No.

In the Supreme Court of the United States

FRANKLIN RAFAEL LOPEZ TOALA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In general, new materials that were never filed, presented, or considered by a sentencing court are not part of the appellate record. In contravention of this principal, the Eleventh Circuit allowed the United States ("the government") to supplement the appellate record to include presentence investigation reports of Eddy Jimy Pinargote Mera and Ramon Elias Zambrano (together "PSRs" or "Mera-Zambrano PSRs"). However, those PSRs were: not part of Toala's case, never proffered at sentencing hearing, and never reviewed by the sentencing judge. As a result, Toala opposed this in the appellate court, but it directed Toala to seek relief in the district court. The district court found no jurisdiction to decide if the Mera-Zambrano PSRs should be part of the appellate record as the sentencing judge never considered them. It then ordered the government to provide redacted PSRs to Toala. The Eleventh Circuit then granted the government's motion to add Mera-Zambrano PSRs to the appellate record. The unorthodox ancillary proceeding did not fix the problem as it deprived: counsel of an opportunity to object at the sentencing hearing, Toala of an evidentiary hearing on the PSRs, and Toala's use of the PSRs to argue a downward departure of the 108-month sentence. Hence, the questions presented are:

1. In reviewing a sentencing judgment, may the Eleventh Circuit consider new materials that were never introduced to the sentencing judge? (A 9-2 split).

2. Whether the holding of *Gardner v. Florida*, 430 U.S. 349 (1977), should extend to Toala whose sentence was reviewed at least in part, on the basis of information that he had no opportunity to deny or explain at his sentencing, in violation of the due process clause of the Fifth Amendment of the Constitution.

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

Petitioner, Franklin Rafael Lopez Toala, was Defendant-Appellant below.

Respondent, United States of America, was Plaintiff-Appellee below.

INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following persons may have an interest in the outcome of this case:

Battaglia, Brian P., Counsel for Defendant-Petitioner in lower court and for this appeal;

Goldman, Summer Rae, Counsel for Co-defendant Ramon Elias Zambrano;

Lagoa, Barbara United States Court of Appeals for the Eleventh Circuit Judge;

Lopez, Maria Chapa, United States Attorney for the Middle District of Tampa;

Martin, Beverley United States Court of Appeals for the Eleventh Circuit Judge;

Merryday, Steven D., United States District Judge (Chief Judge);

Mieczkowski, Sara Lenore, Federal Public Defender; Counsel for Co-Defendant Eddy Jimy Pinargote Mera;

DeRenzo, Nicholas G., Special Assistant United States Attorney

Pryor, William, United States Court of Appeals for the Eleventh Circuit Judge;

Rhodes, David P., Assistant United States Attorney, Chief, Appellate Division;

Siekkinen, Sean, Assistant United States Attorney;

Snead, Julie S., United States Magistrate Judge;

Toala, Franklin Rafael Lopez, Defendant-Petitioner; and

Wilson, Hon. Thomas G., United States Magistrate Judge.

There are no additional persons with an interest in the outcome of this case.

Further, no publicly traded company or corporation has an interest in the outcome of this appeal.

LIST OF PROCEEDINGS

1. *United States v. Lopez Toala*, No. 8:18-cr-511-SDM-JSS-2 (M.D. Fla.). On October 30, 2018, the original proceedings were filed in the Middle District of Florida. *United States v. Lopez Toala*, No. 8:18-cr-511-SDM-JSS-2 (M.D. Fla.). On March 27, 2019, the District Court entered judgment and sentenced Toala in the Middle District of Florida.

2. *United States v. Lopez Toala*, No. 19-1135 (11th Cir.). On November 5, 2019, the Eleventh Circuit by order denied without prejudice Appellant's motion for order to unseal on a limited basis and/or permit Appellant's counsel limited inspection to review the sealed presentence investigation report of Pinargote Mera and alternatively other relief and directed Appellant to seek such relief in The District Court within 14 days and holding in abeyance the government's motion for leave to file corrected supplemental appendix, containing the un-redacted Mera-Zambrano PSRs)

3. *United States v. Lopez Toala*, No. 8:18-cr-511-SDM-JSS-2 (M.D. Fla.). On December 23, 2019, United States Magistrate Judge Julie S. Sneed entered a report and recommendation finding that it had no jurisdiction to deny the Appellant's motion to prohibit the government from relying on portions of the appendix and supplemental appendix filed in the Eleventh Circuit and ordered that certain paragraphs of the sealed Mera-Zambrano PSRs be provided to counsel for the defendant.

4. *United States v. Lopez Toala,* No. 8:18-cr-511-SDM-JSS-2 (M.D. Fla.). On January 6, 2020 the district judge, over the objections of the defendant, accepted the report and recommendation of United States Magistrate Judge Julie S. Sneed.

5. *United States v. Lopez Toala,* No. 19-1135 (11th Cir.). On January 23, 2020 the Eleventh Circuit granted the government's motion for leave to file corrected supplemental appendix containing the un-redacted Mera-Zambrano PSRs.

6. *United States v. Lopez Toala,* No. 19-1135 (11th Cir.). On March 31, 2020, the Eleventh Circuit Court of Appeals affirmed the District Court's sentencing of Toala. The non-published opinion can be found here: 799 Fed. App'x. 804 (11th Cir. 2020) (per curiam).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Franklin Rafael Lopez Toala ("Toala"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit is a non-published decision, and it is reported at 799 Fed. App'x. 804 (11th Cir. 2020) (per curiam). *See* (Pet. App. A).

JURISDICTION

The U.S. Court of Appeals for the Eleventh Circuit filed its opinion on March 31, 2020. Pet. App. A. A petition for rehearing was not filed. Petitioner now invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). On March 19, 2020, this Court entered an Order extending the deadline to file the petition for certiorari to "150 days from the date of the lower court judgment."

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

Additional pertinent statutory, regulatory, and pertinent provisions involved are set forth at Appendix W to this petition.

STATEMENT OF THE CASE

Toala was born on December 26, 1977, in Manta, Ecuador. Pet. App. O at p.4. Even though he had an admittedly "horrible" childhood, he has always been a hard worker and has done his best to provide for his family. *Id.* Growing up, Toala was diagnosed with a learning disability. However, he managed to earn a sixth-grade education and learned to read and write in Spanish. *Id.*

Despite the learning disability, Toala persevered and found work as a security guard for six years. *Id.* After, Toala worked as a tuna packer for thirteen (13) years. *Id.* He was proud of his self-sufficiency and ability to support his family. *Id.* Unfortunately, Toala was laid off from his job in early 2018 and it was difficult to find work. Pet. App. O at p.4. His unemployment condition was exasperated when Toala's grandson was born after only 26 weeks of development; neither of the parents had money to pay for the expensive medical care, so the bill fell heavily on Toala's shoulders. Pet. App. O at p.5. There is a $4,500 debt for his grandson's medical care. *Id.*; *see also* Pet. App. L at p.13.

Toala is not only a family man but he received military training in the Ecuadorian Air Force, during a period when there was an open conflict with casualties known as the Cenepa War, to fight against Peru's forces in 1995. Pet. App. O at p.5. Toala felt compelled to help his country and joined the military. Pet. App. O at pp.5–6; Pet. App. L at pp.3, 4. Currently, Toala is considered to be in the reserves. Pet. App. O at p.6. Toala performed his military duties as required. Pet. App. O at p.6. Moreover, prior to his arrest, Toala had never been arrested for any

criminal misconduct; he has lived a very just and honorable life. In all, the current proceedings are the only exception Pet. App. O at p.6; Pet. App. L at p.2.

B. The Go-Fast Vessel Incident

As reflected in the Toala PSR, in October of 2018, while on routine patrol, the United States Coast Guard Cutter *James* intercepted a panga style go-fast vessel, boarded the boat, and retrieved cocaine that had been jettisoned from the vessel. Pet. App. O at p.6. The seizure totaled 331 kilograms. *Id.* The three individuals on board were interviewed and arrested. *Id.* The other individuals were Eddy Jimy Pinargote Mera ("Mera") and Ramon Elias Zambrano ("Zambrano"). *Id.* It was confirmed that Mera was the captain and navigator of the vessel who gave the orders and coordinates. *Id.* Mera also took the helm when the vessel was spotted. *Id.* On a related note, Zambrano was driving the vessel before he handed the helm to Mera after being spotted by the Coast Guard. *Id.*

Besides Mera's statement, that Mera was to share the helm with Zambrano and Toala, there is no indication Toala navigated the vessel. *Id.* Toala "did point out that he was quickly relieved from steering because "he didn't know how to steer a boat. He had never done it before." Pet. App. O at pp.6–7. Except for this serious violation of the law, Toala did not have a previous criminal record. Pet. App. O at p.7. At all times since his arrest, Toala accepted complete and full responsibility for his actions. *Id.* (*"The defendant has clearly demonstrated acceptance of responsibility for the offense"*). Toala's sentencing qualified for the "safety valve." *Id.*

C. The Sentencing

1. The "Policy Statements" Discussion

Prior to and during sentencing, Toala asserted that, given the totality of the circumstances, a reduced sentence based on employment record, family ties and responsibilities, military service, grounds for departures, and other pertinent, policy statements are befitting per the "heartlands" analysis. Pet. App. O at pp. 7–8, 14, 21, 23; Pet. App. L at pp. 5, 9.

Specifically, Toala noted other cases where the longstanding employment history has led to a downward departure of a sentence and how Toala maintained consistent employment until a few months before the incident. Pet. App. O at p.7; Pet. App. L at p.6; Pet. App. N. at pp. 31, 33–35. Toala also pointed out his robust familial ties and responsibilities. App. N. at p.33. He argued that his grandson's medical condition, and the money needed for his treatment, precipitated his involvement. Pet. App. N. at pp.30, 32. Toala also emphasized his military service. Pet. App. N. at p.33. Toala has no history of drug and alcohol abuse. Pet. App. N at P. 33; *see also* Pet. App. O at p.8. When two or more factors under a "heartlands" analysis are demonstrated, then a downward departure of the sentence in question should be considered. Pet. App. O at pp. 7–8, 14, 21, 23; Pet. App. L at pp. 5, 9.

The government did not counter Toala's argument; instead, the government merely reiterated that the adequate basis for departure was not met. Pet. App. N at p.37. The sentencing court addressed each factor, agreed that the basis was not met, and it did not apply a downward departure. *Id.* at p.40. Specifically, the sentencing court did not find that the factors were substantially fulfilled to depart from the

sentence in question. *Id.* at p.38. Finally, after having already objected on the basis of a departure in his sentencing memoranda and PSR objections, Toala reasserted his objection regarding the court's decision not to grant departures and the court's heartlands analysis. Pet. App. O at p.8.

2. The "Minor Role" Discussion

Prior to the sentencing hearing, a United States probation officer prepared a PSR for Toala that contained sentencing guidelines calculations. *Id.* The calculations yielded a total offense level of 31, a criminal history category of I, and a sentencing guidelines range of 108–135 months. *Id.* at 9. Before and during the sentencing hearing, Toala objected to the offense level based on his minor role. Pet. App. O at p.9; Pet. App. L at pp.10–12; Pet. App. N at p.7. Based on his minor role, Toala argued that the base offense level should have been reduced 2 levels. Pet. App. N at p. 26; Pet. App. O at p.8; App. L at pp.10–12. Toala argued that he was not the planner or mastermind. Pet. App. O at p.9; App. L at p.11. He had no proprietary interest in the drugs, and, in comparison to the value of the cargo, was only paid a pittance ($5,000) for his presence on-board the vessel. Pet. App. O at p.9; Pet. App. L at p.12. During the sentencing hearing, Toala argued his involvement in the conspiracy was less than Mera and Zambrano because Toala was not giving orders, navigating the boat, and he had the least knowledge regarding the transportation plan. Pet. App. O at p.9; Pet. App. N at pp.9, 16.

In response to Toala's arguments, the government submitted that Toala was as similarly involved as Zambrano because they both took "a turn at the helm." Pet. App. O at p.9; Pet. App. N at p.13. The government went on to elaborate that there

was no lesser role in comparison to Zambrano who was a mariner involved in navigating and copiloting the vessel. Pet. App. O at p.9; Pet. App. L at p.11. The government made no attempt to provide the sentencing court with the Mera-Zambrano PSRs, to buttress its argument. Those PSRs were not considered at the sentencing hearing.

Ultimately, the Middle District of Florida, Tampa Division ("District Court") found that the panga style go-fast vessel was piloted by a captain and had two equally culpable crewmembers. Pet. App. O at p.9.; *Id.* at p.19. Thus, the District Court denied the minor role reduction under 3B1.2 because Toala and Zambrano were equally culpable. Pet. App. N at pp.19–20. Also, in rejecting Toala's minor role reduction argument, the court acknowledged the existence of other participants in these types of cases, people more culpable than the defendants, who the court characterized as "the lords of the operation, the leaders of these criminal organizations, and their enforcers, and their captains and the like . . . " *Id.* at p.18.

3. The "Reasonableness" Discussion

At the sentencing hearing Toala rearticulated that due to his character traits of: (1) employment history; (2) unlikeliness to recidivate; (3) and exigent circumstances pertaining to his grandson's medical condition; and (4) the PSR's recommendation of a 108-month sentence would not be reasonable. *Id.* at p.42.

The government maintained that Toala should receive a sentence of 108 months, similar to that of Zambrano's sentence. *Id.* at p.46. The sentencing court agreed and sentenced Toala to 108 months. *Id.* at p.52. Toala reprised his objections regarding procedural and substantive issues with respect to sentencing. *Id.* at p.56.

E. Procedural Review of the Appeal

Toala and the undersigned filed the Initial Brief on Appeal to the Eleventh Circuit on July 12, 2019. *See* Pet. App. O. The appeal was based on two arguments. First, the District Court erred in calculating Toala's sentence without a minor role reduction. *Id.* at p.16. Second, was that the sentencing court committed error in not sentencing downward via "heartland" characteristics pursuant to Toala's family responsibilities, military service, and employment record, which in doing so created unwarranted sentencing disparities between Toala and his codefendants. *Id.* at 18.

In turn, the United States filed an Answer Brief on September 26, 2019. *See* Pet. App. P. The United States argued that Toala's request for a two-level reduction was properly denied because Toala did not demonstrate by a preponderance of the evidence a minor participation compared to Mera and Zambrano. *Id.* at 14.

For the first time on appeal, on October 1, 2019, the government sought to add new evidence into the record on appeal, which were not before the District Court. Pet. App. R. The government filed a supplemental appendix listing Mera's PSR as an exhibit to the pending appeal. Zambrano's PSR was not included in the United States supplemental appendix until January 23, 2020. *See* Pet. App. C & T. On October 7, 2019, counsel for the United States advised counsel for Toala that the information in Mera's PSR would remain under seal.

On October 14, 2019, Toala submitted a motion to the Eleventh Circuit. Pet. App. Q at p.3. The motion was for access to sealed PSRs of the appellant's co-defendants on a limited basis, or to permit inspection rights to Toala's counsel to review the sealed PSR's of the appellant's co-defendants. *Id.* In the alternative,

Toala moved to strike the PSRs from the appellate record. Pet. App. Q p.9. The undersigned also noted that the PSRs were not referenced at the appellant's sentencing hearing, and in fact had not been filed in that proceeding. *Id.* Toala also filed a motion objecting to Zambrano's PSR and strike [including Mera's] PSR. *Id.*; *see generally* Pet. App. U.

On November 5, 2019, the Eleventh Circuit submitted an order regarding Toala's October 14, 2019 motion. Pet. App. B at p.1. The October 14, 2019 motion was denied without prejudice, and the Court directed Toala to seek relief in the District Court. *Id.* In addition, the Eleventh Circuit ordered that the United States Motion for Leave to File Corrected Supplemental Appendix be held in abeyance until the District Court ruled on whether Toala's counsel could access sealed PSRs. *Id.* at p.2.

On November 14, 2019, Toala filed a motion for miscellaneous relief with the District Court. *See* Pet. App. H. Specifically, Toala's timely motion was submitted pursuant to the directive of the Eleventh Circuit. *Id.* The undersigned argued that because the government did not initially seek leave from the District Court regarding the use of the Mera-Zambrano PSRs in the pending appeal, substantive and procedural problems arose. *Id.* at ¶ 6. Notably, that Toala and the undersigned were not given an opportunity to object to the use of the PSRs because they were not used at Toala's sentencing. *Id.* at ¶ 12. As a result, the motion requested that the District Court not allow Toala's co-defendants PSRs to be considered by the Eleventh Circuit nor should the Eleventh Circuit have complete and unredacted access to the PSRs in the pending appeal. *Id.* at ¶ 23.

On November 25, 2019, the United States responded to Toala November 14, 2019 motion for relief. *See* Pet. App. I. The United States responded that Mera's PSR was included in the supplemental appendix under seal with the Eleventh Circuit and that a corrected supplemental appendix was filed to include Zambrano's PSR in the appellate court. *Id.* at p.2. The government further argued that specific sections of the Mera-Zambrano PSRs were needed to rebut the issue on appeal—that Toala was entitled to a decrease in offense level due to being a minor participant in the criminal activity. *Id.* at p.8. The specific sections of Mera-Zambrano PSRs were: ¶¶ 9, 24, and 65 for Mera and ¶ 60 for Zambrano. *Id.* As a result, the government asserted that it had no objection to the Toala's access to these portions of the Mera-Zambrano PSRs, only an objection to the Toala's complete and unredacted access. *Id.* at pp.8, 9.

On December 23, 2019, the District Court entered a report and recommended that Toala's November 14, 2019 motion be granted in part. Pet. App. F at p.3. It recommended that the government furnish the undersigned with portions of the Mera-Zambrano PSRs, which were referenced in its Answer Brief. *Id.* at p.4. However, the District Court explained that because Mera-Zambrano PSRs were not part of the record created in the sentencing court, but rather filed as part of the United States appendix and supplemental appendix in the appellate proceeding, it did not have jurisdiction to rule whether the Mera-Zambrano PSRs were properly before the Eleventh Circuit. *Id.* at p. 6; *see also* Pet. App. D (district court order finding no jurisdiction). The sentencing court still has not seen the Mera-Zambrano

PSRs that the appellate court had access to when reviewing the sentencing judgment of Toala, and which was not before the court at Toala's sentencing.

On December 26, 2019, Toala's counsel objected to the report and recommendation of the District Court. *See* Pet. App. K at p.1. Specifically, Toala's counsel argued that Federal Rule of Appellate Procedure 10(e) does not permit "a party to add materials to the record on appeal that were not before the district court" and that any difference regarding what the record discloses must be submitted to and settled by that court. *Id.* at pp.2–3.

On January 6, 2020, the District Court overruled the objections finding no jurisdiction, and it granted in part the motion. Pet. App. D. It ruled that the United States must provide Toala's counsel with ¶9, 24, and 65 of Mera's PSR and ¶60 of Zambrano's PSR. *Id.* at p.1, 2. However, the remaining portions of both PSRs furnished to Toala's counsel should be redacted. *Id.* at p.2.

Next, the Eleventh Circuit Court of Appeals entered an order granting the government's previous motions allowing Mera-Zambrano unredacted PSRs to be filed in their entirety in the government's Supplemental and Appendix. *See* Pet. App. C.

Toala reaffirmed his argument that he should receive a downward departure; but again, asserted that Mera-Zambrano PSRs should not be considered because they were "never filed in or used" at Toala's sentencing. Pet. App. V at p.9.

On March 31, 2020, Toala's sentence was affirmed. *See* Pet. App. A.

REASONS FOR GRANTING THE PETITION

This petition presents a circuit split of 9-2, involving whether a United States Court of Appeals may consider documents or evidence that were never brought before a District Court.

I. In reviewing a sentencing judgment, may the Eleventh Circuit consider new materials that were never introduced to the sentencing judge? (A 9-2 split).

In the United States Court of Appeals, "the following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." FED. R. APP. P. 10(a). Additionally, the appendix of an appellant's or appellee's brief filed with a United States court of appeals may contain the following: "(A) the relevant docket entries in the proceeding below; (B) the relevant portions of the pleadings, charge, findings, or opinion; (C) the judgment, order, or decision in question; and (D) other parts of the record to which the parties wish to direct the court's attention." FED. R. APP. P. (30)(a)(1) (emphasis added).

Thus, the Federal Rules of Appellate Procedure indicate that for an item to be properly filed in a party's appendix, that item must be part of the district court record and for an item to properly be a part of the district court record it must be an item filed in district court or in the district court's docket. Pet. App. G,V.

A. 9 circuits have ruled that a party may not supplement the record on appeal with materials never considered by a district court.

Despite this straightforward interpretation of the Federal Rules of Appellate Procedure, a 9-2 circuit split persists over whether a party may supplement the record on appeal with materials that were never considered by a district court.

On one hand, the majority rule of the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits do not permit the supplementation of the record on appeal and by extension the appendix with materials or items that were not considered by a district court.

In the First Circuit Court of Appeals, *In re Colonial Mortg. Bankers Corp.*, the held that in an appeal from bankruptcy court, the district court acts in an appellate capacity. 186 F.3d 46, 49–50 (1st Cir. 1999). As a result, the district court is limited to the evidentiary record compiled in the bankruptcy court. *Colonial Mortg. Bankers Corp.*, 186 F.3d at 49; *see also United States v. Approximately2,385.85 Shares of Stock*, 988 F.2d 1281, 1289 n.9 (1st Cir. 1993). The court reasoned that procedures used on appellate review were not designed to vet new evidence or even allow an evidentiary response to it. *Colonial Mortg. Bankers Corp.*, 186 F.3d at 49, 50.

In the Fourth Circuit Court of Appeals, the *Kaiser Aluminum and Chemical Corp. v. Westinghouse Elec. Corp.*, the court held that it was well established that affidavits and exhibits not before a district court in making its decision should not subsequently be considered on appeal. 981 F.2d 136, 140 (4th Cir. 1992); *see also Reedy v. Virginia*, 977 F.2d 573 n.2 (4th Cir. 1992).

In *Kaiser*, a dispute over an improperly manufactured rotor purchased by the appellant from the appellee resulted in the lawsuit. *Kaiser*, 981 F.2d at 138. The district court dismissed *Kaiser's* complaint with judgment in favor of *Westinghouse*. *Id.* at 139. *Kaiser* then filed a motion to vacate the order of judgment in Sixth Circuit Court of Appeals, in addition to the motion, *Kaiser* attached excerpts from depositions taken during discovery proceedings. *Id.* Importantly, the depositions had been taken prior to the district court's dismissal. *Id.* at 140.

However, the deposition excerpts had not been presented to or made available to the district judge at, or before, the hearing pertaining to the motion to dismiss hearing. Instead, the only materials before the district court during the motion to dismiss hearing was a summary of the facts and the complaint. *Id.*

Despite recognizing the general rule that materials not before a district court are not to be considered on appeal, the court in *Kaiser* hypothetically considered the affidavits. *Id.* at 146. The court found that "even if we were to consider the added evidence" the court would still affirm the district court's dismissal of *Kaiser's* claim. *Id.* at 147.

In the Fifth Circuit case, *Ford v. Potter*, 354 F. App'x 28, 31-2 (5th Cir. 2009), the court ruled that it would not enlarge the record on appeal with evidence not considered by the district court, and further held that it would disregard any evidence not considered by the district court at trial. *Id.* at 31. In *Ford*, the court also noted that despite some of the material referenced in the appellant's brief being part of the record on appeal due to being attached to various pre-trial motions, the

materials were not admitted into evidence at trial, not considered by the district court, and therefore not to be considered on appeal. *Id.* at 32

In the Sixth Circuit, *Wasik v. Adams*, 951 F.2d 351, at *3 (6th Cir. 1991), the court agreed with other circuit courts in their interpretation of the Federal Rule of Appellate Procedure 10(a), stating that the rule should be interpreted to mean a Court of Appeals may only review the record prior to the district court reaching its decision (in this case a motion for summary judgment). *Id.* Thus, ruling that a court of appeals should not consider materials obtained at a date after a district court's final decision. *Id*; *see also Canaday v. Kelley*, 37 F.3d 1498, *11 (6th Cir. 1994); *see also United States v. Johnson*, 584 F.2d 148, 158 n.18 (6th Cir. 1978) (noting that although *voir dire* questions were submitted for the record, the questions did not appear in the record transmitted to the Sixth Circuit, and therefore could not be considered).

In the Seventh Circuit Court of Appeals, the *United States v. Menting*, court plainly ruled that the government's improper reliance on the **defendant's PSI in its brief to the court to support its statement of facts** was improper because the court may not consider anything the jury did not consider. 166 F.3d 923, 928 (7th Cir. 1999). (emphasis added) The court further noted that a PSI may contain hearsay or other inadmissible information. *Id.*

In the Eighth Circuit Court of Appeals, the *United States v. Madkins* court held that when a jury was not aware of facts contained in the government's appellant brief, the material will not be considered by the court because it is not in the record. 994 F.2d 540, 542 (8th Cir. 1993)*; see also United States v. Drefke*, 707

F.2d 978, 983 (8th Cir. 1983). The United States in *Madkins*, provided in its brief to the Eighth Circuit Court of Appeals a bevy of background information not contained in the case record regarding the defendant, *Madkins*, who had been charged with felon in possession of a firearm. *Madkins*, 994 F.2d at 540, 542. The information purported a theory that *Madkins* was at the center of a series of bank robberies in West Memphis, Tennessee. *Id.* at 542. The court chose not to consider information because it was not contained in the record but also noted that due to the statement's attempt to prejudice the court's examination of the case, the statements were highly inappropriate. *Id.* at 543.

In the Ninth Circuit Court of Appeals, the *Kirshner v. Uniden Corp. of Am.* court held that "papers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal. 842 F.2d 1074, 1077 (9th Cir. 1988); *see also Panaview Door & Window Co. v. Reynolds Metals Co.*, 255 F.2d 920, 922 (9th Cir. 1958) (striking from the record exhibits that had not been received in evidence); *see also United States v. Armstead*, 421 F. App'x 749, 751 (9th Cir. 2011) (ruling that documents filed in other district court cases may not be included as evidence in the appellate record).

Armstead appealed a 175-month sentence following his conviction of conspiracy to commit bank fraud and nine counts of bank fraud. *Armstead*, 421 F. App'x at 750. The appeal was based on *Armstead's* contention that his sentence was disproportionate to four non-cooperating coconspirators to the charged criminal acts. *Id.* at 751. In support of his argument, *Armstead* filed excerpts of sentencing memoranda and criminal judgments from twenty other criminal cases regarding

bank fraud. *Id.* The United States in turn moved to strike the excerpts filed by *Armstead* because they were not presented to the district court. The Ninth Circuit Court of Appeals granted the motion. *Id.*

In Tenth Circuit Court of Appeals, the *John Hancock Mut. Life Ins. v. Weisman* court denied the appellant's motion to supplement the record with a tax return because it was not part of the record before the district court. 27 F.3d 500, 506 (10th Cir. 1994).

In the D.C. Circuit Court of Appeals, the *Swanson Grp. Mfg. LLC v. Jewell* court noted that its and sister circuits generally rule that materials not part of the record, or considered by the district court at the time of a judgment, are not part of the record on appeal of that same judgment. 790 F.3d 235, 240 (D.C. Cir. 2015); *see also United States v. West*, 392 F.3d 450, 461 n.2 (D.C. Cir. 2004).

B. A minority of courts permit the supplementation of a record and appendix on appeal with materials not considered by a district court.

In contrast, a minority of circuit courts, specifically the Third and Eleventh Circuits, have permitted the supplementation of a record on appeal and by extension the appendix with materials or items that were not considered by a district court:[1]

Concerning the Third Circuit Court of Appeal, in the *Reinert v. Larkins* case, the appellant submitted affidavits from psychiatrists that were not offered at the Pennsylvania Superior Court level as appendices to his direct appeal brief. 379 F.3d

1 The Second Circuit has not yet ruled on the supplementation of the record on appeal with materials or items that were not considered by a district court.

76, 89 (3d Cir. 2004). The Pennsylvania Superior Court did not to consider the psychiatric affidavits because they were not considered by the trial court. *Id.* However, the Third Circuit Court of Appeals determined that since the psychiatric affidavits related to both the appellant's *Miranda* argument and his prior counsel's ineffectiveness, the affidavits needed to be examined, out of an abundance of caution, particularly for the ineffectiveness of counsel claim. *Id.* As a result, the court in *Reinert* deviated from Third Circuit precedent in which the court would not "consider material on appeal that is outside of the district court record." *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 96 (3d Cir. Cir. 2004); *see also Sewak v. INS*, 900 F.2d 667, 673 (3d Cir. 1990); *see also United States ex rel. Mulvaney v. Rush*, 487 F.2d 684, 688 (3d Cir. 1973).

No prior Eleventh Circuit case law exists to illustrate the minority's representation of the 9-2 circuit split. However, Toala's case demonstrates the Eleventh Circuit's willingness to permit the supplementation of an appellee's record on appeal, and by extension the appellee's appendix, with materials that were never proffered at the sentencing hearing. Over Toala's objections, the Eleventh Circuit's record included the Mera-Zambrano PSRs; but neither Toala, his counsel, nor the sentencing judge had this information at the sentencing hearing.

Here, the government impermissibly injected **new evidence** into the appellate procedures. Toala was sentenced on March 27, 2019. *See* Pet. App. N. at p.1. Toala's co-defendants, Mera and Zambrano, were mentioned briefly at various times during the sentencing hearing. However, their PSRs were never presented, discussed, nor introduced in the record for the Honorable Judge Merryday to

evaluate during Toala's sentencing, nor were they available for Toala's counsel to assert objections or request an evidentiary proceeding before entry of the sentencing judgment. *See id.* at p.10:15; p.13:4, 16, 20; p.15:2, 12; p.16:14, 18; p.43:13; p.46:1. Because the unredacted PSRs were never stricken from the government's appendix on appeal, or placed into the record by the District Court, who found no jurisdiction, this procedural error tainted the appellate proceedings to which Toala objected.

C. The Court must resolve the 9-2 Circuit Split in Favor of the Majority.

The transcript of the sentencing proceedings filed with the Eleventh Circuit regarding Toala's case did not include the PSRs of Mera or Zambrano as exhibits or attachments. *See* FED. R. APP. P. 10(a)(2); *see also* Pet. App. N. Toala's Middle District Docket does not reference Mera-Zambrano PSRs. *See* FED. R. APP. P. 10(a)(3); Pet. App. G. Inclusion of the Mera-Zambrano PSR renders Rule 30(a)(1), Federal Rules of Appellate Procedure useless. *See* FED. R. APP. P. 30(a)(1)(A)-(D); Pet. App. K.

In fact, the Docket attached to the United States' appendix—in its brief to the Eleventh Circuit—included the Middle District's Docket Sheet, reflecting proceedings of all three co-defendants, yet the Mera-Zambrano PSRs were not included on that Docket. Pet. App. R & T. The *Drefke* opinion stands for the proposition that Rule 28(j) of the Federal Rules of Appellate Procedure provides for the supplementation of a brief and its appendix with pertinent authorities; at the same time, it **does not** authorize a party to file exhibits and other materials that were not before the district court. *Drefke*, 707 F.2d at 983. Pet. App. H.

The United States argued that because the parties' agreed to Toala and the undersigned having limited access to relevant portions of Mera's PSR, the PSR should be allowed in the United States' appellee brief or its supplemental appendix. *See* Pet. App. R at p.4, 5, 8. First there was no such agreement as argued by the United States. Moreover, the government pushed even further by attaching complete and unredacted PSRs, despite only citing to portions thereof. Pet. App. P, R & T. The after-the-fact proceeding, carved out by the Eleventh Circuit in contravention of Rule 10, did not fix the problem.

Essentially, the government's use of the Mera-Zambrano PSRs successfully precluded Toala from objecting to their use (in any manner), or alternatively gaining full access to the Mera-Zambrano PSRs at an evidentiary hearing, conducted by the sentencing court. Had the PSRs been introduced at the sentencing hearing, instead of the first time on appeal, Toala's counsel, as effective counsel, would have been able to use this information in support of his minor role reduction argument. These procedural protections are afforded in a sentencing court, but not after the appeal has been filed. Put differently, while the Mera-Zambrano PSRs may have been components of their specific and separate records considered by the District Court—for their respective sentences that occurred on separate dates—the PSRs were not included in Toala's case whatsoever, nor were they considered by the Honorable Judge Merryday at Toala's sentencing hearing. *See Menting*, 166 F.3d at 928*; see also Swanson Grp. Mfg. LLC*, 790 F.3d at 240; *see also Wasik*, 951 F.2d at *3. The Eleventh Circuit should not have been permitted complete and unfettered access, to the Mera-Zambrano PSRs, as part of the appellate record. Mr. Toala was

deprived of an opportunity to object, or explain at the sentencing proceeding. *See Gardner*, supra.

Even if this Court finds that all three co-defendants'—Mera, Toala, Zambrano—PSRs were part of the same case docket (although they are not) because of their status as co-defendants, the Mera-Zambrano PSRs should have been stricken. Similar to the ruling in the *Ford* case, the Honorable Judge Merryday did not rely on the Mera-Zambrano PSRs when entering judgment despite the PSRs arguably being attached to other District Court proceedings by virtue of Mera, Toala, and Zambrano being co-defendants. *See Ford*, 354 F. App'x at 32; *see also Wasik*, 951 F.2d at *3.

Instead, the government succeeded in its procedural bypass. The District Court declined to correct or modify the record on appeal for lack of jurisdiction. As result, the District Court kicked the proverbial procedural can to the Eleventh Circuit, which was improper. *See also* Argument II, *infra*.

If usage of Mera-Zambrano PSRs was so crucial in demonstrating that Toala did not deserve a minor participant variance, or a reduction to his 108-month prison sentence, then the government should have proffered those PSRs during Toala's sentencing, as is required by federal law and procedure. *See* U.S. SENT'G GUIDELINES MANUAL § 3B1.2(b). Importantly, Toala and his counsel would have had the opportunity to confront and counter the totality of the Mera-Zambrano PSRs including those paragraphs the government relied on to argue that Toala should be denied a minor role variance or reduction in his 108-month prison sentence. *Id.*

In *Menting*, the court addressed the government's improper reliance on a defendant's PSI to support its statement of facts in its brief to the appeals court. *See Menting*, 166 F.3d at 928. The court noted that by citing to the PSI which was not contained in the trial record, the government's brief violated Federal Rules of Appellate Procedure 28 (because a party is required to include appropriate record citations to its statement of facts). *Id.*; *see also* FED. R. APP. P. 28(a)(4)(b). The *Menting* court also noted that by considering a PSR, a court of appeals may consider hearsay or information that would be inadmissible at trial. *Menting*, 166 F.3d at 928. Like *Menting,* the government improperly relied on Mera-Zambrano PSRs in its brief.

Here, the United States utilized the Mera-Zambrano PSRs to buttress its minor role variance argument. FED. R. APP. P. 28(a)(8)(a). While the government's brief only contained information about the co-defendant's Federal Sentencing Guideline provisions, the rest of their PSRs were improperly provided for the Eleventh Circuit's review and reliance. Pet. App. B.

Importantly, PSRs by their nature are known to contain hearsay, and by presenting complete and unredacted PSRs to the Eleventh Circuit, the government provided and supplied inadmissible hearsay information to the appellate court without first having been evaluated by the District Court, or without the proper due process. *See also* Argument II, *infra.* The proper process would have been for the undersigned to have the ability to demonstrate a compelling need—**at the sentencing hearing**—for access to Mera-Zambrano PSRs in whole or in part, as

part of his endeavor to provide effective counsel to Toala, pursuant to his appointment. *United States v. Gomez*, 323 F.3d 1305, 1308 (11th Cir. 2003).

D. Summary

Accordingly, the Eleventh Circuit should have stricken the PSRs from the government's appendix and directed the United States to file an amended Answer Brief for violation of Rule 10. *See* Pet. App. Q p. 9 at ¶¶17, 18; *see also* FED. R. APP. P. 10(a), 30(a)(1)(A)-(D). In doing so, the Eleventh Circuit would have aligned with nine other Circuit Courts of the United States on this issue.

II. Due to the procedural error permitted by the Eleventh Circuit Court of Appeals as outlined above, Toala suffered a Due Process Violation.

This Court should also consider that when the District Court did not allow Toala, or the undersigned access to confidential portions of the Mera-Zambrano PSRs, the Eleventh Circuit reviewed the sentencing judgment, in part, on the basis of confidential information which was not disclosed to the sentencing judge. As a result, Toala suffered a due process violation. *See* U.S. Const. amend. V.

A. When a defendant has a sentence reviewed, in part, on the basis of information which he had no opportunity to deny or explain, a due process violation has occurred.

The undersigned urges this Court to consider extending the holding of *Gardner v. Florida*, 430 U.S. 349 (1977), to cases in which a defendant is sentenced on the basis of information that they were precluded from disputing or explaining. Absent this procedural error, the defendant below would have been able to dispute or explain the sealed information used against the defendant on appeal.

Regardless of an individual's citizenship status, once a person enters the United States in a lawful, unlawful, temporary, or permanent manner, the Due Process Clause applies. *Wong Wing v. U.S.*, 163 U.S. 228, 238 (U.S. 1896).

In *Gardner*, this Court held that a petitioner was denied due process, at least in part, on the basis of information which he had no opportunity to deny or explain. *Gardner*, 430 U.S. at 362. The information relied on, in part, by the sentencing judge was contained in a confidential portion of the defendant's presentence investigation report that was not disclosed to defense counsel. *Gardner*, 430 U.S. at 353. However, the holding in *Gardner* was limited to capital cases, due to the permanence and weight of the death sentence in comparison to any prison sentence of determinate length. *Id.* at 363 (White, J., concurring in the judgment). Additionally, the Eleventh Circuit Court of Appeals has upheld the limited holding in *Gardner* in its rulings as well. *See United States v. Black*, 570 F. App'x 836, 840 (11th Cir. 2014).

However, circuit courts have heard a number of cases that enlist the *Gardner* holding despite not pertaining to capital punishment. Notably the Second Circuit, articulated one such argument of an appellant as: "the proposition that a defendant cannot be sentenced based on secret information in a presentence investigation report which he cannot dispute or explain because it is not disclosed to him." *United States v. Simmons*, 327 Fed. App'x 305, 307 (2nd Cir. 2009) (citations omitted).

Similar holdings to *Gardner*, have been applied in non-capital cases in the Sixth Circuit Court of Appeals. In *United States v. Coppenger*, 775 F.3d 799, 807 (6th Cir. 2015), the court vacated and remanded a defendant's sentence for

committing mortgage fraud because the district court judge relied on confidential and undisclosed PSIs of the defendant's co-conspirators to justify an upward variance in the defendant's prison sentence. *Coppenger* argued that by not providing notice and fair opportunity to respond to the information contained in his co-conspirator's PSIs, the court committed a procedural error. *Coppenger*, 775 F.3d at 803.

Additionally, the Sixth Circuit indicated an avenue for judicial relief exists when a party can demonstrate facts that a district court relied on to impose a sentencing variance that came as a surprise to the party and that party was subsequently prejudiced by that surprise. *Id.* at 804 (citing *Irizarry v. United States*, 553 U.S. 708, 715–716 (2008)). *Coppenger* demonstrated surprise because he could not have known the specific facts contained in the co-conspirator PSIs nor the weight the sentencing judge would give them. *Coppenger*, 775 F.3d at 805.

The court reasoned that *Coppenger* showed prejudice because the Federal Rules of Criminal Procedure 32(i)(1)(B) clearly require a sentencing court to abide by a system that allows a defendant a reasonable opportunity to respond. *Id.* at 804. Thus, the court determined that by using information not disclosed to *Coppenger*, the court had imposed a procedure that was fundamentally at odds with the adversarial scheme established by Rule 32(i)(1)(B). *Id.* at 805. The court even noted that Rule 32 was enforced to effectuate due process. *Id.*

Importantly, it is not a denial of due process for a judge, in determining a sentence, to rely on evidence given by witnesses whom the defendant could not cross-examine. *United States v. Carmona*, 873 F.2d 569, 574 (2nd Cir. 1989) (citing

Williams v. New York, 337 U.S. 241, 250–251 (1949)). Nor is there a denial of due process committed by a trial judge if they rely on material sourced from a judicial proceeding wherein the defendant was not a party. *Id.* As a result, this Court has demonstrated that a sentencing court's discretion is "largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972). Despite a court's discretion regarding the consideration of information at a sentencing, this Court has noted that even the sentencing procedure is not "immune from scrutiny under the Due Process Clause." *Williams*, 337 U.S. at 253 n.18. In the instant case, the sentencing court was not presented with the information, rather the appellate court allowed all of the information into the record on appeal, the majority of which could not be seen by Toala or his counsel but to which the appellate court had unfettered access.

B. Toala suffered a Due Process Violation because he did not have fair opportunity to respond on appeal to sealed PSRs that should have been originally submitted before the District Court.

Assuming *arguendo* the PSRs were properly submitted to the sentencing court, the mechanisms and procedures to ensure the adversarial scheme and Due Process would have been available to Toala, and the undersigned would have had the fair opportunity to respond to the relevant portions the government relied on prior to sentencing. Due Process protections still apply to Toala despite his unlawful and temporary presence in the United States. *See Wong Wing*, 163 U.S. at 238.

However, similar to *Coppenger*, Toala was not provided notice or a fair opportunity to respond to the undisclosed PSRs. *See Coppenger*, 775 F.3d at 803.

Toala's lack of notice and fair opportunity to respond was exasperated because of the procedural error committed by the Eleventh Circuit in permitting Mera-Zambrano PSRs to be made part of the record and considered.

Toala, and the undersigned, could clearly not know all of the specific facts detailed in the Mera-Zambrano PSRs. Nor do Toala and the undersigned know the weight that the Eleventh Circuit may have assigned to unredacted portions of the PSRs, but to which both Mera and Zambrano roles are referenced, and identified, in the Eleventh Circuit's opinion in relation to Toala's role. Due to the United States citing to Mera-Zambrano PSRs in its Answer Brief and subsequently being permitted to supplement the Brief's appendix with said PSRs so that the Eleventh Circuit could consider them on appeal, Toala demonstrates the sort of surprise similar to the one illustrated in *Coppenger*. *See Coppenger*, 775 F.3d at 805.

Regardless of the procedural error that occurred on appeal, the Eleventh Circuit failed to comply with Rule 32(i)(1)(B) because Toala and the undersigned were barred from the opportunity to draft an effective legal argument that may have countered the factual assertions within the unredacted portions of those PSRs. Even worse—and dissimilar to *Coppenger* which procedurally occurred at the district level—the PSIs were introduced at the appellate level. *Coppenger*, 775 F.3d at 802. Further precluding the undersigned from any opportunity to present a response, object or present testimony that may have countered assertions within the unredacted portions of the co-defendant's PSRs. Thus, Toala demonstrates a prejudice stemming from the surprise he suffered when the Eleventh Circuit

considered materials to which he did not have a fair opportunity to respond. *See Coppenger*, 775 F.3d at 804.

Recognition of a Due Process violation for Toala would provide future defendants an avenue of judicial relief that apparently has not yet been considered. The Federal Rules of Criminal Procedure, Rule 32(i)(1)(B), requires that a defendant have a "fair opportunity to respond" to information contained in a presentence investigation report. Similarly, here a Defendant should have the fair opportunity to respond to materials considered by a court of appeals when they were not in the first place considered by a district court. Especially when the materials considered on appeal are sealed, such as a co-defendant's presentence investigation report. Pet. App. U; Pet. App. Q. While the case law pertaining to Due Process violations are generally set in the district court arena, a defendant's Due Process rights should not be diminished simply because that defendant is before a court of appeals.

In sum, this Court should consider the effect on Due Process, when an appeal involves undisclosed materials to which a sentenced party did not have a fair opportunity to respond.

C. Summary

If the United States had properly submitted the Mera-Zambrano PSRs at the sentencing, the procedural error demonstrated by the 9-2 Circuit Split would have also not been committed. In essence, but for the two-step procedural error committed by the United States, authorized by the Eleventh Circuit, and side stepped by the District Court (claiming no jurisdiction), the resulting procedural

due process violation that Toala suffered would not have occurred. This Court should vacate Toala's sentence and remand to the District Court for resentencing with instructions consistent with this certiorari petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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