

# United States Court of Appeals For the First Circuit

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No. 18-1418

UNITED STATES OF AMERICA,

Appellee,

v.

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

Defendant, Appellant.

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

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

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Before

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

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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.

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April 30, 2020

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**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 goelconda 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.<sup>1</sup> 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,

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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<sup>3</sup> 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.

<sup>4</sup> 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

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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 ) **JUDGMENT IN A CRIMINAL CASE**  
 )  
 v. )  
 )  
 ) Case Number: **1: 15 CR 10338 - 027 - FDS**  
 DAVID LOPEZ ) 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 &amp; 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	2sss

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

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## STANDARD CONDITIONS OF SUPERVISION

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

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

### **U.S. Probation Office Use Only**

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

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: DAVID LOPEZ

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### **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

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**CRIMINAL MONETARY PENALTIES**

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

<u>TOTALS</u>	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 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>
<b>TOTALS</b>	\$ 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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
vs. ) Criminal Action  
DAVID LOPEZ, ) No. 15-10338-FDS  
Defendant )  
 )  
 )  
 )  
 )

BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

## SENTENCING

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

April 26, 2018  
2:05 p.m.

Valerie A. O'Hara  
Official Court Reporter  
John Joseph Moakley United States Courthouse  
1 Courthouse Way, Room 3204  
Boston, MA 02210  
E-mail: [vaohara@gmail.com](mailto: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,  
5 Boston, Massachusetts 02110;

6 For the Defendant:

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

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PROCEEDINGS

2

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

5

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

7

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

9

THE COURT: Would you please swear the interpreter.

02:05PM 10

(The interpreter was sworn.)

11

THE COURT: All right. Good afternoon.

12

THE INTERPRETER: Good afternoon.

13

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.

19

02:05PM 20

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?

22

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

23

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

24

THE COURT: Is there anything you filed?

25

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. PASRICHCHA: 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. PASRICHCHA: 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. PASRICHCHA: 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. PASRICHCHA: 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. PASRICA: 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, callous 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 02:20PM 10 sentencings in this case, that's what we attempted to do to  
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. PASRICHCHA: 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 forgot, we often  
24 forgot 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 difficultly. 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. PASRICA: 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. PASRICHCHA: 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.)

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## C E R T I F I C A T E

3 UNITED STATES DISTRICT COURT )  
4 DISTRICT OF MASSACHUSETTS ) ss.  
5 CITY OF BOSTON )

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

12 Dated this 3rd day of August, 2018.

13 s/s Valerie A. O'Hara

15 VALERIE A. O'HARA

16 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.)