRICHA: No, your Honor.

11 THE COURT: All right. There is an objection to the
12 PSR as to whether the defendant was a manager or supervisor,
13 and then there's a subsidiary issue raised by the government as
14 to how that plays into the guideline calculation.

15 Mr. Hayden, do you want to be heard on that argument?

16 MR. HAYDEN: No, I just rely on my objection.

17 THE COURT: All right. I think under the
18 circumstances, I agree with probation that the enhancement
19 applies, not the leader enhancement but a more intermediate
02:07PM 20 manager or supervisor enhancement. I think there is certainly
21 evidence set forth at paragraph 35 concerning his role in the
22 clique and that he was a de facto manager after Tremendo was
23 arrested being the only homeboy in the clique who was on the
24 streets. As Mr. Hayden has pointed out, for a period of time
25 when he's in New Jersey and the actual management may have been

1 brief, but I think by a preponderance standard, I think I am
2 easily satisfied that he was a manager or supervisor, and the
3 enhancement is appropriate.

4 There's a tricky issue under the guidelines, which I
5 have avoided reaching in the past, but I think I need to reach
6 now as to how that three-level enhancement is applied in a RICO
7 circumstance, such as this, a RICO conviction.

8 Basically I agree with the Second and Seventh
9 Circuits' application in the *Ivezha* case, I-v-e-z-h-a,
02:08PM 10 568 F.3d 88 and *Domico*, D-o-m-i-c-o, 99 F.3d. 1431, that the
11 three-level enhancement should apply across the board. It
12 seems to me otherwise it doesn't make sense. It would actually
13 put a person in a better position if you were a leader of a
14 racketeering conspiracy but didn't personally participate in
15 the individual acts or each of those acts involved five or
16 fewer people, you would wind up with a lower guideline range
17 than you otherwise would, and it doesn't seem to make any sense
18 to me.

19 The way probation applied it, they applied it to one
02:09PM 20 offense but not the other. I think it was applied in Group 2
21 but not Group 1. I don't think -- I think my take on this is
22 that the right way to do it is to count it only once, to do the
23 calculation of the underlying offenses first, and then apply
24 the three-level enhancement. It's a Section 3 enhancement, and
25 I think that's a more sensible way to do it, but it doesn't

1 really matter if you apply it in the individual cases. I think
2 you wind up in the same place either way, so probation applied
3 it in one instance, not the other, so it was a 40 and a 38.
4 With two levels, you take the higher of that, and you wind up
5 with 42.

6 If you did it the way I think it ought to be done,
7 you'd start with 37 and a 35. You'd add two points for
8 grouping, and it would take you to a 39, and another three
9 levels for role in the offense, and it would take you back to
02:10PM 10 42, so I don't need to decide which of those two is
11 appropriate, but I do think that, again, the Second and Seventh
12 Circuits have it right.

13 I will acknowledge that there is considerable
14 ambiguity on this score, and probation apparently checked with
15 the Sentencing Commission staff, who indicated that the way
16 probation did it was right, but, again, I think the Second
17 Circuit has it right, and, in any event, in this case, I think
18 it makes no real difference, but, in any event, I think that's
19 how it ought to be done. Let me pause there. Do you want to
02:11PM 20 weigh in on that or clarify anything, Mr. Pasricha?

21 MR. PASRICHA: No, your Honor. I think either
22 approach, as your Honor indicated, leads to the same result,
23 and I think for purposes of the initial starting point, that
24 would result in a guideline calculation of 240 months, which is
25 what we believe to be correct.

1 THE COURT: Mr. Hayden, anything you want to add to
2 that?

3 MR. HAYDEN: No, your Honor.

4 THE COURT: So then if our base offense level is 42,
5 the government, as I understand it, is willing to make the
6 motion to give the defendant the third level for acceptance of
7 responsibility?

8 MR. PASRICHA: That's correct, your Honor.

9 THE COURT: All right. That motion is granted, and so
02:12PM 10 that brings us to a 39. His criminal history score is 0, his
11 criminal history category is I. That produces a guideline
12 range of 262 to 327 months, but the statutory max is 240
13 months, and so that is his guideline range, 240 months. The
14 supervised release range is 1 to 3 years, the fine range is
15 \$40,000?

16 PROBATION OFFICER: Based on the Court's finding --

17 THE COURT: Yes.

18 PROBATION OFFICER: -- it will increase to 50,000 to
19 250,000.

02:12PM 20 THE COURT: 50,000 to 250,000, but there has been no
21 request for restitution?

22 MR. PASRICHA: That's correct, your Honor.

23 THE COURT: And his special assessment of \$100 is
24 mandatory, so I'm overruling Mr. Hayden's objection, and is
25 there any other correction or objection not previously raised?

1 MR. PASRICHA: No, your Honor, thank you.

2 THE COURT: Mr. Hayden.

3 MR. HAYDEN: Your Honor, I just had one point.

4 THE COURT: Yes.

5 MR. HAYDEN: Your Honor was mentioning that it didn't
6 make any difference the ruling on the issue of probation.

7 THE COURT: That may not be true. As I said it, I'm
8 not sure it's true.

9 MR. HAYDEN: Because I think their way, which resulted
02:13PM 10 in a range of 210 to 262.

11 THE COURT: Right.

12 MR. HAYDEN: With your Honor's way, it's 240 to 262,
13 so it does make a difference. I suppose I'll just offer an
14 objection to your Honor's ruling on that and request that you
15 adopt probation's ruling, but I would waive argument on it.

16 THE COURT: Okay. Let me ask probation because I seem
17 to have misspoken. The way probation calculates, remind me how
18 you got to the lower number.

19 PROBATION OFFICER: Because I only applied role to one
02:13PM 20 of the offenses, so the higher offense level was lower than
21 what the Court has found.

22 THE COURT: Okay.

23 PROBATION OFFICER: So I think there's no difference
24 in the calculation, whether you do it by adding role to each
25 group or adding role at the very end.

1 THE COURT: That's what I meant to say. It doesn't
2 make any difference whether I added it twice in the role, in
3 the groupings, or only once at the end. That doesn't make a
4 difference.

5 PROBATION OFFICER: But the difference is that the
6 Court has made a finding that is higher than the PSR so that is
7 distinct.

8 THE COURT: Okay. Sorry to confuse everyone and
9 myself. All right. With that then as our starting point, let
02:14PM 10 me hear from the government as to its recommendation, and among
11 the things I would like the government to address and defense,
12 of course as well, is how the government's recommendation
13 squares with the recommendation for Mr. Menjivar where the
14 government recommended 156 months, which is what I imposed.

15 MR. PASRICHA: Yes, your Honor, thank you. And I'll
16 get to that shortly, but I think one of the key themes that
17 should hopefully emerge from my argument is as follows: This
18 defendant in terms of what we can glean about his character
19 based on his actions in our opinion is one of the most
02:15PM 20 troubling cases of violence and one of the most troubling
21 defendants in this entire case.

22 The nature and circumstances of the offense as it
23 relates to his individual participation makes him different
24 from any of the other participants in the two underlying
25 racketeering acts.

1 Let me begin with the attempted murder of Dennis
2 Perdomo Rodriguez. This is the one that Roca or Mr. Menjivar
3 was also involved in. That is quite possibly the most gruesome
4 murder in the entire case. Your Honor heard some testimony
5 about that, but, in short, there's an attack initially with a
6 knife with Mr. Menjivar, and he, for lack of a better way to
7 phrase it, guts the victim, and the victim's intestines are
8 essentially being held together by the first responder from
9 Chelsea PD, Star Chung, who you heard from at trial.

02:16PM 10 This defendant then runs up and essentially tries
11 putting kill shots into the victim as he's laying there dying.
12 Just focusing on that for a second in our view, and I'd submit
13 to your Honor that shows an even more heinous, calluous attack
14 than the initial attack.

15 In fact, the PSR tried quoting some of the parts, some
16 of the recordings, but even Menjivar is struck by the nature of
17 the defendant's actions because on tape, he's essentially
18 saying, and the PSR and the offense conduct, I highlighted some
19 of the parts where he talks about this defendant having, "The
02:17PM 20 mind of a murderer" because what he says is, and this is --
21 I'll draw the Court's attention to paragraph 42, and what that
22 recording really shows is in describing the attack, Menjivar is
23 saying, "I had him pretty much dead, and he still ran up and
24 started shooting him."

25 He always has the mind of a murderer. The guy was

1 already on the ground all sliced up, and he still goes in and
2 shoots him. I think that alone is a distinguishing factor.
3 I'd separately say though, however, as to Menjivar, I think the
4 Court was very troubled by the nature of the stabbing in
5 sentencing Menjivar, and I think your Honor on the record
6 referenced the fact that but for the government's
7 recommendation in that case, you would have been inclined to
8 sentence him higher.

9 Two vastly different situations. First, Menjivar pled
02:18PM 10 substantially earlier than this defendant. He pled the Friday
11 before jury selection. That makes him much different, but,
12 secondly, as I mentioned, the nature and circumstances of the
13 offense are different, and when combined with this defendant's
14 role in the conspiracy to kill Clacker, CW-2, it makes him a
15 materially different defendant.

16 I want to focus, continue focusing for a second on the
17 shooting that we're talking about, and I'll note the PSR talks
18 about this defendant proudly boasting how he emptied his clip
19 into the victim who was lying there dead, a victim who, by the
02:18PM 20 way, your Honor, also heard from the ER physician during
21 Tremendo's trial, who said, and it's in the PSR, "The victim
22 had cardiac arrest and 'bled out.'" I mean, the victim,
23 medically speaking, was dead and had to be revived.

24 To the extent the 20-year stab max is the defining
25 line between someone who has killed and someone who has not,

1 I'd submit to you it is medically impossible to get closer to
2 the line of murder than this defendant got, and I want to focus
3 on that shooting for a second because in this case, if I may be
4 as bold as to make the following observation: There is not a
5 Judge in the United States who has had more insight and
6 exposure to MS-13 than your Honor has.

7 Often in finding comparable cases, we have to go
8 outside the district, and initially before there was
9 sentencings in this case, that's what we attempted to do to
02:20PM 10 find comparable sentences in similarly situated defendants. We
11 don't have to do that here, so I want to take a few minutes to
12 compare him to the other two shooters that your Honor is most
13 familiar with.

14 For example, your Honor just sat through a multi-week
15 trial involving, Hector Enamorado, "Vida Loca," who was
16 recently found guilty of murder and who was held responsible
17 for that murder. We expect that his guideline range will be
18 life. We expect we will ask for life.

19 As your Honor knows, the sentence in state court for
02:20PM 20 first-degree murder is life, and the federal guidelines make
21 clear that life is the appropriate sentence for a first-degree
22 murderer, but if you stop and reflect on it, as gruesome as the
23 Vida Loca murder was, what this defendant did in terms of the
24 nature and circumstances of his actions, what was in his mind,
25 what was in his heart was even worse. It wasn't, you know, I

1 had some fight with some guy, and I went back, maybe I was
2 drinking. Obviously, that's a very troubling case, and we'll
3 separately deal with that at sentencing, but in terms of the
4 Vida Loca shooting, he shot at the victim three times, and, you
5 know, once or twice where he put a kill shot into the dying
6 victim.

7 This defendant ran up. The victim was already dying
8 by his co-defendant's words. Was bled, had been stabbed 21
9 times, and he runs up just to make sure that he's finished the
02:21PM 10 job, and he empties his clip into a dying victim.

11 I'd submit to you that had the victim actually died,
12 that would have been an even more troubling order because as it
13 relates to his history and characteristics, his ability to be
14 rehabilitated, the danger he may pose, all of the 3553(a)
15 factors, in many ways, but for luck, his actions were actually
16 worse because as it relates to what he did and what he wanted
17 to do, it's a more troubling set of circumstances.

18 The other example is this is the individual who shot
19 Katherine Gomez. He's the other shooter your Honor has heard a
02:22PM 20 lot about, and in thinking about this sentencing, I was
21 reminded of the Attorney General's comments. The Attorney
22 General of the United States came to this building and spoke in
23 this federal courthouse on September 21st, 2017.

24 The case against this defendant, Tremendo,.
25 Hector Ramires, they were all pending at that time, and it was

1 National Gang Violence Prevention Week, and the Attorney
2 General was commenting on MS-13, and he says this community
3 knows firsthand MS-13 is probably the most violent and ruthless
4 gangs on the streets today. It has made inflicting gruesome
5 violence their primary feature.

6 And moving on, he said one needs to look no further
7 than what has occurred here in Boston as proof positive of what
8 this gang is capable of, and we know that's true, but he then
9 ended some of his comments on MS-13 by saying the alleged gang
02:23PM 10 murder of a mother in front of her children, it simply does not
11 get any worse than this, and he was, of course, referring to
12 Hector Ramires.

13 And in many ways, that's true, and your Honor
14 reflected on that and commented on just what a troubling murder
15 that was, but in hearing the Attorney General's comments on
16 that day, I remember thinking that it is -- of course, the
17 Attorney General was correct in saying that, but what was
18 remarkable and a damning indictment on the violence in this
19 case is at that point, we actually believe that Hector Ramires
02:23PM 20 may not have been the most troubling person still sitting at
21 the defense table because on that day, this defendant was still
22 sitting at the defense table.

23 Hector Ramires shot at someone, who he believed to be
24 a violent gang member, shot once and inadvertently killed
25 someone. He, of course, should have been held responsible for

1 murder, but the reason it was 27 years and not life was our
2 attempt to put into context the nature of his shooting, and I'd
3 submit to you that the nature of this defendant's shooting was
4 much worse, was much troubling. So that's what I would submit
5 separates him even on that initial attempted murder from
6 Menjivar, and then I think that carries through with the
7 conspiracy to kill CW-2.

8 Your Honor, I'd remind the Court your Honor did not
9 hold Menjivar responsible because there was this doubt and
02:24PM 10 given the joint nature of the recommendation.

11 THE COURT: I didn't need to make a finding.

12 MR. PASRICHA: Correct, but your Honor on the record
13 stated that had you found that he was responsible or part of
14 that conspiracy, you would, again, have sentenced at the much
15 higher, and your Honor said that on the record. With this
16 defendant, there's no doubt as to his role in the conspiracy to
17 kill CW-2.

18 And, again, out of anyone who may have been involved
19 in that conspiracy, again, he is the most troubling person.

02:25PM 20 When it comes time for that gang to kill CW-2, who they believe
21 erroneously is cooperating with law enforcement, they go to get
22 this defendant to be the hit man.

23 Out of all of them, he's the guy they bring back to do
24 the job to commit the killing because he is the experienced
25 killer amongst them. That's their view of why they're bringing

1 him back. That's what the conversations say, we have to bring
2 back Villano, he's the serious guy, he's the one. You see the
3 recordings. You see him then come to the area. You see him
4 talk about various ways to kill people. We've cited some of
5 them in our sentencing papers.

6 We have significant concerns about his past criminal
7 activity, which goes against his 3553(a) factors. He's pretty
8 much on tape talking about ways he learned in El Salvador about
9 how to get away with murder and how to shoot people and how
02:26PM 10 there's a different way to kill people, maybe you stab them,
11 how there are ways to wrap wires around people's neck and
12 that's a better way.

13 That's what's happening with this defendant through
14 his words, so it's not just, well, he was also involved in a
15 conspiracy, it's a matter of I'd suggest part of the reason we
16 gave discounts to other people is because we were forced to put
17 a relative hierarchy of culpability, and I'd suggest that the
18 facts and circumstances of the case show that in every incident
19 that he was involved in, he was the most culpable and troubling
02:27PM 20 person.

21 And I want to talk about CW-2 briefly because,
22 respectfully, and part of it is probably, you know, our fault
23 because we focused so much on the violence, we forget, we often
24 forget to talk about him and his family. He's not here today.

25 As your Honor knows, he is in the Federal Witness

1 Protection Program. I spoke to him as recently as this morning
2 in advance of this defendant's sentencing, and there are a
3 couple of things he has said over the years, over the months
4 that I think are worth relating to the Court.

5 1, his reaction when he first sees the tape that this
6 defendant is about, and what he's says stuck with me. He
7 essentially has brought to tears, and he says, "They were
8 hunting me outside my house like an animal."

9 And I want to focus on that because the list of
02:27PM 10 victims in this case is broader than just CW-2 because we tried
11 to move Clacker, and he was a teenager, and you can imagine the
12 reaction when law enforcement knocks on his door and says,
13 "Hey, you've got to move. People are trying to come after
14 you."

15 We failed to get his attention. We had to go speak to
16 his father, and I want the Court to imagine what that was like,
17 to go to a father and to say you need to pack your bags, you
18 need to pack your bags for yourself, for your son, and you need
19 to come to the federal courthouse tonight. You need to give up
02:28PM 20 your job, your son needs to give up his schooling, you need to
21 give up your friends, you need to give up your home, we need to
22 move you because we cannot figure out any other way to keep
23 your son alive.

24 In sum and substance, that's what we're talking about.
25 CW-2 and his entire family had to be moved because it wasn't

1 just words, it wasn't just bluster, while we are trying to move
2 them to save their lives, this defendant is taking the lead in
3 figuring out how to kill them, all of it culminating in
4 April 28th of that year when for the first time CW-2 is brought
5 in to testify before a federal grand jury, and that's the day,
6 among others, where this defendant is found roaming the streets
7 in the car outside CW-2's house looking for him to kill him.

8 So I want to emphasize that, too, because there's, you
9 know, a lot of times the story of CW-2, especially on the
02:29PM 10 stand, is talking about, oh, hundreds of thousands of dollars,
11 benefits, et cetera. He wasn't giving benefits, the government
12 has spent hundreds of thousands of dollars and years of effort
13 to keep him alive based on what this defendant and others were
14 caught on video doing.

15 And this defendant's role in that was, again, the most
16 troubling, so I think those are all distinguishing factors. I
17 think not only have we attempted to make an individualized
18 determination across defendants and across incidents, but
19 within incidents, we've tried our best to assign culpability.

02:30PM 20 So the difference in response to your Honor's question
21 is as to the first incident, he was again more culpable, he was
22 more troubling. It goes more to his propensity for violence,
23 his dangerousness, his lack of respect for the law, his lack of
24 respect for human life, you never want to kind of talk about a
25 person's ability or lack of ability to be rehabilitated. I'd

1 like to think everyone has that ability, but to the extent you
2 are again putting people on a spectrum, given his own words and
3 his own actions, he seems to us to be more troubling. The
4 conspiracy to kill CW-2 is the same, again, most troubling.

5 And, lastly, I want to kind of get lost in the shuffle
6 a little bit, but I want to emphasize he did everything he
7 could to commit murder. He is one of the only people, and I'm
8 struggling to think of someone else of the defendants you've
9 seen who got promoted not for a murder. You've heard statement
02:31PM 10 after statement, witness after witness talking about how people
11 get promoted when they finally commit this murder in the
12 United States.

13 He did everything he could. He gets promoted for that
14 murder, the attempted murder he's in because short of the
15 medical miracle, you know, even the gang essentially throws up
16 its hands to say, hey, you did everything you were supposed to
17 do, you pretty much killed him, we're going to reward you, and
18 we're going to make you a homeboy, so he is a leader. He's the
19 only leader. He's the leader on the streets. Tremendo gets
02:31PM 20 arrested. He comes back. He's not only giving guidance,
21 again, it's not theoretical leadership.

22 Why do people get or why do people deserve leadership
23 enhancements, because they are in a position to shape, guide,
24 instruct more junior members. Here, we have evidence of that
25 because when he comes back as a homeboy, when he comes back as

1 a leader, not only is he giving them guidance, the guidance
2 he's giving them is helping them decide between whether to stab
3 CW-2 to death or put a metal wire around his neck to kill him
4 because that will be easier and make less noise or whether he
5 use a machete because or whether they should use a gun because
6 a gun is too loud, and that may not be the best way to kill
7 him.

8 That's the kind of guidance that this defendant is
9 giving to the more junior members, so I think based on all of
02:32PM 10 those factors, I think a 240-month sentence is appropriate.
11 I'd suggest that if his stat maximum was higher, we'd very
12 strongly consider asking for an even higher sentence. His
13 guideline range absent the stat max obviously is higher.

14 Frankly, this defendant already benefited in some
15 ways, and we don't usually make this argument, but I just want
16 to kind of emphasize given we're up against the stat max, had
17 this case been charged differently, he'd be looking at a higher
18 stat max, right?

19 What he did was a violation of 18 U.S.C. 924(c) as an
02:33PM 20 example. He discharged a firearm in a crime of violence, 10
21 years over and above any other stat max, right, so there are
22 ways to charge in all of that, but I only mention that to say
23 our sentencing recommendation happens to coincide with what I'd
24 submit to your Honor is an appropriate number given not just
25 his greater culpability than some of the people who got less

1 than 20 years, but, frankly, he gets the benefit of being lucky
2 enough that unlike Hector Ramires, he didn't end up killing
3 someone, and so he gets seven years less than that for what I'd
4 submit to you is a more troubling and more gruesome attempted
5 murder and shooting.

6 Based on all of those reasons, I'd ask you to impose
7 the sentence of 240 months. I do not believe anything in his
8 offense conduct, anything in 3553(a) warrants a downward
9 variance, which is what your Honor would have to give. We
02:34PM 10 recognize it is highly, highly unusual to ask for a sentence at
11 a statutory maximum rate on a plea.

12 In fact, I don't ever recall doing it myself. I know
13 it's unusual regardless of the kind of case, but in this case,
14 there are -- I think it speaks to how the government views this
15 defendant. I think there are one, maybe two people, who even
16 on a plea, we would have recommended that. I think that there
17 may be one, maybe two other people who on a plea, we would
18 recommend a statutory maximum. That is how we view this
19 defendant based on his own statements, what he has said about
02:34PM 20 his past, and what he has done and shown with his words.

21 I'll end by saying we've gone back and forth as a
22 prosecution team, as an office to think about what to offer in
23 the alternative, do we ask your Honor, okay, give him five
24 months off, you know, ten months off, and I think as a
25 principal matter, I'd urge you to resist that break because

1 he's already gotten a break, and, more importantly, I think the
2 3553(a) factors are extremely compelling.

3 The other thing I had to mention, this is a defendant
4 who is again caught on tape saying the only thing he fears is
5 the justice system, he doesn't fear violence out on the
6 streets. That's one of the parts I quoted. One of the things
7 he says, the only thing I fear is jail.

8 We have direct evidence in this case that the
9 sentences that your Honor imposes are perhaps the only thing
02:35PM 10 that matters to defendants like this, and although the
11 government's prosecution of MS-13 is coming to a close in this
12 courtroom, we have five defendants left, I want to emphasize
13 that our efforts against MS-13 are not coming to a close out on
14 the street.

15 Even in Massachusetts, and we have members of our law
16 enforcement partners, federal and state law enforcement
17 officers here in the courtroom, almost weekly, we get
18 intelligence reports of MS-13 members in Massachusetts trying
19 to reconstitute themselves, trying to come back to life after a
02:36PM 20 relatively decent period of reduced violence.

21 There may be increased violence as this gang
22 reconstitutes itself. There is a compelling need, there may
23 not be a difference between 135 months and 140 months, but a
24 difference between 230 or 240 or whatever we would typically
25 give a discount is meaningful because it is meaningful to be

1 able to say you commit acts like this, you commit pretty much
2 as close to murder as you can get, you patrol the streets
3 trying to hunt down teenagers like an animal, as like the
4 victim says, you will be prosecuted to the full extent of the
5 law.

6 We recognize there's typically a discount given. We
7 have been more than willing to do that in other cases. This
8 defendant pled the Friday before jury selection. Respectfully,
9 I'd suggest there's no reason to vary downward from the
02:37PM 10 guideline, and I'd ask you to impose a sentence of 240 months.

11 THE COURT: All right. Thank you. Mr. Hayden.

12 MR. HAYDEN: Thank you, Judge. I have to concede that
13 the two predicates are pretty bad, but that's not why they are
14 recommending the maximum on this, the 240 months. That's
15 common because he delayed in pleading guilty. No one was
16 talking about his depravity or his dangerousness when they were
17 trying to get him to plead difficulty. He was going to get a
18 deal, he would have been right around the same time frame as
19 Menjivar if he had pled early, and that's why this is ramped up
02:38PM 20 to the 240 months, so not pleading guilty I don't disagree that
21 if someone pleads guilty early, they should get a benefit for
22 doing that, but just because someone delays in pleading guilty,
23 that doesn't mean that they are depraved and beyond
24 rehabilitation, and I think I should explain to your Honor why
25 he delayed in pleading guilty.

1 As your Honor is well aware, we have had a contentious
2 relationship. He's already treated me with respect, and what
3 he was really pushing me to do is to cross the Ts and dot the
4 Is before he pled guilty. He wanted to be sure that the
5 prosecution could prove their case, and there are two things
6 about that attack on Perdomo that, Number 1, in the Mass.
7 General Hospital emergency room records, there is no mention of
8 Perdomo having been shot. All they talk about is the knife
9 wounds.

02:39PM 10 Now, I brought those records, showed them to
11 Mr. Lopez, and he wanted to be sure that the kid was shot
12 because he is being charged with having shot him.

13 And so that -- you know, I tried to explain to him, I
14 went back and forth to Wyatt numerous times to explain to him
15 that's not really much of a defense at the trial, but he wanted
16 to be sure that there was some evidence that Perdomo had been
17 shot, and I was able to get the transcript from the trial where
18 the emergency room doctor testified, and he had been shot, but
19 that issue was a cause of the delay, not anything to do with
02:40PM 20 his violence or his depravity.

21 He wanted me to do my job and investigate that issue,
22 and that resulted in some delay. Another issue relating to the
23 shooting of Perdomo, they have him on tape saying he emptied
24 the clip into Perdomo, six shots. I agree with that, but the
25 problem is that gun held nine -- I'm sorry, held eight. He was

1 wrong about that, and that's something that we could have used
2 at the trial just to show that he was talking when he made that
3 statement.

4 Again, not much of a defense, but that is something
5 that he wanted me to investigate, and I did, I was finally able
6 to convince him that it wasn't a strong defense going forward,
7 and that's why he eventually decided to plead guilty, but it
8 resulted in a delay, and he shouldn't be judged for being
9 depraved because of the delay.

02:41PM 10 If they want to make that argument that he's this
11 uncontrolled, violent person beyond rehabilitation, it seems to
12 me that argument would have had a lot more validity if they
13 were making it when they were trying get him to plead guilty.
14 They are willing to make a deal with him then, and so I would
15 ask your Honor, he does not want me to make a recommendation
16 for a specific amount of time, but I would request that your
17 Honor give him something less than 240 months, something more
18 comparable with the other defendants in this case who have
19 gotten deals for atrocious behavior.

02:42PM 20 THE COURT: All right. Thank you, Mr. Hayden.

21 Mr. Lopez, do you wish to address the Court before I
22 impose sentence?

23 THE DEFENDANT: Yes. Your Honor, I apologize if I
24 don't speak in the most formal or perfect manner, as I've never
25 been in a situation like this, but I want to apologize, and I

1 don't mean to justify with words what I've done, but I want to
2 be judged according to my actions and my participation, not
3 based on what somebody else might say because I was able to
4 hear what my accuser has been saying about me.

5 There are many things that I've said, and I accept
6 that, but I said many things just to portray being a tough
7 person. I truly accepted culpability because I am culpable,
8 but I just want to be judged based on my participation and to
9 apologize to the United States and to all the people whose
02:44PM 10 peace I took from them.

11 I know that I can't give them back their peace through
12 a mere apology, but I've found God, and I have God in my heart.
13 I know that my responsibility is to apologize. Like I said, I
14 want to justify myself with words, but I just want to make a
15 reference to what the prosecutor said about me and reference as
16 well to the PSR and their characterization of me.

17 I'm being accused with the fact that when Perdomo was
18 on the ground, I'm accused of emptying the clip or an actual
19 gun on him. Based on what I've seen in the evidence, the gun
02:45PM 20 that I shot, and I accept that, I accept having done that, only
21 two bullets came out of that gun. And also, in the medical
22 report, there isn't any showing of sustaining bullet wounds in
23 his body, however, there is a doctor's statement where it said
24 that he did have one bullet wound. I needed to find out the
25 facts because when all these events happened, I was under the

1 influence of drugs, and I simply needed to know what the
2 factual things were.

3 On one side, I needed to know what exactly had
4 happened. I had heard that there was a statement that there
5 was a bullet wound, and the doctor had said that the victim had
6 not sustained, being touched by bullets. When we were in the
7 car and I was recorded, I was saying a lot of things, I was
8 saying a lot of bad things so that I would look like a tough
9 guy in front of other people when in reality those things never
02:47PM 10 happened.

11 I truly hope that you don't think that I'm trying to
12 justify myself with words, but all the things I have heard in
13 terms of characterizing me are just very bad, and I understand
14 it. The truth is I said those things, I said other things as
15 well trying to portray myself and show myself as a tough person
16 and as a person worse than what I am.

17 I would wish that the fact that whether I shot or not
18 Perdomo, that he was hurt or not, I truly don't know in my own
19 conscious whether he was hurt by a bullet. It was very high,
02:48PM 20 and I didn't know. I did know that I did it, I just don't know
21 with certainty that he was shot. Again, I apologize. I'm
22 willing to pay according to what my actions were. I would like
23 to say that I have become a new person, I have found Jesus
24 Christ.

25 In reference to the leadership, had it truly been so,

1 I would accept it in the same way that I have accepted making
2 many other mistakes, but I was never a leader. I spoke in the
3 way I did because I wanted for everyone to think what a tough
4 guy I was, but, in reality, none of those things actually
5 happened, which is I just want that everyone believe that I was
6 bad, but, I apologize, and I'm willing to accept the
7 punishment.

8 I know God at this time will help you make the right
9 decision in your heart because I know how powerful God is, as
02:51PM 10 he created the world, and his dominion is all-encompassing, but
11 I also understand that I made mistakes, and I know that I have
12 to pay for them. Thank you very much for listening to me.

13 THE COURT: Thank you. All right. I'm going to start
14 by reminding myself, reminding everyone that Mr. Lopez is a
15 human being, that he comes from a background of poverty and
16 hardship and crime that is hard for people in this country to
17 imagine, and I fully recognize and appreciate the fact that
18 that poverty and violence pulls people in, including young
19 people, in a way that's very difficult for them to resist.

02:52PM 20 Having said that, he committed or participated in
21 committing a near murder. It was not a murder only because of
22 a medical miracle, but the victim lost 100 percent of his
23 blood, but he had the good fortune to be transported in time to
24 one of the world's finest hospitals and survived, so it was
25 only an attempt instead of an actual murder, and the defendant

1 also wanted to and conspired to and sought to commit a second
2 murder.

3 So certainly I start and maybe I wind up at the
4 proposition that a 20-year sentence, which is the statutory
5 maximum for someone who was prevented from committing a murder
6 only by a medical miracle is an appropriate sentence.

7 There are two issues that perhaps affect that
8 decision. One is the fact that the defendant pleaded guilty,
9 and it's certainly unusual, highly unusual, for anyone who
02:53PM 10 pleads guilty to receive a maximum sentence, and the other
11 reason is the sentence given to Mr. Menjivar, which was 156
12 months or 13 years.

13 Mr. Menjivar did receive a 156-month sentence.
14 There's certainly no question that he stabbed Mr. Perdomo
15 Rodrigues multiple times, bragged about it afterwards. The
16 proposed sentence here is, I think, more than 50 percent
17 higher, years vs. 20 years.

18 I, frankly, as I said at the time, would have imposed
19 a higher sentence on Mr. Menjivar had the government asked for
02:54PM 20 it. I did not feel it was appropriate to exceed the government
21 recommendation for a variety of reasons. I recognize that the
22 government has to make deals, has to put its resources, which
23 are limited, where it thinks it will do best. I thought the
24 recommendation was low, but I did impose that sentence.

25 Mr. Menjivar's plea, of course, was much earlier.

1 That does make a difference. There is considerably to plead
2 many months before the trial and effectively the day before.
3 There was no role enhancement for Mr. Menjivar. He was not in
4 any way an organizer or supervisor or manager of the gang.

5 The various roles in the attempted murder of
6 Mr. Perdomo Rodrigues, the government has discussed, Mr. Lopez
7 himself has discussed, I don't think the issue is really
8 whether one bullet was fired or two or six, I think the
9 culpability is the same.

02:55PM 10 There was his role in the conspiracy to kill Clacker,
11 which the government has also discussed, which is I think a
12 significant difference, certainly the evidence is much stronger
13 here as to Mr. Lopez.

14 The defendant did make a number of disturbing
15 statements on the tapes, how to kill people, for example. I'm
16 sorry to hear that I'm the Judge with the greatest familiarity
17 with MS-13. I have had to endure a parade of evidence of
18 disturbing and grisly and pointless violence. Perhaps all of
19 us become enured to it at some point, but even in that context,
02:56PM 20 I think the defendant's statements on the tape stand out.

21 I recognize that there is a degree of bragging or
22 braggadocio involved in that. I think virtually every person
23 recorded on these tapes has exaggerated their involvement,
24 their violence, what they have accomplished, and what they
25 intend to accomplish, and even taking that into account, again,

1 I think these statements stand out.

2 And, again, this violence is pointless as violence
3 could be. There's no reason for it. There's no underlying
4 ideology, there's no wealth at the end of the day, it's not
5 triggered by consumption of drugs or alcohol, it's just
6 violence of the most extreme and pointless kind imaginable.

7 What about the fact that the defendant pleaded guilty?
8 Again, it is unusual, to say the least, to impose the statutory
9 maximum when someone has pleaded guilty. The system is set up
02:57PM 10 to give people an incentive to plead, to give them a reward for
11 pleading. The failure to give a discount for pleading guilty
12 risks discouraging future pleas, which is not how the system
13 operates or is intended to operate.

14 I guess my response to that is the defendant was
15 offered a deal. He didn't take it. That's his right. He
16 lives with the consequence of that. He was certainly
17 represented by capable counsel. The plea was late in the game.
18 The government made its motion for a guideline reduction, but
19 it was fairly late in the game, extremely late in the game, and
02:58PM 20 the defendant has not gained nothing.

21 Had he gone to trial, there is no possibility I think
22 I would even consider lower than a 20-year sentence, so he's
23 gained at the very least my careful and thoughtful attention
24 about what sentence to impose, not to suggest it wouldn't be
25 thoughtful otherwise, but it's hard to imagine had he been

1 convicted at trial that I would give him anything less than the
2 20-year sentence.

3 So what do I do with all that? I recognize both the
4 fact that his co-defendant received a 13-year sentence for
5 behavior that overlapped in part with his, and recognizing that
6 he did plead guilty and save the Court and the government
7 considerable resources and effort and trial risk. I,
8 nonetheless, conclude that the appropriate sentence is 240
9 months.

03:00PM 10 I don't do that lightly. It gives me some pause to do
11 it for the reasons I indicated, but I think under the
12 circumstances here, it's entirely appropriate given who the
13 defendant is, what he has done, the crimes he committed, his
14 role in the offense, his statements, and his other personal
15 characteristics. And if that sentence seems harsh, and, of
16 course, it is harsh, had it not been for a medical intervention
17 bordered on a miracle, he would be looking and likely receive
18 life in prison.

19 So, that is the sentence that I'm going to impose. As
03:01PM 20 is my practice, I'm going to formally state the reasons for
21 that sentence followed by a formal statement of the reasons.

22 When I've concluded, I'll give the attorneys a final
23 opportunity to make any objections or additions or corrections
24 to the sentence.

25 Is there a forfeiture issue here, Mr. Pasricha?

1 MR. PASRICHA: Not as to this defendant, your Honor.

2 THE COURT: All right. If the defendant would please
3 stand. Pursuant to the pursuant to the Sentencing Reform Act
4 of 1984 and having considered the sentencing factors set forth
5 at 18 United States Code, Section 3553(a), it is the judgment
6 of the Court that the Defendant David Lopez is hereby committed
7 to the custody of the Bureau of Prisons to be imprisoned for a
8 term of 240 months.

9 The Court makes a judicial recommendation that the
03:01PM 10 defendant participate in substance abuse treatment while in
11 Bureau of Prisons' custody.

12 Upon release from imprisonment, the defendant shall be
13 placed on supervised release for a term of three years.

14 Within 72 hours of release from custody of the Bureau
15 of Prisons, the defendant shall report in person to the
16 district to which he is released.

17 While on supervised release, the defendant shall
18 comply with the following terms and conditions:

19 He must not commit another federal, state or local
03:02PM 20 crime.

21 He must unlawfully possess a controlled substance.

22 He must refrain from any unlawful use of a controlled
23 substance.

24 He must submit to one drug test within 15 days of
25 release from imprisonment, and at least two periodic drug tests

1 thereafter, not to exceed 104 tests per year.

2 He must cooperate in the collection of a DNA sample as
3 directed by probation.

4 He must comply with the standard conditions that have
5 been adopted by the Court, which are set forth at Section
6 5D1.3C of the Sentencing Guidelines, and which will be set
7 forth in detail in the judgment.

8 He must not knowingly have any contact, direct or
9 indirect, with any victim of his offense, and if ordered
03:03PM 10 deported or removed, he must leave the United States and shall
11 not return without prior permission of the Secretary of the
12 Department of Homeland Security.

13 It is further ordered that the defendant shall pay to
14 the United States a special assessment of \$100, which shall be
15 due immediately.

16 You may be seated. In terms of the formal reasons for
17 the sentence, it is a guideline sentence imposed for the
18 reasons indicated.

19 Obviously, I expect that the defendant will be
03:03PM 20 deported. If he is, the term of supervised release will help
21 assert greater control over him if he returns, and if he is
22 not, the term of supervised release will help ensure adequate
23 supervision.

24 I'm imposing no fine, as he's established he's unable,
25 and even with the use of a reasonable installment is not likely

1 to pay all or part of the fine required under the guidelines.

2 I'm imposing no restitution because there has been no
3 request by an identifiable victim, notwithstanding the fact
4 that restitution is mandatory, so I'm imposing no restitution.
5 \$100 special assessment is mandatory.

6 Do counsel have any addition or correction or
7 objection to that sentence not previously raised?

8 Mr. Pasricha.

9 MR. PASRICHA: No, thank you, your Honor.

03:04PM 10 THE COURT: Mr. Hayden.

11 MR. HAYDEN: No, your Honor.

12 THE COURT: All right. The sentence is hereby imposed
13 as stated. I'll give Mr. Lopez his advice of rights.

14 You can appeal your conviction if you believe that
15 your guilty plea was unlawful or involuntary or if there was
16 some other fundamental defect in the proceeding that has not
17 been waived. You have a right to appeal your sentence under
18 some circumstances, particularly if you think the sentence was
19 contrary to law.

20 If you're unable to pay the costs of appeal, you may
21 ask permission to have those costs waived and appeal without
22 pain. You must file any notice of appeal within 14 days after
23 the entry of judgment, and if you request, the clerk will
24 immediately prepare and file a notice of appeal on your behalf.

25 All right. Is there anything further, Mr. Pasricha?

1 MR. PASRICHA: No, thank you, your Honor.

2 THE COURT: Mr. Hayden.

3 MR. HAYDEN: No, thank you, your Honor.

4 THE COURT: Yes.

5 MR. HAYDEN: Nothing, your Honor.

6 THE COURT: All right. I guess I'll say in
7 conclusion, Mr. Lopez, two things.

8 The first is I know you've had your differences with
9 your counsel, Mr. Hayden, but I do think he has done an
03:05PM 10 effective job representing you in this case, and if you're not
11 happy with your sentence, it's not his fault.

12 And, second, as I stated, I recognize, of course, that
13 you are human, that like all humans, you've made mistakes, that
14 you've come from a very difficult background. I believe that
15 you've earned your sentence because of what you've done, but I
16 certainly wish you no harm beyond that. The price you're going
17 to pay is significant enough under the circumstances.

18 With that, we'll stand in recess.

19 THE CLERK: All rise.

20 (Whereupon, the hearing was adjourned at 3:05 p.m.)

21

22

23

24

25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing transcript was
recorded by me stenographically at the time and place aforesaid
in Criminal Action No. 15-10338-FDS, UNITED STATES vs.
DAVID LOPEZ and thereafter by me reduced to typewriting and is
a true and accurate record of the proceedings.

Dated this 3rd day of August, 2018.

s/s Valerie A. O'Hara

VALERIE A. O'HARA

OFFICIAL COURT REPORTER

18 U.S. Code § 1962.Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(Added Pub. L. 91-452, title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942; amended Pub. L. 100-690, title VII, § 7033, Nov. 18, 1988, 102 Stat. 4398.)