

NO.

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**In the Supreme Court of the United States**

FRANKLIN RAFAEL LOPEZ TOALA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION APPENDIX  
(Volume 1 of 2)**

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# **Pet. App. A**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 19-11335  
Non-Argument Calendar

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D.C. Docket No. 8:18-cr-00511-SDM-JSS-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANKLIN RAFAEL LOPEZ TOALA,

Defendant-Appellant.

---

Appeal from the United States District Court  
for the Middle District of Florida

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(March 31, 2020)

Before WILLIAM PRYOR, MARTIN and LAGOA, Circuit Judges.

PER CURIAM:

Appendix - A

Franklin Rafael Lopez-Toala appeals his sentence of 108 months of imprisonment for conspiring to possess and for possessing with intent to distribute five kilograms or more of a mixture and substance containing a detectable amount of cocaine while aboard a vessel subject to United States jurisdiction. 21 U.S.C. § 960(b)(1)(B)(ii); 46 U.S.C. §§ 70503(a), 70506(a), (b). Lopez-Toala challenges the denial of his request for a reduction for a minor role and the substantive reasonableness of his sentence. We affirm.

The district court did not clearly err by denying Lopez-Toala a minor role reduction. A defendant may obtain a two-level reduction of his offense level if the facts establish that he “is less culpable than most other participants, but [his] role could not be described as minimal,” United States Sentencing Guidelines Manual § 3B1.2(b) & cmt. n.5 (2018), and his “part in committing the offense . . . makes him substantially less culpable than the average participant in the criminal activity,” *id.* § 3B1.2 cmt. 3(A). The facts in Lopez-Toala’s presentence investigation report, to which he did not object, support the findings of the district court that his role was not minor and that he was no less culpable than most of his crewmates. *See United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) (“[A] failure to object to allegations of fact in a PSI admits those facts for sentencing purposes.”). Lopez-Toala and his two crewmates received \$5,000 in advance to transport 331 kilograms of cocaine from Ecuador to Mexico. Lopez-Toala shared

responsibility with Ramon Zambrano to relieve the pilot, Eddy Mera. Lopez-Toala also shared in whatever tasks were required to make the voyage successful and obtain additional compensation, and he assisted Mera in throwing the cargo overboard when the Coast Guard disabled the boat. That Mera expected more compensation than his crewmates after they completed delivery of the cocaine and that he possibly shouldered more responsibility as the pilot did not make Lopez-Toala's role minor. *See United States v. Valois*, 915 F.3d 717, 732 (11th Cir.), *cert. denied*, 140 S. Ct. 263 (2019). Lopez-Toala played a key role in ensuring that the conspiracy delivered the cocaine.

The district court also did not abuse its discretion when it sentenced Lopez-Toala to two concurrent terms at the low end of his advisory guidelines range of 108 to 135 months of imprisonment. The district court reasonably determined that sentences of 108 months were necessary to punish Lopez-Toala for his role in the "large-scale transoceanic importation of a large quantity of high-purity cocaine" and for endangering law enforcement who had to use deadly force to intercept the boat and to recover packages of drugs from the ocean, to prevent Lopez-Toala from committing similar future crimes, and to protect the public from the danger created by the importation of illegal drugs. *See* 18 U.S.C. § 3553(a)(1), (2). And the district court verified that Lopez-Toala's sentence was consistent with those imposed on other crewmen. *See id.* § 3553(a)(6). The district court also reasonably

decided that the “especially serious” nature of Lopez-Toala’s offense outweighed his arguments for a lesser sentence based on his background in the military, recent unemployment, lack of a criminal history, and familial financial obligations. *See United States v. Amedeo*, 487 F.3d 823, 832–33 (11th Cir. 2007). Lopez-Toala’s sentence, which is well below his maximum statutory penalty of imprisonment for life, is reasonable. *See United States v. Dougherty*, 754 F.3d 1353, 1362 (11th Cir. 2014).

We **AFFIRM** Lopez-Toala’s sentence.

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N W  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

For rules and forms visit  
[www.ca11.uscourts.gov](http://www.ca11.uscourts.gov)

March 31, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-11335-JJ  
Case Style: USA v. Franklin Lopez Toala  
District Court Docket No: 8:18-cr-00511-SDM-JSS-2

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at [www.pacer.gov](http://www.pacer.gov). Information and training materials related to electronic filing, are available at [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov). Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir. R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1.

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or [cja\\_evoucher@ca11.uscourts.gov](mailto:cja_evoucher@ca11.uscourts.gov) for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Tiffany A. Tucker, JJ at (404)335-6193.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch  
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

# **Pet. App. B**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 19-11335-JJ

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANKLIN RAFAEL LOPEZ TOALA

Defendant-Appellant.

---

On Appeal from the United States  
District Court for the Middle District of Florida

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ORDER:

Before the Court are: (1) “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;” (2) “Appellant’s Unopposed Motion for Extension of Time to File Reply Brief;” and (3) the “United States’ Motion for Leave to File Corrected Supplemental Appendix.”

“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” is DENIED WITHOUT PREJUDICE to Appellant’s ability to seek such relief in the district court. Appellant is DIRECTED to seek such relief in the district court within fourteen days after the date of this order.

The "United States" Motion for Leave to File Corrected Supplemental Appendix" is HELD IN ABEYANCE pending a ruling by the district court concerning whether Appellant may access the sealed, *ex parte* information on which the government seeks to rely.

"Appellant's Unopposed Motion for Extension of Time to File Reply Brief" is GRANTED, IN PART, to the extent that Appellant's reply brief is due within 21 days after the date the district court issues a ruling concerning Appellant's access to the sealed information on which the government seeks to rely.



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UNITED STATES CIRCUIT JUDGE

# **Pet. App. C**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 19-11335-JJ

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

FRANKLIN RAFAEL LOPEZ TOALA,

Defendant - Appellant.

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Appeal from the United States District Court  
for the Middle District of Florida

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ORDER:

On November 5, 2019, the Court issued an order that, among other things, held in abeyance the “United States’ Motion for Leave to File Corrected Supplemental Appendix” pending a ruling by the district court concerning whether Appellant may access the sealed, *ex parte* information on which the government seeks to rely.

On January 6, 2020, the district court issued an order requiring the government to provide Appellant’s counsel with portions of the sealed, *ex parte* documents relied upon by the government in its response brief. Following the issuance of that order, the Court now GRANTS the “United States’ Motion for Leave to File Corrected Supplemental Appendix.”



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UNITED STATES CIRCUIT JUDGE

# **Pet. App. D**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:18-cr-511-T-23JSS

FRANKLIN RAFAEL LOPEZ TOALA

**ORDER**

Frank Rafael Lopez Toala moves (Doc. 100) “pursuant to the Eleventh Circuit’s order dated November 5, 2019” for review of “the applicable procedures for the use of Presentence Investigation Reports (PSR) by the United States, specifically as it relates to the pending appeal of Appellant, Toala, and his objections relating thereto . . . .” The United States responds (Doc. 104), and Toala replies (Doc. 107).

The matter was referred to the magistrate judge, who issued a report and recommendation (Doc. 108). Toala objects (Doc. 109) to the report and recommendation.

The objections (Doc. 109) are **OVERRULED**, the report and recommendation is **ADOPTED**, and the motion (Doc 100) is **GRANTED IN PART and DENIED IN PART**. The court lacks jurisdiction to grant Toala’s request for an order “ruling that the Government may not rely on or use the Zambrano PSR or the Mera PSR on appeal.” The United States must furnish Toala’s counsel with paragraph 60 of defendant Zambrano’s PSR and paragraphs 9,

24, and 65 of defendant Mera's PSR. The United States must redact all remaining portions of Zambrano's and Mera's PSRs furnished to Toala's counsel.

ORDERED in Tampa, Florida, on January 6, 2020

  
\_\_\_\_\_  
STEVEN D. MERRYDAY  
UNITED STATES DISTRICT JUDGE

**Pet. App. E**

RECEIVED  
U.S. MARSHALMAY 1 AM 11:34  
MIDDLE DIST. OF FLORIDA  
TAMPAUNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA

## JUDGMENT IN A CRIMINAL CASE

vs.

CASE NUMBER: 8:18-cr-511-T-23JSS  
USM NUMBER: 71310-018

FRANKLIN RAFAEL LOPEZ TOALA

Defendant's Attorney: Brian Battaglia, CJA

The defendant pleaded guilty to counts one and two of the indictment.

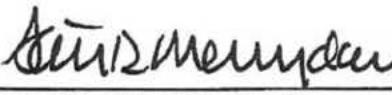
The defendant is adjudicated guilty of these offenses:

<u>TITLE &amp; SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
46 U.S.C. § 70503(a)	Conspiracy to possess with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States	October 18, 2018	One
46 U.S.C. § 70506(a)			
46 U.S.C. § 70506(b)			
21 U.S.C. § 960(b)(1)(B)(ii)			
46 U.S.C. § 70503(a)	Possession with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States	October 18, 2018	Two
46 U.S.C. § 70506(a)			
18 U.S.C. § 2			
21 U.S.C. § 960(b)(1)(B)(ii)			

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

The defendant must notify the United States attorney for this district within thirty 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 the United States attorney of any material changes in his economic circumstances.

Date of Imposition of Judgment: March 27, 2019

  
 STEVEN D. MERRYDAY  
 UNITED STATES DISTRICT JUDGE
March 27, 2019

Defendant: FRANKLIN RAEAEI LOPEZ TOALA

Judgment - Page 2 of 7

Case No.: 8:18-cr-511-T-23JSS

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **one hundred eight months**, comprising concurrent terms of one hundred eight months as to each of counts one and two.

The court recommends confinement at FCI Coleman, Florida, and participation in an English-as-a-Second language class and vocational training. The court also recommends that the defendant participate in treatment for any diagnosed special needs disability. The defendant was paroled into the United States for prosecution.

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:

T. Jones, Warden  
United States Marshal

Defendant: FRANKLIN RAFAEL LOPEZ TOALA  
Case No.: 8:18-cr-511-T-23JSS

Judgment - Page 3 of 7

### SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **sixty months**, comprising concurrent terms of sixty months as to each of counts one and two.

### 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 courts determination that you pose a low risk of future substance abuse. *(check if applicable)*
4.  You must make restitution in accordance with 18 U.S.C. §§3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5.  You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6.  You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7.  You must participate in an approval 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: FRANKLIN RAFAEL LOPEZ TOALA  
Case No.: 8:18-cr-511-T-23JSSJudgment - Page 4 of 7**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 district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

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

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the [www.uscourts.gov](http://www.uscourts.gov).

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

Defendant: FRANKLIN RAFAEL LOPEZ TOALA  
Case No.: 8:18-cr-511-T-23JSS

Judgment - Page 5 of 7

**SPECIAL CONDITION OF SUPERVISION**

If the defendant is deported, he shall not re-enter the United States without the express permission of the United States.

Defendant: FRANKLIN RAFAEL LOPEZ TOALA  
Case No.: 8:18-cr-511-T-23JSSJudgment - Page 6 of 7

## CRIMINAL MONETARY PENALTIES

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

<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTAL</b>	<b>\$200</b>	<b>n/a</b>	<b>waived</b>
			<b>n/a</b>

- 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>
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## TOTALS

- Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_.
- The defendant must pay interest on a fine or restitution 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 7 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 the offenses committed on or after September 13, 1994, but before April 23, 1996.

Defendant: FRANKLIN RAFAEL LOPEZ TOALA

Judgment - Page 7 of 7

Case No.: 8:18-cr-511-T-23JSS

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A.  Lump sum payment of \$200 due immediately

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 \_\_\_\_\_ days (e.g., thirty or sixty 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. thirty or sixty days) after release from imprisonment to a term of supervision; or

E.  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., thirty or sixty 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

- 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) penalties, and (8) costs, including cost of prosecution and court costs.

**Pet. App. F**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

Case No.: 8:18-cr-511-T-23JSS

FRANKLIN RAFAEL LOPEZ TOALA

**REPORT AND RECOMMENDATION**

THIS MATTER is before the Court on Defendant Franklin Rafael Lopez Toala's Motion Pursuant to the Eleventh Circuit's Order Dated November 5, 2019 ("Motion"), the Government's response, and Defendant's reply to the Government's response. (Dkts. 100, 104, 107.) Upon consideration and for the reasons that follow, the Court recommends that the Motion be granted in part.

**BACKGROUND**

On October 30, 2018, a grand jury returned a two-count indictment charging Defendant and two codefendants with conspiring to possess and possession with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a) and 70506(a) and (b), and 21 U.S.C. § 960(b)(1)(B)(ii). (Dkt. 1.) Specifically, Count One charges the defendants with conspiring to possess with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a) and 70506(a) and (b), and 21 U.S.C. § 960(b)(1)(B)(ii). (*Id.* at 1–2.) Count Two charges the defendants with possession with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a) and 70506(a), and 21 U.S.C. § 960(b)(1)(B)(ii). (*Id.* at 2.)

In December 2018, Defendant's codefendants, Ramon Elias Zambrano and Eddy Jimy Pinargote Mera, pleaded guilty to Count Two pursuant to a plea agreement. (Dkts. 32, 35, 38.) The following month, Defendant pleaded guilty to Counts One and Two pursuant to a plea agreement. (Dkt. 43.) Before sentencing, the United States Probation Office conducted presentence investigations of each defendant and furnished the Court with presentence investigation reports ("PSR") as required under Federal Rule of Criminal Procedure 32(d). (Dkt. 54, 56, 72.)

On March 5, 2019, the Court sentenced codefendant Zambrano on Count Two to 108 months of imprisonment followed by 60 months of supervised release, and the Government dismissed Count One pursuant to the plea agreement. (Dkt. 62.) On March 14, 2019, the Court sentenced codefendant Mera on Count Two to 108 months of imprisonment followed by 60 months of supervised release, and Count One was dismissed pursuant to the plea agreement. (Dkt. 62.) On March 27, 2019, the Court sentenced Defendant on Counts One and Two to concurrent terms of 108 months of imprisonment followed by 60 months of supervised release. (Dkt. 78.)

On April 5, 2019, Defendant appealed his judgment and sentence to the Eleventh Circuit Court of Appeals. (Dkt. 80.) In his appellate brief, Defendant argues in part that this Court erroneously rejected his request for a two-level "minor role" reduction and imposed a substantively unreasonable sentence. (Dkt. 104 at 1–2.) In its response, the Government opposed Defendant's contentions and cited portions of the PSRs of codefendants Mera and Zambrano in support of its response. (*Id.* at 2.) Additionally, the Government furnished the Mera PSR to the Eleventh Circuit in its initial appendix and later moved to include the Zambrano PSR in a supplemental appendix. (Dkt. 104 at 2.) Because the Mera and Zambrano PSRs contain confidential information, they are sealed and have not been provided to Defendant's counsel. (Dkt. 100 at 2; Dkt. 104 at 2.) After

Defendant moved to unseal the Mera PSR in the appellate proceeding, the Eleventh Circuit directed Defendant to seek such relief in this Court. (Dkt. 100-1; Dkt. 104 Ex. A.)

### **APPLICABLE STANDARDS**

To “ensure the availability of as much information as possible to assist in sentencing,” federal courts consider presentence reports confidential court documents rather than public records. *United States v. Charmer Indus., Inc.*, 711 F.2d 1164, 1171 (2d Cir. 1983). Thus, a third party seeking to obtain a presentence investigation report must make a showing of a compelling or special need for disclosure. *Id.* at 1176; *see also United States DOJ v. Julian*, 486 U.S. 1, 12, 108 S. Ct. 1606, 100 L. Ed. 2d 1 (1988) (noting that courts typically require “some showing of special need before they will allow a third party to obtain a copy of a presentence report”). District courts have “a fair measure of discretion in weighing the competing interests in order to determine whether or not the person seeking disclosure has shown that the ends of justice require disclosure.” *Charmer Indus., Inc.*, 711 F.2d at 1171.

### **DISCUSSION**

Defendant moves the Court to enter an order directing that the United States “may not use the 2 PSR’s of Mera and Zambrano” on appeal. (Dkt. 107 at 5.) Defendant alternatively argues that the Court should either unseal or allow defense counsel to inspect the entirety of the PSRs of his codefendants. (*Id.*) In response, the Government agrees that Defendant has a compelling and particularized need to access some portions of his codefendants’ PSRs. (Dkt. 104.) The Court recommends that Defendant’s Motion be granted in part.

As an initial matter, the Court finds that Defendant is the moving party and therefore bears the burden of establishing a basis to unseal confidential court records. Defendant sought to unseal

the Mera PSR in the Eleventh Circuit, and the Eleventh Circuit directed Defendant to seek relief in this Court. (Dkt. 100-1; Dkt. 104 Ex. A.) Specifically, the Eleventh Circuit stated:

“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” is DENIED WITHOUT PREJUDICE to Appellant’s ability to seek such relief in the district court. Appellant is DIRECTED to seek such relief in the district court within fourteen days after the date of this order.

(Dkt. 100-1.) Defendant then filed the Motion at issue. (Dkt. 100.) In the Motion, Defendant seeks various alternative forms of relief, including “complete access to the 2 PSR’s of Mera and Zambrano for Appellant’s preparation of his reply brief in the pending appeal, so that an effective appeal can be had.” (Dkt. 100 ¶ 27.) As the moving party, Defendant bears the burden of establishing a compelling or special need to unseal the PSRs of his two codefendants. *See, e.g.*, *United States v. Watkins*, 623 F. Supp. 2d 514, 516 (S.D.N.Y. 2009) (finding petitioner had met his burden of showing a compelling need for disclosure of PSR to meet ends of justice).

Defendant has met his burden of establishing a compelling and particularized need to access some portions of his codefendants’ PSRs. The Government relies on the two PSRs in its answer brief in the appellate proceeding and has furnished the Eleventh Circuit with the PSRs in its appendix and supplemental appendix. Thus, to prepare his reply brief, Defendant’s counsel must review the portions of the PSRs the Government relies on and has furnished to the Eleventh Circuit. The Court recommends, and the Government does not dispute, that Defendant’s counsel’s need to review the PSRs in preparing a reply brief constitutes a compelling and particularized need to unseal portions of the PSRs of codefendants Mera and Zambrano.

After review of the two PSRs, however, the Court recommends that the Government be ordered to furnish only those portions of the PSRs that it has cited in its answer brief. The Government’s answer brief cites codefendant Mera’s PSR at paragraphs 9, 24, and 65, and

codefendant Zambrano's PSR at paragraph 60. (Dkt. 104 at 2.) The Government cites portions of the codefendants' PSR to support its assertions that Defendant had the same advisory guidelines range as codefendant Zambrano, and that codefendant Mera received a downward departure for substantial assistance (which Defendant did not receive). (*Id.*) Notably, these portions of the PSRs are consistent with arguments the Government advanced during the sentencing hearings and do not contain confidential or sensitive personal information. (Dkts. 60, 69.) Defendant has not established a compelling or particularized need to unseal the entirety of the codefendants' PSRs. The Court therefore recommends that the ends of justice are best served by directing the Government to furnish Defendant's counsel with paragraph 60 of codefendant Zambrano's PSR and paragraphs 9, 24, and 65 of codefendant Mera's PSR.

Lastly, the undersigned recommends finding that this Court lacks jurisdiction to grant the remaining relief Defendant requests. Defendant asks the Court to enter an order ruling that the Government may not rely on or use the Zambrano PSR or the Mera PSR on appeal. (Dkt. 100 at 7; Dkt. 107 at 5.) According to Defendant, his codefendants' PSRs are not part of Defendant's trial or appellate court records and thus, they should not be considered in the appellate proceedings. (Dkt. 100 at 3.) Under Rule 10(e) of the Rules of Appellate Procedure, a party can move to correct or modify the record on appeal. Fed. R. App. P. 10(e). The purpose of Rule 10(e) is to ensure that the Court of Appeals has a complete record of the proceedings before the district court. *United States v. Elizalde-Adame*, 262 F.3d 637, 641 (7th Cir. 2001). Rule 10(e) "does not, however, permit a party to add materials to the record on appeal that were not before the district court." *Stewart v. Colvin*, No. CV 14-3265, 2016 WL 6126912, at \*2 (C.D. Ill. Oct. 18, 2016), *aff'd sub nom. Stewart v. Berryhill*, 731 F. App'x 509 (7th Cir. 2018).

Here, the PSRs of codefendants Mera and Zambrano are not part of the record on appeal in appellate case number 19-11335-JJ. Thus, neither Defendant nor the Government have moved under Rule 10(e) to supplement or correct the record to include the codefendants' PSRs. Instead, the Government furnished the PSRs of codefendants Mera and Zambrano to the Eleventh Circuit as part of its appendix and supplemental appendix, which are distinct from the record on appeal as defined under Rule 10(a). *See* Fed. R. App. P. 10(a) (defining record on appeal as "(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"). This Court only possesses concurrent jurisdiction under Rule 10(e) to correct or modify the record on appeal. The Federal Rules of Appellate Procedure provide this Court with no authority to direct what may be filed on appeal. Accordingly, Defendant's request to prohibit the Government from relying on portions of its appendix and supplemental appendix filed before the Eleventh Circuit should be denied given this Court's lack of jurisdiction to consider those issues.

Accordingly, it is **RECOMMENDED**:

1. Defendant/Appellant's Motion Pursuant to the Eleventh Circuit's Order Dated November 5, 2019 (Dkt. 100) be **GRANTED in part** and **DENIED in part**; and
2. The Government be directed to furnish Defendant's counsel with paragraph 60 of Defendant Zambrano's PSR and paragraphs 9, 24, and 65 of Defendant Mera's PSR. Any other portions of the PSRs furnished to Defendant's counsel shall be redacted.

**IT IS SO REPORTED** in Tampa, Florida, on December 23, 2019.



\_\_\_\_\_  
JULIE S. SNEED  
UNITED STATES MAGISTRATE JUDGE

**NOTICE TO PARTIES**

A party has fourteen days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

Copies furnished to:  
The Honorable Steven D. Merryday  
Counsel of Record

# **Pet. App. G**

**U.S. District Court**  
**Middle District of Florida (Tampa)**  
**CRIMINAL DOCKET FOR CASE #: 8:18-cr-00511-SDM-JSS-2**

Case title: USA v. Pinargote Mera et al

Date Filed: 10/30/2018  
Date Terminated: 03/27/2019

Assigned to: Judge Steven D. Merryday  
 Referred to: Magistrate Judge Julie S. Snead  
 Appeals court case number: 19-11335-J  
 Eleventh Circuit

**Defendant (2)****Franklin Rafael Lopez Toala***Spanish interpreter required*

TERMINATED: 03/27/2019

represented by **Brian P. Battaglia**

Bleakley, Baval & Denman  
 15170 N Florida Ave  
 Tampa, FL 33613  
 813-221-3759  
 Fax: 813-221-3198  
 Email: bbattaglia@bleakleybaval.com  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**  
**Designation: CJA Appointment**

**Pending Counts**

46:70503.F MANUFACTURE,  
 DISTRIBUTION OR POSSESSION OF  
 CONTROLLED SUBSTANCE ON  
 VESSELS  
 (1-2)

**Disposition**

IMPRISONMENT--one hundred eight months, comprising concurrent terms of one hundred eight months as to each of counts one and two; SUPERVISED RELEASE--sixty months, comprising concurrent terms of sixty months as to each of counts one and two; FINE--waived; SPECIAL ASSESSMENT--\$200

**Highest Offense Level (Opening)**

Felony

**Terminated Counts**

None

**Disposition****Highest Offense Level (Terminated)**

None

**Complaints****Disposition**

**Plaintiff****USA**

represented by **Thomas Nelson Palermo**  
 U.S. Attorneys Office  
 400 N. Tampa Street  
 Tampa, FL 33602-4798  
 813-274-6000  
 Fax: 813-274-6187  
 Email: thomas.palermo@usdoj.gov  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**  
*Designation: Retained*

Date Filed	#	Docket Text
10/30/2018	<u>1</u>	INDICTMENT returned in open court as to Eddy Jimy Pinargote Mera (1) count(s) 1-2, Franklin Rafael Lopez Toala (2) count(s) 1-2, Ramon Elias Zambrano Zambrano (3) count(s) 1-2. (CTR) (Entered: 10/31/2018)
11/05/2018	<u>7</u>	Arrest Warrant Returned Executed on 11/4/2018 as to Franklin Rafael Lopez Toala. (CTR) (Entered: 11/05/2018)
11/05/2018		Arrest of Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano on 11/5/2018. (DMS) (Entered: 11/06/2018)
11/05/2018	<u>13</u>	***CJA 23 Financial Affidavit by Franklin Rafael Lopez Toala. (DMS) (Entered: 11/06/2018)
11/05/2018	<u>15</u>	Minute Entry for proceedings held before Magistrate Judge Thomas G. Wilson: Initial Appearance as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano held on 11/5/2018. ARRAIGNMENT as to Eddy Jimy Pinargote Mera (1) Count 1-2 and Franklin Rafael Lopez Toala (2) Count 1-2 and Ramon Elias Zambrano Zambrano (3) Count 1-2 held on 11/5/2018: Defendants pled not guilty. Detention Hearing as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano held on 11/5/2018. (DIGITAL) (Interpreter/Language: James Plunkett, Victoria Spellman/Spanish) (DMS) (Entered: 11/06/2018)
11/06/2018	<u>9</u>	<b>ORDER of Appointment of CJA Counsel as to Franklin Rafael Lopez Toala: Appointment of Attorney Brian Battaglia. Signed by Magistrate Judge Thomas G. Wilson on 11/6/2018. (Wilson, Thomas)</b> (Entered: 11/06/2018)
11/07/2018	<u>16</u>	PRETRIAL Discovery Order and Notice as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, and Ramon Elias Zambrano Zambrano. This case is set before the Honorable Steven D. Merryday, Chief United States District Judge, for the January 2019 trial term beginning January 7, 2019, in Tampa Courtroom 15 A. In lieu of a scheduled status conference, the parties shall file a joint status report by the 10th day of each month. Signed by Magistrate Judge Julie S. Sneed on 11/7/2018. (JRB) (Entered: 11/07/2018)
11/08/2018	<u>18</u>	STATUS REPORT by USA as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano (Palermo, Thomas) (Entered: 11/08/2018)
11/08/2018	<u>22</u>	<b>ORDER OF DETENTION PENDING TRIAL as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano. Signed by</b>

		Magistrate: 11895 Thomas Gile Wilcox (Entered: 11/13/2018) (MSp) (Entered: 11/13/2018)
11/15/2018	<u>23</u>	NOTICE OF ATTORNEY APPEARANCE: Brian P. Battaglia appearing for Franklin Rafael Lopez Toala (Battaglia, Brian) (Entered: 11/15/2018)
11/29/2018	<u>26</u>	WAIVER of speedy trial through 4/8/19 by Franklin Rafael Lopez Toala (Battaglia, Brian) (Entered: 11/29/2018)
12/10/2018	<u>27</u>	STATUS REPORT by USA as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano (Palermo, Thomas) (Entered: 12/10/2018)
12/12/2018	<u>30</u>	First MOTION to continue trial by Franklin Rafael Lopez Toala. (Battaglia, Brian) (Entered: 12/12/2018)
12/17/2018	<u>31</u>	<b>ORDER</b> denying <u>30</u> --motion by <u>Franklin Rafael Lopez Toala</u> (2) to continue trial from January 2019 to February 2019. Signed by Judge Steven D. Merryday on 12/17/2018. (BK) (Entered: 12/17/2018)
12/27/2018	<u>40</u>	<b>TRIAL CALENDAR</b> for January 2019 trial term. Signed by Judge Steven D. Merryday on 12/27/2018. (GSO) (Entered: 12/27/2018)
12/28/2018	<u>41</u>	NOTICE OF HEARING as to Franklin Rafael Lopez Toala: Change of Plea Hearing set for 1/8/2019 at 10:00 AM in Tampa Courtroom 11 A before Magistrate Judge Julie S. Sneed. (JRB) (Entered: 12/28/2018)
01/08/2019	<u>42</u>	NOTICE of maximum penalty, elements of offense, personalization of elements and factual basis by USA as to Franklin Rafael Lopez Toala (Palermo, Thomas) (Entered: 01/08/2019)
01/08/2019	<u>43</u>	Minute Entry for proceedings held before Magistrate Judge Julie S. Sneed: Change of Plea Hearing as to Franklin Rafael Lopez Toala held on 1/8/2019. (DIGITAL) (Interpreter/Language: Pedro Marino/Spanish) (JRB) (Entered: 01/08/2019)
01/08/2019	<u>44</u>	CONSENT regarding entry of a plea of guilty as to Franklin Rafael Lopez Toala (JRB) (Entered: 01/08/2019)
01/08/2019	<u>45</u>	CONSENT to institute presentence investigation report as to Franklin Rafael Lopez Toala. (JRB) (Entered: 01/08/2019)
01/08/2019	<u>46</u>	<b>REPORT AND RECOMMENDATIONS</b> concerning Plea of Guilty re: Counts One and Two of the Indictment as to Franklin Rafael Lopez Toala. Signed by Magistrate Judge Julie S. Sneed on 1/8/2019. (JRB) (Entered: 01/08/2019)
02/04/2019	<u>52</u>	ACCEPTANCE OF PLEA of guilty and adjudication of guilt re: counts one and two of the indictment as to Franklin Rafael Lopez Toala signed by Judge Steven D. Merryday on 2/4/2019. <u>See document for important notice and date and time of sentencing.</u> (GSO) (Entered: 02/04/2019)
03/22/2019	<u>74</u>	MOTION for downward departure <i>and Variances and Supporting Memorandum of Law</i> by Franklin Rafael Lopez Toala. (Attachments: # <u>1</u> Exhibit Exhibit A, # <u>2</u> Exhibit Exhibit B, # <u>3</u> Exhibit Exhibit C, # <u>4</u> Exhibit Exhibit D, # <u>5</u> Exhibit Exhibit E, # <u>6</u> Exhibit Exhibit F, # <u>7</u> Exhibit Exhibit G, # <u>8</u> Exhibit Exhibit H)(Battaglia, Brian) Item terminated due to the filing of <u>75</u> . Modified on 3/25/2019 (DG). (Entered: 03/22/2019)
03/22/2019	<u>75</u>	Amended MOTION for downward departure <i>and Variances and Supporting Memorandum of Law</i> by Franklin Rafael Lopez Toala. (Attachments: # <u>1</u> Exhibit Exhibit A, # <u>2</u> Exhibit Exhibit B, # <u>3</u> Exhibit Exhibit C, # <u>4</u> Exhibit Exhibit D, # <u>5</u> Exhibit Exhibit E, # <u>6</u> Exhibit Exhibit F, # <u>7</u> Exhibit Exhibit G, # <u>8</u> Exhibit Exhibit H)(Battaglia, Brian) (Entered: 03/22/2019)

03/26/2019	<u>76</u>	<b>SUPPLEMENT</b> to <u>75</u> <b>MOTION</b> for downward departures and Variances and Supporting Memorandum of Law (Attachments: # <u>1</u> Exhibit H)(Battaglia, Brian) (Entered: 03/26/2019)
03/27/2019	<u>77</u>	MINUTE ENTRY for <u>3/27/2019</u> sentencing of Franklin Rafael Lopez Toala (2) before Judge Steven D. Merryday; denying the <u>75</u> --motion for downward departures and variances; counts one and two, IMPRISONMENT--one hundred eight months, comprising concurrent terms of one hundred eight months as to each of counts one and two; SUPERVISED RELEASE--sixty months, comprising concurrent terms of sixty months as to each of counts one and two; FINE--waived; SPECIAL ASSESSMENT--\$200. Court Reporter: Bill Jones (Interpreter/Language: James Plunkett / Spanish) (GSO) (Entered: 03/27/2019)
03/27/2019	<u>78</u>	<b>JUDGMENT</b> as to Franklin Rafael Lopez Toala (2); counts one and two, IMPRISONMENT--one hundred eight months, comprising concurrent terms of one hundred eight months as to each of counts one and two; SUPERVISED RELEASE--sixty months, comprising concurrent terms of sixty months as to each of counts one and two; FINE--waived; SPECIAL ASSESSMENT--\$200. Signed by Judge Steven D. Merryday on <u>3/27/2019</u> . (GSO) (Entered: 03/27/2019)
04/05/2019	<u>80</u>	NOTICE OF APPEAL by Franklin Rafael Lopez Toala re <u>78</u> Judgment Filing fee not paid. (Battaglia, Brian) (Entered: 04/05/2019)
04/08/2019	<u>81</u>	TRANSMITTAL of initial appeal package as to Franklin Rafael Lopez Toala to USCA consisting of copies of notice of appeal, docket sheet, order/judgment being appealed, and motion, if applicable to USCA re <u>80</u> Notice of Appeal. Eleventh Circuit Transcript information form forwarded to pro se litigants and available to counsel at www.flmd.uscourts.gov under Forms and Publications/General. (CTR) (Entered: 04/08/2019)
04/08/2019	<u>82</u>	First MOTION for Leave to Appeal In Forma Pauperis by Franklin Rafael Lopez Toala. (Battaglia, Brian) (Entered: 04/08/2019)
04/10/2019		USCA Case Number as to Franklin Rafael Lopez Toala. USCA Number: 19-11335-J for <u>80</u> Notice of Appeal filed by Franklin Rafael Lopez Toala. (KE) (Entered: 04/10/2019)
04/18/2019	<u>83</u>	TRANSCRIPT information form filed by Franklin Rafael Lopez Toala for proceedings held on 1/8/19; 3/27/19 before Judge Snead/ Merryday re <u>80</u> Notice of Appeal. USCA number: 19-11335-J (Battaglia, Brian) (Entered: 04/18/2019)
04/18/2019	<u>84</u>	TRANSCRIPT information form filed by Franklin Rafael Lopez Toala for proceedings held on 1/8/19; 3/27/19 before Judge Snead/ Merryday re <u>80</u> Notice of Appeal. USCA number: 19-11335-J (Battaglia, Brian) (Entered: 04/18/2019)
04/19/2019	<u>85</u>	<b>ORDER</b> granting <u>82</u> Motion for Leave to Appeal In Forma Pauperis as to Franklin Rafael Lopez Toala. Signed by Magistrate Judge Julie S. Snead on April 19, 2019. (BRC) (Entered: 04/19/2019)
05/02/2019	<u>86</u>	Judgment Returned Executed as to Franklin Rafael Lopez Toala on 04/25/19. Institution: D Ray James Correctional. (BES) (Entered: 05/03/2019)
05/14/2019	<u>88</u>	COURT REPORTER ACKNOWLEDGEMENT by Tracey Aurelio re <u>80</u> Notice of Appeal as to Franklin Rafael Lopez Toala. Estimated transcript filing date: Upon Receipt of CJA. USCA number: 19-11335-J. (TVA) (Entered: 05/14/2019)
05/14/2019	<u>89</u>	NOTIFICATION that transcript has been filed by Tracey Aurelio re: <u>80</u> Notice of Appeal as to Franklin Rafael Lopez Toala USCA number: 19-11335-J (TVA) (DG). (Entered: 05/14/2019)

05/14/2019	<u>90</u>	Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter or view the document at the clerk's office public terminal as to Franklin Rafael Lopez Toala. Court Reporter: Tracey Aurelio (TVA) (Entered: 05/14/2019)
05/14/2019	<u>91</u>	TRANSCRIPT of hearing as to Franklin Rafael Lopez Toala held on 1/8/19 before Judge Sneed. Court Reporter/Transcriber Tracey Aurelio, Telephone number 813-301-5380. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 6/4/2019, Redacted Transcript Deadline set for 6/14/2019, Release of Transcript Restriction set for 8/12/2019. (TVA) (Entered: 05/14/2019)
05/17/2019	<u>92</u>	COURT REPORTER ACKNOWLEDGEMENT by Bill Jones re <u>80</u> Notice of Appeal as to Franklin Rafael Lopez Toala. Estimated transcript filing date: 5-24-19. USCA number: 19-11335-J. (HWJ) (Entered: 05/17/2019)
06/04/2019	<u>94</u>	TRANSCRIPT of Sentencing for dates of 03-27-19 held before Judge Steven D. Merryday, re: <u>80</u> Notice of Appeal as to Franklin Rafael Lopez Toala. Court Reporter/Transcriber Bill Jones, Telephone number 813-301-5024. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 6/25/2019, Redacted Transcript Deadline set for 7/5/2019, Release of Transcript Restriction set for 9/3/2019. (HWJ) (Entered: 06/04/2019)
06/04/2019	<u>95</u>	NOTICE to counsel of filing of OFFICIAL TRANSCRIPT. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter or view the document at the clerk's office public terminal as to Franklin Rafael Lopez Toala. Court Reporter: Bill Jones (HWJ) (Entered: 06/04/2019)
06/04/2019	<u>96</u>	NOTIFICATION that transcript has been filed by Bill Jones re: <u>80</u> Notice of Appeal as to Franklin Rafael Lopez Toala USCA number: 19-11335-J (HWJ) (Entered: 06/04/2019)
06/28/2019	<u>97</u>	Joint MOTION to supplement Court Record <i>on Appeal from the Sentencing</i> by Franklin Rafael Lopez Toala. (Attachments: # <u>1</u> Exhibit Cenepa War, # <u>2</u> Exhibit Translation Letter, # <u>3</u> Exhibit Correspondence)(Battaglia, Brian) (Entered: 06/28/2019)
06/28/2019	<u>98</u>	<b>ENDORSED ORDER</b> granting <u>97</u> the agreed motion by Franklin Rafael Lopez Toala (2) to supplement the record-on-appeal. Signed by Judge Steven D. Merryday on 6/28/2019. (Entered: 06/28/2019)
07/16/2019	<u>99</u>	Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Middle District of Florida certifies that the record is complete for purposes of this appeal re: <u>80</u> Notice of Appeal as to Franklin Rafael Lopez Toala. The following documents will be forwarded in paper format upon the request for the record on appeal by the USCA in addition to the electronic record. Folder of Sealed pleadings: 1. USCA number: 19-11335-JJ. (CTR) (Entered: 07/16/2019)

Case: 19-11335 PACER Service 07/16/2019 Page: 10 of 202

Transaction Receipt			
07/16/2019 14:24:10			
PACER Login:	th3623:2986896:0	Client Code:	
Description:	Docket Report	Search Criteria:	8:18-cr-00511-SDM-JSS
Billable Pages:	5	Cost:	0.50

**Pet. App. H**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-00511-SDM-JSS-2  
Appeal No: 19-11335-JJ**

**FRANKLIN RAFAEL LOPEZ TOALA**

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**DEFENDANT/APPELLANT, FRANKLIN RAFAEL LOPEZ TOALA'S MOTION  
PURSUANT TO THE ELEVENTH CIRCUIT'S ORDER DATED NOVEMBER 5, 2019**

The Appellant, Franklin Rafael Lopez Toala, through his undersigned counsel, and pursuant to the Eleventh Circuit Court of Appeal's order dated November 5, 2019<sup>1</sup>, and attached hereto as Exhibit "1", files this his Motion requesting that this Honorable Court review the applicable procedures for the use of Presentence Investigation Reports (PSR) by the United States, specifically as it relates to the pending appeal of Appellant, Toala, and his objections relating thereto, and says as follows:

**DEFENDANT/APPELLANT'S MOTION**

1. The undersigned attorney, counsel for the Defendant/Appellant, Franklin Toala filed an appeal [in this Court on April 5, 2019] and in the Eleventh Circuit Court of Appeals on April 8, 2019. (DKT. 80) Defendant, Toala was sentenced by this Court on March 27, 2019. (DKT. 77, 78, 79).

2. After its stipulation with the United States and order from this Court approving same as to supplementing the record (DKT. 97, 98) Appellant thereafter filed his initial brief and appendix with the Eleventh Circuit, on July 14, 2019, and July 17, 2019, respectively.

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<sup>1</sup> The case number in the Eleventh Circuit is 19-11335-JJ

3. On September 26, 2019 Appellee, United States filed its answer brief and thereafter on October 1, 2019 filed a supplemental appendix listing the Pinargote Mera Sealed Presentence Investigation Report (hereinafter “Mera PSR”) as an exhibit to the pending Appeal. The Mera PSR was filed under seal with the Clerk of the Court for the Eleventh Circuit on October 2, 2019. The undersigned is not permitted by law to even look at the Mera PSR.

4. Thereafter, on October 17, 2019 the United States filed a motion with the Eleventh Circuit requesting leave to file a “corrected” appendix in the appeal to include another PSR, that of Zambrano. These matters are being held in abeyance by the Eleventh Circuit pending a ruling from this Court. See, Exhibit “1”. Various motions were filed by the parties, and the Eleventh Circuit entered its order directing these matters back to this Honorable Court, and abating action on other motions. (See Exhibit “1” attached hereto)

5. In the initial Motion filed by Toala in the Eleventh Circuit, the undersigned also sought to strike the use of the 2 PSR’s. In the follow-up motion filed by the undersigned in response to the United States motion to “correct” the appendix to add the PSR of Zambrano, the undersigned outlined in detail the procedural and legal reasons why the PSR’s of Mera and Zambrano should not be allowed in an appeal of another individual, in this case Toala. All of these issues and arguments are set forth in this Motion pertain to the use of the proposed use of the Mera PSR by the United States, and would be dispositive as to any remaining Motions held abeyance.

6. The United States did not seek leave from this Court to use the 2 PSR’s in the pending appeal, before it filed them in the Appellate record. This has created several substantive and procedural issues and problems.

7. First, it is this Court that must first decide if the 2 PSR's of Mera and Zambrano<sup>2</sup> may even be used in an appeal of another party, Toala. See Exhibit "1". This of course begs the question of why must this Court decide this issue?

8. The reason is that the appellate record in the appeal of Toala, as it relates to his sentencing hearing, does not consist of the PSR's of either Mera or Zambrano being filed therein. In fact, to this day, the undersigned has never seen or had access to the PSR's of Mera or Zambrano.

9. There is a procedure for supplementing or correcting the record in this Court, which was in fact used by the parties at the beginning of this appeal. However, that procedure permitted by Fed R. App. P. 10 (e) (2) (A) and (B) would not work here for the United States, in that the 2 PSR's of Mera and Zambrano were not part of the sentencing record of Toala.

10. However, notwithstanding this procedural "glitch" the United States presumably could have filed a motion with this Court explaining why it wanted to use the 2 PSR's of Mera and Zambrano in the appeal filed by Toala. The Order from the Eleventh Circuit seems to by inference acknowledge such process. See, Exhibit "1".

11. Why would it be the United States filing such a motion, and not Toala, you may ask? Because Toala did not seek leave from this Court, in the first instance, (or for that matter the Eleventh Circuit) to file the 2 sealed PSR's of Mera and Zambrano in his appeal. Toala has never been given the Mera and Zambrano PSR's, and as stated above, and Toala and his counsel by law are not even allowed to read them.

12. The United States in bypassing this Court, and directly filing the 2 PSR's of Mera and Zambrano in the appellate record has created a "conundrum". What is the

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<sup>2</sup> Mera and Zambrano were arrested and indicted along with Toala. All 3 were sentenced separately. Mera was sentenced on March 14, 2019 (DKT. 70) Zambrano was sentenced on March 5, 2019. (DKT. 62)

conundrum? The Appellant Toala's counsel was not in the first instance given an opportunity to object to the use of 2 PSR's that were not used at the sentencing of Toala.

13. This opportunity would have been available, if the United States had first sought permission in this Court, to use the 2 PSR's of Mera and Zambrano in the Toala appeal, if it could show first that PSR's of other individual's, not part of Toala's sentencing record, can be used in the appeal of Toala, and if this Court so finds, then a "compelling need" must next be shown by the United States.

14. The reason being is that there is specific burden, as explained in case law, placed upon a party seeking to use the PSR of a third party.

15. The United States by attempting to use the 2 PSR's of Mera and Zambrano, have that burden, in that the PSR's of Mera and Zambrano would then be accessible by Toala and his appellate counsel (third parties).

16. Assuming this Court would even allow the PSR's of Mera and Zambrano to be used as part of the appellate record (which it should not), the burden is to show a "compelling need or reason" for use of the PSR's, which are to be viewed by third parties (Toala and his counsel), so that an effective and fair appeal can be had.

17. It is against court rules<sup>3</sup>, case law and policy to provide PSR's to third parties. In *United States v. Gomez*, 323 F. 3d 1305 (11<sup>th</sup> Cir. 2003) the Eleventh Circuit referred to the general presumption that courts will not grant third parties' access to the presentence reports of other individuals.

18. The undersigned has attempted to object to the use of the 2 PSR's for several

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<sup>3</sup> Fed. R. Crim. P. 32 (e) (3).

reasons, notably that these 2 PSR's were not filed in Toala's sentencing and should not to be made part of the appellate record, and also that counsel for Toala has no access to the 2 PSR's of Mera and Zambrano.

19. The undersigned does formally object to this Court and for the record concerning the United States attempted use of the 2 PSR's of Mera and Zambrano in the appeal of Toala.

20. Again, the burden is on the United States, not Toala to first show that the 2 PSR's can be used in another appeal, and if so, that there is a "compelling need" or "compelling reason" to use the PSR's of Mera and Zambrano in another appeal. The United States injected these two PSR's into this record, not the Appellant. That is why we are now before this Honorable Court. See, *Gomez*, 323 F.3d at 1308, *supra*. (The Eleventh Circuit pointed out that other Circuit's have used a "compelling need" test, which must be one stated with particularity, as opposed to an abstract and conclusory expression of need)

21. Presentence investigation reports, or more simply, presentence reports or PSI's [or PSR's], are generally considered to be confidential documents and are only disclosed to third parties under limited circumstances. See, *U.S. Dept. of Justice v. Julian*, 486 U.S. 1, 12, 108 S. Ct. 1606, 100 L.Ed.2d 1 (1988) ("the courts have typically required some showing of special need before they will allow a third party to obtain a copy of a presentence report"). "[A]s a general rule, criminal defendants have no right to see or examine the PSI's of their co-defendants." *United States v. Simmonds*, 235 F.3d 826, 837 (3d Cir. 2000).

22. The United States to date has not shown a legal reason that would allow the use of the 2 PSR's of Mera and Zambrano in the pending appeal of Toala. And of

course have not yet shown a compelling need or reason to inject 2 other PSR's (not Toala's) into the pending Appeal.

23. More importantly, as stated above, in that the PSR's of Mera and Zambrano were not part of the record in the Toala sentencing, this Court should find or order that the PSR's cannot be used in the appeal of the Defendant/ Appellant, Toala, and so notify the Eleventh Circuit by way of an Order finding same.

24. It does not make logical or legal sense that the United States can use the PSR's of Mera and Zambrano of which were not part of the record at Toala's sentencing. (DKT. 77, 78, 79, 94)

25. If this Court finds that the United States by law can use the 2 PSR's of Mera and Zambrano in an appeal of another person,<sup>4</sup> and the United States elects to make such a showing of "compelling" need or reason to this Court, if after such proceeding, this Court finds that a "compelling" need or reason has not been shown by the United States, then of course this Court should find that the PSR's of Mera and Zambrano must stricken and withdrawn as supplemental appendix items in the United States (already filed) supplemental appendix, and its proposed "corrected" appendix on appeal, and all references to same be removed from the United States Answer Brief by way of Order.

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<sup>4</sup> There are policy reasons set out in the case law that explain why this should not occur. The chilling impact this could have on the ability of Probation and Parole employees to do their job, knowing that confidential and protected information may end up in a third parties appellate brief in the future. As well, do the individuals or counsel for the third parties have any standing to object to the use of their PSR's by the Government in other appeals? The adverse impact and delays in appeals, as in the instant case, and the taking up of this Court's time. And most importantly, defense counsel's inability to properly address issues at a sentencing hearing, based upon information not available to defense counsel for the defendant at sentencing, but which will later be used in his appeal, is very prejudicial.

26. This would be required, since how can the undersigned effectively pursue an appeal for Toala, if he is not permitted to even review the 2 PSR's of Mera and Zambrano?

27. If this Court finds the United States is legally allowed to use the 2 PSR's in the Toala appeal, and this Court finds that United States has met its burden, then this Court should also find that Toala and his appellate counsel shall have complete access to the 2 PSR's of Mera and Zambrano for Appellant's preparation of his Reply brief in the pending appeal, so that an effective appeal can be had.

28. Again, Toala has not sought, to use in his appeal, the PSR's of Mera and Zambrano. If the Court allows the United States to file those 2 PSR's then it should allow Toala and his Counsel to review and have access to the 2 PSR's so that an effective appeal can be had, subject to Toala's procedural and substantive objections.

**WHEREFORE**, based upon all of the foregoing reasons, the undersigned on behalf of the Appellant, Toala respectfully requests:

- a. That this Court find that as a matter of law, it is not permissible for the United State to use the PSR's of Mera and Zambrano in the appeal of Toala, as same were not part of the record in the sentencing of Toala;
- b. That if this Court holds otherwise, that this Court direct the United States to show the "compelling": need or reason upon which it bases the requested use of the PSR's of Mera and Zambrano, in the appeal of Toala, and
- c. That upon the United States failure to show a "compelling" need or reason, that this Court enter an order striking and prohibiting use of the Mera and Zambrano PSR's in the

appeal of Toala, and that any references to same in the Answer Brief of the United States be stricken, and

d. That to the extent, this Court finds that the United States has met its burden and shown a "compelling need" for the use of the Mera and Zambrano PSR's in the appeal of Toala, that this Court allow Toala and his appellate counsel complete access to said PSR's in order to prepare its response and file its Reply.

e. The Appellant Toala through his counsel asserts his continuing objection both procedurally and substantively to the unilateral injection of the 2 PSR's of Mera and Zambrano into the appeal of Toala.

Respectfully submitted on this 14<sup>th</sup> day of November 2019.

By: s/ Brian P. Battaglia  
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CJA Counsel

**Certificate of Service**

I certify that a copy of this motion and the notice of electronic filing was sent by CM/ECF on November 14<sup>th</sup>, 2019, to counsel for the United States:  
SEAN SIEKKINEN, Assistant *United States Attorney*

s/ Brian P. Battaglia  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA,

vs.

CASE NO: 8:18-cr-511-T-23JSS  
FRANKLIN RAFAEL LOPEZ TOALA

/

Defendant/Appellant, Franklin Rafael Lopez Toala's Motion and  
pursuant to Order of the Eleventh Circuit Court of Appeals, Dated  
November 5, 2019

**EXHIBIT 1**

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

For rules and forms visit  
[www.ca11.uscourts.gov](http://www.ca11.uscourts.gov)

November 05, 2019

Brian P. Battaglia  
The Bleakley Baval Law Firm  
15170 N FLORIDA AVE  
TAMPA, FL 33613

Appeal Number: 19-11335-JJ  
Case Style: USA v. Franklin Lopez Toala  
District Court Docket No: 8:18-cr-00511-SDM-JSS-2

**This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.**

The enclosed order has been ENTERED.

Appellant is DIRECTED to seek for Order to Unseal on a Limited Basis and/or Permit Appellant's Counsel Limited Inspection to Review the Sealed Presentence Investigation Report in the district court within **fourteen days** after the date of this order.

“Appellant’s Unopposed Motion for Extension of Time to File Reply Brief” is due within 21 days after the date the district court issues a ruling concerning Appellant’s access to the sealed information on which the government seeks to rely.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tiffany Tucker, JJ  
Phone #: (404)335-6193

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 19-11335-JJ

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANKLIN RAFAEL LOPEZ TOALA

Defendant-Appellant.

---

On Appeal from the United States  
District Court for the Middle District of Florida

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ORDER:

Before the Court are: (1) “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;” (2) “Appellant’s Unopposed Motion for Extension of Time to File Reply Brief;” and (3) the “United States’ Motion for Leave to File Corrected Supplemental Appendix.”

“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” is DENIED WITHOUT PREJUDICE to Appellant’s ability to seek such relief in the district court. Appellant is DIRECTED to seek such relief in the district court within fourteen days after the date of this order.

The “United States’ Motion for Leave to File Corrected Supplemental Appendix” is HELD IN ABEYANCE pending a ruling by the district court concerning whether Appellant may access the sealed, *ex parte* information on which the government seeks to rely.

“Appellant’s Unopposed Motion for Extension of Time to File Reply Brief” is GRANTED, IN PART, to the extent that Appellant’s reply brief is due within 21 days after the date the district court issues a ruling concerning Appellant’s access to the sealed information on which the government seeks to rely.



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UNITED STATES CIRCUIT JUDGE

# **Pet. App. I**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:18-cr-511-T-23JSS

FRANKLIN RAFAEL LOPEZ TOALA

**UNITED STATES' RESPONSE TO DEFENDANT, LOPEZ TOALA's  
MOTION FOR ACCESS TO CO-DEFENDANT PSRs**

COMES NOW, the United States of America, by and through the undersigned counsel, pursuant to this Honorable Court's Order of November 18, 2019, and hereby responds to defendant Franklin Rafael Lopez Toala's motion dated November 14, 2019. In support of its response, the United States hereby states as follows:

**FACTS & PROCEDURAL HISTORY**

Lopez Toala and two co-defendants (Mera and Zambrano) pleaded guilty to attempting to smuggle cocaine from Ecuador to North America on a go-fast vessel. Docs. 48, 49, 52. Lopez Toala has appealed his judgment and sentence, and that appeal remains pending before the Eleventh Circuit Court of Appeals (Case No. 19-11335). Lopez Toala argues on appeal that this Honorable Court erroneously rejected his request for a two-level "minor role" reduction, and,

moreover, imposed a substantively unreasonable sentence. *See* Lopez Toala's brief at 14–35.

In its response brief, the United States cited portions of Zambrano's and Mera's sealed PSRs showing that: (1) Lopez Toala and Zambrano had the same advisory guidelines range, and (2) Mera appropriately received a two-level enhancement for captaining the vessel (which Lopez Toala did not receive), but (3) Mera received a downward departure for substantial assistance (which Lopez Toala also did not receive). *See* United States' brief at 10–11 n.3, 21 –22 (citing Mera's PSR ¶¶ 9, 24, 65 and Zambrano's PSR ¶ 60). These portions of the PSRs rebut Lopez Toala's contention that he played a substantially less culpable role than his co-defendants and his further contention that his overall sentence should have been less than Mera's and Zambrano's sentences. The United States included Mera's PSR in the supplemental appendix filed under seal with the Eleventh Circuit, but inadvertently omitted Zambrano's PSR. Accordingly, the United States sought leave from the Eleventh Circuit to file a corrected supplemental appendix to include Zambrano's PSR.

On November 5, 2019, Lopez Toala filed a motion with the Eleventh Circuit requesting that the PSRs of Mera be unsealed for the purposes of review and preparation of a reply brief in the pending appeal. *See* Ex. A. In this motion, Lopez Toala alternatively requested that counsel for Appellant be permitted to

inspect the sealed PSR at the United States' Attorney's Office for the Middle District of Florida. *Id.* Finally, Lopez Toala requested that the Eleventh Circuit grant this court limited jurisdiction during the pendency of the appeal to allow Lopez Toala to file a motion with this Court requesting that the Mera PSR be unsealed, on a limited basis, or in the alternative to allow counsel for the appellant to inspect the Mera PSR at the United States' Attorney's Office for the Middle District of Florida. *Id.*

On November 5, 2019, the Eleventh Circuit issued an order denying Lopez Toala's motion to unseal the PSR and directed him to seek the specifically requested relief in this Court. *See* Ex. B. The Eleventh Circuit further ordered that the United States' Motion for Leave to File a Corrected Supplemental Appendix (to include the Zambrano PSR) is held in abeyance pending an order by this Court regarding whether Lopez Toala may access the sealed information contained in the PSR. *Id.*

In stark contrast to his motion seeking relief before the Eleventh Circuit, Lopez Toala now seeks, not only access to the PSRs of his co-defendants, but also asks this Court make evidentiary and legal findings related to motions pending before the Eleventh Circuit.

## APPLICABLE LAW

### **1. Jurisdiction of the Court to Grant Requested Relief:**

“The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over the aspects of the case involved in the appeal.” *United States v. Tovar-Rico*, 61 F.3d 1529, 1532 (11th Cir.1995) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)). Accordingly, when an appeal is filed, “the district court is divested of jurisdiction to take *any* action with regard to the matter except in aid of the appeal.” *Shewchun v. United States*, 797 F.2d 941, 942 (11th Cir.1986) (internal quotation marks omitted). *See also, United States v. Dunham*, 240 F.3d 1328, 1329–30 (11th Cir. 2001) (district court lacked jurisdiction to consider and rule on § 2255 motion during the pendency of direct appeal). Only one of the actions requested in Lopez Toala’s motion is in aid of the appellate court’s jurisdiction.

### **2. Disclosure of Pre-Sentence Reports (PSRs) to Third-Party:**

PSRs are filed under seal in the district court because they may contain sensitive and confidential information about the defendant’s upbringing, family, finances, and mental and physical condition, among other things. *See Fed. R. Crim. P. 32(d); M.D. Fla. Local Rule 4.12(h)*. The United States Supreme Court has commented that “in both civil and criminal cases the courts have been very

reluctant to give *third parties* access to the presentence investigation report prepared for some other individual or individuals.” *United States Dep’t of Justice v. Julian*, 486 U.S. 1, 11 (1988). Accordingly, there is a ““general presumption that courts will not grant third parties access to the presentence reports of other individuals.”” *United States v. Gomez*, 323 F.3d 1305, 1308 (11th Cir. 2003) (quoting *United States v. Huckaby*, 43 F.3d 135, 138 (5th Cir.1995)).

Consistent with that presumption, this Court prohibits the probation office from disclosing a PSR except upon court order. M.D. Fla. Local Rule 4.12(h). A third-party seeking access to a PSR should file a “written petition to the [district] court establishing with particularity the need for specific information believed to be contained in such records.” *Id.*

The Eleventh Circuit has recognized that other appellate courts require “a third party requesting disclosure of a [PSR] must demonstrate a ‘compelling, particularized need for disclosure.’” *Gomez*, 323 F.3d at 1308 (11th Cir. 2003) (quoting *United States v. Corbitt*, 879 F.2d 224, 238 (7th Cir. 1989)). And, if such need is demonstrated, those courts typically require “the district court [to] take care—usually by way of in camera review—to ensure that the disclosure is limited to ‘those portions of the report which are directly relevant to the demonstrated need.’” *Id.* (quoting *Corbitt*, 879 F.2d at 238).

## DISCUSSION

### **1. Jurisdiction of the Court to Grant Requested Relief:**

This Court does not have jurisdiction to grant most of the relief requested by Lopez Toala. Once Lopez Toala filed a notice of appeal, this Court was divested of jurisdiction to take any action with respect to this case. *Shewchun*, 797 F.2d at 942. The lone exception to this divestiture is action “in aid of the appeal.” *Id.* That narrow grant of jurisdiction was limited by the Eleventh Circuit to consider Lopez Toala’s request to unseal and review the relevant portions of the PSRs of his co-defendants for the purposes of filing a reply brief in the pending appeal.

Accordingly, this Court does not have jurisdiction to make the evidentiary conclusions that Lopez Toala now asks this Court to make.<sup>1</sup> Specifically, this Court does not have jurisdiction to determine whether the Eleventh Circuit may consider the PSRs of his co-defendants in the pending appeal. Similarly, this Court does not have jurisdiction to enter an order striking said PSRs from the appellate record, striking references to the PSRs in the United States’ brief in the pending appeal, or prohibiting the United States from using the PSRs (or any other material) in the pending appeal. These issues are clearly outside the

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<sup>1</sup> Notably, Lopez Toala merely requested in the pending appeal to have access to PSRs of his co-defendants. Now he has changed course and seeking to use this limited grant of jurisdictional authority to have this Court weigh in on issues currently pending on appeal.

boundaries set forth in the Eleventh Circuit's order dated November 5, 2019.

Given this limited grant of jurisdiction, any such action would not be "in aid of the appeal." *Shewchun*, 797 F.2d at 942. Accordingly, the requests for relief set forth in subsections (a), (b), and (c) of Lopez Toala's motion should be denied.

**2. Disclosure of Co-Defendants' Pre-Sentence Reports (PSRs):**

This Court does have jurisdiction, however, over Lopez Toala's request for access to portions of his co-defendants' sealed PSRs. Indeed, the Eleventh Circuit specifically ordered him to request such access from this Court. To be clear, the United States is not requesting any relief from this Court and therefore has no burden of proof with respect to that aspect of Lopez Toala's motion. The United States is not a "third party" to the PSRs at issue. Rather, the United States is one of two parties in those respective case (the other being the co-defendants themselves). As a party to the litigation, the United States already has access to these reports and has no need to seek third-party access. As we are seeking no relief, we have no corresponding burden of proof or persuasion. The authority cited by Lopez Toala does not shift that burden to the United States.

To the contrary, "a third party requesting disclosure of a [PSR]" typically bears the burden to "demonstrate a 'compelling, particularized need for disclosure.'" *Gomez*, 323 F.3d at 1308 (emphasis added, noting rule in other circuits). Unlike the United States, Lopez Toala was not a party to the cases

against his co-defendants. He is therefore a “third party” to those cases and shoulders the burden to demonstrate a “compelling, particularized need for disclosure” of his co-defendants’ PSRs. *Id.*

The United States agrees that Lopez Toala’s counsel has a compelling and particularized need to access some portions of his co-defendants’ PSRs. In its appellate brief, the United States has referred to limited sections of these PSRs for the limited purpose of responding to issues raised by Lopez Toala on appeal. Lopez Toala invited the United States to do so by arguing (incorrectly) on appeal that he was materially less culpable than his co-defendants and that he was entitled to a shorter sentence than both of them. As noted above, the United States referenced the following relevant sections of the co-defendant PSRs to rebut these contentions: Mera’s PSR ¶¶ 9, 24, 65 and Zambrano’s PSR ¶ 60. There is nothing prejudicial, personal, or sensitive in those sections of the PSRs. They all relate to one of the following topics: terms of the plea agreement, Guidelines adjustments and calculations, and corresponding sentencing ranges under the Guidelines. The United States merely cited to these sections to demonstrate the following: (1) that Mera received a two-level adjustment for being the captain of the smuggling vessel, (2) to compare the applicable advisory sentencing ranges of all three defendants, and (3) provide context for the § 5K1.1 downward departure granted to Mera. Accordingly, the United States has no

objection to Lopez Toala's access to these relevant portions of the co-defendant PSRs.

To the extent he seeks access to any other portion of said PSRs, the United States contends that Lopez Toala must, at a minimum, demonstrate a "compelling, particularized need." *Gomez*, 323 F.3d at 1308. Thus far, it appears that Lopez Toala has not done so. Accordingly, the United States respectfully requests that this Court restrict further disclosure of the co-defendant PSRs unless and until Lopez Toala can make such a showing.

### **CONCLUSION**

WHEREFORE, the United States respectfully requests that this Honorable Court deny the relief requested in subsections (a), (b), and (c) of Lopez Toala's motion. In so far as Lopez Toala is requesting access to the PSRs of his co-defendants beyond what the United States has agreed to, the United States

respectfully requests that this Court deny access unless and until he can demonstrate a compelling and particularized need.

Respectfully submitted,

MARIA CHAPA LOPEZ  
United States Attorney

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Nicholas G. DeRenzo  
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**U.S. v. Lopez Toala**

**Case No. 8:18-cr-511-T-23JSS**

**CERTIFICATE OF SERVICE**

I hereby certify that on November 25, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Brian P. Battaglia, Esq.

/s/ Nicholas G. DeRenzo

Nicholas G. DeRenzo  
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# Exhibit A

No. 19-11335-JJ

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In the  
United States Court of Appeals  
for the Eleventh Circuit

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
No. 8:18-CR-511-T-23JSS-2

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**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**

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October 14, 2019

*United States v. Franklin Rafael Lopez Toala*  
No. 19-11335-JJ

**Certificate of 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-Appellant in lower court and for this appeal;

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

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

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

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

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-appellant;

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

All those listed in Appellee's CIP.

No publicly traded company or corporation has an interest in the outcome of this appeal.

In the  
United States Court of Appeals  
for the Eleventh Circuit

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

No. 19-11335-JJ

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

---

**Appellant's Motion for Order to Unseal on a Limited Basis and/or  
Permit Appellant's Counsel Limited Inspection to Review of the  
Sealed Presentence Investigation Report of Pinargote Mera and  
alternatively other relief**

The Appellant, Franklin Rafael Lopez Toala (who is currently incarcerated), through his undersigned counsel, and pursuant to Fed. R. App. P. 27 files this Motion to Unseal and/or permit Limited Inspection of the Presentence Investigation Report of Pinargote Mera by Appellant's counsel, which is included in the Appellee's supplemental appendix filed on October 1, 2019, or alternatively an Order from this Court striking said PSR of Pinargote Mera, in that good cause exists<sup>1</sup>, and says as follows:

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<sup>1</sup> The Appellant has simultaneously filed its Motion for Extension of Time to File its Reply Brief, in light of this Motion. The Appellee, United States does not oppose the Appellant's Motion for Extension of Time to File its Reply Brief.

1. The undersigned attorney is primarily responsible for preparing and filing the Appellant's Reply Brief in this Appeal. Good Cause exists, as set forth below, for the following reasons:

2. On October 1, 2019 Appellee, the United States filed a supplemental appendix listing the Pinargote Mera Sealed Presentence Investigation Report (hereinafter "Mera PSR") as an exhibit to this pending Appeal. The sealed Mera PSR was filed under seal with the Clerk of the Court for the Eleventh Circuit on October 2, 2019. The undersigned contacted counsel for the United States on or about October 2, 2019 and was advised that the undersigned could contact the Clerk of the Court to access the Mera PSR, which was not an attached Exhibit to the supplemental appendix. The Mera PSR referenced in the United States supplemental appendix was that of another defendant in the lower court.

3. The undersigned contacted a Clerk of the Court for the Eleventh Circuit Court of Appeals and was advised that the undersigned could not access the Mera PSR on the docket. The undersigned has been unable to access or review the Mera PSR filed by the United States. The undersigned then contacted appellate counsel for the United States on October 2, 2019 via email to advise that the undersigned could not access the Mera PSR, and inquired if counsel for the United States would make the Mera PSR available to the undersigned for review. On October 3, 2019 counsel

for the United States advised the undersigned in an email that “... I am looking into whether the rules allow me to send a PDF version by e-mail. I will let you know when I have an answer.” On October 4, 2019 the undersigned advised counsel for the United States that he would be willing to stop by the U.S. Attorney’s Office to inspect the Mera PSR. On the same day counsel for the United States advised the undersigned that “that would not be necessary that I should be able to mail it to you or e-mail it to you. I’m just waiting on confirmation. Sorry for the delay.”

4. On October 7, 2019 the undersigned was advised by counsel for the United States that the Mera PSR could not be shared with the undersigned, but that access could be through the District Court or alternatively from the Eleventh Circuit or from counsel for Pinargote Mera.

5. As of the filing of this Motion, the undersigned has not been able to obtain a copy of the Mera PSR from counsel for Pinargote Mera, and after evaluating this matter, has filed this Motion with the Eleventh Circuit Court of Appeals, in that the United States supplemental appendix was filed in this Court.

6. The undersigned has also simultaneously filed a Motion for Extension of Time to file the Reply Brief in light of this Motion to Unseal and/or permit Limited Inspection of the Presentence Investigation Report of Pinargote Mera by Appellant’s counsel, which is included in the Appellee’s supplemental appendix filed on October 1, 2019, or alternatively striking said PSR of Pinargote Mera.

7. The exigent and unique circumstances that support and show that good cause exists for the granting off this Motion (and the motion for extension) are the undersigned's, and the parties to this Appeal's good faith efforts, in attempting to resolve the matters involving the Mera PSR with counsel for the United States.

8. As of Friday October 11, 2019, the undersigned had conferred with counsel for the United States via telephone to determine if the United States had any objection to this Motion seeking an Order from the Eleventh Circuit Court of Appeals, allowing counsel for the Appellant to review the Mera PSR attached to the United States supplemental appendix.

9. In that counsel for the United States had advised the undersigned he was out of town during the phone call on October 11, 2019, the undersigned followed up with an email to counsel for the United States on Sunday, October 13, 2019 and was advised in a return email on October 13, 2019 from counsel for the United States that the United States had no objection as to an extension of time for the filing of Appellant's Reply Brief, but as to the Mera PSR issue in this Motion, that the undersigned could advise this Court that the Appellant's counsel is still awaiting a position from the United States on the other requested relief i.e. access to the Mera PSR.

10. Also, the undersigned did attempt to contact counsel for the United States on Monday, October 14, 2019 concerning the additional relief of striking some

or all or portions of the United States supplemental appendix containing the Mera PSR and the United States, and as of the filing of this Motion, has not responded with a response and position on this issue.

11. In light of the above, good cause exists for the granting of Appellant's Motion and the undersigned attempted to resolve this matter without seeking relief from this Court, prior to the filing of this Motion.

12. In addition, the undersigned represents to this Court that appellate counsel for the United States, Sean Siekkinen, Esq. has also acted in a good faith effort to resolve and/or address this matter, and that Mr. Siekkinen, Esq. also advised the undersigned on October 13, 2019 via email that he would attempt to obtain an answer by Monday October 14, 2019 as to the United States position as to the Appellant's Motion for limited review of the Mera PSR (but he acknowledged that October 14, 2019 was a Federal holiday, which could delay a response).

13. Therefore, in an abundance of caution, and in light of the upcoming Reply Brief deadline, the undersigned is filing this Motion and requesting the relief sought herein and Order allowing the undersigned to review and/or inspect the PSR of Pinargote Mera, or alternatively that this Court direct the United States to withdraw the PSR of Pinargote Mera or that this Court strike same from the supplemental appendix of the United States.

14. In order for the undersigned to properly review and evaluate the Mera

PSR included in the United States supplemental appendix and formulate a Reply, Appellant requests an Order from this Court to unseal, on a limited basis, the Pinargote Mera Sealed PSR or alternatively direct the United States to allow counsel for the Appellant to inspect the Pinargote Mera Sealed Presentence Investigation Report at the offices of the United States Attorney in Tampa, Florida, upon entry of an Order by this Court granting the relief requested herein.

15. Alternatively, the undersigned on behalf of the Appellant would request that if the Eleventh Circuit cannot grant the relief requested herein as to the Mera PSR [in that this Court holds it must be heard in the lower court], that this Court direct the lower court to entertain a Motion by Appellant/Defendant seeking authorization to review and/or inspect the PSR of Pinargote Mera.

16. In *United States v. Gomez*, 323 F. 3d 1305 (11<sup>th</sup> Cir. 2003) this Court referred to the general presumption that courts will not grant third parties' access to the presentence reports of other individuals. However, in *Gomez, supra*, this Court allowed the state of Florida limited access to the presentence investigation report where it had shown a compelling need. In the instant case, the United States has submitted the entire presentence investigation report of another defendant. In its Answer Brief at page 10-11 at footnote 3, the United States refers to para. 24 of actual Mera PSR. Thus, to the extent that this Court will allow the Appellant's counsel access to the PSR, then it can do so on a limited basis for the compelling reason that

the United States has included the confidential PSR of another defendant in this Appeal.<sup>2</sup>

17. Appellant's counsel should have access to said PSR. However, if Appellant's request does not arise to the level of a showing of a "compelling need", then this Court should strike those portions of the PSR upon which the United States did not rely upon in its Answer Brief as being irrelevant or contrary to the protections and policy of confidentiality or strike from the record as contained in the supplemental appendix the PSR of Pinargote Mera in its totality in that the contents of the PSR are simply not a part of the Appellant's sentencing record in this particular Appeal.

18. In support of the striking of the Mera PSR that has been included as part of the United States supplemental appendix, this Court should note that as referenced in *Gomez, supra*, Pinargote Mera's PSR was not provided to Toala or his counsel for review in the lower court. Most importantly, the sentencing judge never referred to Pinargote Mera's PSR at the sentencing of Toala. See, Doc. 94

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<sup>2</sup> Local Rule of the Middle District of Florida at 4.12 (i) entitled "Pre-Sentence Investigation Report; Pre-Sentencing Procedures" states that "Any party filing an appeal or cross appeal in any criminal case in which it is expected that an issue will be asserted pursuant to 18 U.S.C. Section 3742 concerning the sentence imposed by the Court shall immediately notify the probation officer who shall then file with the Clerk for inclusion in the record in camera a copy of the presentence investigation report. The probation officer shall also furnish, at the same time, a copy of the presentence report to the Government and to the defendant. (Emphasis supplied)

19. Additionally, the undersigned in its separate Motion for Extension of Time to File a Reply Brief will require an additional 12 days within which to submit Appellant's Reply Brief in light of this Motion, and is also requesting the 12 days begin running from the entry of an Order on this Motion from this Honorable Court.

20. As to the relief sought in this Motion by Appellant with respect to the PSR issue, the undersigned as set forth above, made a good faith effort to determine the position of the United States, but as of the filing of this Motion was unable to obtain an answer as to the United States position concerning the PSR issue and the relief sought specifically relating hereto.

**WHEREFORE**, the Appellant respectfully requests that the Court issue an Order as follows:

- a. Unsealing on a limited basis the Pinargote Mera Sealed Presentence Investigation Report so that that counsel for the Appellant may review same; and/or
- b. Entering an Order unsealing the Pinargote Mera Sealed Presentence Investigation Report on a limited basis so that counsel for the Appellant may review and inspect said report at the Offices of the United States Attorney in Tampa, Florida upon entry of an Order from this Court granting this Motion and authorizing said review by Appellant's counsel; and
- c. That the Eleventh Circuit Court of Appeals (if it so holds, that this Court relinquish jurisdiction temporarily) and grant the U.S. District Court limited jurisdiction during

the pendency of this Appeal to allow the Appellant/Defendant to file a Motion in the lower court in United States District Court for the Middle District of Florida for the filing of a Motion to unseal, on a limited basis, the Pinargote Mera PSR or alternatively direct the United States to allow counsel for the Appellant to inspect the Pinargote Mera Sealed Presentence Investigation Report at the offices the United States Attorney in Tampa, Florida.

d. Alternatively, that this Court Strike the supplemental appendix that contains the PSR of Pinargote Mera in that said PSR is confidential and should not be included in the appellate record of the Appellant and that the portions of the United States Answer brief that refers to the PSR of Pinargote Mera should be withdrawn.

e. That this Honorable Court find that Good Cause exists for the separate Motion for Extension of Time to file a Reply Brief filed simultaneously with the above Motion and grant the Appellant a 12-day extension within which to file its Reply Brief in the above Appeal, running from the entry of an Order from this Honorable Court granting Appellant/Defendant's Motion to review and/or inspect on a limited basis the PSR of Pinargote Mera or striking same.

Respectfully submitted on this 14<sup>th</sup> day of October 2019.

By: s/ Brian P. Battaglia  
Brian P. Battaglia  
Fla. Bar #0557978  
Bleakley Baval Denman & Grace  
15316 N. Florida Avenue

Tampa, FL 33613  
(813) 221-3759  
bbattaglia@bbdglaw.com  
CJA Counsel

**Certificate of Compliance with Type-Volume Limitation**

This motion, which contains 2,582 countable words, complies with Fed. R. App. P. 27(d)(2)(A) and Fed. R. App. P. 32(a)(5), (6).

### **Certificate of Service**

I certify that a copy of this motion and the notice of electronic filing was sent by CM/ECF on October 14, 2019, to counsel for the United States:

SEAN SIEKKINEN, Assistant *United States Attorney*

s/ Brian P. Battaglia

Brian P. Battaglia  
Fla. Bar 0557978  
Bleakley Baval Denman & Grace  
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Tampa, FL 33613  
(813) 221-3759  
[bbattaglia@bbdglaw.com](mailto:bbattaglia@bbdglaw.com)

# Exhibit B

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

For rules and forms visit  
[www.ca11.uscourts.gov](http://www.ca11.uscourts.gov)

November 05, 2019

Brian P. Battaglia  
The Bleakley Bavol Law Firm  
15170 N FLORIDA AVE  
TAMPA, FL 33613

Appeal Number: 19-11335-JJ  
Case Style: USA v. Franklin Lopez Toala  
District Court Docket No: 8:18-cr-00511-SDM-JSS-2

**This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.**

The enclosed order has been ENTERED.

Appellant is DIRECTED to seek for Order to Unseal on a Limited Basis and/or Permit Appellant's Counsel Limited Inspection to Review the Sealed Presentence Investigation Report in the district court within **fourteen days** after the date of this order.

“Appellant’s Unopposed Motion for Extension of Time to File Reply Brief” is due within 21 days after the date the district court issues a ruling concerning Appellant’s access to the sealed information on which the government seeks to rely.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tiffany Tucker, JJ  
Phone #: (404)335-6193

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 19-11335-JJ

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANKLIN RAFAEL LOPEZ TOALA

Defendant-Appellant.

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On Appeal from the United States  
District Court for the Middle District of Florida

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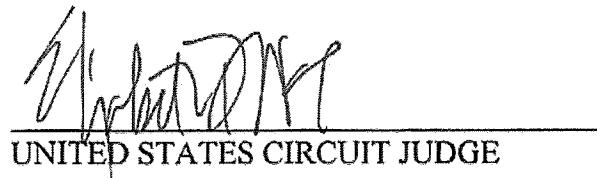
ORDER:

Before the Court are: (1) "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;" (2) "Appellant's Unopposed Motion for Extension of Time to File Reply Brief;" and (3) the "United States' Motion for Leave to File Corrected Supplemental Appendix."

"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" is DENIED WITHOUT PREJUDICE to Appellant's ability to seek such relief in the district court. Appellant is DIRECTED to seek such relief in the district court within fourteen days after the date of this order.

The “United States’ Motion for Leave to File Corrected Supplemental Appendix” is HELD IN ABEYANCE pending a ruling by the district court concerning whether Appellant may access the sealed, *ex parte* information on which the government seeks to rely.

“Appellant’s Unopposed Motion for Extension of Time to File Reply Brief” is GRANTED, IN PART, to the extent that Appellant’s reply brief is due within 21 days after the date the district court issues a ruling concerning Appellant’s access to the sealed information on which the government seeks to rely.



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UNITED STATES CIRCUIT JUDGE

**Pet. App. J**

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA,

vs.

CASE NO: 8:18-cr-00511-SDM-JSS-2  
Appeal No: 19-11335-JJ

FRANKLIN RAFAEL LOPEZ TOALA

Defendant/Appellant,

/

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DEFENDANT/APPELLANT, FRANKLIN RAFAEL LOPEZ TOALA'S REPLY TO  
UNITED STATES RESPONSE

The Defendant/Appellant, Franklin Rafael Lopez Toala, through his undersigned counsel, and pursuant to this Court's Order of November 26, 2019 (DKT 106) files his Reply to the United States Response, filed on November 25, 2019 (DKT 104), and says as follows:

1. The United States in its Response (DKT 104) first argues that only one of Defendant/Appellant's requests will aid in the appellate court's jurisdiction.

2. This first argument by the United States is incorrect. This Court, pursuant to Federal Rule of Appellate Procedure 10 ("FRAP") has specific authority to address all issues raised in the Defendant/Appellant's Motion. A clear example of this is this Court's previous Order in this case (DKT 98), and after the Notice of Appeal was filed by the Defendant/Appellant (DKT 80, 85), approving the joint stipulation of the parties supplementing the record on appeal pursuant to FRAP 10.

3. In fact FRAP 10 (e) provides such authority to this Court to *correct* or modify the record "*by the district court before or after the record has been forwarded.*"

(Emphasis supplied).

4. Thus, this Court by Order can decide that the MERA and Zambrano PSR's which were (i) not part of the sentencing record, (ii) not filed by the United States at the sentencing of the Defendant/Appellant, Toala, and (iii) which at the time of sentencing and hearing by this Court had never been reviewed or seen by Defendant/Appellant, are simply not part of the record on appeal and have no place in the appellate record of Defendant/Appellant, and so Order, pursuant to FRAP 10 (e).

5. The law is established that FRAP 10 (e) does not permit or allow "new evidence" to be submitted in the appeal, that was not filed at the Defendant/Appellant's sentencing hearing. See, *United States v. Miller*, 2011 WL 13175529 (M.D. Fla. 2011) (Rule 10(e) may not be used to introduce new evidence to the court of appeals. *United States v. Husein*, 478 F.3d 318, 335–56 (6th Cir. 2007)). In *Miller*, the district court rejected the United States attempt to include in the appellate record a document that was not presented to the court at sentencing by the United States.

6. Allowing the PSR's of Mera and Zambrano in this appellate record would constitute clear and fundamental error, and violate case law, FRAP 10 (e) and notions of fundamental fairness and procedural correctness.<sup>1</sup>

7. If this Court rules in favor of the Defendant/Appellant on point one above, then this matter is over, and all remaining issue are moot. However, if this Court rules that "new evidence" not introduced at a sentencing hearing and not provided to the

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<sup>1</sup> Not only were the Mera and Zambrano PSR's never filed or provided to Defendant/Appellant at his sentencing, as well, since the United States did not use the 2 PSR's at the sentencing hearing, Defendant/Appellant never had an opportunity to review and object to the Mera and Zambrano PSR's at his sentencing.

Defendant/Appellant or his counsel, may now be used in the subsequent appeal by the United States, then of course this Court must next decide who has the burden to show a compelling need for use of the PSR's?

8. In the instant case, it is undisputed that it is the United States, and not the Defendant/Appellant, is attempting to use the Mera and Zambrano PSR's. The United States references M.D. Fla. Local Rule 4.12 (h). However, this Rule prohibits the probation office from disclosing a PSR and the party "seeking" access to the PSR Rule..." (Emphasis supplied) Again, it was the United States seeking to use the 2 PSR's, not the Defendant/Appellant.

9. Logic would dictate that the burden then should be on the United States to show a "compelling need" for the use of a confidential PSR's. Why would it be Defendant/Appellant's burden? The United States by injecting "new evidence" into the appellate record of the Defendant/Appellant in the form of the Mera and Zambrano PSR's, has *stepped into the shoe's*, so to speak, of any party that desires to use a confidential PSR in a court proceeding; thus the United States has become that "*Third Party*" in this circumstance..

10. Now comes the tricky part. Not only does the United States argue that Defendant/Appellant Toala should have the burden. The United States also argues that the Defendant/Appellant should have *limited access* to the 2 PSR's. (See p. 9 of Response) (Emphasis supplied)

11. It seems that the United States in filing the entirety of the 2 PSR's should explain to this Court the "compelling need" to limit access to the PSR's, and the compelling reasons why Defendant/Appellant and his counsel should be limited in

their access to the 2 PSR's, when in fact the Appellate Court will be able to review the entire PSR of both Mera and Zambrano.

12. In the event this Court rules that the 2 PSR's can be submitted after the fact in a pending appeal, and also rules that it is the Defendant/Appellant and not the United States, has the burden to show a compelling need for access, then (without waiver of the Defendant/Appellant's procedural and substantive objections to this process and the United States submittal of the Mera and Zambrano PSR's into the appellate record) the Defendant/Appellant would assert that complete and unfettered access and use of the 2 PSR's be ordered by this Court, so that the Defendant/Appellant can formulate a complete Reply Brief, for filing with the Appellate court.

13. If not, that that this Honorable Court, should allow the undersigned to review in camera<sup>2</sup>, the Mera and Zambrano PSR's so that the undersigned can fully be informed as to their contents. Only then, can the undersigned respond to the United States argument that Defendant/Appellant show a "compelling need".

14. The United States argument that Defendant/Appellant should not have access to the complete PSR's of Mera and Zambrano, notwithstanding the fact that the Appellate Court would have full access, only serves to prejudice the Defendant/Appellant and his counsel's ability to prosecute an appeal with full and complete access to the information that will be reviewed and relied upon by the

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<sup>2</sup> This case is unique both as to the current posture and that use of other PSR's was initiated by the United States. The typical case is where a defendant seeks to inspect another PSR for exculpatory or impeachment material. But again, such action occurs, not after the proceedings have concluded, and an appeal is pending, but before an appeal when the case is before the trial court for hearings, trial or the sentencing hearing and the parties have the ability to object to or respond to the proposed action.

Appellate Court, and in order to prepare the Reply Brief of the Defendant/Appellant.

**WHEREFORE**, Defendant/Appellant respectfully requests that this Honorable Court,

- a. Enter an Order in favor of the Defendant/Appellant that the United States may not use the 2 PSR's of Mera and Zambrano, in that said PSR's were not filed or provided to the Defendant/Appellant at the sentencing hearing; alternatively,
- b. If this Court finds the United States may use the 2 PSR's of Mera and Zambrano as part of the appellate record, then this Court also rule that such ruling is conditioned upon and before said PSR's are made part of the appellate record, that the United States show a compelling need for such use, and absent such showing, this Court strike the 2 PSR's from the appellate record; and
- c. If this Court finds that the United States has shown a compelling need, that this Court rule that counsel for the undersigned have unfettered access to the 2 PSR's in order to effectively prepare the Defendant/Appellant's Reply Brief; and
- d. If this Court rules that notwithstanding the fact that the Defendant/Appellant is not the party that has requested use of the 2 PSR's, and this Court finds the burden to show a "compelling need" is upon the Defendant/Appellant, then this Court allow the undersigned to inspect the PSR's of Mera and Zambrano in camera, so that the undersigned can effectively formulate a response and present arguments as to the Defendant/Appellant's compelling need for limited access (and objections by Defendant/Appellant as to the position asserted by the United States) or full and complete access to the 2 PSR's, as asserted by the Defendant/Appellant in order to effectively file a Reply Brief in the pending Appeal.

Respectfully submitted on this 30th day of November 2019.

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CJA Counsel

**Certificate of Service**

I certify that a copy of this motion and the notice of electronic filing was sent by CM/ECF on November 30th, 2019, to counsel for the United States:  
Nicholas G. DeRenzo, *Assistant United States Attorney*

s/ Brian P. Battaglia  
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[bbattaglia@bbdqlaw.com](mailto:bbattaglia@bbdqlaw.com)

**Pet. App. K**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-00511-SDM-JSS-2  
Appeal No: 19-11335-JJ**

**FRANKLIN RAFAEL LOPEZ TOALA**

**Defendant/Appellant,**

**/**

**DEFENDANT/APPELLANT, FRANKLIN RAFAEL LOPEZ TOALA'S WRITTEN  
OBJECTIONS TO REPORT AND RECOMMENDATION ISSUED ON DECEMBER  
23, 2019**

The Defendant/Appellant, Franklin Rafael Lopez Toala, through his undersigned counsel, and pursuant to this Court's Report and Recommendation of December 23, 2019 (DKT 108) respectfully files his objections to the Report and Recommendation, dated December 23, 2019, and says as follows:

1. Respectfully, the undersigned files this objection to the Report and Recommendation of the Court issued on December 23, 2019 (DKT 108) on the ground that the United States should not be permitted to circumvent the requirements Federal Rule of Appellate Procedure 10, including 10 (a) and 10 (e) by filing items that were not part of the sentencing hearing by way of a supplemental appendix directly in the Appellate Court. As this Court notes at page 5 of its recommendation, Rule 10 (e) does not permit "a party to add materials to the record on appeal that were not before the district court." Citing *Stewart v. Colvin*, No. CV 14-3265, 2016 WL 6126912 at \*2 (C.D. Ill. Oct. 18, 2016), aff' sub nom. *Stewart v. Berryhill*, 731 F. App'x 509 (7<sup>th</sup> Cir.

2018).

2. In *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F. 2d 89 (3d Cir. 1990) the Circuit Court noted that by including in its appendix a number of items that were not part of the district court record, *Capital Cities* ha[d] violated the command of several provisions of the Federal Rules of Appellate Procedure. Rule 10(a) states that the record on appeal is composed of:

The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court.... See, Fed.R.App.P. 10(a). Federal Rule of Appellate Procedure 30, entitled "Appendix to the Briefs," *limits the contents of a party's appendix to that which is contained in the record before the district court.* (Emphasis supplied) The Circuit court also stated that "moreover, we are unable to consider in the first instance any of the material that *Capital Cities* has included in its appendix that was not part of the district court record". In *Sewak v. INS*, 900 F.2d 667, 673 (3d Cir.1990), we stated that "[a]s an appellate court we do not take testimony, hear evidence or determine disputed facts in the first instance. Instead, we rely upon a record developed in those fora that do take evidence and find facts." See also *United States ex rel. Mulvaney v. Rush*, 487 F.2d 684, 687 (3d Cir.1973) ("We are not a fact-finding body. We are entitled to have the judgment of the district court both as to findings of fact and conclusions of law....").

Also see, *U.S. v. Harris*, 542 F. 2d 1283 (7<sup>th</sup> Cir. 1976) (Materials which consisted of excerpts from transcripts of another trial and were not part of the record in the case were not properly before court on review and should not have been presented in the appendix).

3. Under Federal Rule of Appellate Procedure Rule 10 (e) it specifically states: (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that

court and the record conformed accordingly. (Emphasis supplied).<sup>1</sup> This Court has already determined the issue, at paragraph 6 of its Report and Recommendations. (“Here, the PSR’s of co-defendants Mera and Zambrano are not part of the record on appeal in appellate case number 19-11335-JJ”).

4. Thus, and as set forth expressly in Rule 10 (e), it is the District Court, that conducted the sentencing, that must decide what constitutes the record. In Toala’s Motion pursuant to the 11<sup>th</sup> Circuit’s Order (DKT 100) Toala cited Rule 10 (e) and further at his Wherefore Clause at paragraph a. sought relief from this Court that the United States not be permitted to use the 2 PSR’s, which is exactly what Rule 10 (e) directs this Court determine, and grant such relief.

5. Toala again asked for that relief in his Reply (DKT 107) to the United States Response to his motion. It is error for the United States to have not moved this Court (or for that matter the 11<sup>th</sup> Circuit) to consider supplementing the record. However, as seen above, in *In re Capital Cities*, [the United States] could not have done so, in that this Court would not have allowed the PSR’s of Zambrano and Mera to be part of the record on appeal of the sentencing of Toala, simply because they were not part of his sentencing record before Chief Judge Merryday. (DKT 94) The law is established that FRAP 10 (e) does not permit or allow “new evidence” to be submitted in the appeal that was not filed at the Defendant/Appellant’s sentencing hearing. See, *United States v. Miller*, 2011 WL 13175529 (M.D. Fla. 2011)

6. Thus, it is up to this Court (See Rule 10 (e)), to *conform the record*

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<sup>1</sup> Rule 10 (e) (2) (B) also gives the District Court authority to determine the record “*before and after the record has been forwarded.*” (Emphasis supplied)

accordingly, and it does have jurisdiction to do so in that the parties are back before the sentencing court, by also ordering that the 2 PSR's of Zambrano and Mera are not part of the sentencing record and should not be allowed as such. This of course should be part of the Order of this Court that will be transmitted to the 11th Circuit Court of Appeals.

WHEREFORE, Defendant/Appellant, by and through his counsel, for all of the foregoing reasons, Most Respectfully submits the above objections to the Report and Recommendation issued on December 23, 2019 (DKT 108) by the Court.

Respectfully submitted on this 26th day of December 2019.

By: s/ Brian P. Battaglia  
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Fla. Bar #0557978  
15316 N. Florida Avenue  
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[bbattaglia@bbdqlaw.com](mailto:bbattaglia@bbdqlaw.com)  
CJA Counsel

#### **Certificate of Service**

I certify that a copy of this motion and the notice of electronic filing was sent by CM/ECF on December 26th, 2019, to counsel for the United States:  
Nicholas G. DeRenzo, *Assistant United States Attorney*

s/ Brian P. Battaglia  
Brian P. Battaglia  
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**Pet. App. L**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**

**FRANKLIN RAFAEL LOPEZ TOALA**

/

**FRANKLIN RAFAEL LOPEZ TOALA'S AMENDED SENTENCING MOTION  
FOR DOWNWARD DEPARTURES AND VARIANCES AND  
SUPPORTING MEMORANDUM OF LAW**

The Defendant, **FRANKLIN RAFAEL LOPEZ TOALA** ("Franklin"), by and through his undersigned counsel, files this Amended\* Sentencing Motion (\*to correct a scrivener's error with respect to the defendant's name) for downward departures and variances and supporting Memorandum of Law, and respectfully requests a departure(s) and downward variance(s) from the applicable advisory Sentencing Guidelines range, pursuant to applicable law, as explained below, and says as follows:

**BACKGROUND**

As reflected in the Presentence Investigation Report (hereinafter "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. The seizure totaled 331 kilograms. (DKT# 72 ¶ 9). The 3 individuals on board were interviewed and arrested. (DKT# 72, ¶ 8-12) It was confirmed that Franklin was a mariner on the boat. (Dkt# 72, ¶ 11) Except for this serious violation of the law, Franklin did not have a previous criminal record. (DKT# 72, ¶¶ 30 and 31). At all times since his arrest, Franklin has accepted complete and full responsibility for his actions. ("The defendant has clearly

*demonstrated acceptance of responsibility for the offense") (DKT# 46, 52 72, ¶¶ 15, 25, 26).<sup>1</sup>*

Franklin's actions on and after his arrest on October 18, 2018 are consistent with the law-abiding life he led, before his arrest in October of 2018.

Franklin's Mother, Juana Sylvia Toala, instilled in him a very good work ethic. His mother raised the family on her own after Franklin's father left them while Franklin was very young, in his mother and father's off and on relationship over the years. Franklin went to work baking, selling bread, shining shoes and cleaning tables at a restaurant where his mother worked as a cook. Franklin helped raise his brother and is close to his mother. (DKT# 72, ¶¶ 38, 39) Franklin was diagnosed with a learning disability, was unable to get assistance, but did learn to read and write in Spanish. (DKT# 72, ¶ 49)

Franklin worked at a tuna packing plant for 13 years, and before that for 6 years as a security guard, and made a good wage during that period. He was always self-sufficient and proud that he was able to support his family. (DKT# 72, ¶¶ 52, 53) Unfortunately, when he was laid off from his job earlier last year, it was difficult to find work, and with his financial condition worsening, there were the added strains which arose from his son's (Justin) girlfriend delivering a baby that was born pre-mature, and the need for expensive medical care for the baby. (DKT# 72, ¶¶ 40, 42) This confluence of events led to decision to commit a crime, for which Franklin is ashamed and for which he has accepted complete responsibility for his actions. (DKT# 46, 52, 72, ¶¶ 15, 25 and 26) This writers' observations can confirm Franklin's expressions of remorse and deep pain for an act which runs counter to his honorable life before these events, that culminated in his arrest in October of 2018.

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<sup>1</sup> Franklin has also fully complied, prior to his sentencing, with the requirements of 18 U.S.C. § 3553(f) 1 through 4, and 5.

Franklin received military training and is still considered to be in the reserves, and performed his duties as required and properly. (DKT# 72, ¶52) As well, Franklin does not drink very much, maybe three times a year and has not used or abused drugs. ((DKT# 72, ¶ 47)

Prior to this case, Franklin did not have a criminal record, and had up until earlier in 2018 been a self-sufficient productive member of his community. (DKT# 72, ¶ 29 through 34) As noted in the PSR, Franklin has had a longstanding and continuous working record until earlier last year, (DKT# 72, ¶¶ 52, 53). Franklin is close to his family and had two children from his first wife. The two children are named Gesenia and Justin. (DKT# 72, ¶ 40) Franklin has been in a relationship with Gladys Guerrero Serano for nine years and has helped raised her younger children who are named Adriana and Adrian (DKT# 72, ¶ 41).

As referenced above, Franklin's grandchild born pre-mature needed serious medical care. (DKT# 72, ¶40, 54) The undersigned has included in the record, data from reliable governmental and non-governmental agencies that point to the significant increased mortality rate for infants born prematurely in countries such as Ecuador. See Exhibits "A", "B", "C" and "D" attached hereto. (Data from *Central Intelligence Agency Fact Book*, Deaths/1000 live births South America, and Ecuador Fact Book, 2019; *GEO FRED* (Federal Reserve Economic Data Book 2017); World Health Organization: *The Global Action Report on Preterm Birth*)

Franklin, made a terrible and wrong choice committing a crime, which resulted in his arrest in October of 2018, however in the instant case, the characteristics and circumstances, as applied to Franklin and in combination, present an exceptional basis and foundation for this Court to grant departures and variances, to go below the low end of the sentencing guidelines currently at a total offense level of 31, or 108 months (9 years imprisonment). Under the unique and extraordinary circumstances and applicable characteristics with respect to Franklin, a downward departure or variance between *78 to 95 months*, from the current low-end range of 108 months in the PSR

(DKT# 72, ¶27) would be reasonable, and still meet penological framework of the sentencing guidelines. As well, it would be consistent with the exceptional factors applicable to this particular Defendant and in line with statistical data relevant to the Florida Federal Courts as researched and presented by the United States Sentencing Commission. See Exhibit "E" attached hereto. Also, the Defendant has outlined the grounds for a *Role Reduction* departure. See PSR. (DKT#72, page 20)

### **DEFENDANT, FRANKLIN'S ARGUMENTS FOR DEPARTURES AND VARIANCES**

As a result of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), sentencing courts are no longer constrained solely by the federal sentencing guidelines and must now consider each of the factors enumerated in 18 U.S.C. § 3553(a) to fashion an appropriate sentence. An appropriate sentence is one that is "sufficient, but not greater than necessary" to comply with the purposes set forth in 18 U.S.C. § 3553(a) (2). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). The advisory sentencing guideline range is but one of many relevant factors in the sentencing court's determination of an appropriate sentence. 18 U.S.C. § 3553(a). Reasonableness is a key factor.

#### **(i. Relevant Sentencing Factors Under 18 U.S.C. § 3553**

When determining an appropriate sentence under 18 U.S.C. § 3553, the Court must consider:

- (1) the nature and circumstances of the offense *and the history and characteristics* of the defendant;
- (2) the need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) [the applicable Sentencing Guidelines]; . . .
- (5) any pertinent [Sentencing Guidelines] policy statement . . .
- (6) the need to *avoid unwarranted sentence disparities* among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

For the factual basis, sentencing guidelines calculation, and relevant arguments for departure, please see the Presentence Investigation Report. ((DKT# 72) and objections from Counsel for Franklin which were provided to U.S. Probation and Parole and the United States on March 5, 2019 via email. Additionally, post *Booker*, this Court can fashion any sentence that is sufficient to comply with the purposes set forth 18 U.S.C. § 3553(A) (2) and discussed above, and in this Memorandum of Law. Finally, this Court should also consider in its evaluations and deliberations, the recent passage of the *First Step Act* by Congress, and its intent on reducing lengthy sentences for non-violent offenders. See Exhibit “F” attached hereto.

**A. Downward Departure and/or variance is warranted under U.S.S.G. §§ 5H1.5, 5H1.6, 5H1.11 and 5K2.0**

Franklin should receive a downward departure or variance below the current low end range of 108 months imprisonment, with respect to his sentence, in that as set forth on the *Comparison Chart*, attached hereto as Exhibit “G” when compared to the other defendants in this action<sup>2</sup>, and as gleaned from statistical data United States Sentencing Commission attached hereto, such a departure or variance as to this Defendant, is appropriate, as explained below.

First, as compared to similar defendants, there are a combination of exceptional offender characteristics, when taken as a whole remove Franklin from the “Heartland” of the typical “boat case defendants”, which the two other Co-defendants in this case represent. The examination of whether a factor is appropriate basis for departure is limited to (1) whether the Sentencing Commission has prohibited consideration of the factor in departing from the guidelines, and (2) whether the factor as occurring in the particular instance takes the case outside of the “*heartland*” of the applicable guidelines. (Emphasis supplied) See, *Koon v. United States*, 518 U.S. 81, 109;

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<sup>2</sup> Co-Defendants, Ramon Zambrano was sentenced by this Court on March 5, 2019 to 108 months imprisonment, and the captain of the go-fast boat, Eddy Pinargote-Mera was sentenced by this Court on March 14, 2019 to 108 months imprisonment. (Pinargote-Mera received a 5K1).

116 S. Ct. 2035; 135 L. Ed. 2d 392 (1996). If a factor is forbidden, a district court cannot use the factor to depart. If a factor is encouraged, a court may depart on the basis of the factor unless the Guidelines already takes the factor into account. If the factor is discouraged or is an encouraged factor already taken into account by the applicable guideline, the court may depart only if the factor is present to an exceptional degree or in some way makes the case distinguishable from an ordinary case where the factor is present. See, See, *Koon v. United States, supra*. Also see, *United States v. Mogel*, 956 F. 2d 1555 (11<sup>th</sup> Cir. 1992). The Guidelines list certain factors that may never be considered for the basis for departure. See U.S.S.G. § 5H1.10 (*race, sex, national origin, creed, religion, socio-economic status*); § 5H1.4 (*drug or alcohol dependence*). (Emphasis supplied) With the exception of those factors, the guidelines do not generally limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

As set forth in U.S.S.G. §5K2.0 a combination of two or more offender characteristics, if when taken together, make the case an exceptional one, does allow the Court to depart or vary, with respect to downward sentencing ranges. In this case, Franklin's exceptional offender characteristics and other circumstances include, (i) a long and consistent employment history (5H1.5) (DKT# 72, ¶¶ 52, 53) (*court can consider*<sup>3</sup>) (ii) special family ties and responsibilities<sup>4</sup> (5H1.6) (DKT# 72, ¶¶ 38, 39) (*court can consider*<sup>5</sup>); (DKT# 72, ¶ 40); (DKT# 72, ¶ 41); (iii)

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<sup>3</sup> *United States v. Big Crow*, 898 F.2d 1326 (8th Cir.1990) (unemployment rate on the Pine Ridge Indian Reservation is 72 percent. Per capita annual income on the reservation is estimated at \$1,042. Bureau of Indian Affairs, *Comprehensive Solid Waste Management Program for the Pine Ridge Indian Reservation, South Dakota* 2 (June 1989). Big Crow, who was twenty-three at the time of his offense, has worked steadily since the age of seventeen. With his wife's help, he provides more than adequately for the needs of their family, which includes two children); *United States v. Harris*, 293 F. 863 (5th Cir. 2002); *United States v. Big Crow*, 898 F. 2d. 1326(8th Cir. 1990).

<sup>4</sup> *United States v. Husein*, 478 F. 3d 318 (7th Cir. 2007); *United States v. Spero*, 382 F. 3d 803 (8th Cir. 2004). This Court should also consider this factor also with respect to a reduction of fines and restitution.

<sup>5</sup> See Exhibit "E" attached hereto.

military service (5H1.11) (DKT# 72, ¶52) (*court can consider*<sup>6</sup>); (iv) no history of drug or alcohol abuse (DKT# 72, ¶ 47); (v) no prior criminal record (DKT# 72, ¶ 29 through 34); and, (vi) a previously diagnosed learning disability. (DKT# 72, ¶ 49) The relevant provisions under the U.S.S.G's are as follows:

(c) LIMITATION ON DEPARTURES BASED ON MULTIPLE CIRCUMSTANCES.<sup>7</sup>— The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

(1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and

(2) each such offender characteristic or other circumstance is—

(A) present to a substantial degree; and

(B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is *not ordinarily relevant* to a determination of whether a departure is warranted. (Emphasis supplied)

As noted in the PSR, Franklin has had a 13-year longstanding and continuous working record at a Tuna Factory, until earlier last year, and prior to that 6 years as a security guard. (DKT# 72, ¶¶ 52, 53) That the decision to board the go-fast boat, which Franklin has acknowledged was a terrible and wrong decision, was not sparked by greed or other similar circumstance. Rather it was to try and help his grand-child, a pre-mature infant that was in serious need of medical care.<sup>8</sup> (DKT# 72, ¶¶ 40, 42) Also see attached Exhibit “A” which outlines the infant mortality rate in Ecuador as very high, and without proper medical care, the rate of increase in mortality rates for a premature infant increase greatly. This point relates to the combination of factors, and not as an attempt by Franklin to excuse the terrible decision he made. He has accepted responsibility and

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<sup>6</sup> 5H1.11 “Military service may be relevant in determining whether a departure is warranted, if military service, individually *or in combination with other offender characteristics*, is present to an unusual degree ....” (Emphasis supplied)

<sup>7</sup> U.S.S.G. 5K 2.0: (Application Notes C).

<sup>8</sup> See, U.S.S.G. 5K2.0 and 5K2.11(Lesser harms)

owned up to his conduct which was wrong. However, from a sentencing perspective, this factor does add to and make<sup>9</sup> Franklin's totality of characteristics and circumstances exceptional, when viewed in the light of the other characteristics referenced herein, and the exigent circumstances and serious medical harm (or death) facing the pre-mature infant. (DKT# 72, ¶¶ 40, 42) Also, as reflected by the letters of support from family members attached hereto and to the PSR, Franklin is very much needed home as soon as possible in that he is the sole means of support. See, Exhibit "H" attached hereto. See, 5H1.6.

And as mentioned above, Franklin has had a consistent and excellent track record of employment over the years, and although under U.S.S.G. 5H1.5 one's employment record is *not ordinarily relevant* in determining whether a departure is warranted, the term "*not ordinarily*", does not mean that it may never be considered. These characteristics, in combination are the key factor to consider and apply with respect to Franklin. See, *United States v. Big Crow*, 898 F.2d 1326 (8th Cir.1990).

This Court has handled many boat cases, and the undersigned would posit, that similar to Franklin's co-defendant's (Ramon Zambrano and Eddy Mera) the majority of boat case defendants do not have in combination of consistent and longstanding employment records (DKT# 72, ¶¶ 52, 53), military service (DKT# 72, ¶52), special family ties and responsibilities (DKT# 72, ¶ 39, 40, 41, 42, 52,53), a history of not abusing alcohol or drugs (DKT# 72, ¶ 47), no previous criminal

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<sup>9</sup> §5K2.11. Lesser Harms (Policy Statement) Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected. In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

record and a law abiding life (DKT# 72, ¶ 47), and the motivating factor, although ill-conceived, but a grandfather's attempts to save his pre-mature grandchild.

Therefore, in light of *the family ties and responsibilities* provision under U.S.S.G. 5H1.6 consideration should be given to the totality of circumstances relating to not only Franklin's military service, longstanding commitment to work (as well as the other characteristics referenced above) but as well the needs for a reduced sentence due to *the family ties and responsibilities*, under the United States Sentencing Guidelines (hereinafter "USSG") U.S.S.G. 5H1.6. (See DKT# 72, ¶ 39, 40, 41, 42, 52,53) Importantly, under U.S.S.G. §5H1.11 of things such as *Military*, *Civic*, *Charitable*, or *Public Service*; *Employment-Related Contributions*; *Record of Prior Good Works* may be relevant in determining *whether a departure is warranted*, if, individually *or in combination with other offender characteristics*, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines, which from the totality of information and background data is in this case, as compared to similar cases, outside the realm or as the case law says the "*heartland*". (Emphasis supplied)

In the instant case as reflected above, along with the other Exhibits filed in the record, along with the Comparison Chart attached hereto Exhibit "G" does present a record that in combination with the totality of characteristics and circumstances distinguish this case from the typical case. In addition, because there is not just one, but two or more circumstances present in this case to a substantial degree, taken together also make the case an exceptional one, as set forth in the application notes of the U.S.S.G<sup>10</sup>, a downward departure and/or variance is warranted and reasonable in this case as applied to Franklin.

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<sup>10</sup> See, footnotes 3 and 4 supra.

B. **Downward Departure is warranted under U.S.S.G. § 3B1.2 (b); and also see U.S.S.G. § 2D1.1 (b) (18).**

The PSR does not provide any reduction in the calculations for an “Adjustment for Role in Offense.” (DKT# 72, ¶ 21) An objection was timely submitted to U.S. Probation and Parole and United States, on March 5, 2019 (DKT# 72, pg. 22-27). The March 19, 2019 PSR (DKT# 72) has not changed as to the Defendant’s objection requesting a decrease in the levels applied for the downward “Adjustment for Role in Offense.” The defense maintains that Franklin should be eligible to receive a 2-level decrease in his being a minor participant. See, USSG §3B1.2 (b). The Court is required to review the totality of circumstances in deciding on a minor role reduction. The Eleventh Circuit Court of Appeals addressed mitigating role adjustments in large quantity drug cases in United States v. Carlington Cruickshank, 837 F. 3d. 1182 (11<sup>th</sup> Cir. 2016). The Cruickshank court clarified the Eleventh Circuit’s prior ruling in United States v. De Varon, 175 F.3d 930, 945 (11th Cir. 1999) (*en banc*) which held § 3B1.2 does not automatically preclude a defendant from being considered for a mitigating role adjustment in a case in which the defendant is held accountable under 3B1.2 solely for the number of drugs the defendant personally handled. Apparently, some courts were under the belief that possession of a large quantity of drugs precluded a defendant from receiving a mitigating role adjustment. In Cruickshank, the court reiterated its’ position in De Varon that “the district court must assess all of the facts probative of the defendant’s role in her relevant conduct in evaluating the defendant’s role in the offense.” *Cruickshank*, *Id.* at 1193, *citing De Varon*, at 943. The Cruickshank Court also noted the Sentencing Commission, through Amendment 635 to the Sentencing Guidelines, adopted amendments to the Sentencing Guidelines further clarify the factors for a court to consider for a minor-role adjustment, and, in doing so, still continue to

embrace the approach the Eleventh Circuit took in *De Varon*. *Id.* at 1194.<sup>11</sup> Also See, USA v. Colorado, 716 Fed. Appx. 922 (Nov. 28, 2017 11<sup>th</sup> Cir. Unpublished opinion) (Totality of Circumstances must be considered) A *minimal* participant is a defendant who “plays a minimal role” and is intended to cover defendants who are “plainly among the least culpable of those involved in the conduct of a group.” U.S.S.G. § 3B1.2 (b), comment, (n. 4). A minimal participant is eligible for a 4-level decrease.

A *minor* participant is a defendant who is “less culpable than most other participants, but whose role could not be considered as minimal.” USSG § 3B1.2 (b), comment (n.4).<sup>12</sup> Also see; U.S.S.G. § 2D1.1 (b) (18). If the defendant meets the criteria set forth in subdivisions (1) – (5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

Applying the 5 factors in the instant matter, the burden of showing a role reduction has been satisfied. Franklin was one of three mariners on a Go-Fast boat. He was not the planner or mastermind. He was merely a minor cog in a larger operation. It cannot be said that Franklin did not participate in the endeavor, or that his role was minimal under the circumstances. However,

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<sup>11</sup> In November 2015, the Commission added the following language to Application Note 3(C) for § 3B1.2:

In determining whether [a defendant warrants a minimal or minor participant] or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
- (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
- (iv) the nature and extent of the defendant’s participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
- (v) the degree to which the defendant stood to benefit from the criminal activity.

<sup>12</sup> One who falls in between the two is entitled to a 3-level reduction. U.S.S.G. 3B1.2 “In cases falling between (a) and (b), decrease by 3 levels.”

his role was relatively minor in that he was merely assisting in the transportation of the narcotics as a mariner, and he was to receive a minuscule payment. He had no proprietary interest in the drugs, and was paid a pittance in comparison to the market value of such a large number of drugs. As well he did not set up this maritime drug trafficking venture. Based upon the foregoing, respectfully, a minor role reduction should be granted Franklin, under the particular facts of this matter.

**C. A Downward Departure and/or adjustment/variance is warranted, based upon the First Step Act, signed into law on December 21, 2018.**

The March 19, 2019 Presentence Investigation Report (DKT# 72, ¶ 56) at paragraph 56 now states that the with respect to 18 U.S.C 3553 (f) (1)-(5) that the Defendant [Franklin], appears to meet the criteria and therefore the Court shall impose a sentence in accordance with the applicable guidelines *without regard* to any *statutory minimum sentence*. (Emphasis supplied) The Defendant Franklin entered his plea of guilty after January 8, 2019. (DKT# 43-46) On February 4, 2019 this Court accepted the Magistrate Judge's report and recommendations. (DKT# 52) and entered an order accepting Franklin's plea of guilty to Counts I and II of the indictment, and adjudged Franklin guilty of the offense (DKT# 52), and then set sentencing for March 27, 2019. Franklin has met all criteria for the application of 18 U.S.C 3553 (f) (1)-(5). (DKT# 72, ¶ 56) As a result of his proper and appropriate actions as to 18 U.S.C 3553 (f) (1)-(4) and (5) Franklin is entitled to a downward departure and variance, and below the minimum mandatory. Also see, 18 U.S.C 3553 (a).

**D. Additional Matters for the Court's Consideration for Departures and Variance**

Franklin as outlined above, and reflected in the photos and letters in his support attached hereto as Exhibit "H", has led a life that has been described by his wife ***Gladys Elizabeth Guerro Cedeno*** in her letter of March 6, 2019 to the Court as "an honest, responsible and very hard working man"; "So much so that he is considered a respected man that day to day strives to do for

his family to be able to move forward but unfortunately had many challenges, one being his grandson was born ill, and the doctors said he would need an operation, because he was born premature at 7 months.”; “He would require treatment because he was too small for the operation but we needed money for all the expenses and my husband had no other alternatives but to go on the embarkation”.; This is why I am pleading with you to forgive my husband for the mistake he committed.”; Help us, we want him back and he is the only one that helps at home.” All us are in a bad way and he has never has been far from us”; By **Bella Angela Guerrero Cedeno**, Franklin’s sister -in-law in her letter to the Court of March 6, 2019 *describing Franklin* as “...honest, responsible and hard workingman”; He has always been that way, always good. Never has not done anything illegal, he has always been upright person and has helped all his family; “Your Honor, help us so my brother in law can return to be with his family at home because they really need him. He was the sole provider of his home”; By **Adriana Elizabeth Tuarez Guerrero** the daughter of Franklin “*direct your attention to let you know that my dad is a very honorable person, always has supported our family with honorable work. I am asking a favor, I beg you to help my daddy especially since we miss him very much at home.*” By **Bernarda Lourdes Cedeno Mero**, mother-in-law to Franklin in her letter to the Court of March 6, 2019, “*direct your attention so you would know that my son in law is a responsible person and very hard working. He has always worked honorably and supported his family, he made a mistake but due to urgent causes. I am asking, your Honor, that you forgive him for the mistake he made and help him return home because his family misses him and they really feel his absence.*” By **Joe Lopez Castro** the son of Franklin, “Hi Dad, it's me Joe. I hope you are doing well health wise. We really miss you here at home. Every time I go to Manta, I ask if you have called and how you are doing. I feel so sad not seeing you at home in your room or see you arrive on your "moto" and give you a hug like I always

have. We miss you very much and long to see you again. I miss you very much". See Exhibit "H".

### **CONCLUSION**

The undersigned would request from this Honorable Court that Franklin be considered for, and that a recommendation be made to the Bureau of Prisons for (i) Franklin to participate in an ESOL class; (ii) that Franklin be allowed to participate in a training or vocational program in mechanics or training as an electrician or other similar trade or vocation; (iii) Franklin be recommended for special needs educational programs due to his learning disability; and, (iv) that Franklin serve his sentence at McRae, Georgia FCI or Coleman Florida FCI.

Franklin should not go unpunished, but even a low-end Guidelines sentence would be greater than necessary to meet the goals of sentencing in this case, and would not be reasonable under the unique and extraordinary facts, circumstances and characteristics of this Defendant, Franklin Lopez Toala.

Accordingly, the undersigned respectfully requests and suggests that this Honorable Court should not only depart downward from the current low-end range of 108 months, but also allow for variances downward from the guidelines range, and as set forth above for a sentence between 78 to 95 months, while reasonable, would still meet penological framework of the sentencing guidelines as applied to this particular Defendant, Franklin Lopez Toala. Also, the Defendant has outlined the grounds for a *Role Reduction* departure. See PSR. (DKT#72, page 20)

**WHEREFORE** the Defendant, Franklin, prays this Court will grant the relief sought herein, and make a departure from and also grant a variance downward *below* the lowest end of the applicable Guidelines Range, and as required by applicable law, below the minimum mandatory sentence, as outlined above, and also consider a recommendation to the Bureau of Prisons that Franklin be considered for ESOL class and that Franklin be allowed to participate in a training or vocational program training in mechanical or electric or other similar trade or vocation, and special

learning classes due to his learning disability, and that Franklin serve his sentence at McRae, Georgia FCI or Coleman Florida FCI, and the other items and requests referenced above, in this Sentencing Motion and Supporting Memorandum of Law.

DATED: March 22, 2019.

Respectfully submitted,

/s/ Brian P. Battaglia  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22nd day of March 2019, a true and correct copy of the foregoing Sentencing Motion and Memorandum of Law in support was filed with the Clerk of the Court using the CM/ECF system, which will send a notice of the electronic filing to: the United States through its counsel, Mr. Thomas Palermo, Esq., AUSA.

/s/ Brian P. Battaglia  
Brian P. Battaglia

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**  
**FRANKLIN RAFAEL LOPEZ TOALA**

\_\_\_\_\_ /

**FRANKLIN RAFAEL LOPEZ TOALA'S SENTENCING MOTION FOR  
DOWNWARD DEPARTURES AND VARIANCES AND SUPPORTING  
MEMORANDUM OF LAW**

**EXHIBIT A**



# CENTRAL INTELLIGENCE AGENCY

(/)

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Country Comparison :: Infant mortality rate (/fields/rawdata\_354.txt)

Infant mortality rate compares the number of deaths of infants under one year old in a given year per 1,000 live births in the same year. This rate is often used as an indicator of the level of health in a country.

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Rank	Country	(deaths/1,000 live births)	Date of Information
51	<a href="#">BOLIVIA (/GEOS/BL.HTML)</a>	34.20	2018 est.
63	<a href="#">GUYANA (/GEOS/GY.HTML)</a>	29.50	2018 est.
69	<a href="#">SURINAME (/GEOS/NS.HTML)</a>	23.70	2018 est.
86	<a href="#">PARAGUAY (/GEOS/PA.HTML)</a>	18.10	2018 est.
88	<a href="#">PERU (/GEOS/PE.HTML)</a>	17.80	2018 est.
91	<a href="#">BRAZIL (/GEOS/BR.HTML)</a>	16.90	2018 est.
97	<a href="#">ECUADOR (/GEOS/EC.HTML)</a>	15.90	2018 est.
105	<a href="#">COLOMBIA (/GEOS/CO.HTML)</a>	13.20	2018 est.
117	<a href="#">VENEZUELA (/GEOS/VE.HTML)</a>	11.90	2018 est.
138	<a href="#">ARGENTINA (/GEOS/AR.HTML)</a>	9.50	2018 est.
151	<a href="#">URUGUAY (/GEOS/UY.HTML)</a>	8.10	2018 est.
163	<a href="#">CHILE (/GEOS/CI.HTML)</a>	6.40	2018 est.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**  
**FRANKLIN RAFAEL LOPEZ TOALA**

\_\_\_\_\_ /

**FRANKLIN RAFAEL LOPEZ TOALA'S SENTENCING MOTION FOR  
DOWNWARD DEPARTURES AND VARIANCES AND SUPPORTING  
MEMORANDUM OF LAW**

**EXHIBIT B**



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(I)

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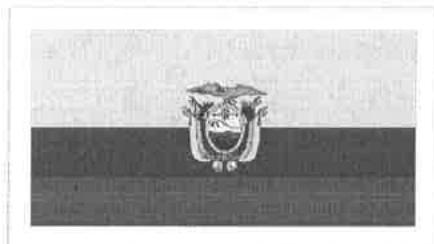
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South America :: Ecuador [..../geos/print\\_ec.html](#)

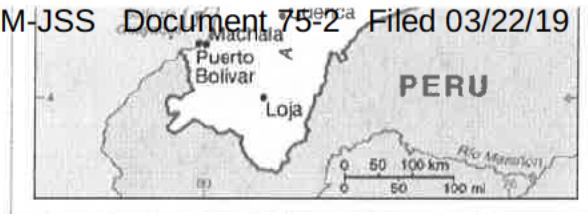
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View 61 photos of  
ECUADOR

(..../attachments/maps/EC-map.gif)





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## Introduction :: Ecuador

Background (./docs/notesanddefs.html#325): This entry usually highlights major historic events and current issues and may include a statement about one or two key future trends.



(./fields/325.html#EC)

What is now Ecuador formed part of the northern Inca Empire until the Spanish conquest in 1533. Quito became a seat of Spanish colonial government in 1563 and part of the Viceroyalty of New Granada in 1717. The territories of the Viceroyalty - New Granada (Colombia), Venezuela, and Quito - gained their independence between 1819 and 1822 and formed a federation known as Gran Colombia. When Quito withdrew in 1830, the traditional name was changed in favor of the "Republic of the Equator." Between 1904 and 1942, Ecuador lost territories in a series of conflicts with its neighbors. A border war with Peru that flared in 1995 was resolved in 1999. Although Ecuador marked 30 years of civilian governance in 2004, the period was marred by political instability. Protests in Quito contributed to the mid-term ouster of three of Ecuador's last four democratically elected presidents. In late 2008, voters approved a new constitution, Ecuador's 20th since gaining independence. General elections were held in April 2017, and voters elected President Lenin MORENO.



(./attachments/docs/original/EC\_general\_summary.pdf?1539992712)

## ECUADOR SUMMARY:

(./fields/276.html#EC)

## Geography :: Ecuador

Location (./docs/notesanddefs.html#276): This entry identifies the country's regional location, neighboring countries, and adjacent bodies of water.



(./fields/276.html#EC)

Western South America, bordering the Pacific Ocean at the Equator, between Colombia and Peru

Geographic coordinates (./docs/notesanddefs.html#277): This entry includes rounded latitude and longitude figures for the centroid or center point of a country expressed in degrees and minutes; it is based on the locations provided in the Geographic Names Server (GNS), maintained by the National Geospatial-Intelligence Agency on behalf of the US Board on Geographic Names.



(./fields/277.html#EC)

2 00 S, 77 30 W

Map references (./docs/notesanddefs.html#278): This entry includes the name of the Factbook reference map on which a country may be found. Note that boundary representations on these maps are not necessarily authoritative. The entry on Geographic coordinates may be helpful in finding some smaller countries.



(./fields/278.html#EC)

South America

Area (./docs/notesanddefs.html#279): This entry includes three subfields. Total area is the sum of all land and water areas delimited by international boundaries and/or coastlines. Land area is the aggregate of all surfaces delimited by international boundaries and/or coastlines, excluding inland water bodies (lakes, reservoirs, rivers). Water area is the sum of the surfaces of all inland water bodies, such as lakes, reservoirs, or rivers, as delimited by international boundaries and/or coastlines.



(./fields/279.html#EC)

total: 283,561 sq km

land: 276,841 sq km

water: 6,720 sq km

**note:** includes Galapagos Islands

country comparison to the world: 75 (./fields/279rank.html#EC)

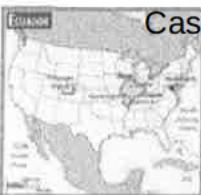
Area - comparative (./docs/notesanddefs.html#280): This entry provides an area comparison based on total area equivalents. Most entities are compared with the entire US or one of the 50 states based on area measurements (1990 revised) provided by the US Bureau of the Census. The smaller entities are compared with Washington, DC (178 sq km, 69 sq mi) or The Mall in Washington, DC (0.59 sq km, 0.23 sq mi, 146 acres).



(./fields/280.html#EC)

slightly smaller than Nevada

Area comparison map:



Land boundaries (./docs/notesanddefs.html#281): This entry contains the total length of all land boundaries and the individual lengths for each of the contiguous border countries. When available, official lengths published by national statistical agencies are used. Because surveying methods may differ, country border lengths reported by contiguous countries may differ.



(./fields/281.html#EC)

total: 2,237 km

border countries (2): Colombia 708 km, Peru 1529 km

Coastline (./docs/notesanddefs.html#282): This entry gives the total length of the boundary between the land area (including islands) and the sea.



(./fields/282.html#EC)

2,237 km

Maritime claims (./docs/notesanddefs.html#283): This entry includes the following claims, the definitions of which are excerpted from the United Nations Convention on the Law of the Sea (UNCLOS), which alone contains the full and definitive descriptions: territorial sea - the sovereignty of a coastal state extends beyond its land territory and internal waters to an adjacent belt of sea, described as the territorial sea in the UNCLOS (Part II); this sovereignty extends to the air space over the territorial sea as well as its . . . more (./docs/notesanddefs.html#283)



(./fields/283.html#EC)

territorial sea: 200 nm

exclusive economic zone: 200 nm

continental shelf: 200 nm

**note:** Ecuador has declared its right to extend its continental shelf to 350nm measured from the baselines of the Galapagos Archipelago

Climate (./docs/notesanddefs.html#284): This entry includes a brief description of typical weather regimes throughout the year.



(./fields/284.html#EC)

tropical along coast, becoming cooler inland at higher elevations; tropical in Amazonian jungle lowlands

Terrain (./docs/notesanddefs.html#285): This entry contains a brief description of the topography.



(./fields/285.html#EC)

coastal plain (costa), inter-Andean central highlands (sierra), and flat to rolling eastern jungle (oriente)

Elevation (./docs/notesanddefs.html#407): This entry includes the mean elevation and elevation extremes, lowest point and highest point. more (./docs/notesanddefs.html#407)



(./fields/407.html#EC)

mean elevation: 1,117 m

lowest point: Pacific Ocean 0 m

highest point: Chimborazo 6,267

**note:** because the earth is not a perfect sphere and has an equatorial bulge, the highest point on the planet farthest from its center is Mount Chimborazo not Mount Everest, which is merely the highest peak above sea level

Natural resources (./docs/notesanddefs.html#287): This entry lists a country's mineral, petroleum, hydropower, and other resources of commercial importance, such as rare earth elements (REEs). In general, products appear only if they make a significant contribution to the economy, or are likely to do so in the future.



(./fields/287.html#EC)

petroleum, fish, timber, hydropower

Land use (./docs/notesanddefs.html#288): This entry contains the percentage shares of total land area for three different types of land use: agricultural land, forest, and other; agricultural land is further divided into arable land - land cultivated for crops like wheat, maize, and rice that are replanted after each harvest, permanent crops - land cultivated for crops like citrus, coffee, and rubber that are not replanted after each harvest, and includes land under flowering shrubs, fruit trees, nut trees, and vines, and permane . . . more (./docs/notesanddefs.html#288)



(./fields/288.html#EC)

agricultural land: 29.7% (2011 est.)

arable land: 4.7% (2011 est.) / permanent crops: 5.6% (2011 est.) / permanent pasture: 19.4% (2011 est.)

forest: 38.9% (2011 est.)

other: 31.4% (2011 est.)

Irrigated land (./docs/notesanddefs.html#289): This entry gives the number of square kilometers of land area that is artificially supplied with water.



(./fields/289.html#EC)

15,000 sq km (2012)

Population distribution (./docs/notesanddefs.html#348): This entry provides a summary description of the population dispersion within a country. While it may suggest population density, it does not provide density figures.

(../fields/348.html#EC)

nearly half of the population is concentrated in the interior in the Andean intermontane basins and valleys, with large concentrations also found along the western coastal strip; the rainforests of the east remain sparsely populated

Natural hazards (..../docs/notesanddefs.html#292): This entry lists potential natural disasters. For countries where volcanic activity is common, a volcanism subfield highlights historically active volcanoes.

(../fields/292.html#EC)

frequent earthquakes; landslides; volcanic activity; floods; periodic droughts

**volcanism:** volcanic activity concentrated along the Andes Mountains; Sangay (5,230 m), which erupted in 2010, is mainland Ecuador's most active volcano; other historically active volcanoes in the Andes include Antisana, Cayambe, Chacana, Cotopaxi, Guagua Pichincha, Reventador, Sumaco, and Tungurahua; Fernandina (1,476 m), a shield volcano that last erupted in 2009, is the most active of the many Galapagos volcanoes; other historically active Galapagos volcanoes include Wolf, Sierra Negra, Cerro Azul, Pinta, Marchena, and Santiago

Environment - current issues (..../docs/notesanddefs.html#293): This entry lists the most pressing and important environmental problems. The following terms and abbreviations are used throughout the entry: Acidification - the lowering of soil and water pH due to acid precipitation and deposition usually through precipitation; this process disrupts ecosystem nutrient flows and may kill freshwater fish and plants dependent on more neutral or alkaline conditions (see acid rain). Acid rain - characterized as containing harmful levels of sulfur dioxi . . . more (..../docs/notesanddefs.html#293)

(../fields/293.html#EC)

deforestation; soil erosion; desertification; water pollution; pollution from oil production wastes in ecologically sensitive areas of the Amazon Basin and Galapagos Islands

Environment - international agreements (..../docs/notesanddefs.html#294): This entry separates country participation in international environmental agreements into two levels - party to and signed, but not ratified. Agreements are listed in alphabetical order by the abbreviated form of the full name.

(../fields/294.html#EC)

party to: Antarctic-Environmental Protocol, Antarctic Treaty, Biodiversity, Climate Change, Climate Change-Kyoto Protocol, Desertification, Endangered Species, Hazardous Wastes, Ozone Layer Protection, Ship Pollution, Tropical Timber 83, Tropical Timber 94, Wetlands signed, but not ratified: none of the selected agreements

Geography - note (..../docs/notesanddefs.html#295): This entry includes miscellaneous geographic information of significance not included elsewhere.

(../fields/295.html#EC)

Cotopaxi in Andes is highest active volcano in world

## People and Society :: Ecuador

Population (..../docs/notesanddefs.html#335): This entry gives an estimate from the US Bureau of the Census based on statistics from population censuses, vital statistics registration systems, or sample surveys pertaining to the recent past and on assumptions about future trends. The total population presents one overall measure of the potential impact of the country on the world and within its region. Note: Starting with the 1993 Factbook, demographic estimates for some countries (mostly African) have explicitly taken into account t . . . more (..../docs/notesanddefs.html#335)

(../fields/335.html#EC)

16,498,502 (July 2018 est.)

country comparison to the world: 68 (..../fields/335rank.html#EC)

Nationality (..../docs/notesanddefs.html#336): This entry provides the identifying terms for citizens - noun and adjective.

(../fields/336.html#EC)

noun: Ecuadorian(s)

adjective: Ecuadorian

Ethnic groups (..../docs/notesanddefs.html#400): This entry provides an ordered listing of ethnic groups starting with the largest and normally includes the percent of total population.

(../fields/400.html#EC)

mestizo (mixed Amerindian and white) 71.9%, Montubio 7.4%, Amerindian 7%, white 6.1%, Afroecuadorian 4.3%, mulatto 1.9%, black 1%, other 0.4% (2010 est.)

Languages (..../docs/notesanddefs.html#402): This entry provides a listing of languages spoken in each country and specifies any that are official national or regional languages. When data is available, the languages spoken in each country are broken down according to the percent of the total population speaking each language as a first language. For those countries without available data, languages are listed in rank order based on prevalence, starting with the most-spoken language.

(../fields/402.html#EC)

Spanish (Castilian) 93% (official), Quechua 4.1%, other indigenous 0.7%, foreign 2.2% (2010 est.)

Religions (./docs/notesanddefs.html#401): This entry is an ordered listing of religions by adherents starting with the largest group and sometimes includes the percent of total population. The core characteristics and beliefs of the world's major religions are described below. Baha'i - Founded by Mirza Husayn-Ali (known as Baha'u'llah) in Iran in 1852, Baha'i faith emphasizes monotheism and believes in one eternal transcendent God. Its guiding focus is to encourage the unity of all peoples on the earth so that justice and peace . . . more (./docs/notesanddefs.html#401)



(./fields/401.html#EC)

Roman Catholic 74%, Evangelical 10.4%, Jehovah's Witness 1.2%, other 6.4% (includes Mormon Buddhist, Jewish, Spiritualist, Muslim, Hindu, indigenous religions, African American religions, Pentecostal), atheist 7.9%, agnostic 0.1% (2012 est.)

**note:** data represent persons at least 16 years of age from five Ecuadoran cities

Demographic profile (./docs/notesanddefs.html#340): This entry describes a country's key demographic features and trends and how they vary among regional, ethnic, and socioeconomic sub-populations. Some of the topics addressed are population age structure, fertility, health, mortality, poverty, education, and migration.



(./fields/340.html#EC)

Ecuador's high poverty and income inequality most affect indigenous, mixed race, and rural populations. The government has increased its social spending to ameliorate these problems, but critics question the efficiency and implementation of its national development plan. Nevertheless, the conditional cash transfer program, which requires participants' children to attend school and have medical check-ups, has helped improve educational attainment and healthcare among poor children. Ecuador is stalled at above replacement level fertility and the population most likely will keep growing rather than stabilize.

An estimated 2 to 3 million Ecuadorians live abroad, but increased unemployment in key receiving countries - Spain, the United States, and Italy - is slowing emigration and increasing the likelihood of returnees to Ecuador. The first large-scale emigration of Ecuadorians occurred between 1980 and 2000, when an economic crisis drove Ecuadorians from southern provinces to New York City, where they had trade contacts. A second, nationwide wave of emigration in the late 1990s was caused by another economic downturn, political instability, and a currency crisis. Spain was the logical destination because of its shared language and the wide availability of low-skilled, informal jobs at a time when increased border surveillance made illegal migration to the US difficult. Ecuador has a small but growing immigrant population and is Latin America's top recipient of refugees; 98% are neighboring Colombians fleeing violence in their country.

Age structure (./docs/notesanddefs.html#341): This entry provides the distribution of the population according to age. Information is included by sex and age group as follows: 0-14 years (children), 15-24 years (early working age), 25-54 years (prime working age), 55-64 years (mature working age), 65 years and over (elderly). The age structure of a population affects a nation's key socioeconomic issues. Countries with young populations (high percentage under age 15) need to invest more in schools, while countries with older population . . . more (./docs/notesanddefs.html#341)



(./fields/341.html#EC)

0-14 years: 26.64% (male 2,242,148 /female 2,153,776)

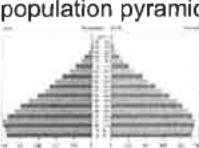
15-24 years: 18.19% (male 1,526,300 /female 1,474,626)

25-54 years: 39.82% (male 3,207,692 /female 3,362,464)

55-64 years: 7.67% (male 615,769 /female 649,777)

65 years and over: 7.67% (male 599,221 /female 666,729) (2018 est.)

population pyramid:



Dependency ratios (./docs/notesanddefs.html#342): Dependency ratios are a measure of the age structure of a population. They relate the number of individuals that are likely to be economically "dependent" on the support of others. Dependency ratios contrast the ratio of youths (ages 0-14) and the elderly (ages 65+) to the number of those in the working-age group (ages 15-64). Changes in the dependency ratio provide an indication of potential social support requirements resulting from changes in population age structures. As fertility lev . . . more (./docs/notesanddefs.html#342)



(./fields/342.html#EC)

total dependency ratio: 55.6 (2015 est.)

youth dependency ratio: 45.1 (2015 est.)

elderly dependency ratio: 10.4 (2015 est.)

potential support ratio: 9.6 (2015 est.)

Median age (./docs/notesanddefs.html#343): This entry is the age that divides a population into two numerically equal groups; that is, half the people are younger than this age and half are older. It is a single index that summarizes the age distribution of a population. Currently, the median age ranges from a low of about 15 in Niger and Uganda to 40 or more in several European countries and Japan. See the entry for "Age structure" for the importance of a young versus an older age structure and, by implication, a low versus a high . . . more (./docs/notesanddefs.html#343)



(./fields/343.html#EC)

male: 27.3 years

female: 28.8 years (2018 est.)

country comparison to the world: 141 (./fields/343rank.html#EC)

Population growth rate (./docs/notesanddefs.html#344): The average annual percent change in the population, resulting from a surplus (or deficit) of births over deaths and the balance of migrants entering and leaving a country. The rate may be positive or negative. The growth rate is a factor in determining how great a burden would be imposed on a country by the changing needs of its people for infrastructure (e.g., schools, hospitals, housing, roads), resources (e.g., food, water, electricity), and jobs. Rapid population growth can be seen as . . . more (./docs/notesanddefs.html#344)



(./fields/344.html#EC)

1.25% (2018 est.)

country comparison to the world: 87 (./fields/344rank.html#EC)

Birth rate (./docs/notesanddefs.html#345): This entry gives the average annual number of births during a year per 1,000 persons in the population at midyear; also known as crude birth rate. The birth rate is usually the dominant factor in determining the rate of population growth. It depends on both the level of fertility and the age structure of the population.



(./fields/345.html#EC)

17.6 births/1,000 population (2018 est.)

country comparison to the world: 96 (./fields/345rank.html#EC)

Death rate (./docs/notesanddefs.html#346): This entry gives the average annual number of deaths during a year per 1,000 population at midyear; also known as crude death rate. The death rate, while only a rough indicator of the mortality situation in a country, accurately indicates the current mortality impact on population growth. This indicator is significantly affected by age distribution, and most countries will eventually show a rise in the overall death rate, in spite of continued decline in mortality at all ages, as declining . . . more (./docs/notesanddefs.html#346)



(./fields/346.html#EC)

5.1 deaths/1,000 population (2018 est.)

country comparison to the world: 192 (./fields/346rank.html#EC)

Net migration rate (./docs/notesanddefs.html#347): This entry includes the figure for the difference between the number of persons entering and leaving a country during the year per 1,000 persons (based on midyear population). An excess of persons entering the country is referred to as net immigration (e.g., 3.56 migrants/1,000 population); an excess of persons leaving the country as net emigration (e.g., -9.26 migrants/1,000 population). The net migration rate indicates the contribution of migration to the overall level of population chan . . . more (./docs/notesanddefs.html#347)



(./fields/347.html#EC)

0 migrant(s)/1,000 population (2017 est.)

country comparison to the world: 80 (./fields/347rank.html#EC)

Population distribution (./docs/notesanddefs.html#348): This entry provides a summary description of the population dispersion within a country. While it may suggest population density, it does not provide density figures.



(./fields/348.html#EC)

nearly half of the population is concentrated in the interior in the Andean intermontane basins and valleys, with large concentrations also found along the western coastal strip; the rainforests of the east remain sparsely populated

Urbanization (./docs/notesanddefs.html#349): This entry provides two measures of the degree of urbanization of a population. The first, urban population, describes the percentage of the total population living in urban areas, as defined by the country. The second, rate of urbanization, describes the projected average rate of change of the size of the urban population over the given period of time. Additionally, the World entry includes a list of the ten largest urban agglomerations. An urban agglomeration is defined as comprising th . . . more (./docs/notesanddefs.html#349)



(./fields/349.html#EC)

urban population: 63.8% of total population (2018)

rate of urbanization: 1.66% annual rate of change (2015-20 est.)

Major urban areas - population (./docs/notesanddefs.html#350): This entry provides the population of the capital and up to six major cities defined as urban agglomerations with populations of at least 750,000 people. An urban agglomeration is defined as comprising the city or town proper and also the suburban fringe or thickly settled territory lying outside of, but adjacent to, the boundaries of the city. For smaller countries, lacking urban centers of 750,000 or more, only the population of the capital is presented.



(./fields/350.html#EC)

2.899 million Guayaquil, 1.822 million QUITO (capital) (2018)

Sex ratio (./docs/notesanddefs.html#351): This entry includes the number of males for each female in five age groups - at birth, under 15 years, 15-64 years, 65 years and over, and for the total population. Sex ratio at birth has recently emerged as an indicator of certain kinds of sex discrimination in some countries. For instance, high sex ratios at birth in some Asian countries are now attributed to sex-selective abortion and infanticide due to a strong preference for sons. This will affect future marriage patterns and fertilit . . . more (./docs/notesanddefs.html#351)



(./fields/351.html#EC)

at birth: 1.04 male(s)/female (2017 est.)

0-14 years: 1.04 male(s)/female (2017 est.)

15-24 years: 1.03 male(s)/female (2017 est.)

25-54 years: 0.86 male(s)/female (2017 est.)

55-64 years: 0.96 male(s)/female (2017 est.)

65 years and over: 0.91 male(s)/female (2017 est.)

total population: 0.99 male(s)/female (2017 est.)

Maternal mortality rate (..../docs/notesanddefs.html#353): The maternal mortality rate (MMR) is the annual number of female deaths per 100,000 live births from any cause related to or aggravated by pregnancy or its management (excluding accidental or incidental causes). The MMR includes deaths during pregnancy, childbirth, or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, for a specified year.



(..../fields/353.html#EC)

64 deaths/100,000 live births (2015 est.)

country comparison to the world: 87 (..../fields/353rank.html#EC)

Infant mortality rate (..../docs/notesanddefs.html#354): This entry gives the number of deaths of infants under one year old in a given year per 1,000 live births in the same year. This rate is often used as an indicator of the level of health in a country.



(..../fields/354.html#EC)

total: 15.9 deaths/1,000 live births (2018 est.)

male: 18.8 deaths/1,000 live births (2018 est.)

female: 12.8 deaths/1,000 live births (2018 est.)

country comparison to the world: 97 (..../fields/354rank.html#EC)

Life expectancy at birth (..../docs/notesanddefs.html#355): This entry contains the average number of years to be lived by a group of people born in the same year, if mortality at each age remains constant in the future. Life expectancy at birth is also a measure of overall quality of life in a country and summarizes the mortality at all ages. It can also be thought of as indicating the potential return on investment in human capital and is necessary for the calculation of various actuarial measures.



(..../fields/355.html#EC)

total population: 77.1 years (2018 est.)

male: 74.2 years (2018 est.)

female: 80.3 years (2018 est.)

country comparison to the world: 79 (..../fields/355rank.html#EC)

Total fertility rate (..../docs/notesanddefs.html#356): This entry gives a figure for the average number of children that would be born per woman if all women lived to the end of their childbearing years and bore children according to a given fertility rate at each age. The total fertility rate (TFR) is a more direct measure of the level of fertility than the crude birth rate, since it refers to births per woman. This indicator shows the potential for population change in the country. A rate of two children per woman is considered the replacement . . . more (..../docs/notesanddefs.html#356)



(..../fields/356.html#EC)

2.15 children born/woman (2018 est.)

country comparison to the world: 99 (..../fields/356rank.html#EC)

Contraceptive prevalence rate (..../docs/notesanddefs.html#357): This field gives the percent of women of reproductive age (15-49) who are married or in union and are using, or whose sexual partner is using, a method of contraception according to the date of the most recent available data. The contraceptive prevalence rate is an indicator of health services, development, and women's empowerment. It is also useful in understanding, past, present, and future fertility trends, especially in developing countries.



(..../fields/357.html#EC)

80.1% (2007/12)

Health expenditures (..../docs/notesanddefs.html#358): This entry provides the total expenditure on health as a percentage of GDP. Health expenditures are broadly defined as activities performed either by institutions or individuals through the application of medical, paramedical, and/or nursing knowledge and technology, the primary purpose of which is to promote, restore, or maintain health.



(..../fields/358.html#EC)

9.2% of GDP (2014)

country comparison to the world: 35 (..../fields/358rank.html#EC)

Physicians density (..../docs/notesanddefs.html#359): This entry gives the number of medical doctors (physicians), including generalist and specialist medical practitioners, per 1,000 of the population. Medical doctors are defined as doctors that study, diagnose, treat, and prevent illness, disease, injury, and other physical and mental impairments in humans through the application of modern medicine. They also plan, supervise, and evaluate care and treatment plans by other health care providers. The World Health Organization estimates that f . . . more (..../docs/notesanddefs.html#359)



(..../fields/359.html#EC)

1.67 physicians/1,000 population (2011)

Hospital bed density (..../docs/notesanddefs.html#360): This entry provides the number of hospital beds per 1,000 people; it serves as a general measure of inpatient service availability. Hospital beds include inpatient beds available in public, private, general, and specialized hospitals and rehabilitation centers. In most cases, beds for both acute and chronic care are included. Because the level of inpatient services required for individual countries depends on several factors - such as demographic issues and the burden of disease - there is . . . more (..../docs/notesanddefs.html#360)



(..../fields/360.html#EC)

1.5 beds/1,000 population (2013)

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Drinking water source (./docs/notesanddefs.html#361): This entry provides information about access to improved or unimproved drinking water sources available to segments of the population of a country. Improved drinking water - use of any of the following sources: piped water into dwelling, yard, or plot; public tap or standpipe; tubewell or borehole; protected dug well; protected spring; or rainwater collection. Unimproved drinking water - use of any of the following sources: unprotected dug well; unprotected spring; cart with small tank or . . . more  
(./docs/notesanddefs.html#361)

 (./fields/361.html#EC)

improved: urban: 93.4% of population

rural: 75.5% of population

total: 86.9% of population

unimproved: urban: 6.6% of population

rural: 24.5% of population

total: 13.1% of population (2015 est.)

Sanitation facility access (./docs/notesanddefs.html#398): This entry provides information about access to improved or unimproved sanitation facilities available to segments of the population of a country. Improved sanitation - use of any of the following facilities: flush or pour-flush to a piped sewer system, septic tank or pit latrine; ventilated improved pit (VIP) latrine; pit latrine with slab; or a composting toilet. Unimproved sanitation - use of any of the following facilities: flush or pour-flush not piped to a sewer system, septic tank . . . more  
(./docs/notesanddefs.html#398)



(./fields/398.html#EC)

improved: urban: 87% of population (2015 est.)

rural: 80.7% of population (2015 est.)

total: 84.7% of population (2015 est.)

unimproved: urban: 13% of population (2015 est.)

rural: 19.3% of population (2015 est.)

total: 15.3% of population (2015 est.)

HIV/AIDS - adult prevalence rate (./docs/notesanddefs.html#363): This entry gives an estimate of the percentage of adults (aged 15-49) living with HIV/AIDS. The adult prevalence rate is calculated by dividing the estimated number of adults living with HIV/AIDS at yearend by the total adult population at yearend.



(./fields/363.html#EC)

0.3% (2017 est.)

country comparison to the world: 79 (./fields/363rank.html#EC)

HIV/AIDS - people living with HIV/AIDS (./docs/notesanddefs.html#364): This entry gives an estimate of all people (adults and children) alive at yearend with HIV infection, whether or not they have developed symptoms of AIDS.



(./fields/364.html#EC)

36,000 (2017 est.)

country comparison to the world: 67 (./fields/364rank.html#EC)

HIV/AIDS - deaths (./docs/notesanddefs.html#365): This entry gives an estimate of the number of adults and children who died of AIDS during a given calendar year.



(./fields/365.html#EC)

<1000 (2017 est.)

Major infectious diseases (./docs/notesanddefs.html#366): This entry lists major infectious diseases likely to be encountered in countries where the risk of such diseases is assessed to be very high as compared to the United States. These infectious diseases represent risks to US government personnel traveling to the specified country for a period of less than three years. The degree of risk is assessed by considering the foreign nature of these infectious diseases, their severity, and the probability of being affected by the diseases present. Th . . . more  
(./docs/notesanddefs.html#366)



(./fields/366.html#EC)

degree of risk: high (2016)

food or waterborne diseases: bacterial diarrhea, hepatitis A, and typhoid fever (2016)

vectorborne diseases: dengue fever and malaria (2016)

**note:** active local transmission of Zika virus by Aedes species mosquitoes has been identified in this country (as of August 2016); it poses an important risk (a large number of cases possible) among US citizens if bitten by an infective mosquito; other less common ways to get Zika are through sex, via blood transfusion, or during pregnancy, in which the pregnant woman passes Zika virus to her fetus

Obesity - adult prevalence rate (./docs/notesanddefs.html#367): This entry gives the percent of a country's population considered to be obese. Obesity is defined as an adult having a Body Mass Index (BMI) greater to or equal to 30.0. BMI is calculated by taking a person's weight in kg and dividing it by the person's squared height in meters.



(./fields/367.html#EC)

19.9% (2016)

country comparison to the world: 107 (./fields/367rank.html#EC)

Children under the age of 5 years underweight (./docs/notesanddefs.html#368): This entry gives the percent of children under five considered to be underweight. Underweight means weight-for-age is approximately 2 kg below for standard at age one, 3 kg below standard for ages two and

(..[fields/368.html#EC](#))

5.1% (2014)

country comparison to the world: 81 (..[fields/368rank.html#EC](#))

Education expenditures (..[docs/notesanddefs.html#369](#)): This entry provides the public expenditure on education as a percent of GDP.

(..[fields/369.html#EC](#))

5% of GDP (2015)

country comparison to the world: 76 (..[fields/369rank.html#EC](#))

Literacy (..[docs/notesanddefs.html#370](#)): This entry includes a definition of literacy and Census Bureau percentages for the total population, males, and females. There are no universal definitions and standards of literacy. Unless otherwise specified, all rates are based on the most common definition - the ability to read and write at a specified age. Detailing the standards that individual countries use to assess the ability to read and write is beyond the scope of the Factbook. Information on literacy, while not a perfect measure . . . more (..[docs/notesanddefs.html#370](#))

(..[fields/370.html#EC](#))

definition: age 15 and over can read and write (2016 est.)

total population: 94.4% (2016 est.)

male: 95.4% (2016 est.)

female: 93.3% (2016 est.)

School life expectancy (primary to tertiary education) (..[docs/notesanddefs.html#371](#)): School life expectancy (SLE) is the total number of years of schooling (primary to tertiary) that a child can expect to receive, assuming that the probability of his or her being enrolled in school at any particular future age is equal to the current enrollment ratio at that age. Caution must be maintained when utilizing this indicator in international comparisons. For example, a year or grade completed in one country is not necessarily the same in terms of educational content or quality . . . more (..[docs/notesanddefs.html#371](#))

(..[fields/371.html#EC](#))

total: 16 years (2015)

male: 15 years (2015)

female: 16 years (2015)

Unemployment, youth ages 15-24 (..[docs/notesanddefs.html#373](#)): This entry gives the percent of the total labor force ages 15-24 unemployed during a specified year.

(..[fields/373.html#EC](#))

total: 8.4% (2017 est.)

male: 6.6% (2017 est.)

female: 11.4% (2017 est.)

country comparison to the world: 137 (..[fields/373rank.html#EC](#))

## Government :: Ecuador

Country name (..[docs/notesanddefs.html#296](#)): This entry includes all forms of the country's name approved by the US Board on Geographic Names (Italy is used as an example): conventional long form (Italian Republic), conventional short form (Italy), local long form (Repubblica Italiana), local short form (Italia), former (Kingdom of Italy), as well as the abbreviation. Also see the Terminology note.

(..[fields/296.html#EC](#))

conventional long form: Republic of Ecuador

conventional short form: Ecuador

local long form: Republica del Ecuador

local short form: Ecuador

etymology: the country's position on the globe, straddling the Equator, accounts for its Spanish name

Government type (..[docs/notesanddefs.html#299](#)): This entry gives the basic form of government. Definitions of the major governmental terms are as follows. (Note that for some countries more than one definition applies.): Absolute monarchy - a form of government where the monarch rules unhindered, i.e., without any laws, constitution, or legally organized opposition. Anarchy - a condition of lawlessness or political disorder brought about by the absence of governmental authority. Authoritarian - a form of government in which . . . more (..[docs/notesanddefs.html#299](#))

(..[fields/299.html#EC](#))

presidential republic

Capital (..[docs/notesanddefs.html#301](#)): This entry gives the name of the seat of government, its geographic coordinates, the time difference relative to Coordinated Universal Time (UTC) and the time observed in Washington, DC, and, if applicable, information on daylight saving time (DST). Where appropriate, a special note has been added to highlight those countries that have multiple time zones.

(..[fields/301.html#EC](#))

name: Quito

geographic coordinates: 0 13 S, 78 30 W

time difference: UTC-5 (same time as Washington, DC, during Standard Time)

**note:** Ecuador has two time zones, including the Galapagos Islands (UTC-6)



(./fields/302.html#EC)

24 provinces (provincias, singular - provincia); Azuay, Bolivar, Canar, Carchi, Chimborazo, Cotopaxi, El Oro, Esmeraldas, Galapagos, Guayas, Imbabura, Loja, Los Rios, Manabi, Morona-Santiago, Napo, Orellana, Pastaza, Pichincha, Santa Elena, Santo Domingo de los Tsachilas, Sucumbios, Tungurahua, Zamora-Chinchipe

Independence (./docs/notesanddefs.html#305): For most countries, this entry gives the date that sovereignty was achieved and from which nation, empire, or trusteeship. For the other countries, the date given may not represent "independence" in the strict sense, but rather some significant nationhood event such as the traditional founding date or the date of unification, federation, confederation, establishment, fundamental change in the form of government, or state succession. For a number of countries, the establishment of statehood . . . more

(./docs/notesanddefs.html#305)



(./fields/305.html#EC)

24 May 1822 (from Spain)

National holiday (./docs/notesanddefs.html#306): This entry gives the primary national day of celebration - usually independence day.



(./fields/306.html#EC)

Independence Day (independence of Quito), 10 August (1809)

Constitution (./docs/notesanddefs.html#307): This entry provides information on a country's constitution and includes two subfields. The history subfield includes the dates of previous constitutions and the main steps and dates in formulating and implementing the latest constitution. For countries with 1-3 previous constitutions, the years are listed; for those with 4-9 previous, the entry is listed as "several previous," and for those with 10 or more, the entry is "many previous." The amendments subfield summarizes the process of am . . . more (./docs/notesanddefs.html#307)



(./fields/307.html#EC)

history: many previous; latest approved 20 October 2008

amendments: proposed by the president of the republic through a referendum, by public petition of at least 1% of registered voters, or by agreement of at least one-third of the National Assembly membership; passage requires two separate readings a year apart and approval by at least two-thirds majority vote of the Assembly, and approval by absolute majority in a referendum; amendments such as changes to the structure of the state, constraints on personal rights and guarantees, or constitutional amendment procedures are not allowed; amended 2011, 2015, last 2018; note - a 2015 constitutional amendment lifting presidential term limits was overturned by a February 2018 referendum (2018)

Legal system (./docs/notesanddefs.html#308): This entry provides the description of a country's legal system. A statement on judicial review of legislative acts is also included for a number of countries. The legal systems of nearly all countries are generally modeled upon elements of five main types: civil law (including French law, the Napoleonic Code, Roman law, Roman-Dutch law, and Spanish law); common law (including United State law); customary law; mixed or pluralistic law; and religious law (including Islamic law). An addition . . . more (./docs/notesanddefs.html#308)



(./fields/308.html#EC)

civil law based on the Chilean civil code with modifications; traditional law in indigenous communities

International law organization participation (./docs/notesanddefs.html#309): This entry includes information on a country's acceptance of jurisdiction of the International Court of Justice (ICJ) and of the International Criminal Court (ICCt); 59 countries have accepted ICJ jurisdiction with reservations and 11 have accepted ICJ jurisdiction without reservations; 122 countries have accepted ICCt jurisdiction. Appendix B: International Organizations and Groups explains the differing mandates of the ICJ and ICCt.



(./fields/309.html#EC)

has not submitted an ICJ jurisdiction declaration; accepts ICCt jurisdiction

Citizenship (./docs/notesanddefs.html#310): This entry provides information related to the acquisition and exercise of citizenship; it includes four subfields: citizenship by birth describes the acquisition of citizenship based on place of birth, known as Jus soli, regardless of the citizenship of parents. citizenship by descent only describes the acquisition of citizenship based on the principle of Jus sanguinis, or by descent, where at least one parent is a citizen of the state and being born within the territorial limits of the . . . more (./docs/notesanddefs.html#310)



(./fields/310.html#EC)

citizenship by birth: yes

citizenship by descent only: yes

dual citizenship recognized: no

residency requirement for naturalization: 3 years

Suffrage (./docs/notesanddefs.html#311): This entry gives the age at enfranchisement and whether the right to vote is universal or restricted.



(./fields/311.html#EC)

18-65 years of age; universal and compulsory; 16-18, over 65, and other eligible voters, voluntary

Executive branch (./docs/notesanddefs.html#312): This entry includes five subentries: chief of state; head of government; cabinet; elections/appointments; election results. Chief of state includes the name, title, and beginning date in office of the titular leader of the country who represents the state at official and ceremonial functions but may not be involved with the day-to-day activities of the government. Head of government includes the name, title of the top executive designated to manage the executive branch of the government, a . . . more

(./docs/notesanddefs.html#312)



(./fields/312.html#EC)

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chief of state: President Lenin MORENO Garces (since 24 May 2017); Vice President Otto Ramon SONNENHOLZNER Sper (since 11 December 2018); note - Vice President Jorge GLAS Espinel (since 24 May 2013) was jailed for corruption and absent from office for more than 3 months, causing him to be constitutionally stripped of his office; Vice President Maria Alejandra VICUNA Munoz (since 6 January 2018) resigned from office 4 December 2018; president is both chief of state and head of government

head of government: President Lenin MORENO Garces (since 24 May 2017); Vice President Otto Ramon SONNENHOLZNER Sper (since 11 December 2018)

cabinet: Cabinet appointed by the president

elections/appointments: president and vice president directly elected on the same ballot by absolute majority popular vote in 2 rounds if needed for a 4-year term (eligible for a second term); election last held on 19 February 2017 with a runoff on 2 April 2017 (next to be held in 2021)

election results: Lenin MORENO Garces elected president in second round; percent of vote - Lenin MORENO Garces (Alianza PAIS Movement) 51.1%, Guillermo LASSO (CREO) 48.9%

Legislative branch (./docs/notesanddefs.html#313): This entry has three subfields. The description subfield provides the legislative structure (unicameral – single house; bicameral – an upper and a lower house); formal name(s); number of member seats; types of constituencies or voting districts (single seat, multi-seat, nationwide); electoral voting system(s); and member term of office. The elections subfield includes the dates of the last election and next election. The election results subfield lists percent of vote by party/coalition an . . . more (./docs/notesanddefs.html#313)

[+]

(./fields/313.html#EC)

description: unicameral National Assembly or Asamblea Nacional (137 seats; 116 members directly elected in single-seat constituencies by simple majority vote, 15 members directly elected in a single nationwide constituency by proportional representation vote, and 6 directly elected in multi-seat constituencies for Ecuadorians living abroad by simple majority vote; members serve 4-year terms)

elections: last held on 19 February 2017 (next to be held in 2021)

election results: percent of vote by party - PAIS 39.1%, CREO-SUMA 20.1%, PSC 15.9%, ID 3.8%, MUPP 2.7%, other 10.7; seats by party - PAIS 74, CREO-SUMA 34, PSC 15, ID 4, MUPP 4, PSP 2, Fuerza Ecuador 1, independent 3; composition - men 85, women 52, percent of women 38%; note - defections by members of National Assembly are commonplace, resulting in frequent changes in the numbers of seats held by the various parties

Judicial branch (./docs/notesanddefs.html#314): This entry includes three subfields. The highest court(s) subfield includes the name(s) of a country's highest level court(s), the number and titles of the judges, and the types of cases heard by the court, which commonly are based on civil, criminal, administrative, and constitutional law. A number of countries have separate constitutional courts. The judge selection and term of office subfield includes the organizations and associated officials responsible for nominating and appointing j . . . more (./docs/notesanddefs.html#314)

[+]

(./fields/314.html#EC)

highest courts: National Court of Justice or Corte Nacional de Justicia (consists of 21 judges, including the chief justice and organized into 5 specialized chambers); Constitutional Court or Corte Constitucional (consists of 9 judges)

judge selection and term of office: justices of National Court of Justice elected by the Judiciary Council, a 9-member independent body of law professionals; judges elected for 9-year, non-renewable terms, with one-third of the membership renewed every 3 years; Constitutional Court judges appointed by the executive, legislative, and Citizen Participation branches of government; judges appointed for 9-year non-renewable terms with one-third of the membership renewed every 3 years

subordinate courts: Fiscal Tribunal; Election Dispute Settlement Courts, provincial courts (one for each province); cantonal courts

Political parties and leaders (./docs/notesanddefs.html#315): This entry includes a listing of significant political parties, coalitions, and electoral lists as of each country's last legislative election, unless otherwise noted.

[+]

(./fields/315.html#EC)

Alianza PAIS movement [Lenin Voltaire MORENO Garces]

Avanza Party or AVANZA [Ramiro GONZALEZ]

Creating Opportunities Movement or CREO [Guillermo LASSO]

Democratic Left or ID

Forward Ecuador Movement [Alvaro NOBOA]

Fuerza Ecuador [Abdala BUCARAM] (successor to Roldosist Party)

Pachakutik Plurinational Unity Movement or MUPP [Marlon Rene SANTI Gualinga]

Patriotic Society Party or PSP [Gilmar GUTIERREZ Borbua]

Popular Democracy Movement or MPD [Luis VILLACIS]

Social Christian Party or PSC [Pascual DEL CIOPO]

Socialist Party [Patricio ZABRANO]

Society United for More Action or SUMA [Mauricio RODAS]

International organization participation (./docs/notesanddefs.html#317): This entry lists in alphabetical order by abbreviation those international organizations in which the subject country is a member or participates in some other way.

[+]

(./fields/317.html#EC)

CAN, CD, CELAC, FAO, G-11, G-77, IADB, IAEA, IBRD, ICAO, ICC (national committees), ICCT, ICRM, IDA, IFAD, IFC, IFRCS, IHO, ILO, IMF, IMO, Interpol, IOC, IOM, IPU, ISO, ITSO, ITU, ITUC (NGOs), LAES, LAIA, Mercosur (associate), MIGA, MINUSTAH, NAM, OAS, OPANAL, OPCW, OPEC, Pacific Alliance (observer), PCA, SICA (observer), UN, UNAMID, UNASUR, UNCTAD, UNESCO, UNHCR, UNIDO, Union Latina, UNISFA, UNMIL, UNMISS, UNOCI, UNWTO, UPU, WCO, WFTU (NGOs), WHO, WIPO, WMO, WTO

Diplomatic representation in the US (./docs/notesanddefs.html#318): This entry includes the chief of mission, chancery address, telephone, FAX, consulate general locations, and consulate locations. The use of the annotated title Appointed Ambassador refers to a new ambassador who has presented his/her credentials to the secretary of state but not the US president. Such ambassadors fulfill all diplomatic functions except meeting with or appearing at functions attended by the president until such time as they formally present their credentials at a White Hou . . . more (./docs/notesanddefs.html#318)

[+]

chief of mission: Ambassador Francisco Benjamin Esteban CARRION Mena (since 24 January 2018)

chancery: 2535 15th Street NW, Washington, DC 20009

telephone: [1] (202) 234-7200

FAX: [1] (202) 667-3482

consulate(s) general: Atlanta, Chicago, Houston, Los Angeles, Miami, Minneapolis, New Haven (CT), New Orleans, New York, Newark (NJ), Phoenix, San Francisco

Diplomatic representation from the US (./docs/notesanddefs.html#319): This entry includes the chief of mission, embassy address, mailing address, telephone number, FAX number, branch office locations, consulate general locations, and consulate locations.



(./fields/319.html#EC)

chief of mission: Ambassador Todd C. CHAPMAN (since 14 April 2016)

embassy: Avenida Avigiras E12-170 y Avenida Eloy Alfaro, Quito

mailing address: Avenida Guayacanes N52-205 y Avenida Avigiras

telephone: [593] (2) 398-5000

FAX: [593] (2) 398-5100

consulate(s) general: Guayaquil

Flag description (./docs/notesanddefs.html#320): This entry provides a written flag description produced from actual flags or the best information available at the time the entry was written. The flags of independent states are used by their dependencies unless there is an officially recognized local flag. Some disputed and other areas do not have flags.



(./fields/320.html#EC)

three horizontal bands of yellow (top, double width), blue, and red with the coat of arms superimposed at the center of the flag; the flag retains the three main colors of the banner of Gran Colombia, the South American republic that broke up in 1830; the yellow color represents sunshine, grain, and mineral wealth, blue the sky, sea, and rivers, and red the blood of patriots spilled in the struggle for freedom and justice

**note:** similar to the flag of Colombia, which is shorter and does not bear a coat of arms

National symbol(s) (./docs/notesanddefs.html#321): A national symbol is a faunal, floral, or other abstract representation - or some distinctive object - that over time has come to be closely identified with a country or entity. Not all countries have national symbols; a few countries have more than one.



(./fields/321.html#EC)

Andean condor; national colors: yellow, blue, red

National anthem (./docs/notesanddefs.html#322): A generally patriotic musical composition - usually in the form of a song or hymn of praise - that evokes and eulogizes the history, traditions, or struggles of a nation or its people. National anthems can be officially recognized as a national song by a country's constitution or by an enacted law, or simply by tradition. Although most anthems contain lyrics, some do not.



(./fields/322.html#EC)

name: "Salve, Oh Patria!" (We Salute You, Our Homeland)

lyrics/music: Juan Leon MERA/Antonio NEUMANE

**note:** adopted 1948; Juan Leon MERA wrote the lyrics in 1865; only the chorus and second verse are sung

## Economy :: Ecuador

Economy - overview (./docs/notesanddefs.html#207): This entry briefly describes the type of economy, including the degree of market orientation, the level of economic development, the most important natural resources, and the unique areas of specialization. It also characterizes major economic events and policy changes in the most recent 12 months and may include a statement about one or two key future macroeconomic trends.



(./fields/207.html#EC)

Ecuador is substantially dependent on its petroleum resources, which accounted for about a third of the country's export earnings in 2017. Remittances from overseas Ecuadorian are also important.

In 1999/2000, Ecuador's economy suffered from a banking crisis that lead to some reforms, including adoption of the US dollar as legal tender. Dollarization stabilized the economy, and positive growth returned in most of the years that followed. China has become Ecuador's largest foreign lender since 2008 and now accounts for 77.7% of the Ecuador's bilateral debt. Various economic policies under the CORREA administration, such as an announcement in 2017 that Ecuador would terminate 13 bilateral investment treaties - including one with the US, generated economic uncertainty and discouraged private investment.

Faced with a 2013 trade deficit of \$1.1 billion, Ecuador imposed tariff surcharges from 5% to 45% on an estimated 32% of imports. Ecuador's economy fell into recession in 2015 and remained in recession in 2016. Declining oil prices and exports forced the CORREA administration to cut government outlays. Foreign investment in Ecuador is low as a result of the unstable regulatory environment and weak rule of law.

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In April of 2017, Lenin MORENO was elected President of Ecuador by popular vote. His immediate challenge was to reengage the private sector to improve cash flow in the country. Ecuador's economy returned to positive, but sluggish, growth. In early 2018, the MORENO administration held a public referendum on seven economic and political issues in a move counter to CORREA-administration policies, reduce corruption, strengthen democracy, and revive employment and the economy. The referendum resulted in repeal of taxes associated with recovery from the earthquake of 2016, reduced restrictions on metal mining in the Yasuni Intangible Zone - a protected area, and several political reforms.

GDP (purchasing power parity) (./docs/notesanddefs.html#208): This entry gives the gross domestic product (GDP) or value of all final goods and services produced within a nation in a given year. A nation's GDP at purchasing power parity (PPP) exchange rates is the sum value of all goods and services produced in the country valued at prices prevailing in the United States in the year noted. This is the measure most economists prefer when looking at per-capita welfare and when comparing living conditions or use of resources across countries. The measur . . . more (./docs/notesanddefs.html#208)



(./fields/208.html#EC)

\$193 billion (2017 est.)

\$188.6 billion (2016 est.)

\$190.9 billion (2015 est.)

**note:** data are in 2017 dollars

country comparison to the world: 66 (./fields/208rank.html#EC)

GDP (official exchange rate) (./docs/notesanddefs.html#209): This entry gives the gross domestic product (GDP) or value of all final goods and services produced within a nation in a given year. A nation's GDP at official exchange rates (OER) is the home-currency-denominated annual GDP figure divided by the bilateral average US exchange rate with that country in that year. The measure is simple to compute and gives a precise measure of the value of output. Many economists prefer this measure when gauging the economic power an economy maintains vis- . . . more (./docs/notesanddefs.html#209)



(./fields/209.html#EC)

\$104.3 billion (2017 est.)

GDP - real growth rate (./docs/notesanddefs.html#210): This entry gives GDP growth on an annual basis adjusted for inflation and expressed as a percent. The growth rates are year-over-year, and not compounded.



(./fields/210.html#EC)

2.4% (2017 est.)

-1.2% (2016 est.)

0.1% (2015 est.)

country comparison to the world: 138 (./fields/210rank.html#EC)

GDP - per capita (PPP) (./docs/notesanddefs.html#211): This entry shows GDP on a purchasing power parity basis divided by population as of 1 July for the same year.



(./fields/211.html#EC)

\$11,500 (2017 est.)

\$11,400 (2016 est.)

\$11,700 (2015 est.)

**note:** data are in 2017 dollars

country comparison to the world: 132 (./fields/211rank.html#EC)

Gross national saving (./docs/notesanddefs.html#212): Gross national saving is derived by deducting final consumption expenditure (household plus government) from Gross national disposable income, and consists of personal saving, plus business saving (the sum of the capital consumption allowance and retained business profits), plus government saving (the excess of tax revenues over expenditures), but excludes foreign saving (the excess of imports of goods and services over exports). The figures are presented as a percent of GDP. A negative . . . more (./docs/notesanddefs.html#212)



(./fields/212.html#EC)

25.9% of GDP (2017 est.)

26.4% of GDP (2016 est.)

24.7% of GDP (2015 est.)

country comparison to the world: 51 (./fields/212rank.html#EC)

GDP - composition, by end use (./docs/notesanddefs.html#213): This entry shows who does the spending in an economy: consumers, businesses, government, and foreigners. The distribution gives the percentage contribution to total GDP of household consumption, government consumption, investment in fixed capital, investment in inventories, exports of goods and services, and imports of goods and services, and will total 100 percent of GDP if the data are complete. household consumption consists of expenditures by resident households, and by nonprofit insti . . . more (./docs/notesanddefs.html#213)



(./fields/213.html#EC)

household consumption: 60.7% (2017 est.)

government consumption: 14.4% (2017 est.)

investment in fixed capital: 24.3% (2017 est.)

investment in inventories: 1% (2017 est.)

exports of goods and services: 20.3% (2017 est.)

Imports of goods and services: -21.3% (2017 est.)

GDP - composition, by sector of origin (./docs/notesanddefs.html#214): This entry shows where production takes place in an economy. The distribution gives the percentage contribution of agriculture, industry, and services to total GDP, and will total 100 percent of GDP if the data are complete. Agriculture includes farming, fishing, and forestry. Industry includes mining, manufacturing, energy production, and construction. Services cover government activities, communications, transportation, finance, and all other private economic activities that do not prod . . . more (./docs/notesanddefs.html#214)



(./fields/214.html#EC)

agriculture: 6.7% (2017 est.)

industry: 32.9% (2017 est.)

services: 60.4% (2017 est.)

Agriculture - products (./docs/notesanddefs.html#215): This entry is an ordered listing of major crops and products starting with the most important.



(./fields/215.html#EC)

bananas, coffee, cocoa, rice, potatoes, cassava (manioc, tapioca), plantains, sugarcane; cattle, sheep, pigs, beef, pork, dairy products; fish, shrimp; balsa wood

Industries (./docs/notesanddefs.html#216): This entry provides a rank ordering of industries starting with the largest by value of annual output.



(./fields/216.html#EC)

petroleum, food processing, textiles, wood products, chemicals

Industrial production growth rate (./docs/notesanddefs.html#217): This entry gives the annual percentage increase in industrial production (includes manufacturing, mining, and construction).



(./fields/217.html#EC)

-0.6% (2017 est.)

**note:** excludes oil refining

country comparison to the world: 173 (./fields/217rank.html#EC)

Labor force (./docs/notesanddefs.html#218): This entry contains the total labor force figure.



(./fields/218.html#EC)

8.086 million (2017 est.)

country comparison to the world: 62 (./fields/218rank.html#EC)

Labor force - by occupation (./docs/notesanddefs.html#219): This entry lists the percentage distribution of the labor force by sector of occupation. Agriculture includes farming, fishing, and forestry. Industry includes mining, manufacturing, energy production, and construction. Services cover government activities, communications, transportation, finance, and all other economic activities that do not produce material goods. The distribution will total less than 100 percent if the data are incomplete and may range from 99-101 percent due to rounding. more (./docs/notesanddefs.html#219)



(./fields/219.html#EC)

agriculture: 26.1%

industry: 18.4%

services: 55.5% (2017 est.)

Unemployment rate (./docs/notesanddefs.html#220): This entry contains the percent of the labor force that is without jobs. Substantial underemployment might be noted.



(./fields/220.html#EC)

4.6% (2017 est.)

5.2% (2016 est.)

country comparison to the world: 66 (./fields/220rank.html#EC)

Population below poverty line (./docs/notesanddefs.html#221): National estimates of the percentage of the population falling below the poverty line are based on surveys of sub-groups, with the results weighted by the number of people in each group. Definitions of poverty vary considerably among nations. For example, rich nations generally employ more generous standards of poverty than poor nations.



(./fields/221.html#EC)

21.5% (December 2017 est.)

Household income or consumption by percentage share (./docs/notesanddefs.html#222): Data on household income or consumption come from household surveys, the results adjusted for household size. Nations use different standards and procedures in collecting and adjusting the data. Surveys based on income will normally show a more unequal distribution than surveys based on consumption. The quality of surveys is improving with time, yet caution is still necessary in making inter-country comparisons.



(./fields/222.html#EC)

lowest 10%: 1.4%

highest 10%: 35.4% (2012 est.)

Distribution of family income - Gini index (./docs/notesanddefs.html#223): This index measures the degree of inequality in the distribution of family income in a country. The index is calculated from the Lorenz curve, in which cumulative family income is plotted against the number of families arranged from the poorest to the richest. The index is the ratio of (a) the area between a country's Lorenz curve and the 45 degree helping line to (b) the entire triangular area under the 45 degree line. The more nearly equal a country's income distribution, the closer its . . . more (./docs/notesanddefs.html#223)

(./fields/223.html#EC)

45.9 (December 2017)

48.5 (December 2017)

**note:** data are for urban households only

country comparison to the world: 36 (./fields/223rank.html#EC)

Budget (./docs/notesanddefs.html#224): This entry includes revenues, expenditures, and capital expenditures. These figures are calculated on an exchange rate basis, i.e., not in purchasing power parity (PPP) terms.

(./fields/224.html#EC)

revenues: 33.43 billion (2017 est.)

expenditures: 38.08 billion (2017 est.)

Taxes and other revenues (./docs/notesanddefs.html#225): This entry records total taxes and other revenues received by the national government during the time period indicated, expressed as a percent of GDP. Taxes include personal and corporate income taxes, value added taxes, excise taxes, and tariffs. Other revenues include social contributions - such as payments for social security and hospital insurance - grants, and net revenues from public enterprises. Normalizing the data, by dividing total revenues by GDP, enables easy comparisons acr . . . more (./docs/notesanddefs.html#225)

(./fields/225.html#EC)

32% (of GDP) (2017 est.)

country comparison to the world: 69 (./fields/225rank.html#EC)

Budget surplus (+) or deficit (-) (./docs/notesanddefs.html#226): This entry records the difference between national government revenues and expenditures, expressed as a percent of GDP. A positive (+) number indicates that revenues exceeded expenditures (a budget surplus), while a negative (-) number indicates the reverse (a budget deficit). Normalizing the data, by dividing the budget balance by GDP, enables easy comparisons across countries and indicates whether a national government saves or borrows money. Countries with high budget deficits (relat . . . more (./docs/notesanddefs.html#226)

(./fields/226.html#EC)

-4.5% (of GDP) (2017 est.)

country comparison to the world: 164 (./fields/226rank.html#EC)

Public debt (./docs/notesanddefs.html#227): This entry records the cumulative total of all government borrowings less repayments that are denominated in a country's home currency. Public debt should not be confused with external debt, which reflects the foreign currency liabilities of both the private and public sector and must be financed out of foreign exchange earnings.

(./fields/227.html#EC)

45.4% of GDP (2017 est.)

43.2% of GDP (2016 est.)

country comparison to the world: 114 (./fields/227rank.html#EC)

Fiscal year (./docs/notesanddefs.html#228): This entry identifies the beginning and ending months for a country's accounting period of 12 months, which often is the calendar year but which may begin in any month. All yearly references are for the calendar year (CY) unless indicated as a noncalendar fiscal year (FY).

(./fields/228.html#EC)

calendar year

Inflation rate (consumer prices) (./docs/notesanddefs.html#229): This entry furnishes the annual percent change in consumer prices compared with the previous year's consumer prices.

(./fields/229.html#EC)

0.4% (2017 est.)

1.7% (2016 est.)

country comparison to the world: 23 (./fields/229rank.html#EC)

Central bank discount rate (./docs/notesanddefs.html#230): This entry provides the annualized interest rate a country's central bank charges commercial, depository banks for loans to meet temporary shortages of funds.

(./fields/230.html#EC)

8.17% (31 December 2011)

8.68% (31 December 2010)

country comparison to the world: 39 (./fields/230rank.html#EC)

(./fields/231.html#EC)

7.92% (31 December 2017 est.)

8.69% (31 December 2016 est.)

country comparison to the world: 111 (./fields/231rank.html#EC)

Stock of narrow money (./docs/notesanddefs.html#234): This entry, also known as "M1," comprises the total quantity of currency in circulation (notes and coins) plus demand deposits denominated in the national currency held by nonbank financial institutions, state and local governments, nonfinancial public enterprises, and the private sector of the economy, measured at a specific point in time. National currency units have been converted to US dollars at the closing exchange rate for the date of the information. Because of exchange rate moveme . . . more (./docs/notesanddefs.html#234)

(./fields/234.html#EC)

\$9.578 billion (31 December 2017 est.)

\$9.281 billion (31 December 2016 est.)

country comparison to the world: 83 (./fields/234rank.html#EC)

Stock of broad money (./docs/notesanddefs.html#235): This entry covers all of "Narrow money," plus the total quantity of time and savings deposits, credit union deposits, institutional money market funds, short-term repurchase agreements between the central bank and commercial deposit banks, and other large liquid assets held by nonbank financial institutions, state and local governments, nonfinancial public enterprises, and the private sector of the economy. National currency units have been converted to US dollars at the closing exchange r . . . more (./docs/notesanddefs.html#235)

(./fields/235.html#EC)

\$9.578 billion (31 December 2017 est.)

\$9.281 billion (31 December 2016 est.)

country comparison to the world: 85 (./fields/235rank.html#EC)

Stock of domestic credit (./docs/notesanddefs.html#236): This entry is the total quantity of credit, denominated in the domestic currency, provided by financial institutions to the central bank, state and local governments, public non-financial corporations, and the private sector. The national currency units have been converted to US dollars at the closing exchange rate on the date of the information.

(./fields/236.html#EC)

\$39.3 billion (31 December 2017 est.)

\$35.56 billion (31 December 2016 est.)

country comparison to the world: 71 (./fields/236rank.html#EC)

Market value of publicly traded shares (./docs/notesanddefs.html#237): This entry gives the value of shares issued by publicly traded companies at a price determined in the national stock markets on the final day of the period indicated. It is simply the latest price per share multiplied by the total number of outstanding shares, cumulated over all companies listed on the particular exchange.

(./fields/237.html#EC)

\$6.838 billion (31 December 2017 est.)

\$6.065 billion (31 December 2016 est.)

\$6.615 billion (31 December 2015 est.)

country comparison to the world: 79 (./fields/237rank.html#EC)

Current account balance (./docs/notesanddefs.html#238): This entry records a country's net trade in goods and services, plus net earnings from rents, interest, profits, and dividends, and net transfer payments (such as pension funds and worker remittances) to and from the rest of the world during the period specified. These figures are calculated on an exchange rate basis, i.e., not in purchasing power parity (PPP) terms.

(./fields/238.html#EC)

-\$349 million (2017 est.)

\$1.442 billion (2016 est.)

country comparison to the world: 109 (./fields/238rank.html#EC)

Exports (./docs/notesanddefs.html#239): This entry provides the total US dollar amount of merchandise exports on an f.o.b. (free on board) basis. These figures are calculated on an exchange rate basis, i.e., not in purchasing power parity (PPP) terms.

(./fields/239.html#EC)

\$19.62 billion (2017 est.)

\$16.8 billion (2016 est.)

country comparison to the world: 71 (./fields/239rank.html#EC)

Exports - partners (./docs/notesanddefs.html#241): This entry provides a rank ordering of trading partners starting with the most important; it sometimes includes the percent of total dollar value.

(./fields/241.html#EC)

US 31.5%, Vietnam 7.6%, Peru 6.7%, Chile 6.5%, Panama 4.9%, Russia 4.4%, China 4% (2017)

Exports - commodities (./docs/notesanddefs.html#240): This entry provides a listing of the highest-valued exported products; it sometimes includes the percent of total dollar value.

(./fields/240.html#EC)

Imports (..docs/notesanddefs.html#242): This entry provides the total US dollar amount of merchandise imports on a c.i.f. (cost, insurance, and freight) or f.o.b. (free on board) basis. These figures are calculated on an exchange rate basis, i.e., not in purchasing power parity (PPP) terms.

 (../fields/242.html#EC)

\$19.31 billion (2017 est.)

\$15.86 billion (2016 est.)

country comparison to the world: 79 (../fields/242rank.html#EC)

Imports - commodities (..docs/notesanddefs.html#243): This entry provides a listing of the highest-valued imported products; it sometimes includes the percent of total dollar value.

 (../fields/243.html#EC)

industrial materials, fuels and lubricants, nondurable consumer goods

Imports - partners (..docs/notesanddefs.html#403): This entry provides a rank ordering of trading partners starting with the most important; it sometimes includes the percent of total dollar value.

 (../fields/403.html#EC)

US 22.8%, China 15.4%, Colombia 8.7%, Panama 6.4%, Brazil 4.4%, Peru 4.2% (2017)

Reserves of foreign exchange and gold (..docs/notesanddefs.html#245): This entry gives the dollar value for the stock of all financial assets that are available to the central monetary authority for use in meeting a country's balance of payments needs as of the end-date of the period specified. This category includes not only foreign currency and gold, but also a country's holdings of Special Drawing Rights in the International Monetary Fund, and its reserve position in the Fund.

 (../fields/245.html#EC)

\$2.395 billion (31 December 2017 est.)

\$4.259 billion (31 December 2016 est.)

country comparison to the world: 116 (../fields/245rank.html#EC)

Debt - external (..docs/notesanddefs.html#246): This entry gives the total public and private debt owed to nonresidents repayable in internationally accepted currencies, goods, or services. These figures are calculated on an exchange rate basis, i.e., not in purchasing power parity (PPP) terms.

 (../fields/246.html#EC)

\$39.29 billion (31 December 2017 est.)

\$38.14 billion (31 December 2016 est.)

country comparison to the world: 77 (../fields/246rank.html#EC)

Stock of direct foreign investment - at home (..docs/notesanddefs.html#247): This entry gives the cumulative US dollar value of all investments in the home country made directly by residents - primarily companies - of other countries as of the end of the time period indicated. Direct investment excludes investment through purchase of shares.

 (../fields/247.html#EC)

\$17.25 billion (31 December 2017 est.)

\$16.63 billion (31 December 2016 est.)

country comparison to the world: 85 (../fields/247rank.html#EC)

Stock of direct foreign investment - abroad (..docs/notesanddefs.html#248): This entry gives the cumulative US dollar value of all investments in foreign countries made directly by residents - primarily companies - of the home country, as of the end of the time period indicated. Direct investment excludes investment through purchase of shares.

 (../fields/248.html#EC)

\$6.33 billion (31 December 2012 est.)

country comparison to the world: 71 (../fields/248rank.html#EC)

Exchange rates (..docs/notesanddefs.html#249): This entry provides the average annual price of a country's monetary unit for the time period specified, expressed in units of local currency per US dollar, as determined by international market forces or by official fiat. The International Organization for Standardization (ISO) 4217 alphabetic currency code for the national medium of exchange is presented in parenthesis. Closing daily exchange rates are not presented in The World Factbook, but are used to convert stock values - e.g., the . . . more (..docs/notesanddefs.html#249)

 (../fields/249.html#EC)

the US dollar became Ecuador's currency in 2001

## Energy :: Ecuador

Electricity access (..docs/notesanddefs.html#251): This entry provides information on access to electricity. Electrification data - collected from industry reports, national surveys, and international sources - consists of four subfields. Population without electricity provides an estimate of the number of citizens that do not have access to electricity. Electrification - total population is the percent of a country's total population with access to electricity, electrification - urban areas is the percent of a country's urban population w . . . more (..docs/notesanddefs.html#251)

 (../fields/251.html#EC)

population without electricity: 500,000 (2013)

electrification - urban areas: 100% (2013)

electrification - rural areas: 92% (2013)

Electricity - production (./docs/notesanddefs.html#252): This entry is the annual electricity generated expressed in kilowatt-hours. The discrepancy between the amount of electricity generated and/or imported and the amount consumed and/or exported is accounted for as loss in transmission and distribution.



(./fields/252.html#EC)

26.5 billion kWh (2016 est.)

country comparison to the world: 71 (./fields/252rank.html#EC)

Electricity - consumption (./docs/notesanddefs.html#253): This entry consists of total electricity generated annually plus imports and minus exports, expressed in kilowatt-hours. The discrepancy between the amount of electricity generated and/or imported and the amount consumed and/or exported is accounted for as loss in transmission and distribution.



(./fields/253.html#EC)

22.68 billion kWh (2016 est.)

country comparison to the world: 70 (./fields/253rank.html#EC)

Electricity - exports (./docs/notesanddefs.html#254): This entry is the total exported electricity in kilowatt-hours.



(./fields/254.html#EC)

211 million kWh (2015 est.)

country comparison to the world: 75 (./fields/254rank.html#EC)

Electricity - imports (./docs/notesanddefs.html#255): This entry is the total imported electricity in kilowatt-hours.



(./fields/255.html#EC)

82 million kWh (2016 est.)

country comparison to the world: 102 (./fields/255rank.html#EC)

Electricity - installed generating capacity (./docs/notesanddefs.html#256): This entry is the total capacity of currently installed generators, expressed in kilowatts (kW), to produce electricity. A 10-kilowatt (kW) generator will produce 10 kilowatt hours (kWh) of electricity, if it runs continuously for one hour.



(./fields/256.html#EC)

8,192 million kW (2016 est.)

country comparison to the world: 69 (./fields/256rank.html#EC)

Electricity - from fossil fuels (./docs/notesanddefs.html#257): This entry measures the capacity of plants that generate electricity by burning fossil fuels (such as coal, petroleum products, and natural gas), expressed as a share of the country's total generating capacity.



(./fields/257.html#EC)

43% of total installed capacity (2016 est.)

country comparison to the world: 163 (./fields/257rank.html#EC)

Electricity - from nuclear fuels (./docs/notesanddefs.html#258): This entry measures the capacity of plants that generate electricity through radioactive decay of nuclear fuel, expressed as a share of the country's total generating capacity.



(./fields/258.html#EC)

0% of total installed capacity (2017 est.)

country comparison to the world: 81 (./fields/258rank.html#EC)

Electricity - from hydroelectric plants (./docs/notesanddefs.html#259): This entry measures the capacity of plants that generate electricity by water-driven turbines, expressed as a share of the country's total generating capacity.



(./fields/259.html#EC)

54% of total installed capacity (2017 est.)

country comparison to the world: 32 (./fields/259rank.html#EC)

Electricity - from other renewable sources (./docs/notesanddefs.html#260): This entry measures the capacity of plants that generate electricity by using renewable energy sources other than hydroelectric (including, for example, wind, waves, solar, and geothermal), expressed as a share of the country's total generating capacity.



(./fields/260.html#EC)

2% of total installed capacity (2017 est.)

country comparison to the world: 138 (./fields/260rank.html#EC)

Crude oil - production (./docs/notesanddefs.html#261): This entry is the total amount of crude oil produced, in barrels per day (bbl/day).



(./fields/261.html#EC)

531,300 bbl/day (2017 est.)

country comparison to the world: 28 (./fields/261rank.html#EC)

Crude oil - exports (./docs/notesanddefs.html#262): This entry is the total amount of crude oil exported, in barrels per day (bbl/day).



(./fields/262.html#EC)

383,500 bbl/day (2017 est.)

country comparison to the world: 22 (./fields/262rank.html#EC)  
Crude oil - imports (./docs/notesanddefs.html#263): This entry is the total amount of crude oil imported, in barrels per day (bbl/day).

(./fields/263.html#EC)

0 bbl/day (2015 est.)

country comparison to the world: 119 (./fields/263rank.html#EC)

Crude oil - proved reserves (./docs/notesanddefs.html#264): This entry is the stock of proved reserves of crude oil, in barrels (bbl). Proved reserves are those quantities of petroleum which, by analysis of geological and engineering data, can be estimated with a high degree of confidence to be commercially recoverable from a given date forward, from known reservoirs and under current economic conditions.

(./fields/264.html#EC)

8.273 billion bbl (1 January 2018 est.)

country comparison to the world: 17 (./fields/264rank.html#EC)

Refined petroleum products - production (./docs/notesanddefs.html#265): This entry is the country's total output of refined petroleum products, in barrels per day (bbl/day). The discrepancy between the amount of refined petroleum products produced and/or imported and the amount consumed and/or exported is due to the omission of stock changes, refinery gains, and other complicating factors.

(./fields/265.html#EC)

137,400 bbl/day (2015 est.)

country comparison to the world: 62 (./fields/265rank.html#EC)

Refined petroleum products - consumption (./docs/notesanddefs.html#266): This entry is the country's total consumption of refined petroleum products, in barrels per day (bbl/day). The discrepancy between the amount of refined petroleum products produced and/or imported and the amount consumed and/or exported is due to the omission of stock changes, refinery gains, and other complicating factors.

(./fields/266.html#EC)

265,000 bbl/day (2016 est.)

country comparison to the world: 48 (./fields/266rank.html#EC)

Refined petroleum products - exports (./docs/notesanddefs.html#267): This entry is the country's total exports of refined petroleum products, in barrels per day (bbl/day).

(./fields/267.html#EC)

25,870 bbl/day (2015 est.)

country comparison to the world: 66 (./fields/267rank.html#EC)

Refined petroleum products - imports (./docs/notesanddefs.html#268): This entry is the country's total imports of refined petroleum products, in barrels per day (bbl/day).

(./fields/268.html#EC)

153,900 bbl/day (2015 est.)

country comparison to the world: 40 (./fields/268rank.html#EC)

Natural gas - production (./docs/notesanddefs.html#269): This entry is the total natural gas produced in cubic meters (cu m). The discrepancy between the amount of natural gas produced and/or imported and the amount consumed and/or exported is due to the omission of stock changes and other complicating factors.

(./fields/269.html#EC)

477.8 million cu m (2017 est.)

country comparison to the world: 73 (./fields/269rank.html#EC)

Natural gas - consumption (./docs/notesanddefs.html#270): This entry is the total natural gas consumed in cubic meters (cu m). The discrepancy between the amount of natural gas produced and/or imported and the amount consumed and/or exported is due to the omission of stock changes and other complicating factors.

(./fields/270.html#EC)

453.1 million cu m (2017 est.)

country comparison to the world: 100 (./fields/270rank.html#EC)

Natural gas - exports (./docs/notesanddefs.html#271): This entry is the total natural gas exported in cubic meters (cu m).

(./fields/271.html#EC)

0 cu m (2017 est.)

country comparison to the world: 97 (./fields/271rank.html#EC)

Natural gas - imports (./docs/notesanddefs.html#272): This entry is the total natural gas imported in cubic meters (cu m).

(./fields/272.html#EC)

0 cu m (2017 est.)

country comparison to the world: 118 (./fields/272rank.html#EC)

Natural gas - proved reserves (./docs/notesanddefs.html#273): This entry is the stock of proved reserves of natural gas in cubic meters (cu m). Proved reserves are those quantities of natural gas, which, by analysis of geological and engineering data, can be estimated with a high degree of confidence to be commercially recoverable from a given date forward, from known reservoirs and under current economic conditions.

(./fields/273.html#EC)

10.9 billion cu m (January 2018 est.)

country comparison to the world: 78 (./fields/273rank.html#EC)

Carbon dioxide emissions from consumption of energy (./docs/notesanddefs.html#274): This entry is the total amount of carbon dioxide, measured in metric tons, released by burning fossil fuels in the process of producing and consuming energy.



(./fields/274.html#EC)

37.54 million Mt (2017 est.)

country comparison to the world: 69 (./fields/274rank.html#EC)

#### Communications :: Ecuador

Telephones - fixed lines (./docs/notesanddefs.html#196): This entry gives the total number of fixed telephone lines in use, as well as the number of subscriptions per 100 inhabitants.



(./fields/196.html#EC)

total subscriptions: 2,415,204 (2017 est.)

subscriptions per 100 inhabitants: 15 (2017 est.)

country comparison to the world: 55 (./fields/196rank.html#EC)

Telephones - mobile cellular (./docs/notesanddefs.html#197): This entry gives the total number of mobile cellular telephone subscribers, as well as the number of subscriptions per 100 inhabitants. Note that because of the ubiquity of mobile phone use in developed countries, the number of subscriptions per 100 inhabitants can exceed 100.



(./fields/197.html#EC)

total subscriptions: 13,881,562 (2017 est.)

subscriptions per 100 inhabitants: 85 (2017 est.)

country comparison to the world: 69 (./fields/197rank.html#EC)

Telephone system (./docs/notesanddefs.html#198): This entry includes a brief general assessment of the system with details on the domestic and international components. The following terms and abbreviations are used throughout the entry: Arabsat - Arab Satellite Communications Organization (Riyadh, Saudi Arabia). Autodin - Automatic Digital Network (US Department of Defense). CB - citizen's band mobile radio communications. Cellular telephone system - the telephones in this system are radio transceivers, with each instrument having its own unique identifier (./docs/notesanddefs.html#198)



(./fields/198.html#EC)

general assessment: fixed-line service and sophisticated 4G LTE ultra-broadband network; much of the country's fixed-line structure is influenced by topographical challenges associated with the Andes Mountains; Ecuador has a small telecom market with a dominant mobile sector; the state-owned incumbent CNT dominates the fixed-line market, and therefore the DSL broadband market as well (2018)

domestic: fixed-line services with digital networks provided by multiple telecommunications operators; fixed-line teledensity stands at about 15 per 100 persons; mobile-cellular use has surged and subscribership has reached 85 per 100 persons (2018)

international: country code - 593; landing points for the PAN-AM and South America-1 submarine cables that provide links to the west coast of South America, Panama, Colombia, Venezuela, and extending onward to Aruba and the US Virgin Islands in the Caribbean; in 2017, Alcatel completed a 6000km, submarine-cable system from Sarasota, Florida to Manta, Ecuador; satellite earth station - 1 Intelsat (Atlantic Ocean) (2018)

Broadcast media (./docs/notesanddefs.html#199): This entry provides information on the approximate number of public and private TV and radio stations in a country, as well as basic information on the availability of satellite and cable TV services.



(./fields/199.html#EC)

about 60 media outlets are recognized as national; the Ecuadorian Government controls 12 national outlets and multiple radio stations; there are multiple TV networks and many local channels, as well as more than 300 radio stations; many TV and radio stations are privately owned; broadcast media is required by law to give the government free airtime to broadcast programs produced by the state; the Ecuadorian Government is the biggest advertiser and grants advertising contracts to outlets that provide favorable coverage; a 2011 antimonopoly law and the 2013 Communication Law limit ownership and investment in the media by non-media businesses (2018)

Internet country code (./docs/notesanddefs.html#202): This entry includes the two-letter codes maintained by the International Organization for Standardization (ISO) in the ISO 3166 Alpha-2 list and used by the Internet Assigned Numbers Authority (IANA) to establish country-coded top-level domains (ccTLDs).



(./fields/202.html#EC)

.ec

Internet users (./docs/notesanddefs.html#204): This entry gives the total number of individuals within a country who can access the Internet at home, via any device type (computer or mobile) and connection. The percent of population with Internet access (i.e., the penetration rate) helps gauge how widespread Internet use is within a country. Statistics vary from country to country and may include users who access the Internet at least several times a week to those who access it only once within a period of several months.



(./fields/204.html#EC)

total: 8,693,739 (July 2016 est.)

percent of population: 54.1% (July 2016 est.)

country comparison to the world: 51 (./fields/204rank.html#EC)

Broadband - fixed subscriptions (./docs/notesanddefs.html#206): This entry gives the total number of fixed-broadband subscriptions, as well as the number of subscriptions per 100 inhabitants. Fixed broadband is a physical wired connection to the Internet (e.g., coaxial cable, optical fiber) at speeds equal to or greater than 256 kilobits/second (256 kbit/s).



(./fields/206.html#EC)

total: 1,683,788 (2017 est.)

subscriptions per 100 inhabitants: 10 (2017 est.)

country comparison to the world: 58 (./fields/206rank.html#EC)

## Transportation :: Ecuador

National air transport system (./docs/notesanddefs.html#377): This entry includes four subfields describing the air transport system of a given country in terms of both structure and performance. The first subfield, number of registered air carriers, indicates the total number of air carriers registered with the country's national aviation authority and issued an air operator certificate as required by the Convention on International Civil Aviation. The second subfield, inventory of registered aircraft operated by air carriers, lists the total number . . . more (./docs/notesanddefs.html#377)



(./fields/377.html#EC)

number of registered air carriers: 7 (2015)

inventory of registered aircraft operated by air carriers: 35 (2015)

annual passenger traffic on registered air carriers: 5,762,485 (2015)

annual freight traffic on registered air carriers: 86,128,720 mt-km (2015)

Civil aircraft registration country code prefix (./docs/notesanddefs.html#378): This entry provides the one- or two-character alphanumeric code indicating the nationality of civil aircraft. Article 20 of the Convention on International Civil Aviation (Chicago Convention), signed in 1944, requires that all aircraft engaged in international air navigation bear appropriate nationality marks. The aircraft registration number consists of two parts: a prefix consisting of a one- or two-character alphanumeric code indicating nationality and a registration suffix of one to fi . . . more (./docs/notesanddefs.html#378)



(./fields/378.html#EC)

HC (2016)

Airports (./docs/notesanddefs.html#379): This entry gives the total number of airports or airfields recognizable from the air. The runway(s) may be paved (concrete or asphalt surfaces) or unpaved (grass, earth, sand, or gravel surfaces) and may include closed or abandoned installations.

Airports or airfields that are no longer recognizable (overgrown, no facilities, etc.) are not included. Note that not all airports have accommodations for refueling, maintenance, or air traffic control.



(./fields/379.html#EC)

432 (2013)

country comparison to the world: 20 (./fields/379rank.html#EC)

Airports - with paved runways (./docs/notesanddefs.html#380): This entry gives the total number of airports with paved runways (concrete or asphalt surfaces) by length. For airports with more than one runway, only the longest runway is included according to the following five groups - (1) over 3,047 m (over 10,000 ft), (2) 2,438 to 3,047 m (8,000 to 10,000 ft), (3) 1,524 to 2,437 m (5,000 to 8,000 ft), (4) 914 to 1,523 m (3,000 to 5,000 ft), and (5) under 914 m (under 3,000 ft). Only airports with usable runways are included in this listing. Not all . . . more (./docs/notesanddefs.html#380)



(./fields/380.html#EC)

total: 104 (2017)

over 3,047 m: 4 (2017)

2,438 to 3,047 m: 5 (2017)

1,524 to 2,437 m: 18 (2017)

914 to 1,523 m: 26 (2017)

under 914 m: 51 (2017)

Airports - with unpaved runways (./docs/notesanddefs.html#381): This entry gives the total number of airports with unpaved runways (grass, dirt, sand, or gravel surfaces) by length. For airports with more than one runway, only the longest runway is included according to the following five groups - (1) over 3,047 m (over 10,000 ft), (2) 2,438 to 3,047 m (8,000 to 10,000 ft), (3) 1,524 to 2,437 m (5,000 to 8,000 ft), (4) 914 to 1,523 m (3,000 to 5,000 ft), and (5) under 914 m (under 3,000 ft). Only airports with usable runways are included in this listin . . . more (./docs/notesanddefs.html#381)



(./fields/381.html#EC)

total: 328 (2013)

914 to 1,523 m: 37 (2013)

under 914 m: 291 (2013)

Heliports (./docs/notesanddefs.html#382): This entry gives the total number of heliports with hard-surface runways, helipads, or landing areas that support routine sustained helicopter operations exclusively and have support facilities including one or more of the following facilities: lighting, fuel, passenger handling, or maintenance. It includes former airports used exclusively for helicopter operations but excludes heliports limited to day operations and natural clearings that could support helicopter landings and takeoffs.



(./fields/382.html#EC)

2 (2013)

Pipelines (./docs/notesanddefs.html#383): This entry gives the lengths and types of pipelines for transporting products like natural gas, crude oil, or petroleum products.



(./fields/383.html#EC)

485 km extra heavy crude, 123 km gas, 2131 km oil, 1526 km refined products (2017)

Railways (./docs/notesanddefs.html#384): This entry states the total route length of the railway network and of its component parts by gauge, which is the measure of the distance between the inner sides of the load-bearing rails. The four typical types of gauges are: broad, standard,

Case 8:18-cr-00511-SDM-JSS Document 75-2 Filed 03/22/19 Page 23 of 25 PageID 457  
narrow, and dual. Other gauges are listed under Note. Some 80% of the world's railways use the standard gauge of 1.4 m (4.7 ft). Gauges vary by country and sometimes within countries. The choice of gauge during initial construction was mainly in resp . . . more  
(../docs/notesanddefs.html#384)

(../fields/384.html#EC)

total: 965 km (2017)

narrow gauge: 965 km 1.067-m gauge (2017)

**note:** passenger service limited to certain sections of track, mostly for tourist trains

country comparison to the world: 91 (..../fields/384rank.html#EC)

Roadways (..../docs/notesanddefs.html#385): This entry gives the total length of the road network and includes the length of the paved and unpaved portions.

(../fields/385.html#EC)

Waterways (..../docs/notesanddefs.html#386): This entry gives the total length of navigable rivers, canals, and other inland bodies of water.

(../fields/386.html#EC)

1,500 km (most inaccessible) (2012)

country comparison to the world: 52 (..../fields/386rank.html#EC)

Merchant marine (..../docs/notesanddefs.html#387): Merchant marine may be defined as all ships engaged in the carriage of goods; or all commercial vessels (as opposed to all nonmilitary ships), which excludes tugs, fishing vessels, offshore oil rigs, etc. This entry contains information in four fields - total, ships by type, foreign-owned, and registered in other countries. Total includes the number of ships (1,000 GRT or over), total DWT for those ships, and total GRT for those ships. DWT or dead weight tonnage is the total weight of ca . . . more  
(../docs/notesanddefs.html#387)

(../fields/387.html#EC)

total: 138 (2017)

by type: general cargo 6, oil tanker 37, other 95 (2017)

country comparison to the world: 76 (..../fields/387rank.html#EC)

Ports and terminals (..../docs/notesanddefs.html#388): This entry lists major ports and terminals primarily on the basis of the amount of cargo tonnage shipped through the facilities on an annual basis. In some instances, the number of containers handled or ship visits were also considered. Most ports service multiple classes of vessels including bulk carriers (dry and liquid), break bulk cargoes (goods loaded individually in bags, boxes, crates, or drums; sometimes palletized), containers, roll-on/roll-off, and passenger ships. The listing le . . . more  
(../docs/notesanddefs.html#388)

(../fields/388.html#EC)

major seaport(s): Esmeraldas, Manta, Puerto Bolivar

container port(s) (TEUs): Guayaquil (1,821,654) (2016)

river port(s): Guayaquil (Guayas)

## **Military and Security :: Ecuador**

Military expenditures (..../docs/notesanddefs.html#330): This entry gives spending on defense programs for the most recent year available as a percent of gross domestic product (GDP); the GDP is calculated on an exchange rate basis, i.e., not in terms of purchasing power parity (PPP). For countries with no military forces, this figure can include expenditures on public security and police.

(../fields/330.html#EC)

1.7% of GDP (2017)

2.21% of GDP (2016)

2.44% of GDP (2015)

2.72% of GDP (2014)

2.88% of GDP (2013)

country comparison to the world: 66 (..../fields/330rank.html#EC)

Military branches (..../docs/notesanddefs.html#331): This entry lists the service branches subordinate to defense ministries or the equivalent (typically ground, naval, air, and marine forces).

(../fields/331.html#EC)

Ecuadorian Armed Forces: Ecuadorian Land Force (Fuerza Terrestre Ecuatoriana, FTE), Ecuadorian Navy (Fuerza Naval del Ecuador, FNE, includes Naval Infantry, Naval Aviation, Coast Guard), Ecuadorian Air Force (Fuerza Aerea Ecuatoriana, FAE) (2012)

Military service age and obligation (..../docs/notesanddefs.html#333): This entry gives the required ages for voluntary or conscript military service and the length of service obligation.

(../fields/333.html#EC)

18 years of age for selective conscript military service; conscription has been suspended; 18 years of age for voluntary military service; Air Force 18-22 years of age, Ecuadorian birth requirement; 1-year service obligation (2012)

Maritime threats (..../docs/notesanddefs.html#334): This entry describes the threat of piracy, as defined in Article 101, UN Convention on the Law of the Sea (UNCLOS), or armed robbery against ships, as defined in Resolution A. 1025 (26) adopted on 2 December 2009 at the 26th Assembly Session of the International Maritime Organization. The entry includes the number of ships on the high seas or in territorial waters that were

(../fields/334.html#EC)

the International Maritime Bureau continues to report the territorial and offshore waters as at risk for piracy and armed robbery against ships; vessels, including commercial shipping and pleasure craft, have been attacked and hijacked both at anchor and while underway; crews have been robbed and stores or cargoes stolen; after several years with no incidents, two attacks were reported in 2017

#### Transnational Issues :: Ecuador

Disputes - international (../docs/notesanddefs.html#326): This entry includes a wide variety of situations that range from traditional bilateral boundary disputes to unilateral claims of one sort or another. Information regarding disputes over international terrestrial and maritime boundaries has been reviewed by the US Department of State. References to other situations involving borders or frontiers may also be included, such as resource disputes, geopolitical questions, or irredentist issues; however, inclusion does not necessarily constitute . . . more (../docs/notesanddefs.html#326)

(../fields/326.html#EC)

organized illegal narcotics operations in Colombia penetrate across Ecuador's shared border, which thousands of Colombians also cross to escape the violence in their home country

Refugees and internally displaced persons (../docs/notesanddefs.html#327): This entry includes those persons residing in a country as refugees, internally displaced persons (IDPs), or stateless persons. Each country's refugee entry includes only countries of origin that are the source of refugee populations of 5,000 or more. The definition of a refugee according to a UN Convention is "a person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a . . . more (../docs/notesanddefs.html#327)

(../fields/327.html#EC)

refugees (country of origin): 46,616 (Colombia) (2017), 111,535 (Venezuela) (economic and political crisis; includes Venezuelans who have claimed asylum or have received alternative legal stay) (2018)

IDPs: 1,708 (earthquake April 2016) (2017)

Illicit drugs (../docs/notesanddefs.html#329): This entry gives information on the five categories of illicit drugs - narcotics, stimulants, depressants (sedatives), hallucinogens, and cannabis. These categories include many drugs legally produced and prescribed by doctors as well as those illegally produced and sold outside of medical channels. Cannabis (*Cannabis sativa*) is the common hemp plant, which provides hallucinogens with some sedative properties, and includes marijuana (pot, Acapulco gold, grass, reefer), tetrahydrocannabinol . . . more (../docs/notesanddefs.html#329)

(../fields/329.html#EC)

significant transit country for cocaine originating in Colombia and Peru, with much of the US-bound cocaine passing through Ecuadorian Pacific waters; importer of precursor chemicals used in production of illicit narcotics; attractive location for cash-placement by drug traffickers laundering money because of dollarization and weak anti-money-laundering regime; increased activity on the northern frontier by trafficking groups and Colombian insurgents

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Country Comparison :: Infant mortality rate [Download](#) (/fields/rawdata\_354.txt)

Infant mortality rate compares the number of deaths of infants under one year old in a given year per 1,000 live births in the same year. This rate is often used as an indicator of the level of health in a country.

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Rank	Country	(deaths/1,000 live births)	Date of Information
125	<a href="#">MEXICO</a> (/GEOS/MX.HTML)	11.30	2018 est.
147	<a href="#">GREENLAND</a> (/GEOS/GL.HTML)	8.70	2018 est.
164	<a href="#">SAINT PIERRE AND MIQUELON</a> (/GEOS/SB.HTML)	6.40	2018 est.
170	<a href="#">UNITED STATES</a> (/GEOS/US.HTML)	5.70	2018 est.
180	<a href="#">CANADA</a> (/GEOS/CA.HTML)	4.50	2018 est.
217	<a href="#">BERMUDA</a> (/GEOS/BD.HTML)	2.50	2018 est.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**  
**FRANKLIN RAFAEL LOPEZ TOALA**

\_\_\_\_\_ /

**FRANKLIN RAFAEL LOPEZ TOALA'S SENTENCING MOTION FOR  
DOWNWARD DEPARTURES AND VARIANCES AND SUPPORTING  
MEMORANDUM OF LAW**

**EXHIBIT C**



GEOGRAPHICAL ECONOMIC DATA | ST. LOUIS FED

2017 Infant Mortality Rate by Nation (number per 1,000 live births)



**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**  
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\_\_\_\_\_ /

**FRANKLIN RAFAEL LOPEZ TOALA'S SENTENCING MOTION FOR  
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**EXHIBIT D**

## **Born Too Soon: The Global Action Report on Preterm Birth**

2 MAY 2012 - NEW YORK

### **Download the Report**

Born Too Soon: The Global Action Report on Preterm Birth  
pdf, 6.23Mb

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Cover page, contents, abbreviations, country groups, foreword, commitments to preterm birth  
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Chapter 3 - Care before and between pregnancy  
pdf, 389kb

Chapter 4 - Care during pregnancy and childbirth  
pdf, 326kb

Chapter 5 - Care for the preterm baby  
pdf, 695kb

Chapter 6 - Actions: everyone has a role to play  
pdf, 1.06Mb

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Briefing
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9. Contributors to Born Too

Soon

10. The Partnership for Maternal,

Newborn & Child Health:

Taking action for preterm birth

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## Related links



## Photo gallery

Interactive map of preterm births  
on March of Dimes

Every Woman Every Child  
commitments to preterm birth



The United Nations Inter-agency Group for Child Mortality Estimation (UN IGME) was formed in 2004 to share data on child mortality, harmonize estimates within the UN system, improve methods for child mortality estimation, report on progress towards child survival goals and enhance country capacity to produce timely and properly assessed estimates of child mortality. The UN IGME is led by United Nations Children's Fund and includes the World Health Organization, the World Bank Group and the United Nations Population Division of the Department of Economic and Social Affairs as full members.

The UN IGME's independent Technical Advisory Group, comprising leading academic scholars and independent experts in demography and biostatistics, provides technical guidance on estimation methods, technical issues and strategies for data analysis and data quality assessment.

The UN IGME updates its child mortality estimates annually after reviewing newly available data and assessing data quality. This report contains the latest UN IGME estimates of child mortality at the country, regional and global levels. Country-specific estimates and the data used to derive them are available at <[www.childmortality.org](http://www.childmortality.org)>.

Suggested citation: United Nations Inter-agency Group for Child Mortality Estimation (UN IGME), 'Levels & Trends in Child Mortality: Report 2018, Estimates developed by the United Nations Inter-agency Group for Child Mortality Estimation', United Nations Children's Fund, New York, 2018.

# Executive Summary

## Headline Messages

### 15 million babies are born too soon every year

- More than 1 in 10 babies are born preterm, affecting families all around the world.
- Over 1 million children die each year due to complications of preterm birth. Many survivors face a lifetime of disability, including learning disabilities and visual and hearing problems.

### Rates of preterm birth are rising

- Preterm birth rates are increasing in almost all countries with reliable data.
- Prematurity is the leading cause of newborn deaths (babies in the first 4 weeks of life) and now the second-leading cause of death after pneumonia in children under the age of 5.
- Global progress in child survival and health to 2015 and beyond cannot be achieved without addressing preterm birth.
- Investment in women's and maternal health and care at birth will reduce stillbirth rates and improve outcomes for women and newborn babies, especially those who are premature.

### Prevention of preterm birth must be accelerated

- Family planning and increased empowerment of women, especially adolescents, plus improved quality of care before, between and during pregnancy can help to reduce preterm birth rates.
- Strategic investments in innovation and research are required to accelerate progress.

### Premature babies can be saved now with feasible, cost-effective care

- Historical data and new analyses show that deaths from preterm birth complications can be reduced by over three-quarters even without the availability of neonatal intensive care.
- Inequalities in survival rates around the world are stark: half of the babies born at 24 weeks (4 months early) survive in high-income countries, but in low-income settings, half the babies born at 32 weeks (two months early) continue to die due to a lack of feasible, cost-effective care, such as warmth, breastfeeding support, and basic care for infections and breathing difficulties.
- Over the last decade, some countries have halved deaths due to preterm birth by ensuring frontline workers are skilled in the care of premature babies and improving supplies of life-saving commodities and equipment.

### Everyone has a role to play

- Everyone can help to prevent preterm births and improve the care of premature babies, accelerating progress towards the goal of halving deaths due to preterm birth by 2025.
- The *Every Woman Every Child* effort, led by UN Secretary-General Ban Ki-moon, provides the framework to coordinate action and ensure accountability.

**Definition of preterm birth:** Babies born alive before 37 weeks of pregnancy are completed.

#### Sub-categories of preterm birth, based on weeks of gestational age:

Extremely preterm (<28 weeks)

Very preterm (28 to <32 weeks)

Moderate to late preterm (32 to <37 weeks)

Note: Births at 37 to 39 weeks still have suboptimal outcomes, and induction or cesarean birth should not be planned before 39 completed weeks unless medically indicated



## Inform

### Why do preterm births matter?

Urgent action is needed to address the estimated 15 million babies born too soon, especially as preterm birth rates are increasing each year (Figure 1). This is essential in order to progress on the Millennium Development Goal (MDG) for child survival by 2015 and beyond, since 40% of under-five deaths are in newborns, and it will also give added value to maternal health (MDG 5) investments (Chapter 1). For babies who survive, there is an increased risk of disability, which exacts a heavy load on families and health systems.



Photo: March of Dimes

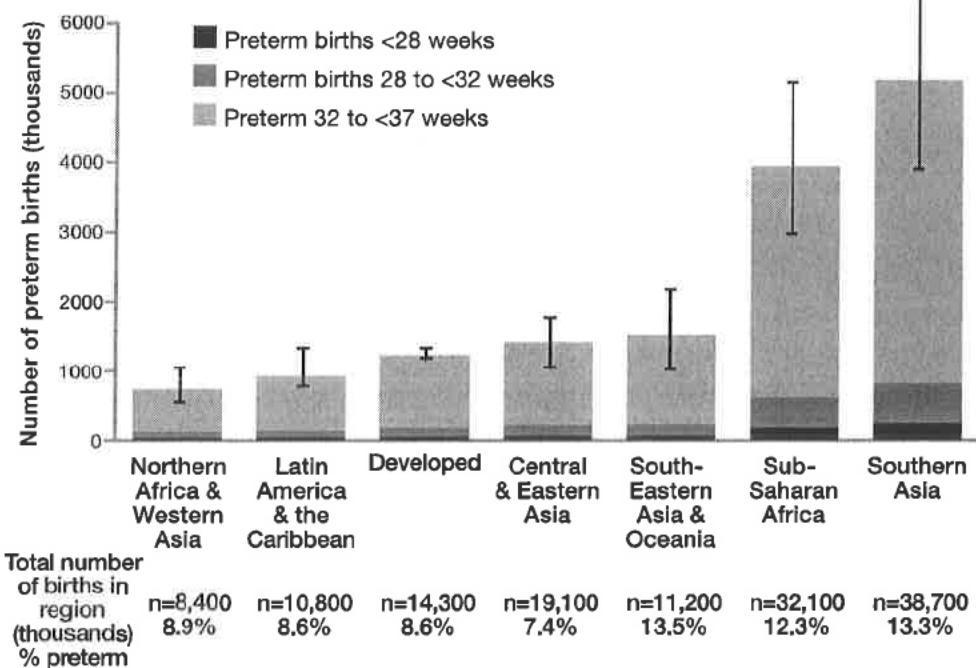
### Why does preterm birth happen?

Preterm birth occurs for a variety of reasons (Chapter 2). Some preterm births result from early induction of labor or cesarean birth whether for medical or non-medical reasons. Most preterm births happen spontaneously. Common causes include multiple pregnancies, infections and chronic conditions, such as diabetes and high blood pressure; however, often no cause is identified. There is also a genetic influence. Better understanding of the causes and mechanisms will advance the development of prevention solutions.

### Where and when?

Over 60% of preterm births occur in Africa and South Asia (Figure 1). The 10 countries with the highest numbers include Brazil, the United States, India and Nigeria, demonstrating that preterm birth is truly a global problem. Of the 11 countries with preterm birth rates of over 15%, all but two are in sub-Saharan Africa (Figure 2). In the poorest countries, on average, 12% of babies are born too soon compared with 9% in higher-income countries. Within countries, poorer families are at higher risk.

Figure 1: Preterm births by gestational age and region for 2010



#### Preterm birth by the numbers:

- 15 million preterm births every year and rising
- 1.1 million babies die from preterm birth complications
- 5-18% is the range of preterm birth rates across 184 countries of the world
- >80% of preterm births occur between 32-37 weeks of gestation and most of these babies can survive with essential newborn care
- >75% of deaths of preterm births can be prevented without intensive care
- 7 countries have halved their numbers of deaths due to preterm birth in the last 10 years

Of 65 countries with reliable trend data, all but 3 show an increase in preterm birth rates over the past 20 years. Possible reasons for this include better measurement and improved health such as increases in maternal age and underlying maternal health problems such as diabetes and high blood pressure; greater use of infertility treatments leading to increased rates of multiple pregnancies; and changes in obstetric practices such as more caesarean births before term.

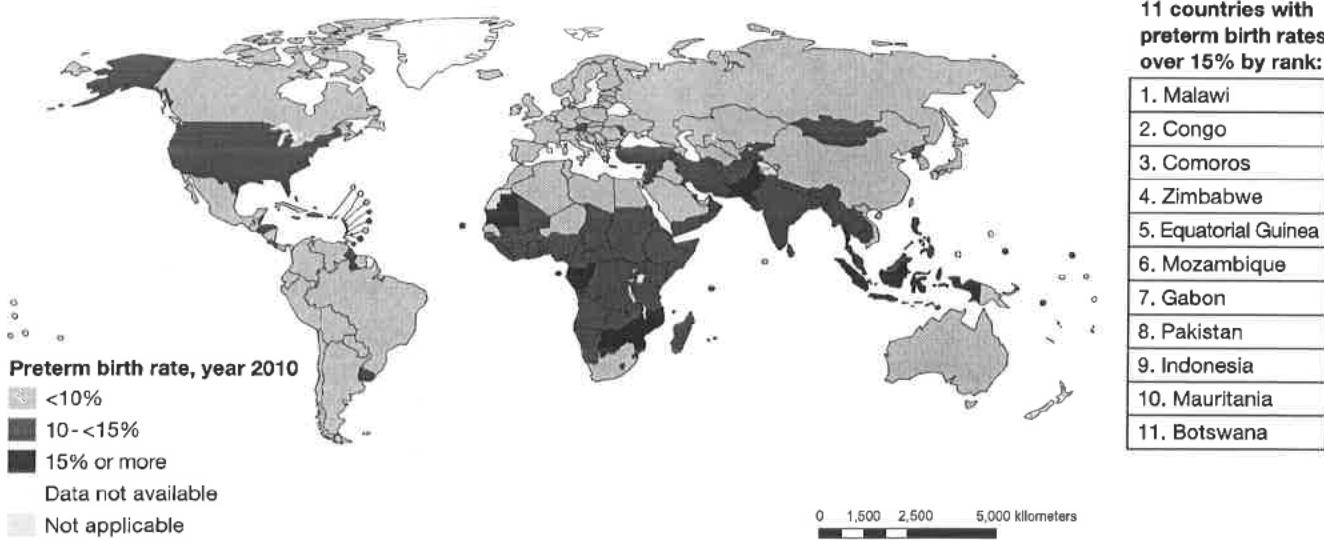
There is a dramatic survival gap for premature babies depending on where they are born. For example, over 90% of extremely preterm babies (<28 weeks) born in low-income countries die within the first few days of life; yet less than 10% of babies of this gestation die in high-income settings, a 10:90 survival gap.

## Counting preterm births

The preterm birth rates presented in this report are estimated based on data from national registries, surveys and special studies (Blencowe et al., 2012). Standard definitions of preterm birth and consistency in reporting pregnancy outcomes are essential to improving the quality of data and ensuring that all mothers and babies are counted.



Figure 2: Global burden of preterm birth in 2010



The boundaries and names shown and the designations used on this map do not imply the expression of any opinion whatsoever on the part of the World Health Organization concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. Dotted lines on maps represent approximate border lines for which there may not yet be full agreement.

Data Source: World Health Organization  
Map Production: Public Health Information and Geographic Information Systems (GIS)  
World Health Organization

 World Health Organization  
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## Preconception

Empowering and educating girls as well as providing care to women and couples before and between pregnancies improve the opportunity for women and couples to have planned pregnancies increasing chances that women and their babies will be healthy, and survive. In addition, through reducing or addressing certain risk factors, preterm birth prevention may be improved (Chapter 3).

### Invest and plan

Adolescent pregnancy, short time gaps between births, unhealthy pre-pregnancy weight (underweight or obesity), chronic disease (e.g., diabetes), infectious diseases (e.g., HIV), substance abuse (e.g., tobacco use and heavy alcohol use) and poor psychological health are risk factors for preterm birth. One highly cost-effective intervention is family planning, especially for girls in regions with high rates of adolescent pregnancy. Promoting better nutrition, environmental and occupational health and education for women are also essential. Boys and men, families and communities should be encouraged to become active partners in preconception care to optimize pregnancy outcomes.

### Implement priority, evidence-based interventions

- Family planning strategies, including birth spacing and provision of adolescent-friendly services;
- Prevention, and screening/ management of sexually transmitted infections (STIs), e.g., HIV and syphilis;
- Education and health promotion for girls and women;
- Promoting healthy nutrition including micronutrient fortification and addressing life-style risks, such as smoking, and environmental risks, like indoor air pollution.

### Inform and improve program coverage and quality

Consensus around a preconception care package and the testing of this in varying contexts is an important research need. When researching pregnancy outcomes or assessing reproductive, maternal, newborn and child health strategies, preterm birth and birthweight measures should be included as this will dramatically increase the information available to understand risks and advance solutions.

## Premature baby care

The survival chances of the 15 million babies born preterm each year vary dramatically depending on where they are born (Chapter 5). South Asia and sub-Saharan Africa account for half the world's births, more than 60% of the world's preterm babies and over 80% of the world's 1.1 million deaths due to preterm birth complications. Around half of these babies are born at home. Even for those born in a health clinic or hospital, essential newborn care is often lacking.

The risk of a neonatal death due to complications of preterm birth is at least 12 times higher for an African baby than for a European baby. Yet, more than three-quarters of premature babies could be saved with feasible, cost-effective care, and further reductions are possible through intensive neonatal care.

### Invest and plan

Governments, together with civil society, must review and update existing policies and programs to integrate high-impact care for premature babies within existing programs for maternal, newborn and child health. Urgent increases are needed in health system capacity to take care of newborns particularly in the field of human resources, such as training nurses and midwives for newborn and premature baby care, and ensuring reliable supplies of commodities and equipment. Seven middle-income countries have halved their neonatal deaths from preterm birth through strategic scale up of referral-level care.

## Pregnancy and birth

Pregnancy and childbirth are critical windows of opportunity for providing effective interventions to improve maternal health and reduce mortality and disability due to preterm birth. While many countries report high coverage of antenatal care and increasing coverage of facility births, significant gaps in coverage, equity and quality of care remain between and within countries, including high-income countries (Chapter 4).



### Invest and plan

Countries need to ensure universal access to comprehensive antenatal care, quality childbirth services and emergency obstetric care. Workplace policies are important to promote healthy pregnancies and reduce the risk of preterm birth, including regulations to protect pregnant women from physically-demanding work. Environmental policies to reduce exposure to potentially harmful pollutants, such as from traditional cookstoves and secondhand smoke, are also necessary.

### Implement priority, evidence-based interventions

- Ensure antenatal care for all pregnant women, including screening for, and diagnosis and treatment of infections such as HIV and STIs, nutritional support and counseling;
- Provide screening and management of pregnant women at higher risk of preterm birth, e.g., multiple pregnancies, diabetes, high blood pressure, or with a history of previous preterm birth;
- Effectively manage preterm labor, especially provision of antenatal corticosteroids to reduce the risk of breathing difficulties in premature babies. This intervention alone could save around 370,000 lives each year;
- Promote behavioral and community interventions to reduce smoking, secondhand smoke exposure, and other pollutants; and prevention of violence against women by intimate partners;
- Reduce non-medically indicated inductions of labor and cesarean births especially before 39 completed weeks of gestation.

### Inform and improve program coverage and quality

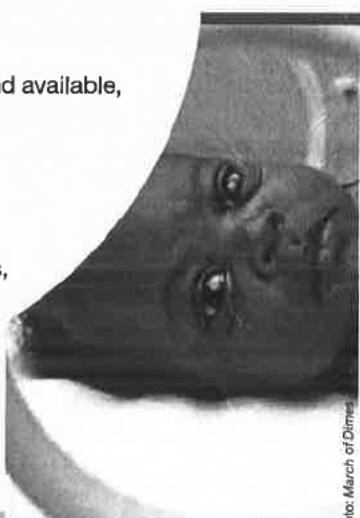
Better measurement of antenatal care services will improve monitoring coverage and equity gaps of high-impact interventions. Implementation research is critical for informing efforts to scale up effective interventions and improve the quality of care. Discovery research on normal and abnormal pregnancies will facilitate the development of preventive interventions for universal application.

## Implement priority, evidence-based interventions

- Essential newborn care for all babies, including thermal care, breastfeeding support, and infection prevention and management and, if needed, neonatal resuscitation;
- Extra care for small babies, including Kangaroo Mother Care (carrying the baby skin-to-skin, additional support for breastfeeding), could save an estimated 450,000 babies each year;
- Care for preterm babies with complications:
- Treating infections, including with antibiotics;
- Safe oxygen management and supportive care for respiratory distress syndrome, and, if appropriate and available, continuous positive airway pressure and/or surfactant;
- Neonatal intensive care for those countries with lower mortality and higher health system capacity.

### Inform and improve program coverage and quality

Innovation and implementation research is critical to accelerate the provision of care for premature babies, especially skilled human resources and robust, reliable technologies. Monitoring coverage of preterm care interventions, including Kangaroo Mother Care, as well as addressing quality and equity requires urgent attention. Better tracking of long-term outcomes, including visual impairment for surviving babies, is critical.



# Implement

## Priority interventions, packages and strategies for preterm birth

Reducing the burden of preterm birth has a dual track: prevention and care.

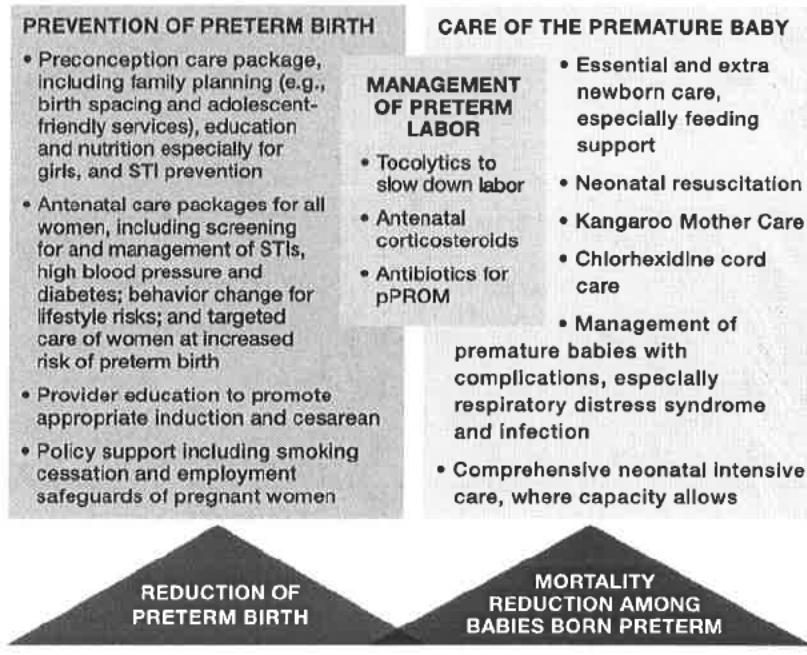
Interventions with proven effect for prevention are clustered in the preconception, between pregnancy and pregnancy periods as well as during preterm labor (Figure 3).

Interventions to reduce death and disability among premature babies can be applied both during labor and after birth. If interventions with proven benefit were universally available to women and their babies (i.e., 95% coverage), then almost 1 million premature babies could be saved each year.

## A global action agenda for research

Preterm birth has multiple causes; therefore, solutions will not come through a single discovery but rather from an array of discoveries addressing multiple biological, clinical, and social-behavioral risk factors. The dual agenda of preventing preterm birth and addressing the care and survival gap for premature babies requires a comprehensive research strategy, but involves different approaches along a pipeline of innovation. The pipeline starts from describing the problem and risks more thoroughly, through discovery science to understanding causes, to developing new tools, and finally to research the delivery of these new tools in various health system contexts. Research capacity and leadership from low- and middle-income countries is critical to success and requires strategic investment.

Figure 3: Approaches to prevent preterm births and reduce deaths among premature babies



For preterm prevention research, the greatest emphasis should be on descriptive and discovery learning, understanding what can be done to prevent preterm birth in various contexts. While requiring a long-term investment, risks for preterm birth and the solutions needed to reduce these risks during each stage of the reproductive, maternal, newborn and child health continuum, are becoming increasingly evident (Chapters 3-5). However, for many of these risks such as genital tract infections, we do not yet have effective program solutions for prevention.

For premature baby care, the greatest emphasis should be on development and delivery research, learning how to implement what is known to be effective in caring for premature babies, and this has a shorter timeline to impact at scale (Chapter 6). Some examples include adapting technologies such as robust and simplified devices for support for babies with breathing difficulties, or examining the roles of different health care workers (e.g., task shifting).



## Goal by 2025

Since prematurity contributes significantly to child mortality, Born Too Soon presents a new goal for the reduction of deaths due to complications of preterm birth.

- For countries with a current neonatal mortality rate level of more than or equal to 5 per 1,000 live births, the goal is to reduce the mortality due to preterm birth by 50% between 2010 and 2025.
- For countries with a current neonatal mortality rate level of less than 5 per 1,000 live births, the goal is to eliminate remaining preventable preterm deaths, focusing on equitable care for all and quality of care to minimize long-term impairment.

After the publication of this report, a technical expert group will be convened to establish a goal for reduction of preterm birth rate by 2025, for announcement on World Prematurity Day 2012.

Details of these goals are given in Chapter 6 of the report.

## **Everyone has a role to play... to reach every woman, every newborn, every child**

Reducing preterm births and improving child survival are ambitious goals. The world has made much progress reducing maternal, newborn and child deaths since the MDGs were set, but accelerated progress will require even greater collaboration and coordination among national and local governments, donors, UN and other multilaterals, civil society, the business community, health care professionals and researchers, working together to advance investment, implementation, innovation and information-sharing (Figure 4, Chapter 6).



**Figure 4:** Shared actions to address preterm births

CARE FOR THE PRETERM BABY



Photo: Ritam Banerjee/ Getty Images for Save the Children

# Chapter 5.

## Care for the preterm baby

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### Preterm baby survival and care round the world

Each year 15 million babies are born preterm and their survival chances vary dramatically around the world (Blencowe et al., 2012) (Figure 5.1). For the 1.2 million babies born in high income countries, increasing complexity of neonatal intensive care the last quarter of the 20th century has changed the chances of survival at lower gestational ages. Middle-income and emerging economies have around 3.8 million preterm babies each year, and whilst some countries such as Turkey have halved deaths for preterm babies within a decade, other countries have made minimal progress (Chapter 6). South Asia and sub-Saharan Africa account for almost two-thirds of the world's preterm babies and over three-quarters of the

world's newborn deaths due to preterm birth complications (Chapter 2). Worldwide, almost half of preterm babies are born at home, and even for those born in facilities, essential newborn care is often lacking.

Most premature babies (>80%) are born between 32 and 37 weeks of gestation (moderate/late preterm), and die needlessly for lack of simple, essential care such as warmth and feeding support. About 10% of preterm babies are born 28 to <32 weeks gestation, and in low-income countries more than half of those will die but many could be saved with feasible care, not including intensive care such as ventilation (Figure 5.2). For babies born before 28 weeks gestation, intensive care would be needed to save most of these, but it is important to



Photo: Gavi/UNICEF/Save the Children

**High-income countries**  
Access to full intensive care  
(1.2 million preterm babies)



Photo: Bill & Melinda Gates Foundation/Fredrik Gullberg

**Middle-income countries**  
Neonatal care units  
(3.8 million preterm babies)



Photo: Save the Children

**Low-income countries**  
Home birth and care at home  
(5.6 million preterm babies)



Photo: Panos/Save the Children

**Low-income countries**  
Facility births but limited space, staff and equipment  
(4.4 million preterm babies)

Figure 5.1: Worlds apart: the four settings where 15 million preterm babies receive care

*"I never thought that this baby would survive; I thought it would die any time"*

— Mother of moderately preterm baby at home in Eastern Uganda (Waiswa et al., 2010)

realize that these are the minority – about 5% of premature babies. Yet in many countries, families and health care providers still perceive the deaths of any premature baby as inevitable.

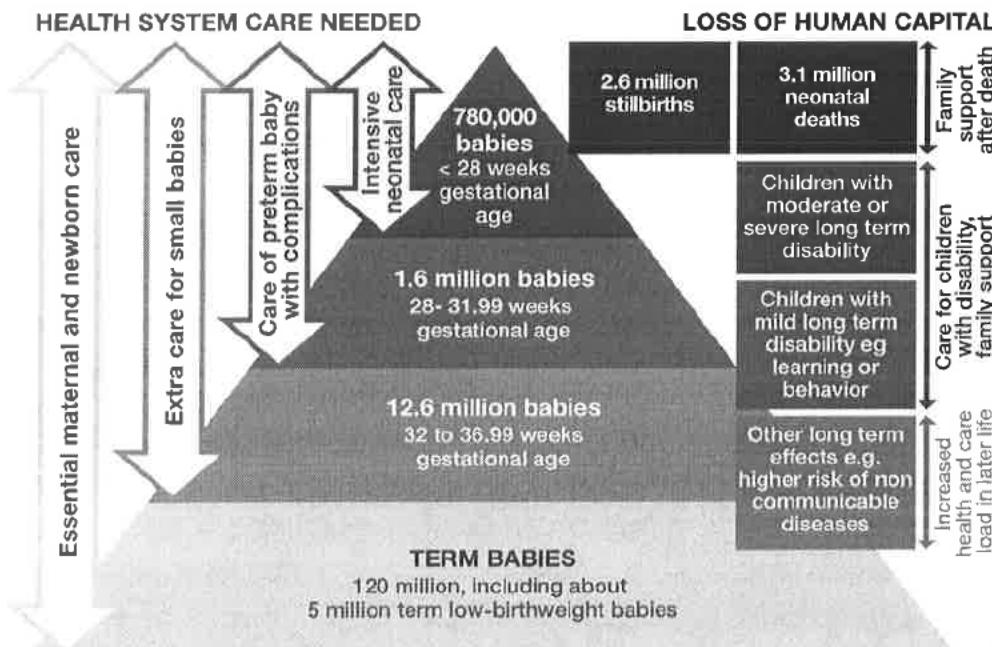
In contrast, neonatal survival is extending to lower and lower extremes of gestational age in high-income settings. In 1990, few babies under 25 weeks gestation were surviving; yet by 2010, 95% of preterm babies under 28 weeks survived, and more than half of the babies born before 25 weeks gestation survived, although the latter have a higher risk of impairment (Petrou et al., 2006).

Over the last few decades the survival gap for babies born in high-income countries and babies born in the poorest countries has widened dramatically, even though the pace of survival gains in high-income countries has slowed reaching the extremes of preterm gestation. For example, North America is still achieving an average annual

reduction of more than 5% per year for preterm-specific mortality, yet Africa on average is improving mortality rates for preterm babies by only 1% a year (Figure 5.3). Those countries with the highest risk of death and the most feasible deaths to avert are still experiencing the least progress. The history of neonatal care in high income countries shows that the major reduction in deaths occurred before neonatal intensive care was established. Yet the risk of a neonatal death due to complications of preterm birth is about twelve times higher for an African baby than for a European baby (Liu et al., 2012) (Figure 5.2).

An important but under-recognized issue for all countries is that of disability for survivors of preterm birth (see Chapter 2). In the early days of neonatal intensive care, disabilities were common amongst survivors, ranging from some school learning disability through to severe cerebral palsy. Impairment outcomes have a heavy toll on families and on the health system. Indeed a recent report estimated that the average

Figure 5.2: 135 million newborns and 15 million premature babies - health system needs and human capital outcomes



Source: Analysis using data from Blencowe et al., 2012; Cousens et al., 2011; Liu et al., 2012

baby born 28 to 31 weeks gestation in the United States costs \$95,000 in medical care in the first year alone (Behrman and Butler, 2006). Over time the pattern of impairment from preterm birth in high-income countries has shifted. The focus of intensive care has shifted to extremely premature babies (less than 28 weeks), or "micro preemies" as this smaller subset of babies has increased risk and severity of impairment (Marlow et al., 2005; Petrou et al., 2006).

Recent data show that even late and moderate preterm (LAMP, or 32 to <37 weeks gestation) is also associated with significant adverse effects, including on school learning, prompting increasing debate regarding avoidable causes of moderate preterm birth such as high cesarean birth rates (Osrin, 2010; Shapiro-Mendoza and Lackritz, 2012). These long-term effects on society and on the health system as well as more evidence of the link with non-communicable diseases in later adult life (see Chapter 1) underline that importance of addressing preterm birth is beyond survival.

Over the last four decades with an increasing evidence-based care for premature babies in high-income countries, the risk of long-term impairments is reducing. Neonatal intensive care has also become less interventionist and hence some aspects are also potentially more feasible to adapt to lower-income settings. Notable advances in quality of intensive care for premature babies include:

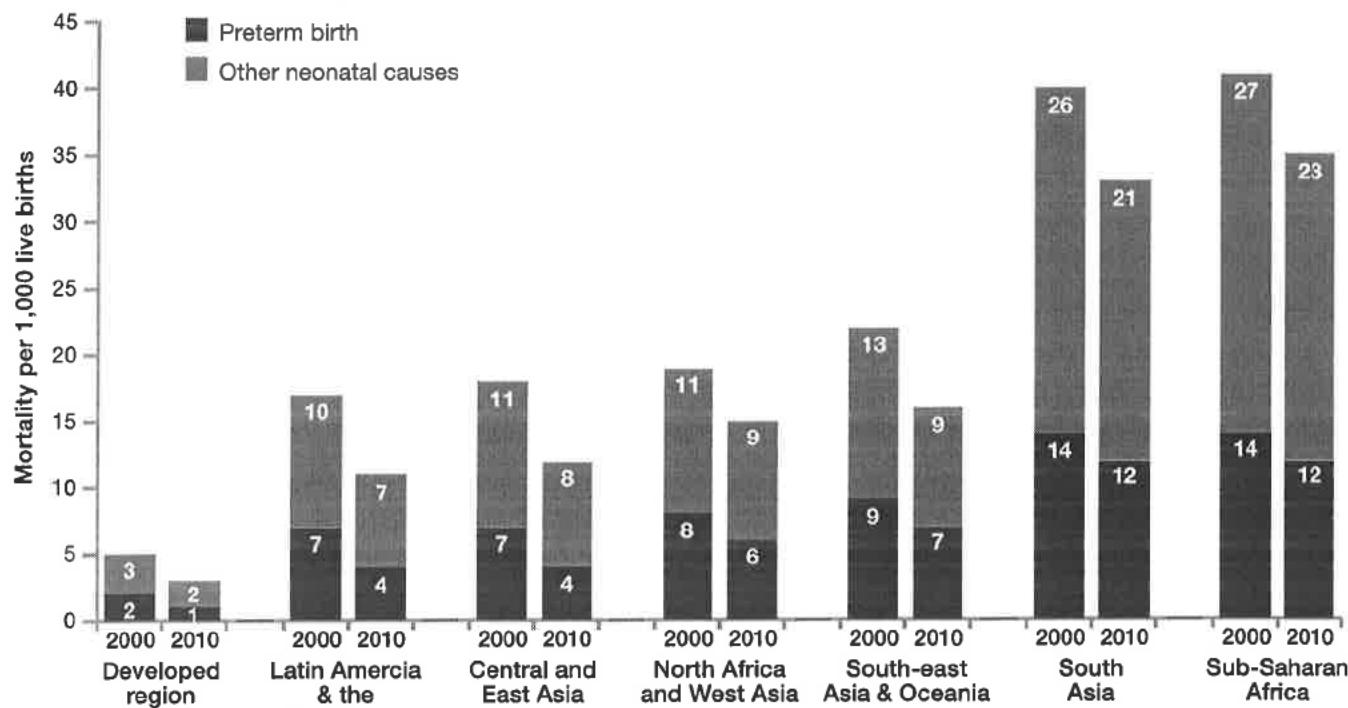
- Widespread use of antenatal corticosteroids in high- and some middle-income countries following multiple RCTs and the National Institute of Health consensus statement ("The effect of antenatal steroids for fetal maturation on perinatal outcomes statement," 1994),

ensuring that babies are less likely to develop respiratory distress syndrome (RDS), or have less severe RDS (Mwansa-Kambafwile et al., 2010; Roberts and Dalziel, 2006).

- A shift to less intensive ventilator pressures and increasing use of continuous positive airway pressure (CPAP), now often the respiratory support method of choice (De Paoli et al., 2003).
- Detailed quality of care protocols and "job aids" for almost every aspect of care have improved quality and also shifted more care to the responsibility of skilled neonatal nurses, particularly with respect to addressing infection prevention, feeding support, use of intravenous fluids, and safe oxygen use with careful tracking of oxygen saturation levels (Sola et al., 2008) and follow-up services.
- Deliberate attention to baby friendly care, reducing pain and over stimulation and more family friendly care, including family rooms linked to neonatal units and increased access for parents to their babies while in neonatal care units. (Symington and Pinelli, 2003).

In low- and middle-income countries, there are limited comparable data on long-term outcomes after preterm

Figure 5.3: Increasing survival gap for preterm babies around the world: Regional variation in preterm birth as direct cause of neonatal deaths showing change between 2000 to 2010



### Box 5.1: Preterm babies face specific risks

- Feeding difficulties since the coordinated suck and swallow process only starts at 34 weeks gestation. Preterm babies need help to feed and are more likely to aspirate.
- Severe infections are more common, and premature babies are at higher risk of dying once they get an infection. The majority of babies who die from neonatal sepsis are preterm.
- Respiratory Distress Syndrome due to lung immaturity and lack of surfactant in the alveoli, resulting in collapsing lungs that take extra pressure to inflate. Below 32 weeks gestation, the majority of babies develop RDS, although this risk can be reduced by antenatal corticosteroids injections to women at risk or preterm labor, or in preterm labor.
- Jaundice is more common in premature babies since the immature liver cannot easily metabolize bilirubin, and once jaundiced, the preterm baby's brain is at higher risk since their blood-brain barrier is less well developed to protect the brain.
- Brain injury in preterm babies is most commonly intraventricular hemorrhage, occurring in the first few days after birth in about 1 in 5 babies under 2,000 g and is often linked to severity of RDS and hypotension. Less commonly, preterm babies may have hypoxic brain injury with white matter loss which differs from that seen in the brain of term babies (Volpe, 2009).
- Necrotizing enterocolitis is a rarer condition affecting the intestinal wall of very premature babies, with a typical X-ray image of gas in the bowel wall. Formula feeding increases the risk tenfold compared to babies who are fed breast milk alone (Schanler, 2001).
- Retinopathy of prematurity due to abnormal proliferation of the blood vessels around the retina of the eye, which is more severe if the baby is given too high levels of oxygen.
- Anemia of prematurity, which often becomes apparent at a few weeks of age due to delay in producing red blood cells as the bone marrow is immature.

birth (Lawn et al., 2009b; Mwaniki et al., 2012). However, small studies suggest a high risk of moderate or severe neurodevelopmental impairment and an urgent need to improve awareness, data and care. Retinopathy of prematurity caused an epidemic of blindness for preterm babies in Europe and North America 50 years ago, especially after high or unmonitored use of oxygen. Data from Latin America show increasing rates of retinopathy of prematurity (Gilbert et al., 1997; Gilbert, 2008) and it is likely that areas without data such as Southeast Asia are also experiencing an increase, recreating an avoidable problem. As neonatal care is improved and complexity increases, monitoring quality of care and tracking impairment outcomes are critical and should

not be considered an optional extra in low-resource settings. Urgent attention is needed to develop standard, simpler measures of such impairments and integrate these metrics into other measurement systems and also provide support for such babies and their families (Lawn et al., 2009b).

### Priority packages and evidence-based interventions

All newborn babies are vulnerable given that birth and the following few days hold the highest concentrated risk of death of any time in the human lifespan. Every baby needs essential newborn care, ideally with their mothers providing warmth, breastfeeding and a clean environment.

Table 5.1: Life-saving essential and extra newborn care

Risk for all babies, especially those who are preterm	Essential care for all babies	Extra care for preterm babies
<b>Hypothermia = low body temperature</b> (Increased risk of infections, mortality, and for preterm babies increased risk of RDS)	<b>Thermal care</b> Drying, warming, skin-to-skin and delayed bathing	<b>Extra thermal care</b> Kangaroo Mother Care, baby hats, blankets, overhead heaters, incubators
<b>Cord and skin infections, neonatal sepsis</b>	<b>Hygienic cord and skin care at birth and home care practices</b> Hand washing and other hygiene Delayed cord clamping Consider chlorhexidine	<b>Extra attention to infection prevention and skin care</b> Consider chlorhexidine and emollients
<b>Hypoglycemia = low blood sugar</b> (Increased risk of impairment or death)	<b>Early and exclusive breastfeeding</b>	<b>Extra support for breastfeeding</b> e.g., expressing and cup or tube feeding, supplemented breast milk if indicated Lack of breast milk is a risk factor for necrotising enterocolitis in preterm babies
<b>Hypoxia = low oxygen levels</b> (Increased risk of impairment or death and for preterm babies, higher risk of RDS and intracranial bleeding)	<b>Neonatal resuscitation if not breathing at birth</b> Bag-and-mask resuscitation with room air is sufficient for >99% of babies not breathing at birth	<b>Safe oxygen use</b> Monitored oxygen use e.g., in head box or with nasal cannula, routine use of pulse oximeters

Premature babies are especially vulnerable to temperature instability, feeding difficulties, low blood sugar, infections and breathing difficulties (Table 5.1). There are also complications that specifically affect premature babies (Box 5.1).

Saving lives and preventing disability from preterm birth can be achieved with a range of evidence-based care increasing in complexity and ranging from simple care such as warmth and breastfeeding up to full intensive care (Table 5.2). The packaged interventions in this chapter are adapted from a recent extensive evidence review and a consensus report, "Essential Interventions Commodities and Guidelines for Reproductive Maternal, Newborn and Child Health" (PMNCH, 2011).

Recognition of small babies and distinguishing which ones are preterm are essential first steps in prioritizing care for the highest risk babies. First trimester ultrasound assessment is the most accurate measure, but this is not available for most of the world's pregnant women (Chapter 2, Table 2.3). Other options include Last Menstrual Period, using birthweight as a surrogate or assessment of the baby to estimate gestational age (e.g., Dubowitz or other simpler scoring methods). The highest-risk babies are those that are both preterm and growth restricted.

## Package 1: Essential and extra newborn care

Care at birth from a skilled provider is crucial for both women and babies and all providers should have the competencies to care for both mother and baby, ensuring that mother and baby are not separated unnecessarily, promoting warmth, early and exclusive breastfeeding, cleanliness

and resuscitation if required (WHO, 2010). These practices are essential for full-term babies, but for premature babies, missing or delaying any of this care can rapidly lead to deterioration and death. For all babies at birth, minutes count.

### Thermal care

Simple methods to maintain a baby's temperature after birth include drying and wrapping, increased environmental temperature, covering the baby's head (e.g., with a knitted cap), skin-to-skin contact with the mother and covering both with a blanket (McCall et al., 2005) (WHO, 1997a). Delaying the first bath is promoted, but there is a lack of evidence as to how long to delay, especially if the bath can be warm and in a warm room (Penny-MacGillivray, 1996). Kangaroo Mother Care (KMC) has proven mortality effect for babies <2,000 g and is discussed below. Equipment-dependent warming



Photo: Sanjana Shrestha/Save the Children

**Table 5.2:** Priority evidence-based packages and interventions for preterm babies

Essential Newborn Care For All Babies	Grade
Thermal care (drying, warming, skin-to-skin and delayed bathing) Hygienic cord and skin care Early initiation, exclusive breastfeeding	Evidence: Low to moderate Recommendation: Strong
Neonatal resuscitation for babies who do not breathe at birth	Evidence: Low to moderate Recommendation: Strong
Extra Care For Small Babies	
Kangaroo Mother Care for small babies (birthweight <2,000 g) Extra support for feeding	Evidence: Moderate to high Recommendation: Strong
Care For Preterm Babies With Complications	
Case management of babies with signs of infection Safe oxygen management and supportive care for RDS Case management of babies with significant jaundice	Evidence: Moderate to high* Recommendation: Strong
Hospital care of preterm babies with RDS including if appropriate, CPAP and/or surfactant	Evidence: Moderate to high* Recommendation: Strong
Intensive neonatal care	Evidence: High* Recommendation: Strong

Sources: Adapted from The Healthy newborn: A reference guide for program managers (Lawn et al., 2001), and PMNCH Essential Interventions (PMNCH, 2011) using WHO guidelines, LIST, Cochrane and other reviews, with detailed references in text. \* Note that the evidence is mostly from high-income countries and more context specific research required in middle- and low-income settings

techniques include warming pads or warm cots, radiant heaters or incubators and these also require additional nursing skills and careful monitoring (WHO, 1997a). Sleeping bags lack evidence for comparison with skin-to-skin care or of large-scale implementation. There are several trials suggesting benefit for plastic wrappings but, to date, these have been tested only for extremely premature babies in neonatal intensive care units (Duman et al., 2006).

established with lower incidence of infection and necrotizing enterocolitis and improved neurodevelopmental outcome (Edmond et al., 2007; Hurst, 2007). Most premature babies require extra support for feeding with a cup, spoon or another device such as gastric tubes (either oral or nasal) (WHO, 2011a; Lawn et al., 2001). In addition, the mother requires support for expressing milk. Where this is not possible, donor milk is recommended (WHO, 2011a). In populations with high HIV prevalence, feasible solutions for pasteurisation are critical. Milk-banking services are common in many countries and must be monitored for quality and infection prevention. Extremely preterm babies under about 1,000 g and babies who are very unwell may require intravenous fluids or even total parenteral nutrition, but this requires meticulous attention to volume and flow rates. Routine supplementation of human milk given to premature babies is not currently recommended by WHO. WHO does recommend supplementation with vitamin D, calcium and phosphorus and iron for very low birthweight babies (WHO, 2011) and vitamin K at birth for low birthweight babies (WHO et al., 2003a; WHO, 2012).

## Infection prevention

Clean birth practices reduce maternal and neonatal mortality and morbidity from infection-related causes, including tetanus (Blencowe et al., 2011). Premature babies have a higher risk of bacterial sepsis. Hand cleansing is especially critical in neonatal care units. However basic hygienic practices such as hand washing and maintaining a clean environment are well known but poorly done. Unnecessary separation from the mother or sharing of incubators should be avoided as these practices increase spread of infections. For the poorest families giving birth at home, the use of clean birth kits and improved practices have been shown to reduce mortality (Seward et al., 2012).

Recent cluster-randomized trials have shown some benefit from chlorhexidine topical application to the baby's cord and no identified adverse effects. To date, about half of trials have shown a significant neonatal mortality effect especially for premature babies and particularly with early application, which may be challenging for home births (Arifeen et al., 2012; Soofi et al., 2012; Tielsch et al., 2007). Another possible benefit of chlorhexidine is a behavior change agent — in many cultures around the world, something is applied to the



Photo: Joshua Roberts/Save the Children

## Feeding support

At the start of the 20th century, Pierre Budin, a famous French obstetrician, led the world in focusing on the care of "weaklings," as premature babies were known then. He promoted simple care—warmth, breastfeeding and cleanliness. However, by the middle of the 20th century, formula milk was widely used and the standard text books said that premature babies should not be fed for the first few days. After 1960, the resurgence of attention and support for feeding of premature babies was an important factor in reducing deaths before the advent of intensive care (Greer, 2001).

Early initiation of breastfeeding within one hour after birth has been shown to reduce neonatal mortality (Bhutta et al., 2008; Edmond et al., 2006; Mullany et al., 2008). Premature babies benefit from breast milk nutritionally, immunologically and developmentally (Callen and Pinelli, 2005). The short-term and long-term benefits compared with formula feeding are well

cord and a policy of chlorhexidine application may accelerate change by substituting a helpful substance for harmful ones.

The skin of premature babies is more vulnerable, and is not protected by vernix like a term baby's. Topical application of emollient ointment such as sunflower oil or Aquaphor™ reduces water loss, dermatitis and risk of sepsis (Soll and Edwards, 2000) and has been shown to reduce mortality for preterm babies in hospital-based trials in Egypt and Bangladesh (Darmstadt et al., 2004; Darmstadt et al., 2007). Three trials are now testing the effect of emollients in community settings in South Asia, but as yet there are none being conducted in Africa (Duffy et al., 2011). This is a potentially scaleable, simple approach to save lives even where most births are at home.

Another effective and low cost intervention is appropriate timing for clamping of the umbilical cord, waiting 2-3 minutes or until the cord stops pulsating, whilst keeping the baby below the level of the placenta. For preterm babies this reduces the risk of intracranial bleeding and need for blood transfusions as well as later anemia. Yet this intervention has received limited attention (McDonald and Middleton, 2008). Possible tension between delayed cord clamping and active management of the 3rd stage of labor with controlled cord traction has been debated, but the Cochrane review and also recent-evidence statements by obstetric societies support delayed cord clamping for several minutes in all uncomplicated births (Leduc et al., 2009).

## Package 2: Neonatal resuscitation

Between 5 to 10% of all newborns and a greater percentage of premature babies require assistance to begin breathing at birth (Wall et al., 2009). Basic resuscitation through use of a bag-and-mask or mouth-to-mask (tube and mask) will save four out of every five babies who need resuscitation; more complex procedures, such as endotracheal intubation, are required only for a minority of babies who do not breathe at birth and who are also likely to need ongoing ventilation. Recent randomized control trials support the fact that in most cases assisted ventilation with room air is equivalent to using oxygen, and unnecessary oxygen has additional risks (Saugstad et al., 2006). Expert opinion suggests that

basic resuscitation for preterm births reduces preterm mortality by about 10% in addition to immediate assessment and stimulation (Lee et al., 2011). An education program entitled *Helping Babies Breathe* has been developed by the American Academy of Pediatrics and partners for promotion of basic neonatal resuscitation at lower levels of the health system in low-resource settings and is currently being scaled up in over 30 low-income countries and promises potential improvements for premature babies (Chapter 6, Box 6.5) (WHO, 1997b; WHO, resuscitation guidelines, forthcoming, American Academy of Pediatrics et al., 2010; Singhal et al., 2012).

## Package 3: Kangaroo Mother Care

KMC was developed in the 1970s by a Colombian pediatrician, Edgar Rey, who sought a solution to incubator shortages, high infection rates and abandonment among preterm births in his hospital (Charpak et al., 2005; Rey and Martinez, 1983). The premature baby is put in early, prolonged and continuous direct skin-to-skin contact with her mother or another family member to provide stable warmth and to encourage frequent and exclusive breastfeeding. A systematic review and meta-analysis of several randomized control trials found that KMC is associated with a 51% reduction in neonatal mortality for stable babies weighing <2,000g if started in the first week, compared to incubator care (Lawn et al., 2010). These trials



Photo: Jean Warrin/Save the Children

all considered facility-based KMC practice where feeding support was available. An updated Cochrane review also reported a 40% reduction in risk of post-discharge mortality, about a 60% reduction in neonatal infections and an almost 80% reduction in hypothermia. Other benefits included increased breastfeeding, weight gain, mother-baby bonding and developmental outcomes (Conde-Agudelo et al., 2011). In addition to being more parent and baby friendly, KMC is more health-system friendly by reducing hospital stay and nursing load and therefore giving cost savings (Lima et al., 2000). KMC was endorsed by the WHO in 2003 when it developed a program implementation guide (WHO, 2003b). Some studies and program protocols have a lower weight limit for KMC, e.g., not below 800g, but in contexts where no intensive care is available, some babies under 800g do survive with KMC and more research is required before setting a lower cut off. Despite the evidence of its cost effectiveness, KMC is underutilized although it is a rare example of a medical innovation moving from the Southern hemisphere, with recent rapid uptake in neonatal intensive care units in Europe (Lawn et al., 2010).

## **Package 4: Special care of premature babies and phased scale up of neonatal intensive care**

Moderately-premature babies without complications can be cared for with their mothers on normal postnatal wards or at home, but babies under 32 weeks gestation are at greater risk of developing complications and will usually require

hospital admission. Fewer babies are born under 28 weeks of gestation and most of these will require intensive care.

### **Care of babies with signs of infection**

Improved care involves early detection of such danger signs and rapid treatment of infection, while maintaining breastfeeding if possible (WHO, 2005; WHO, 2007). Identification is complicated by the fact that ill premature babies may have a low temperature, rather than fever. First level management of danger signs in newborns has relatively recently been added to Integrated Management of Childhood Illness guidelines (WHO et al., 2005; The Young Infants Clinical Signs Study Group, 2008). WHO recommends that all babies with danger signs be referred to a hospital. Where referral is not possible, then treatment at the primary care center can be lifesaving.

### **Care of babies with jaundice**

Premature babies are at increased risk of jaundice as well as infection, and these may occur together compounding risks for death and disability (Mwaniki et al., 2012). Since severe jaundice often peaks around day 3, the baby may be at home by then. Implementation of a systematic predischarge check of women and their babies would be an opportunity to prevent complications or increase careseeking, advising mothers on common problems, basic home care and when to refer their baby to a professional.

### **Babies with Respiratory Distress Syndrome**

For premature babies with RDS, methods for administering oxygen include nasal prongs, or nasal catheters. Safe oxygen management is crucial and any baby on continuous oxygen therapy should be monitored with a pulse oximeter (Duke et al., 2009).

The basis of neonatal care of very premature babies since the 1990s was assisted ventilation. However, reducing severity of RDS due to greater use of antenatal corticosteroids and increasing concerns about lung damage prompted a shift to less intensive respiratory support, notably CPAP commonly using nasal prongs to deliver pressurized, humidified, warmed gas (air and/or oxygen)

to reduce lung and alveoli collapse (Sankar et al., 2008). This model of lower intensity may be feasible for wider use in middle-income countries and for some low-income countries that have referral settings with stronger systems support such as high-staffing, 24-hour laboratories.

Recent trials have demonstrated that CPAP reduces the need for positive pressure ventilation of babies less than 28 weeks gestation, and the need for transfer babies under 32 weeks gestation to neonatal intensive care units (Finer et al., 2010; Gittermann et al., 1997; Morley et al., 2008). One very small trial in South Africa comparing CPAP with no ventilation among babies who were refused admission to neonatal intensive care units found CPAP reduced deaths (Pieper et al., 2003). In Malawi, a CPAP device developed for low-resource settings is being trialed in babies with respiratory distress who weigh over 1,000g. Early results are encouraging, and an important outcome will be to assess the nursing time required and costs (Williams, 2010).

Increasing use of CPAP without regulation is a concern. Many devices are in the “homemade” category; several low-cost bubble CPAP devices are being developed specifically for low-income countries but need to be tested for durability, reliability and safety (Segre, 2012a). CPAP-assisted ventilation requires adequate medical and nursing skill to apply and deliver safely and effectively, and also requires other supportive equipment such as an oxygen source, oxygen-monitoring device and suction machine.

Surfactant is administered to premature babies' lungs to replace the missing natural surfactant, which is one of the reasons babies develop RDS. The first trials in the 1980s demonstrated mortality reduction in comparison to ventilation alone, but it was 2008 before the drug was added to the WHO Essential Medicine list (WHO, 2011b). Uptake is limited in middle- and especially low-income countries as the current products can only be feasibly administered in a well-equipped and staffed hospital that can intubate babies. The cost also remains a significant barrier. In India, surfactant costs up to \$600 for a dose (Vidyasagar et al., 2011). Data from India and South Africa suggest that surfactant therapy is restricted to use in babies with potential for better survival, usually over 28



weeks' gestation due to its high price (Vidyasagar et al., 2011). Costs may be reduced by synthetic generics and simplified administration, for example with an aerosolized delivery system, but before wide uptake is recommended, studies should assess the additional lives saved by surfactant once antenatal corticosteroids and CPAP are used.

## Evidence limitations

Most published trials come from high-income countries where care for premature babies assumes the presence of neonatal intensive care, and often large multi-site trials are required to examine the incremental effect of a change in care. Few rigorous trials are undertaken in lower-income settings where severe morbidity and even fatal outcomes are common and contextual challenges may be critical. Ironically, more of the large recently funded rigorous trials are community-based, such as those assessing chlorhexidine and emollients (Duffy et al., 2011), and there is an urgent need for more facility-based research addressing quality of care which includes cost analyses.

There were a number of interventions considered in the PMNCH essential interventions review process that are

used in high-income settings for premature babies but were not included in the global recommendations for scale up due to lack of context-specific evidence on cost effectiveness – for example, caffeine citrate to reduce the risk of apnea of prematurity (Bhutta et al., 2011). Thus, more evidence from low-income settings is required.

## Program opportunities for scale up of care

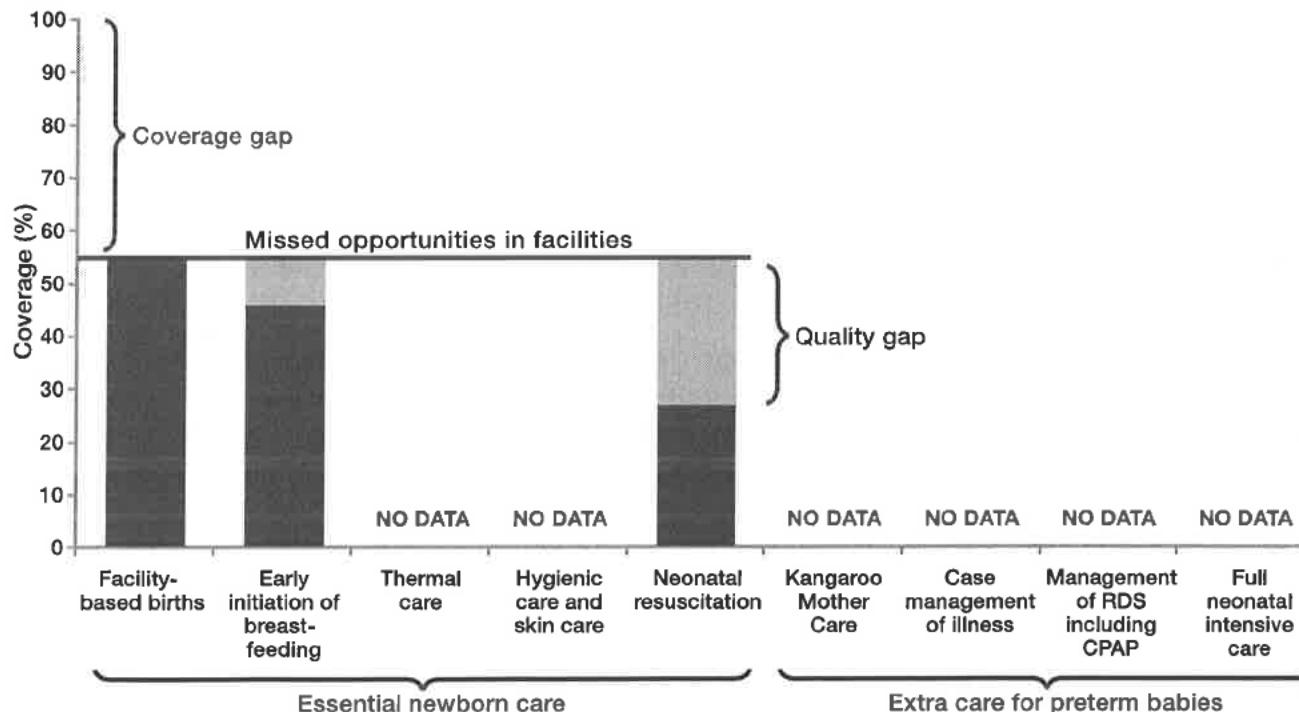
National coverage data for many of the evidence-based interventions for premature babies are lacking even in high-income settings, hence it is difficult to assess the global situation for care of premature babies or indeed for several important newborn care interventions (Figure 5.4).

For the 50 million home births without skilled care, the poorest women in the poorest countries, a major care gap is obvious. In sub-Saharan Africa, more than half of home births are alone, with no attendant (UNICEF, 2012). In South Asia, around one-thirds of home births are without traditional birth attendants. In these instances, the primary caregivers of babies are their mothers and their families. Ensuring that women and communities are informed about

healthy home care and enabled to care for their newborns and especially their preterm babies in the best possible way is critical. Women's groups offer peer counseling and community mobilisation have been shown to have a significant effect on neonatal mortality in at least half of the trials in Asia and Africa to date (Lassi et al., 2010; Manandhar et al., 2004).

The increasing pace of policy and program change for home-visit packages during pregnancy and after birth provides an opportunity to empower women to have a better outcome themselves and for their babies (WHO et al., 2009). An early postnatal visit (within two days of birth) is one of only seven coverage indicators along the continuum of care selected by the United Nations Commission on Information and Accountability and tracked by Countdown to 2015 (Commission on Information and Accountability, 2011; Requejo et al., 2012). In the 75 Countdown to 2015 priority countries, only 1 in 3 women and babies have an early postnatal visit –the lowest of the seven indicators. This early visit is critical for survival and health and an important opportunity to identify preterm babies. Novel methods for identification of premature babies include community health workers using foot size to identify those babies and then

Figure 5.4: Missed opportunities to reach preterm babies with essential interventions, median for Countdown to 2015 priority countries



Data sources: Adapted (Kinney et al., 2010) using data from UNICEF Global Databases (UNICEF, 2012) based on Demographic Health Surveys, Multiple Indicator Cluster Surveys and other national surveys, neonatal resuscitation from LIST ("LIST: The Lives Saved Tool. An evidence-based tool for estimating intervention impact," 2010).

### Box 5.2: Kangaroo Mother Care – what works to accelerate progress towards scale?

#### **Preparation and national buy-in by key stakeholders**

- Identify national champions to understand and address the barriers to expansion of KMC.
- Interact with policymakers, service providers and donors regarding the evidence for KMC as a cost-effective intervention, sharing experiences from other countries.
- Enable catalytic learning visits - internal or external - for policymakers and service providers, to see KMC implementation, and tiny preterm babies surviving with KMC, recognize that KMC is used in neonatal intensive care units in high-income countries and is not just a second best option, and that initial cultural reluctance, or modesty concerns can be overcome.
- Establish a Ministry of Health led national level stakeholder process with support from implementing partners and ownership by nursing and medical associations.

#### **Planning and introduction**

- Develop national policy/strategy, service guidelines, training materials, job aids, supervisory systems and indicators to track implementation and monitor outcomes.
- Adapt KMC to the local setting, translation (e.g., “kumkumbatia mtoto kifuanī” = cuddle your baby in Kiswahili), locally tested counseling materials and posters addressing specific barriers e.g., re modesty.
- Establish learning centers strategically to maximize expansion (e.g., regional hospitals) and implement master training, transfer training, ongoing mentoring.
- Promote systems focus and district ownership and sustainable resource commitment for training and supervision. Equipment or commodities are not the limiting factor for scale up. Staff skills, leadership, ongoing quality improvement are fundamental to success.



Photo: Joshua Roberts/Unicef/Unicef

#### **Institutionalizing, increasing coverage and quality**

- Integrate KMC with other training packages and supervision systems and institutionalize within pre-service medical and nursing education including adequate practical KMC experience.
- Integrate KMC and other newborn care indicators into national HMIS, national household surveys and quality improvement systems and use this data to review coverage and quality of services, linking to national, and district health annual workplans.
- Expand newborn care services using KMC as an entry point to improve the care of preterm babies including feeding support, safe oxygen use and training for preterm baby care especially for nurses.

providing extra visits, breastfeeding support and referral to a facility if needed (Marchant et al., 2010).

As well as gaps in coverage of crucial interventions for women and babies, there are equity gaps between rich and poor, public and private health sectors, provinces and districts and among rural, urban and peri-urban populations. Complex, facility-based interventions tend to have a higher level of inequity than simpler interventions that can be delivered closer to home (Barros et al., 2012). For example, there is low inequity for immunization and antenatal care, while higher

disparities exist for skilled attendance coverage (Victora and Rubens, 2010). Among the 54 of 75 Countdown to 2015 priority countries with equity data, birth in a health facility is more than twice as likely for a richer family compared to a poorer family (Barros et al., 2012).

Many African and most South Asian countries are experiencing increases in health facility births, some very rapidly (Requejo et al., 2012). However, the quality of care has not kept pace with coverage, leaving a quality gap but also giving cost-effective opportunities for lifesaving care for

women and babies who are reachable in health facilities. For example, midwives are skilled and equipped to provide essential newborn care and resuscitation if needed. However, often key commodities or attention to infection prevention are lacking. Perinatal audit data are a powerful tool for improving quality of care and can also be collated and used for national or subnational improvement of care (Pattinson et al., 2009).

Figure 5.4 shows the coverage and quality gaps for premature baby care in the Countdown to 2015 priority countries, highlighting the data gaps. With just over 50% of all births taking place in health facilities, essential newborn care could be provided for all those babies. Yet data show even the apparently simple practices of hand cleansing and warmth in the labor room are poorly done around the world (Knobel et al., 2005). Early initiation of breastfeeding is tracked by

national household surveys but the practices for premature babies and duration of breastfeeding preterm are not known at national level.

Neonatal resuscitation scale up is benefitting from recent innovation in technology and from public-private partnerships (American Academy of Pediatrics et al., 2010). However, data from Service Provision Assessment surveys suggested that under half of all skilled birth attendants had resuscitation skills and/or the correct equipment in terms of bag-and-mask (Figure 5.4) (Wall et al., 2009).

KMC, despite being established for more than 20 years, has had limited scale up (Box 5.2). It is currently implemented on a large scale in only a few countries such as Colombia, Brazil and South Africa. There has also been rapid uptake in neonatal intensive care units in high-income countries, including

### Box 5.3: The right people for reducing deaths and disability in preterm babies



#### Community Level/Home

- Mothers and Fathers
- Community Health Workers, Extension workers and outreach nurses or midwives



#### First Level/Outreach

- Nurse and midwives also with skills for newborn care
- Medical assistants or clinical officers
- Extension workers
- Ward attendants



#### Referral Level/District Hospital

- Nurse and midwives with higher skills in newborn care (e.g., KMC, management of sepsis and RDS)
- Doctor and specialists
- Content-specific cadres e.g. medical assistants, clinical officers

**Table 5.3: Tools, technologies, and innovations required for the care of preterm babies**

Priority packages and interventions	Current technology/Tools	Technological innovations required
<b>ALL BABIES</b>		
Essential newborn care and extra care for preterm babies <ul style="list-style-type: none"> <li>Thermal care (drying, warming, skin-to-skin and delayed bathing)</li> <li>Early initiation, exclusive breastfeeding</li> <li>Hygienic cord and skin care</li> </ul>	<ul style="list-style-type: none"> <li>Protocols for care, training materials and job aids</li> <li>Materials for counselling, health education and health promotion</li> <li>Weighing scales</li> <li>Cord clamp and scissors, clean birth kit if appropriate</li> <li>Vitamin K for LBW babies</li> </ul>	<ul style="list-style-type: none"> <li>Generic communications and counselling toolkit for local adaptation</li> <li>Generic, modular training kit for adaptation, novel methods eg cell phone prompts</li> <li>Birth kits for frontline workers</li> <li>Chlorhexidine preparations for application to the umbilical cord</li> <li>Simplified approaches to identifying preterm babies such as footsize</li> </ul>
Neonatal resuscitation for babies who do not breathe at birth	<ul style="list-style-type: none"> <li>Materials for training and job aids</li> <li>Training manikins</li> <li>Newborn resuscitation devices (bag-and-mask)</li> <li>Suction devices</li> <li>Resuscitation stations with overhead heater</li> <li>Clock with large face and second hand</li> </ul>	<ul style="list-style-type: none"> <li>Wide scale novel logistics systems to increase availability of devices for basic resuscitation and training manikins</li> <li>Additional innovation for resuscitation devices (eg upright bag-and-mask, adaptable, lower cost resuscitation stations)</li> </ul>
<b>PRETERM BABIES</b>		
Kangaroo mother care for small babies (birthweight <2,000 g)	<ul style="list-style-type: none"> <li>Cloth or wrap for KMC</li> <li>Baby Hats</li> </ul>	Generic communications and counselling toolkit for local adaptation, Innovation to address cultural, professional barriers Generic, modular training kit and job aids for local adaptation
Care of preterm babies with complications including: <ul style="list-style-type: none"> <li>Extra support for feeding preterm and small babies</li> <li>Case management of babies with signs of infection</li> <li>Safe oxygen management and supportive care for RDS</li> <li>Case management of babies with significant jaundice</li> <li>Managing seizures</li> </ul>	<ul style="list-style-type: none"> <li>Nasogastric tubes, feeding cups, breast milk pumps</li> <li>Blood sugar testing sticks</li> <li>IV fluids including glucose and more accurate giving sets</li> <li>Syringe drivers</li> <li>Injection antibiotics, 1 cc syringes/27G needles, preloaded syringes</li> <li>Oxygen supply/concentrators</li> <li>Nasal prongs, headboxes, other O2 delivery systems</li> <li>Pulse oximeters to assess blood oxygen levels with reusable cleanable neonatal probes.</li> <li>Bilirubinometers (table top and transcutaneous)</li> <li>Phototherapy lamps and eye shades</li> <li>Exchange transfusion kits</li> <li>Hot cots, overhead heaters</li> </ul>	Lower-cost and more robust versions of: <ul style="list-style-type: none"> <li>Blood sugar testing for babies on low volume samples, heel pricks</li> <li>Oxygen condensers, including portable options</li> <li>Pulse oximeters and robust probes, including with alternative power options</li> <li>Syringe drivers able to take a range of syringes</li> <li>Bilirubin testing devices including lower cost transcutaneous devices</li> <li>Haemoglobin and blood Grouping, Rhesus Point of Care</li> <li>Point of care for C-reactive protein/procalcitonin</li> <li>Apnoea alarm</li> <li>Phototherapy devices such as portable "billed" to provide both phototherapy treatment and heat</li> </ul>
Neonatal intensive care	<ul style="list-style-type: none"> <li>Continuous Positive Air Pressure (CPAP) devices with standardized safety features</li> </ul>	<ul style="list-style-type: none"> <li>Lower-cost robust CPAP equipment with standardized settings</li> <li>Neonatal intensive care context specific "kits", e.g., district hospital with ongoing support for quality use and for equipment maintenance</li> <li>Surfactant as more stable, lower cost preparations</li> </ul>

Note this table refers to care after the baby is born so does not include other essential tools and technologies such as antenatal steroids, or critical commodities for the woman  
Sources: (East Meets West; WHO et al., 2003; Lawn et al., 2006; 2009a; PMNCH, 2011)

for ventilated babies (Nyqvist et al., 2010). Systematic scale up of KMC is making progress in some countries in sub-Saharan Africa and South Asia including Malawi (Blencowe et al., 2009), Tanzania, Rwanda, Ghana (Nguah et al., 2011), Indonesia and Vietnam (Bergh et al., 2012). In other countries, a KMC unit established in one teaching hospital over a decade ago has yet to benefit babies in the rest of the country. Lessons are being learned in overcoming barriers such as lack of knowledge by policy makers and service providers. Countries that are making more rapid progress have a national policy for KMC, a learning site, national champions and a plan for national implementation and have integrated training along with essential newborn care and resuscitation into pre-service medical and nursing education (Box 5.2). KMC can be safely delivered by trained patient attendants under the supervision of nurses, allowing nurses to look after the sickest neonates – a successful example of taskshifting (Blencowe et al., 2009). A major

impediment to program tracking and accountability is the lack of data for coverage of KMC, although this indicator could feasibly be tested for inclusion in household surveys.

Quality of service provision requires the availability of people with the right skills (Box 5.3) as well as essential equipment and drugs. Indeed, for newborn survival, skilled people are at least as critical as equipment and commodities (Table 5.3) (Honeyfield, 2009). Shortages of qualified health workers and inadequate training and skills for the care of premature babies are a major reason for poor progress in reducing neonatal deaths (Knippenberg et al., 2005; Victora and Rubens, 2010). Nurses or midwives with skills in critical areas such as resuscitation, KMC, safe oxygen management and breastfeeding support are the frontline worker for premature babies, yet in the whole of sub-Saharan Africa there are no known neonatal nurse training courses. Urgent systematic attention is required for preservice and inservice

training, non-rotation of nurses with skills in neonatal care, and where appropriate the development of a neonatal nurse cadre, as well as rewarding for those who work against the odds in hard-to-serve areas (Chapter 6).

While most premature babies are born just a few weeks early and can be saved with the right people and simple care, for more extreme premature babies, additional skills, equipment and commodities are critical, ranging from bag-and-mask and controlled IV fluid-giving sets, to CPAP and surfactant (Table 5.3). A premature baby suffering from RDS requires oxygen and safe monitoring of oxygen saturation levels with a pulse oximeter — however, this equipment is often unavailable. Likewise, prevention of hearing impairment for premature babies being treated for infection with gentamicin requires dose titration and, ideally, laboratory monitoring of gentamicin levels, which is often unavailable. The UN Commission on Life-saving Commodities for Women and Children has prioritized high-impact, neglected commodities, and these include several for the care of premature babies (Chapter 6, Box 6.6).

Addressing newborn care in district hospitals is a key priority for improving newborn survival and health. In most countries, district hospitals are understaffed and poorly resourced compared to teaching hospitals. There are a number of large-scale examples of improved newborn care in district hospitals including a network in rural Western Kenya (Opondo

et al., 2009). In Limpopo, South Africa, a network of more than 30 district hospitals instituted an accreditation scheme and targeted quality improvement with mentor teams (Robertson et al., 2010), and in another province, a program called Neonatal Experiential Learning reaches 16 hospitals with standard guidelines, a 2-week neonatal training course and monthly mentor visits. Across several Indian states, peripheral hospitals have developed a dedicated newborn care space, basic equipment and standard protocols and referral hospitals have had upgraded special-care baby units. Some also have experimented with the use of alternative cadres of ward aides specially trained in newborn care and restricted from rotations to other wards (Sen et al., 2007). Design and implementation of context-specific hospital newborn care packages is critical, especially as more births occur in facilities.

## Priority research for care of the premature newborn

Although 92% of premature babies are born in low- and middle-income countries and 99% of premature babies in these countries die, to date the vast majority of published research has been conducted in high-income countries (Lawn et al., 2008). Important health gains are achievable in the short term with delivery or implementation research, prioritizing the highest-impact interventions and the most significant constraints to scale up (Table 5.4) (Martines et al., 2005). For preterm birth, there is a major gap in developing, delivering and testing community-based interventions. A recent

systematic exercise ranked 55 potential research questions to address preterm birth and stillbirth at the community level and 29 experts applied a standardized scoring approach developed by the Child Health and Nutrition Research Initiative (George et al., 2011). The 10 top-ranked questions were all about delivery of interventions, notably demand approaches, such as

**Table 5.4:** Research priorities for reducing deaths and disability in preterm babies

Description
• Standardized, simplified metrics for assessing acute morbidities in premature babies and tools and protocols for comparable follow up of impairment and disability in premature babies
Discovery
• Biomarkers of neonatal sepsis • Sensitive, specific identification of sepsis in preterm and other newborns • Shorter course antibiotics, oral, fewer side effects • Stability of oral surfactant
Development
• Development of simpler, lower-cost, robust devices (See Table 5.3 for full list) • Simplified identification of preterm babies in communities, increased accuracy of GA in facilities • Community initiation of Kangaroo Mother Care
Delivery
Implementation research to understand and accelerate scaling up of facility based care: • KMC, including quality improvement, task shifting • Feeding support for preterm babies • Infection case management protocols and quality improvement • Improved care of RDS, including safe oxygen use protocols and practices • Infection prevention
Implementation research at community level • Simplified improved identification for premature babies • Referral strategies • Feasibility and effect of home care for preterm babies in humanitarian emergencies or where referral is not possible

overcoming financial barriers and use of incentives, but also supply such as community health workers tasks and supervision. The need for simplified, validated methods to identify premature babies at community level was ranked second of 55. Since the exercise was focused at the community level, equipment and facility-based innovations were not listed but are widely recognized to be of critical importance (Table 5.4). Most equipment is developed for high-income countries and requires development and testing in varying contexts in low- and middle-income countries (Powerfree Education Technology, 2012). Discovery research often requires a longer time frame but potentially could have high return, especially with prevention of preterm birth. Description research is also important, especially to address major data gaps for impairment outcomes in low- and middle-income

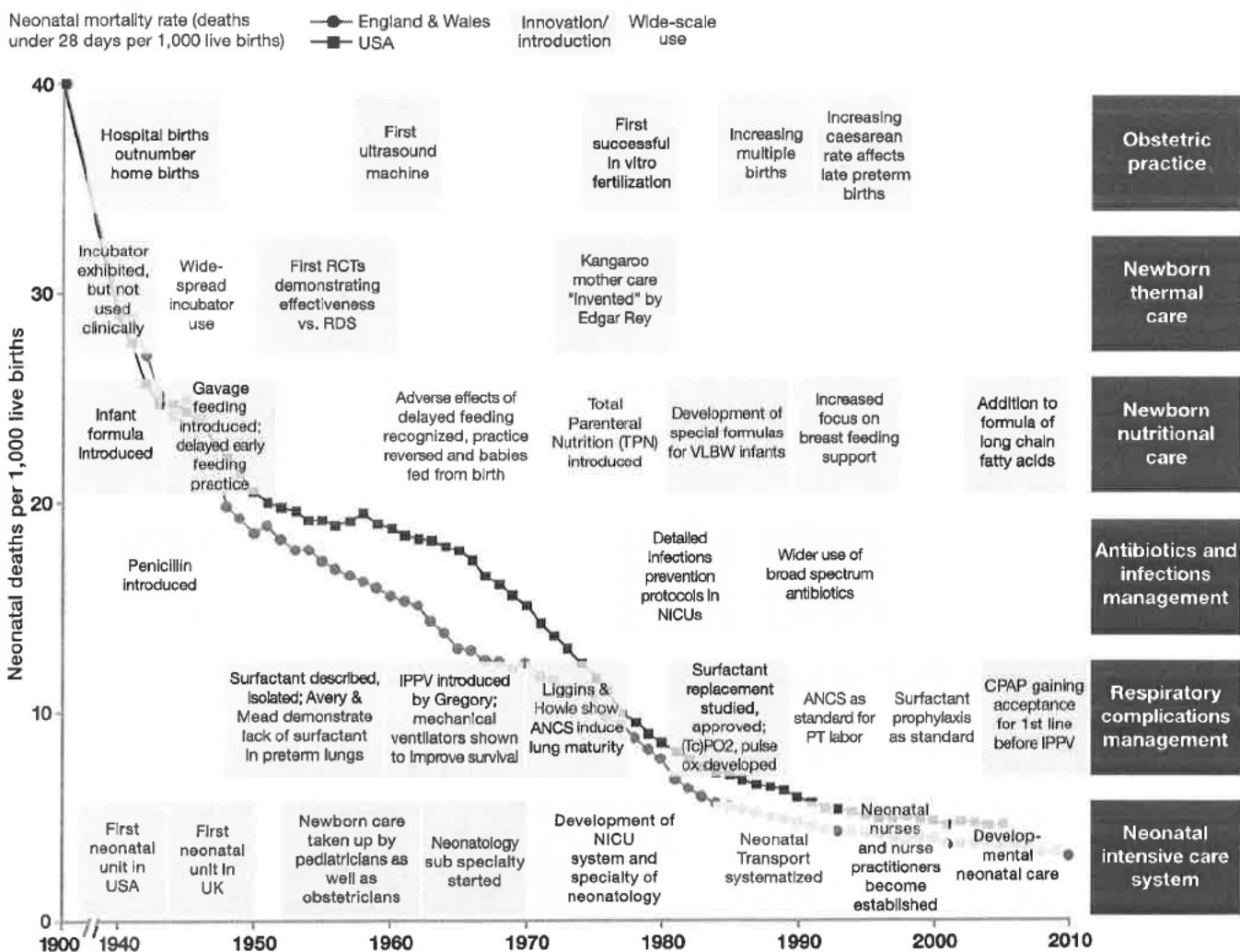
settings and promote more controlled assessment of some interventions, notably the impact of thermal care practices on mortality and morbidity.

## Prescription for action

The neonatal mortality rate (NMR) in the United Kingdom and the United States was reduced to below 15 per 1,000 live births before neonatal intensive care was widely available, and the largest reduction in NMR from 40 to 15 was related to obstetric care and simpler improvements in individualized newborn care such as warmth, feeding and infection prevention and case management (Figure 5.5).

Seven low- and middle-income countries have halved their preterm deaths within a decade (Chapter 6). These

**Figure 5.5: The history of neonatal care in the United Kingdom and the United States shows that dramatic declines in neonatal mortality are possible even before neonatal intensive care is scaled up**



Acronyms used: ANCS = antenatal corticosteroids, CPAP = continuous positive airways pressure, NICU = neonatal intensive care, IPPV = intermittent positive pressure ventilation, VLBW = very low birth weight  
 Sources: (Smith et al., 1983; NIH, 1985; Baker, 2000; Wegner, 2001; Philip, 2005; Jamison et al., 2006; Lissauer and Fanaroff, 2006; CDC, 2012; Office for National Statistics, 2012) with thanks to Boston Consulting Group

**Table 5.5: Actions for reducing deaths and disability in preterm babies**

<b>Invest and plan</b>	and do survive and thrive can be a turning point for clinical staff as well as also hospital management.
<b>Assess and advocate for newborn and preterm baby care, mobilize parent power</b>	
<ul style="list-style-type: none"> <li>• Review existing policies and programs to integrate high-impact care for premature babies</li> <li>• Train nurses for newborn care and include skilled personnel for premature baby care in human resource planning for all levels of the health system where babies are cared for</li> <li>• Ensure essential equipment and commodities are consistently available</li> </ul>	
<b>Implement</b>	
<b>Seize opportunities through other programs including</b> For all facility births ensure: <ul style="list-style-type: none"> <li>• immediate essential newborn care and neonatal resuscitation if needed</li> <li>• infection prevention and management</li> <li>• At community level scale up:</li> <li>• Pregnancy and postnatal home visits, including behavior change messages for families, as well as identification, extra care and referral for premature babies,</li> <li>• Breastfeeding promotion through home visits, well baby clinics, baby friendly hospital initiative</li> </ul>	Starting from existing program platforms at community level (e.g. home visit packages, women's groups) and at facility level to ensure effective care for all births at health facilities, is cost effective and more likely to show early results. However whilst families remain unreached, for example because of financial barriers to facility birth care, these gaps often mean those most at risk are unreached.
<b>Reach high coverage with improved care for premature babies especially</b> <ul style="list-style-type: none"> <li>• Kangaroo mother care and improved feeding for small babies</li> <li>• Antenatal corticosteroid use</li> <li>• Respiratory distress syndrome support, safe oxygen use</li> <li>• Audit and quality improvement processes</li> <li>• Provide family support</li> </ul>	
Where additional capacity consider:	
<ul style="list-style-type: none"> <li>• Additional neonatal care such as CPAP,</li> <li>• Referral level neonatal intensive care, with safeguards to ensure the poor can also access this care</li> </ul>	
Careful attention to follow up of premature babies (including extremely premature babies) and early identification of impairment	
<b>Inform and improve program, coverage and quality</b>	
<ul style="list-style-type: none"> <li>• Improve the data including morbidity follow up and use this in programmatic improvement e.g. gestational specific survival, rates of retinopathy of prematurity etc</li> <li>• Address key gaps in the coverage data especially for kangaroo mother care</li> </ul>	
<b>Innovate and undertake research</b>	
<ul style="list-style-type: none"> <li>• Establish prioritized research agenda with emphasis on implementation</li> <li>• Invest in research and in research capacity</li> <li>• Conduct multi-country studies of effect, cost and "how to" and disseminate findings linked to action</li> </ul>	

countries are Sri Lanka, Turkey, Belarus, Croatia, Ecuador, El Salvador, Oman and China. Some of these countries also had fertility rate reductions, which may have contributed (Lawn et al., 2012), but the likely explanation is national focus on improved obstetric and neonatal care, and systematic establishment of referral systems with higher capacity of neonatal care units and staff and equipment helped in some cases by larger national budgets (Chapter 6). Over time, as neonatal care increases in scope, people skills, commodities and equipment become more critical and at a NMR below 15 per 1,000 live births, intensive care plays an increasing role. Hence low- and middle-income countries should be able to halve the risk of their newborns, their most vulnerable citizens, of dying with the right people and the right basic commodities. Yet human resource planning has not addressed this key need, and courses for nurse training in neonatal care are rare in sub-Saharan Africa and much of South Asia. Investing in frontline workers and skills is crucial to overcoming nervousness of many workers when looking after tiny babies, and building their lifesaving skills. A phased approach, for example using KMC as an entry point to show that babies under 1,000g at birth can

Action for preterm birth will start from increased visibility and recognition of the size of the problem— deaths, disability, later chronic disease, parent suffering and wider economic loss (Table 5.5). In many higher-income countries, visibility is driven by empowered parents or by professionals or synergy of the two (Box 5.4). Parents of premature babies are both those who experience the greatest pain and those who hold the greatest power for change. Societal mobilization has made it unacceptable for women to die while giving birth. The voice of women and families in low-income countries is yet to be mobilized for the issue of newborn deaths and stillbirths, and these deaths too often continue to be accepted as the norm despite the existence of highly cost-effective and feasible solutions.

## Conclusion

Globally, progress is being made in reducing maternal deaths and child death after the first month of life. Progress for neonatal deaths is slower. Severe neonatal infection deaths may possibly be reduced through "trickle down" from child health programs. Neonatal

deaths due to intrapartum complications ("birth asphyxia") also are beginning to decline, although slowly, perhaps related to increased investments in care at birth and maternal health and care. However the 1.1 million deaths among premature babies are less likely to be reduced through "trickle down" from other programs and indeed it was the specific vulnerability and needs of the premature baby that catalyzed the specialty of neonatology. There are simple solutions that will reduce deaths among premature babies immediately for the poorest families at home in the lowest income settings — for example early and exclusive breastfeeding,

chlorhexidine cord applications and skin-to-skin care. However, higher-impact facility-based care, such as KMC is needed and is dependent on nurses and others with skills in caring for small babies and can be phased over time to add increased complexity. Starting with intensive care will fail if simple hygiene, careful attention to feeding and other basic building blocks are not in place. Many countries cannot afford to rapidly scale up neonatal intensive care but no country can afford to delay doing the simple things well for every baby and investing extra attention in survival and health of newborns especially those who are preterm.

#### Box 5.4: Parents' pain and parents' power

Depending where in the European Union a woman becomes pregnant or a baby is born, the care received will vary. Wide differences still exist in morbidity and mortality for women and newborns between countries and within countries. Preterm deliveries in Europe make up 5-12% of all births, and disproportionately affect the poorer families. Preterm babies represent Europe's largest child patient group and the number of preterm survivors is increasing. Yet despite the growing prevalence and increasing costs, maternal and newborn health still ranks low on the policy agendas of EU countries.

Parents and healthcare professionals felt the urgent need to act and to give our most vulnerable group - newborns - a voice. The European Foundation for the Care of Newborn Infants (EFCNI) was founded in 2008. EFCNI is a network between countries and between stakeholders across Europe and is motivated especially by parents whose lives have been changed by having or losing a preterm baby. The vision is that every child in Europe receives the best possible start in life, aiming to reduce the preterm birth rate, prevent complications and to provide the best possible treatment and care, also improving long-term health. So far this network has:

- Created a movement of over 30 parent organizations across 27 European countries, a platform for information exchange and targeted training, amplifying the power of parents.
- Published policy documents to promote accountability such as the EU Benchmarking Report "Too little, too late?", a comparison of policies impacting newborn healthcare and support to families across 14 European Member States and the European Call to Action for Newborn Health and "Caring for Tomorrow- EFCNI White Paper on Maternal and Newborn Health as well as Aftercare Services"
- Mobilized politicians through the European Parliament Interest Group on Maternal and Neonatal Health.
- Involved the general public through the first pan-European online awareness and information campaign on prematurity "ene, mene, mini. One baby in ten is born premature worldwide".

Placing maternal and newborn health more centrally in European and national health policies and research programs is an investment in the human capital of Europe's future generations.

More information is available at <http://www.efcni.org/>



Courtesy: Academy of Pediatrics

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**  
**FRANKLIN RAFAEL LOPEZ TOALA**

\_\_\_\_\_ /

**FRANKLIN RAFAEL LOPEZ TOALA'S SENTENCING MOTION FOR  
DOWNWARD DEPARTURES AND VARIANCES AND SUPPORTING  
MEMORANDUM OF LAW**

**EXHIBIT E**

Sentence Length in Each Primary Offense Category<sup>1</sup>  
 Fiscal Years: 2013, 2014, 2015, 2016, 2017, 2013, 2014, 2015, 2016, 2017, 2013, 2014, 2015, 2016, 2017  
 Districts: Florida Mid, Florida North, Florida South

PRIMARY OFFENSE	Mean Months	Median Months	N
<b>TOTAL</b>	59	33	20,275
Murder	339	360	15
Manslaughter			
Kidnapping/Hostage Taking	292	298	6
Sexual Abuse	183	133	242
Assault	39	12	93
Robbery	68	57	250
Arson	65	60	10
➔Drugs - Trafficking	86	70	5,731
Drugs - Communication Facility	26	12	7
Drugs - Simple Possession	3	0	31
Firearms	109	75	2,328
Burglary/B&E			
Auto Theft	78	55	20
Larceny	18	9	445
Fraud	37	27	4,155
Embezzlement	10	5	118
Forgery/Counterfeiting	17	12	269
Bribery	24	18	112
Tax	19	12	138
Money Laundering	43	24	379
Racketeering/Extortion	102	63	172
Gambling/Lottery	2	0	5
Civil Rights	28	12	15
Immigration	11	4	4,073
Child Pornography	162	96	653
Prison Offenses	16	14	26
Administration of Justice Offenses	20	15	239
Environmental/Wildlife	5		56
National Defense	67	37	36
Antitrust			
Food & Drug	9	0	57
Other Miscellaneous Offenses	33	6	591

<sup>1</sup> Sentences of probation only are included in this table as zero months of imprisonment. In addition, the information presented in this table includes time of confinement as described in USSG §SCI.1. Descriptions of variables used in this table are provided in Appendix A.

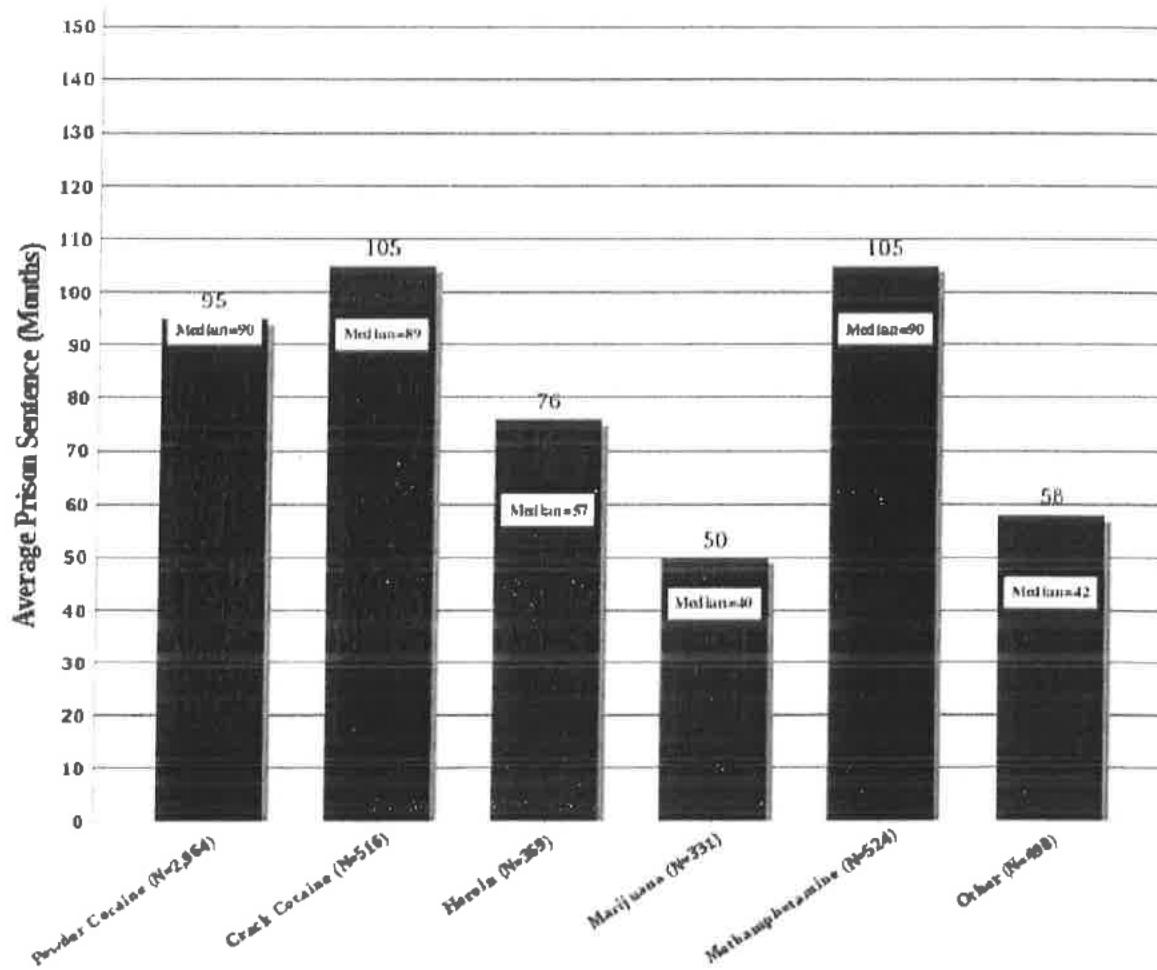
**Sentence Length in Each Primary Offense Category<sup>1</sup>****Fiscal Years: 2013, 2014, 2015, 2016, 2017****District: Florida Mid**

PRIMARY OFFENSE	Mean Months	Median Months	N
<b>TOTAL</b>	<b>70</b>	<b>40</b>	<b>7,297</b>
<b>Murder</b>	430	470	8
<b>Manslaughter</b>			
<b>Kidnapping/Hostage Taking</b>			0
<b>Sexual Abuse</b>	183	140	118
<b>Assault</b>	64	30	28
<b>Robbery</b>	95	87	53
<b>Arson</b>			1
<b>➔Drugs - Trafficking</b>	96	96	2,548
<b>Drugs - Communication Facility</b>			2
<b>Drugs - Simple Possession</b>			2
<b>Firearms</b>	104	70	947
<b>Burglary/B&amp;E</b>			1
<b>Auto Theft</b>			2
<b>Larceny</b>	14	6	209
<b>Fraud</b>	34	21	1,062
<b>Embezzlement</b>	9	3	71
<b>Forgery/Counterfeiting</b>	17	12	163
<b>Bribery</b>	16	12	13
<b>Tax</b>	15	12	49
<b>Money Laundering</b>	35	24	70
<b>Racketeering/Extortion</b>	88	48	41
<b>Gambling/Lottery</b>	0	0	4
<b>Civil Rights</b>	16	13	10
<b>Immigration</b>	11	5	1,144
<b>Child Pornography</b>	169	97	366
<b>Prison Offenses</b>	18	15	9
<b>Administration of Justice Offenses</b>	20	15	100
<b>Environmental/Wildlife</b>	0	0	8
<b>National Defense</b>	19	21	8
<b>Antitrust</b>			0
<b>Food &amp; Drug</b>	9	0	20
<b>Other Miscellaneous Offenses</b>	35	6	239

<sup>1</sup> Sentences of probation only are included in this table as zero months of imprisonment. In addition, the information presented in this table includes time of confinement as described in USSG §5C1.1. Descriptions of variables used in this table are provided in Appendix A.

**LENGTH OF IMPRISONMENT IN EACH DRUG TYPE<sup>1</sup>**

**Fiscal Years: 2013-2017**  
**Florida Mid, Florida South**  
**Primary Sentencing Guideline: §2D1.1**



<sup>1</sup> Of the 5,293 cases, zero had missing guideline application information. Of the remaining 5,393 cases, 5,393 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 5,393 were sentenced under §§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.8, or 2D2.1. Additionally, 199 with zero months prison ordered were excluded. Descriptions of variables used in this figure are provided in Appendix A.

Below Guideline Range With Booker/18 U.S.C. § 3553: Degree  
of Decrease for Offenders in Each Primary Offense Category<sup>1</sup>

Fiscal Years: 2012, 2013, 2014, 2015, 2016, 2017

District: Florida Mid

PRIMARY OFFENSE	N	Median Sentence In Months	Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
TOTAL	2,447	24	15	36.2
Murder	1			
Manslaughter	0			
Kidnapping/Hostage Taking	0			
Sexual Abuse	31	84	30	31.2
Assault	8	12	10	46.0
Robbery	9	44	16	23.8
Arson	0			
➔ Drugs - Trafficking	745	48	19	31.0
Drugs - Communication Facility	2			
Drugs - Simple Possession	0			
Firearms	346	36	13	26.7
Burglary/B&E	0			
Auto Theft	1			
Larceny	98	0	10	100.0
Fraud	422	12	12	50.4
Embezzlement	23	0	10	99.4
Forgery/Counterfeiting	57	6	9	66.7
Bribery	7	12	12	52.5
Tax	37		12	94.4
Money Laundering	34	15	16	51.5
Racketeering/Extortion	15	36	17	33.2
Gambling/Lottery				
Civil Rights				
Immigration	206	15	9	34.8
Child Pornography	270	72	49	38.5
Prison Offenses	3	9	6	33.3
Administration of Justice Offenses	37	7	10	60.0
Environmental/Wildlife	2			
National Defense	4	34	30	53.3
Antitrust	0			
Food & Drug	6	12	18	74.2
Other Miscellaneous Offenses	81	1	10	92.3

<sup>1</sup> Of the 8,988 cases, 2,479 were sentenced below the guideline range with Booker/18 U.S.C. § 3553. Of these, 2,457 cases had complete guideline application information. Due to an inability to calculate the extent of departure for cases with a guideline minimum of life, an additional ten cases were also excluded from this table. Note that the information presented in this table does include sentences of probation, but does not include any time of alternative confinement as described in USSG §5Cl.1. Descriptions of variables used in this table are provided in Appendix A.

**Reasons Given by Sentencing Courts for All Sentences Below the Guideline Range<sup>1</sup>****Fiscal Years: 2012, 2013, 2014, 2015, 2016, 2017****District: Florida Mid****Primary Sentencing Guideline: §2D1.1**

REASONS	N	%
Nature and circumstance of offense/history of defendant	442	13.8
Reflect seriousness of offense/promotes respect for law/just punishment	394	12.3
Afford adequate deterrence to criminal conduct	249	7.8
Criminal history issues	201	6.3
Avoid unwarranted sentencing disparity among defendants	173	5.4
→The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)	171	5.4
Protect public from further crimes	134	4.2
→Family ties and responsibilities (§SH1.6)	115	3.6
Reduce disparity	104	3.3
The nature and circumstance of the offense pursuant to 18 U.S.C. § 3553(a)(1)	99	3.1
Cooperation without motion (not §5K1.1)	87	2.7
Age (§5H1.1)	85	2.7
→Role in the offense(§5H1.7)	80	2.5
Remorse/lack of remorse	72	2.3
Drug dependence and alcohol abuse (§5H1.4)	61	1.9
Insufficient documentation provided on SOR to determine reason	59	1.8
Provide defendant with educational or vocational training/medical care	51	1.6
Early implementation of Amendment 782 to drug guidelines	50	1.6
Low likelihood of recidivism/not a risk to community	38	1.2
Lack of youthful guidance/tragic or troubled childhood (§5H1.12)	34	1.1
→Previous employment record (§SH1.5)	31	1.0
Physical condition (§SH1.4)	29	0.9
Acceptance of responsibility	29	0.9
General aggravating or mitigating circumstances (§5K2.0)	27	0.8
Mental and emotional conditions (§SH1.3)	26	0.8
Community ties (§5H1.6)	23	0.7
Aberrant behavior (§5K2.20)	18	0.6
Rehabilitation	17	0.5
Mental and emotional conditions	16	0.5
Provide correctional treatment pursuant to 18 U.S.C. § 3553(a)(2)(D)	16	0.5
Sufficient punishment	15	0.5
Nonviolent offense/offender	13	0.4
Provide educational or vocational training	12	0.4
Indigent background	12	0.4
Pre-sentence rehabilitation	12	0.4
Party motion/agreement/consent (reason unspecified)	12	0.4
Drug quantity	9	0.3
Conduct while on release, bond, or supervision	9	0.3
Influenced/used by others	9	0.3
→Military record/charitable works/good deeds (§SH1.11)	8	0.3
Limited duration of involvement	8	0.3
→Letters of support - unspecified from whom	8	0.3
Educational and vocational skills (§SH1.2)	7	0.2

**Reasons Given by Sentencing Courts for All Sentences Below the Guideline Range<sup>1</sup>****Fiscal Years: 2012, 2013, 2014, 2015, 2016, 2017****District: Florida Mid****Primary Sentencing Guideline: §2D1.1**

REASONS	N	%
General guideline adequacy issues	7	0.2
No or minimal incarceration for priors	7	0.2
Crime motivated by financial distress	7	0.2
Time served/U.S. v. Barrera-Saucedo	6	0.2
Statutory minimum/maximum	5	0.2
Adequate punishment to meet purposes of sentencing	5	0.2
Diminished capacity (§5K2.13)	4	0.1
Provide medical care	4	0.1
18 U.S.C. § 3553(a)	4	0.1
Excerpt from 18 U.S.C. § 3553(a)	4	0.1
Child abuse syndrome	4	0.1
Charitable service/good works	3	0.1
Other	68	2.1
<b>TOTAL</b>	<b>3,193</b>	<b>100.0</b>

<sup>1</sup> Of the 3,286 cases, 829 were sentenced below the guideline range. Courts may cite multiple reasons for sentencing outside the guideline range; consequently, the total number of reasons cited generally exceeds the total number of cases. In this table, 3,193 reasons were cited for the 829 cases. In 59 cases where the SOR was received, there was insufficient documentation provided to determine some of the reasons for the sentence. The "Other" category includes all reasons cited fewer than three times among relevant cases. This table does not include cases reported out in the "Otherwise Below Range" category. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: This was produced using the U.S. Sentencing Commission's Interactive Sourcebook (<https://isb.ussc.gov>) using the Commission's fiscal year 2012-2017 Data files, USSCFY2012-USSCFY2017.

Reasons Given by Sentencing Courts for Sentences Below  
 the Guideline Range With Booker/18 U.S.C. § 3553<sup>1</sup>  
 Fiscal Years: 2012, 2013, 2014, 2015, 2016, 2017  
 District: Florida Mid  
 Primary Sentencing Guideline: §2D1.1

REASONS	N	%
Nature and circumstance of offense/history of defendant	433	14.4
Reflect seriousness of offense/promotes respect for law/just punishment	384	12.7
Afford adequate deterrence to criminal conduct	245	8.1
→ The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)	168	5.6
Avoid unwarranted sentencing disparity among defendants	156	5.2
Criminal history issues	146	4.8
Protect public from further crimes	131	4.3
→ Family ties and responsibilities (§5H1.6)	111	3.7
Reduce disparity	102	3.4
The nature and circumstance of the offense pursuant to 18 U.S.C. § 3553(a)(1)	98	3.2
Cooperation without motion (not §5K1.1)	85	2.8
Age (§5H1.1)	78	2.6
→ Role in the offense (§5H1.7)	78	2.6
Remorse/lack of remorse	69	2.3
Insufficient documentation provided on SOR to determine reason	59	2.0
Drug dependence and alcohol abuse (§5H1.4)	59	2.0
Early implementation of Amendment 782 to drug guidelines	49	1.6
Provide defendant with educational or vocational training/medical care	44	1.5
Low likelihood of recidivism/not a risk to community	37	1.2
Lack of youthful guidance/tragic or troubled childhood (§5H1.12)	33	1.1
→ Previous employment record (§5H1.5)	31	1.0
Acceptance of responsibility	28	0.9
General aggravating or mitigating circumstances (§5K2.0)	26	0.9
Mental and emotional conditions (§5H1.3)	24	0.8
Physical condition (§5H1.4)	22	0.7
Community ties (§5H1.6)	22	0.7
Aberrant behavior (§5K2.20)	16	0.5
Provide correctional treatment pursuant to 18 U.S.C. § 3553(a)(2)(D)	16	0.5
Rehabilitation	16	0.5
Sufficient punishment	15	0.5
Mental and emotional conditions	13	0.4
Nonviolent offense/offender	13	0.4
Indigent background	12	0.4
Pre-sentence rehabilitation	12	0.4
Provide educational or vocational training	11	0.4
Conduct while on release, bond, or supervision	9	0.3
Influenced/used by others	9	0.3
Drug quantity	8	0.3
Party motion/agreement/consent (reason unspecified)	8	0.3
Limited duration of involvement	8	0.3
General guideline adequacy issues	7	0.2
→ Military record/charitable works/good deeds (§5H1.11)	7	0.2
No or minimal incarceration for priors	7	0.2

**Reasons Given by Sentencing Courts for Sentences Below  
the Guideline Range With Booker/18 U.S.C. § 3553<sup>1</sup>  
Fiscal Years: 2012, 2013, 2014, 2015, 2016, 2017**  
District: Florida Mid  
Primary Sentencing Guideline: §2D1.1

REASONS	N	%
Crime motivated by financial distress	7	0,2
Educational and vocational skills (§5H1.2)	6	0,2
Statutory minimum/maximum	5	0,2
Adequate punishment to meet purposes of sentencing	5	0,2
Time served/U.S. v. Barrera-Saucedo	5	0,2
Provide medical care	4	0,1
18 U.S.C. § 3553(a)	4	0,1
Excerpt from 18 U.S.C. § 3553(a)	4	0,1
Child abuse syndrome	4	0,1
Diminished capacity (§5K2.13)	3	0,1
Other	64	2,1
<b>TOTAL</b>	<b>3,016</b>	<b>100.0</b>

<sup>1</sup> Of the 3,286 cases, 786 were sentenced below the guideline range with Booker/18 U.S.C. § 3553. Courts may cite multiple reasons for sentencing outside the guideline range; consequently, the total number of reasons cited generally exceeds the total number of cases. In this table, 3,016 reasons were cited for the 786 cases. In 59 cases where the SOR was received, there was insufficient documentation provided to determine some of the reasons for the sentence. The "Other" category includes all reasons cited fewer than three times among relevant cases. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: This was produced using the U.S. Sentencing Commission's Interactive Sourcebook (<https://isb.ussc.gov>) using the Commission's fiscal year 2012-2017 Data files, USSCFY2012-USSCFY2017.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**  
**FRANKLIN RAFAEL LOPEZ TOALA**

\_\_\_\_\_ /

**FRANKLIN RAFAEL LOPEZ TOALA'S SENTENCING MOTION FOR  
DOWNWARD DEPARTURES AND VARIANCES AND SUPPORTING  
MEMORANDUM OF LAW**

**EXHIBIT F**

DECEMBER 12, 2018

# Senate & House Lawmakers Release Updated First Step Act

*Majority Leader, House Speaker pledge to consider criminal justice reform package this year*

**WASHINGTON** – A bipartisan, bicameral group of lawmakers today released revised text of the *First Step Act* to continue building support for criminal justice reform. This update was brokered by the White House and a bipartisan group of lawmakers in both chambers of Congress. Majority Leader Mitch McConnell and Speaker Paul Ryan have pledged to take up the revised package before the end of the year.

***“Over the last several years, we’ve expanded support for comprehensive criminal justice reform by listening to stakeholders and lawmakers to strike a balance that reduces crime and recidivism, and the associated taxpayer burden, while ensuring that dangerous and career criminals face steep consequences for their actions. Today’s update represents the latest in our effort to achieve this goal. I appreciate the engagement from many of my colleagues to fine tune the most significant criminal justice reform in a generation, and I applaud President Trump and the White House for bringing everyone to the table to make this happen. Following these changes and the growing demonstration of support for this bill, Leader McConnell is keeping his word by pledging to hold a vote this year,”*** Senate Judiciary Committee Chairman Chuck Grassley said.

***“The bipartisan First Step Act is a once in a political lifetime aligning of the stars. Republicans, Democrats, President Trump, Fraternal Order of Police, and ACLU have all thrown their support behind our bill. This bipartisan compromise could be one of the most important things we do when it comes to criminal justice not only this year but for a long time. I commend my colleagues for their spirit of cooperation on this important piece of legislation and I look forward to***

**getting this job done in the closing weeks of this session," Senate Democratic Whip Dick Durbin said.**

**"After listening to many of our colleagues, this updated First Step Act addresses each of the concerns we've heard from stakeholders across the country. It is solid common-sense reform that will make our families stronger and our communities safer and I look forward to debating it on the Senate floor," Senator Mike Lee said.**

**"Our broken criminal justice system is a cancer on the soul of our nation that's disproportionately preyed upon low-income Americans, the addicted, and people of color. This bill is a meaningful step in the right direction that will help correct the ills of the failed War on Drugs. It will have a profound effect on thousands of families suffering under the burden of our broken system," Senator Cory Booker said.**

**"This bill does two important things: lowers the recidivism rate and reduces sentences for nonviolent offenders which allows us to direct resources towards truly dangerous criminals. For a nonviolent offender to be released early, the offender has to acquire a necessary skill-set to be more productive once released. The bill also gives more latitude to judges to make sure lengthy sentences are not mandated for multiple nonviolent offenses. This has produced a great burden on the system and has taken a lot of people out of the workforce that could be productive. Finally, I very much appreciate Jared Kushner's tenacity when it comes to making sure the criminal justice reform legislation becomes law. I also appreciate President Trump's bold and energetic leadership on this issue. It was also an honor working side by side with Senator Tim Scott on another important reform. Senator McConnell's announcement that the Senate will take up criminal justice reform was music to my ears. Now, let's pass it into law," said Senator Graham**

**"We know the reforms in this bill can yield real improvement in our criminal justice system because they've worked in states like Rhode Island and Texas. Now, we are poised to pass those reforms into law across the federal system. I am proud of the bipartisan work that has led us to this moment, and grateful to all the people – law enforcement, civil rights groups, former inmates, state and local officials, community leaders, and so many more – who helped us get here," Senator Sheldon Whitehouse said.**

***“As an original co-sponsor of the First Step Act, I want to thank each and every person who has played an instrumental role in getting this once-in-a-generation bill to the Senate floor. This has been a team effort that has spanned the political spectrum; and for that, we should all celebrate. Meaningful criminal justice reform is just one step in ensuring that the scales of justice are balanced for every American —a core principle of our nation. I am thrilled that President Trump, Chairman Grassley, various Senators, and advocacy groups worked side by side to prove to the American public that Congress still works. I look forward to ushering the First Step Act through the finish line and to the President’s desk,” Senator Tim Scott said.***

***“The First Step Act represents years of bipartisan work to address some of the most egregious and unjust outcomes in our criminal justice system. While our work is not done, these reforms, and how senators came together to produce them, represent the best of the Senate, and it will make a real difference in the lives of so many. I am proud to cosponsor the First Step Act and believe now is the time to pass this historic legislation,” Senator Patrick Leahy said.***

***“During my chairmanship of the House Judiciary Committee, I have made reform of our federal criminal justice system a top priority. It is clear that reforms are necessary to protect Americans from crime, to help ensure that offenders become productive members of society after they serve their time, and to adjust some sentences that are currently excessive. I am extremely pleased that we have reached a bipartisan, bicameral agreement on legislation to accomplish these goals, and I urge immediate consideration of this legislation so that we can send it to President Trump to sign into law,” House Judiciary Committee Chairman Bob Goodlatte said.***

***“I am pleased to join with my colleagues in introducing the First Step Act, an important bill that will advance criminal justice reform. This bill includes critical changes to our sentencing laws that will reduce the impact of some mandatory minimum sentences, notably with retroactive application of the reduced crack cocaine sentences under the Fair Sentencing Act of 2010. The bill’s reauthorization of the Second Chance Act is also a measure that is long overdue. We will continue to work in Congress to oversee the implementation of these reforms as well as the new system to allow some federal prisoners to earn early entry into pre-release custody. There is still more work to be done to ensure our criminal justice system is equally fair and just for every American;***

*however, this bill is its namesake: a positive first step,” House Judiciary Committee Ranking Member Jerry Nadler said.*

*“Seventeen months ago, the People’s House partnered with the White House to improve public safety by lowering recidivism and prioritizing evidence-based rehabilitation, and we’ve continued moving forward with the Senate since the House passed this bill 360-59 last May. Lawmakers across both chambers and both parties agree that the time to act is now, and we agree on what that action looks like. Today, I stand with my colleagues in the House and Senate as we take strides that move the First Step Act closer to the president’s desk,” Congressman Doug Collins said.*

*“The First Step Act is a historic piece of legislation that strikes a forceful blow against the mass incarceration epidemic in America. This bill will meaningfully reform our broken criminal justice system, enact fairer sentencing laws, reduce recidivism and save taxpayer dollars. It is a significant step toward redemption for thousands of non-violent drug offenders harshly treated by unjust crack-cocaine laws. The FIRST STEP Act represents the beginning of the end of over-criminalization in America,” Congressman Hakeem Jeffries said.*

*“Criminal justice reform has been a top priority of the House Judiciary Committee for the last three and a half years, and I’m glad to help move it forward. I’m also pleased that this comprehensive package includes my reauthorization of the Second Chance Act, which has been widely successful in helping former inmates transition back to society,” Congressman Jim Sensenbrenner said.*

*“I am pleased that our diligent efforts in the House allowed a fruitful yield in the inclusion of sentencing reform to the First Step Act. I am also pleased that my amendment to create an Independent Review Committee that will oversee the implementation of the risk assessment tools and the bill generally, was also included in the final version of this bill. I look forward, in the next Congress, to expanding upon this preliminary progress,” Congresswoman Sheila Jackson Lee said.*

*“This bill is a good first step to address the issue of mass incarceration. I am pleased to work with my colleagues in both chambers to include a provision that addresses the egregious practice of shackling women who are pregnant, especially during labor and delivery. I’m excited that Congress will be coming*

***together in a bipartisan fashion on this important issue and I look forward to continuing to work on criminal justice reform in the upcoming Congress,”*** Congresswoman Karen Bass said.

The revised legislation further clarifies eligibility for earned time credits following successful completion of evidence-based recidivism reduction programs, and expands on the existing list of disqualifying offenses. The changes address points raised by some law enforcement groups and provides for additional transparency in the Bureau of Prisons’ risk assessment framework. A summary of the update can be found [HERE](#). Text is available [HERE](#).

The *First Step Act* is endorsed by President Trump and cosponsored by more than a third of the Senate, evenly balanced among Democrats and Republicans. The recent updates to the bill have garnered the support of additional senators in recent days, including Senators Thom Tillis, Ted Cruz, David Perdue and John Cornyn.

Here's a complete list of current cosponsors:

1. Chuck Grassley (R-Iowa)
2. Dick Durbin (D-Ill.)
3. Mike Lee (R-Utah)
4. Sheldon Whitehouse (D-R.I.)
5. Lindsey Graham (R-S.C.)
6. Cory Booker (D-N.J.)
7. Tim Scott (R-S.C.)
8. Patrick Leahy (D-Vt.)
9. Joni Ernst (R-Iowa)
10. Jerry Moran (R-Kan.)
11. Amy Klobuchar (D-Minn.)
12. Chris Coons (D-Del.)
13. Jeff Flake (R-Ariz.)
14. Richard Blumenthal (D-Conn.)
15. Pat Roberts (R-Kan.)
16. Doug Jones (D-Ala.)
17. Susan Collins (R-Maine)
18. Tammy Duckworth (D-Ill.)
19. Lamar Alexander (R-Tenn.)
20. Kirsten Gillibrand (D-N.Y.)
21. Rand Paul (R-Ky.)
22. Mazie Hirono (D-Hawaii)

23. Rob Portman (R-Ohio)
24. Angus King (I-Maine)
25. Todd Young (R-Ind.)
26. Brian Schatz (D-Hawaii)
27. Bill Cassidy (R-La.)
28. Ben Cardin (D-Md.)
29. Steve Daines (R-Mont.)
30. Tina Smith (D-Minn.)
31. Thom Tillis (R-N.C.)
32. Michael Bennet (D-Colo.)
33. Ted Cruz (R-Texas)
34. Chris Van Hollen (D-Md.)

The *First Step Act* is backed by a number of law enforcement groups, including the nation's largest police group. It's also supported by 172 former federal prosecutors including two former Republican U.S. attorneys general, two former deputy attorneys general and a former director of the FBI along with sheriffs from 34 states across the country. The National Governor's Association, which represents the governors of all 50 states, praised the bill. A broad coalition of conservative and progressive groups along with a host of business leaders and faith-based organizations also support the *First Step Act*.

More information on the revised *First Step Act*

- [Text of revised First Step Act](#)
- [Summary of revised First Step Act](#)
- [Summary of First Step Act as introduced](#)
- [Current cosponsors and endorsements](#)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**  
**FRANKLIN RAFAEL LOPEZ TOALA**

\_\_\_\_\_ /

**FRANKLIN RAFAEL LOPEZ TOALA'S SENTENCING MOTION FOR  
DOWNWARD DEPARTURES AND VARIANCES AND SUPPORTING  
MEMORANDUM OF LAW**

**EXHIBIT G**

**COMPARISON CHART - Record Supports Departure From Advisory Sentencing Guidelines and Also a Variance Under Booker Factors and that the Factors as Outlined in USGGA as Applied to Franklin Lopez Toala Takes His Sentencing Outside the Heartland of the Applicable Guidelines**

\*Pinargote Mera in the past worked for a drug trafficking organization and also refueled drug laden go-fast boats. Pinargote Mera stated he has known a friend for years who recruits fisherman to transport drugs on go-fast boats. Pinargote Mera approached this friend and asked for work which resulted in Pinargote Mera being hired for this drug-running incident. Pinargote Mera also admitted to being involved in human trafficking. In 2007, he smuggled 60 Ecuadorians into Guatemala on a fishing boat.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
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**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**  
**FRANKLIN RAFAEL LOPEZ TOALA**

\_\_\_\_\_ /

**FRANKLIN RAFAEL LOPEZ TOALA'S SENTENCING MOTION FOR  
DOWNWARD DEPARTURES AND VARIANCES AND SUPPORTING  
MEMORANDUM OF LAW**

**EXHIBIT H**

**Re; Franklin Lopez Toala**

**Case No. 8:8-cr-511-T-23JSS Middle District of Florida**

On Wed, Mar 6, 2019 at 2:26 PM Veronica Locklear <[locklearvee@gmail.com](mailto:locklearvee@gmail.com)> wrote:  
Translation from wife, Gladys Elizabeth Guerrero Cedeno:

I, Gladys Elizabeth Guerrero Cedeno, with the I.D. of 130825205-3, wife of Mr. Franklin Rafael Lopez Toala by which I will tell you is my husband; an honest, responsible and very hard working man.

So much so, that he is considered a respected man that day to day strives to do for his family to be able to move forward but unfortunately had many challenges, one being that his grandson was born ill and the doctors said he would need an operation because he was born premature at 7 months. He would require treatment because he was too small for the operation but we needed money for all the expenses and my husband had no other alternative but to go on the embarkation

This is why I am pleading with you to forgive my husband for the mistake he committed. Help us, we want him back and he is the only one that helps at home. All of us are in a bad way and he never has been far from us. My children, his mother, we all miss him very much.

He is an good man and his family misses him very much, please help us so he can return.

Respectfully,  
Gladys Elizabeth Guerrero Cedeno  
I.D. 130825205-3.

Translation from Bella Angela Guerrero Cedeno, sister n law:

I, Bella Angela Guerrero Cedeno, I.D. 131143627-1, sister n law of Franklin Rafael Lopez Toala, would like to let you know that my brother n law is an honest, responsible and hard working man.

He has always been that way, always good. Never has not done anything illegal, he has always been an upright person and has helped all of his family.

We are asking you, Your Honor, that you help us so my brother n law can return to be with his family at home because they really need him. He was the sole provider of his home. (family)

Respectfully,  
Bella Angela Guerrero Cedeno  
I.D. 131143627-1

Ecuador, 06 de Marzo del 2019

Yo, GLADYS ELIZABETH GUERRERO CEDEÑO con C.I. 130825205-3, esposa del Sr. FRANKLIN RAFAEL LOPEZ TOALA, por medio de presente me dirijo a usted para hacerle saber que mi esposo es una persona honesta, responsable y muy trabajadora.

Tanto en casa como en su trabajo es considerado un hombre respetuoso que día a día lucha por sacar adelante a su familia, pero lamentablemente tuvo muchos inconvenientes y uno de esos fue cuando mi nieto nació enfermo y los doctores dijeron que tenía que ser operado pero como salió sletemesino tenían que hacerle tratamiento ya que era muy pequeño para la operación, pero igual necesitábamos dinero para estos gastos y mi esposo no tuvo otra salida más que salir en una embarcación.

Es por esto que me dirijo a usted para suplicarle que perdone a mi esposo por el error que cometió, que nos ayude lo queremos de vuelta ya que es la única persona que nos ayuda en casa, nos encontramos mal ya que él nunca había estado lejos de nosotros, mis hijos, su mama, todos los extrañamos demasiado.

Él es un buen hombre, y hace mucha falta en nuestra familia, por favor ayúdenos a que regrese.

Atentamente

Glady's Guerrero C.

GLADYS ELIZABETH GUERRERO CEDEÑO  
C.I. 130825205-3

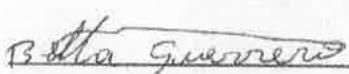
Ecuador, 06 de Marzo del 2019

Yo, BELLA ANGELA GUERRERO CEDEÑO con C.I. 131143627-1, cuñada del Sr. FRANKLIN RAFAEL LOPEZ TOALA, por medio de presente me dirijo a usted para hacerle saber que mi cuñado es una persona honesta, responsable y muy trabajadora.

Tanto con sus hijos y esposa siempre ha estado ahí, es una persona de bien nunca ha hecho nada ilegal, siempre ha estado en lo correcto y también nos ha ayudado a toda la familia.

Le pedimos Sr. Juez que no ayude para que mi cuñado vuelva a estar con su familia, en casa ya que ellos necesitan mucho de él porque es el sustento de su hogar.

Atentamente



BELLA ANGELA GUERRERO CEDEÑO  
C.I. 131143627-1

**1. Lopez Castro Joe - son**

Hello Dad I hope you are in good health. I miss you. Every time I come to Manta I ask if you have called, or how you are doing it saddens me not seeing you here at home in your room I miss you and would like to see you again. I miss you very much.

**2. Adriana Elizabeth Tuarez Guerrero - daughter**

I write this letter to let you know my father is an honest man trying to raise his family. I ask, I beg you to help my father, we miss him. Help him to return home, please.

**3. Annabelle Alejandra Guerrero Cedeño - sister-in-law**

My brother-in-law is a hard worker, responsible and honest. He has been honest in every job he has had trying to raise his family. I ask you with all my heart that you help us to bring him home. His family misses him and his family is not doing well since he is the only provider or breadwinner. Help us bring him home soon.

**4. Bernarda Lourdes Cedeño Mero – mother-in-law**

Franklin is a responsible worker he has been honest raising a family. He made a mistake for urgent reasons. I ask of you, Honorable Judge to help my son-in-law, forgive him and let him return to his home because his family misses him and need him.

De: López Castro Joe con C.I. 1316360153

Hola papi soy Joe, espero que te encuentre bien de salud, nosotros te extrañamos acá en casa, siempre que vengo para Manta estoy preguntando si haz llamado o como te encuentras, me da una tristeza no verte en la casa o en tu cuarto o venir en tu moto, darte una abrazo como siempre lo ha hecho, te extrañamos mucho y quisiera verte de nuevo.

Te extraño mucho

Atentamente

Joe López C.  
Joe López Castro

López Castro Joe  
C.I. 1316360153

**From:** Veronica Locklear <locklearvee@gmail.com>  
**Sent:** Tuesday, March 19, 2019 11:03 AM  
**To:** Brian Battaglia <bbattaglia@bbdglaw.com>  
**Subject:** Re: FW:

Doc. 1

From: Lopez Castro, Jose I.D. 1316360153 Ecuador March 6, 2019

Hi Dad, it's me Joe. I hope you are doing well health wise. We really miss you here at home. Every time I go to Manta, I ask if you have called and how you are doing. I feel so sad not seeing you at home in your room or see you arrive on your "moto" and give you a hug like I always have. We miss you very much and long to see you again

.

I miss you very much

Sincerely,  
Lopez Castro, Joe  
I.D. 1316360153

Yo, ADRIANA ELIZABETH TUAREZ GUERRERO con C.I.131517126-2, soy hija del Sr. FRANKLIN RAPHAEL LOPEZ TOALA, por medio de presente me dirijo a usted para hacerle saber que mi padre es una persona muy honrada, siempre nos ha sacado adelante, con su trabajo honradamente, le pido de favor, le suplico que ayude a mi papito ya que nos hace mucha falta en nuestro hogar.

Ayúdenos a que regrese por favor.

Atentamente

*Adriana Tuarez Guerrero*  
ADRIANA ELIZABETH TUAREZ GUERRERO  
C.I.131517126-2

**From:** Veronica Locklear <locklearvee@gmail.com>  
**Sent:** Tuesday, March 19, 2019 11:12 AM  
**To:** Brian Battaglia <bbattaglia@bbdglaw.com>  
**Subject:** Re: FW:

Doc.2

Ecuador March 6, 2019

I, Adriana Elizabeth Tuarez Guerrero with I.D. 131517126.2 am the daughter of Mr. Franklin Rafael Lopez Toala and direct your attention to let you know that my dad is a very honorable person, always has supported our family with honorable work. I am asking a favor, I beg you to help my daddy especially since we miss him very much at home.

Help him return please.

Sincerely,  
Adriana Elizabeth Tuarez Guerrero  
I.D. # 131517126.2

Yo, ANABEL ALEJANDRA GUERRERO CEDENO con CI. 1313411033, ciudad del Sr. FRANKLIN RAFAEL LOPEZ TOALA, por medio de presente me dirijo a usted para hacerle saber que mi citado es una persona muy trabajadora, responsable y honesta.

Todos los trabajos que ha tenido los ha hecho honestamente y sacado adelante a su familia, le pido de corazón que nos ayude para que le mida a estar en su casa, su hogar ya que su familia lo extraña demasiado, él es la única persona que los ayuda económicamente, ellos se encuentran mal, ya que no tienen el sustento de su padre.

Ayúdenme a que él regrese pronto a su hogar.



ANABEL ALEJANDRA GUERRERO CEDENO  
CI 1313411033

**From:** Veronica Locklear <locklearvee@gmail.com>  
**Sent:** Tuesday, March 19, 2019 11:24 AM  
**To:** Brian Battaglia <bbattaglia@bbdglaw.com>  
**Subject:** Re: FW:

Doc. 3

Ecuador March 6, 2019

I Anabel Alexandra Guerrero Cedeno, with I.D. 1313411033 sister in law of Mr. Franklin Rafael Lopez Toala, direct your attention to you so you know that my son in law is a hard working person, responsible and honorable.

All the jobs that he has had have been honorable and he has supported his family. I ask you from my heart that you help him return to his house, his home where his family misses him a lot. He is the only person that helps economically. They are in a bad way now that they do not have the support of their father. Help us so he can return to his home soon.

Sincerely,

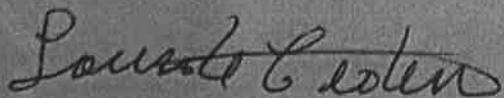
Anabel Alexandra Guerrero Cedeno  
I.D. 13134111033

Yo, BERNARDA LOURDES CEDEÑO MERO con C.I. 130186137-1, suegra del Sr. FRANKLIN RAFAEL LOPEZ TOALA, por medio de presente me dirijo a usted para conocer que mi yerno es una persona responsable y muy trabajadora.

Siempre ha trabajado honradamente y sacado a su familia adelante, cometió un error pero por causas urgentes, le pido señor Juez que ayude a mi yerno, lo perdone por el error que cometió y lo ayude a volver a su hogar porque su familia lo extraña y les hace mucha falta.

Atentamente

BERNARDA LOURDES CEDEÑO MERO  
C.I. 130186137-1



**From:** Veronica Locklear <locklearvee@gmail.com>  
**Sent:** Tuesday, March 19, 2019 11:36 AM  
**To:** Brian Battaglia <bbattaglia@bbdglaw.com>  
**Subject:** Re: FW:

Doc. 4

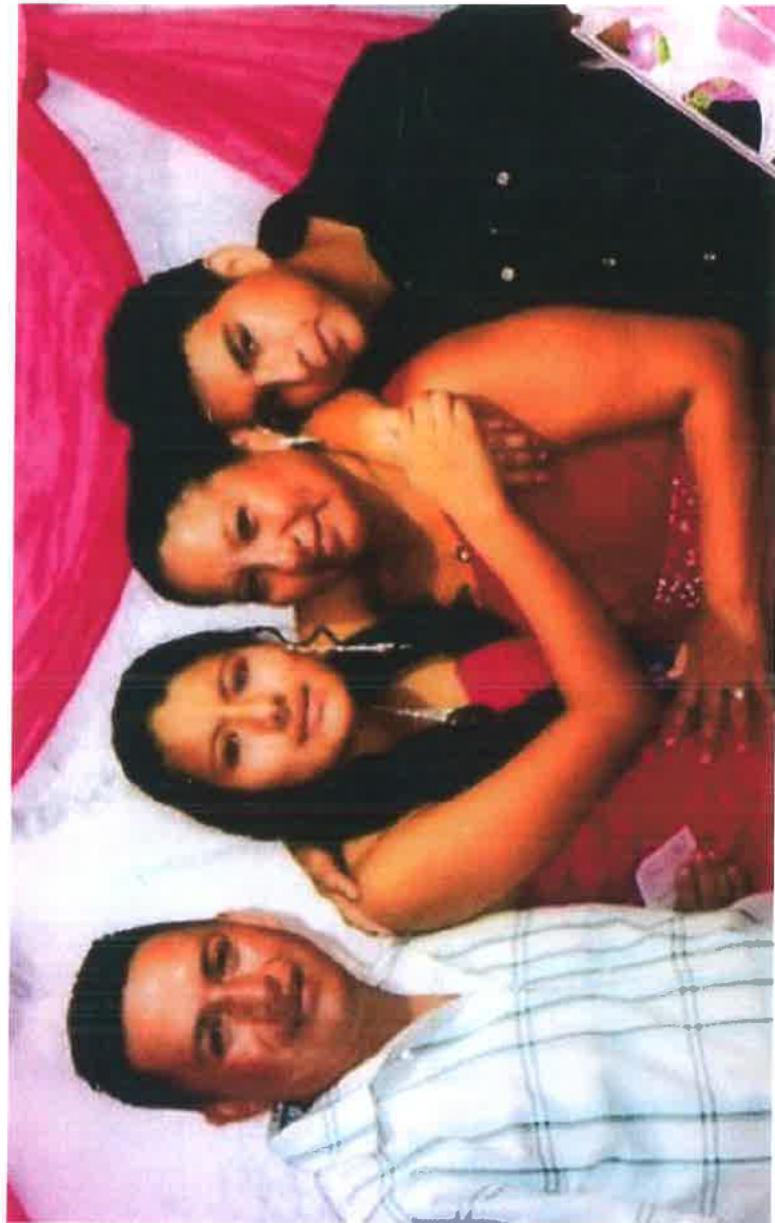
Ecuador, March 6, 2019

I, Bernarda Lourdes Cedeno Mero with I.D. 130186137 1, mother in law of Mr. Franklin Rafael Lopez Toala direct your attention so you would know that my son in law is a responsible person and very hard working.

He has always worked honorably and supported his family, he made a mistake but due to urgent causes. I am asking, your Honor, that you forgive him for the mistake he made and help him return home because his family misses him and they really feel his absence.

Respectfully,

Bernarda Lourdes Cedeno Mero  
I. D. 130186137 1





**Pet. App. M**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**  
**FRANKLIN RAFAEL LOPEZ TOALA,**

\_\_\_\_\_ /

**NOTICE OF FILING SUPPLEMENTAL EXHIBITS FOR INCORPORATION INTO  
EXHIBIT H OF FRANKLIN RAFAEL LOPEZ TOALA'S AMENDED SENTENCING  
MOTION FOR DOWNWARD DEPARTURES AND VARIANCES AND SUPPORTING  
MEMORANDUM OF LAW**

Defendant FRANKLIN RAFAEL LOPEZ TOALA hereby files the attached photographs and letters to be incorporated into Exhibit H of Franklin Rafael Lopez Toala's Amended Sentencing Motion for Downward Departures and Variances and Supporting Memorandum of Law.

Respectfully submitted,

/s/ Brian P. Battaglia  
Brian P. Battaglia, Esq. – FBN #557978  
Attorney for Defendant  
Bleakley Baval Denman & Grace  
15170 N. Florida Avenue  
Tampa, FL 33613  
813-221-3759 [Telephone]  
813-221-3198 [Facsimile]

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26th day of March, 2019, a true and correct copy of the foregoing was furnished by the CM/ECF system with the Clerk of Court, which will send a notice of electronic submission to Assistant United States Attorney, Thomas Palermo, Lead Attorney.

/s/ Brian P. Battaglia  
Brian P. Battaglia, Esq.  
Florida Bar No. 557978

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**vs.**

**CASE NO: 8:18-cr-511-T-23JSS**  
**FRANKLIN RAFAEL LOPEZ TOALA**

---

/

**NOTICE OF FILING SUPPLEMENTAL EXHIBITS TO BE INCORPORATED  
INTO EXHIBIT H OF FRANKLIN RAFAEL LOPEZ TOALA'S AMENDED  
SENTENCING MOTION FOR DOWNWARD DEPARTURES AND VARIANCES  
AND SUPPORTING MEMORANDUM OF LAW**

**EXHIBIT H**

- 1. PHOTO OF LOPEZ TAOLA IN THE MILITARY WITH AUNT NARCIZA**
- 2. PHOTO OF LOPEZ TAOLA WITH MOTHER AND GRANDSON**
- 3. PHOTO OF MOTHER AND GRANDFATHER**
- 4. PHOTO OF MOTHER AND GRANDMOTHER**
- 5. PHOTO OF MOTHER**
- 6. PHOTO OF GRANDSON**
- 7. LETTERS FROM SON AND DAUGHTER-IN-LAW WITH  
TRANSLATION**



Number 1



Number 2



Number 3



Number 4



Number 5



Number 6

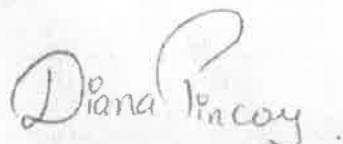
Ecuador- Manta, 07 de marzo del 2019

Yo DIANA YULETZI PINCAY CHOEZ con cedula de identidad N# 1350592398 saludando a mi suegro sr. FRANKLIN RAFAEL LOPEZ TOALA a dar conocer y poder apoyándolo porque él es una persona responsable respetuosa y trabajadora él nos ayudaba y trabajaba y con algo nos apoyaba a mí y su hijo

Yo estaba embarazada mi parto se me adelanto por placenta previa mi hijo nació 26 semanas de gestación era tan pequeño que los doctores me decían cualquier día se me podía morir tanta angustia y tristeza pazo internado dos meses

A veces días día de alegría como de tristeza mi niño se puso bien enfermo estuvo con infección retinopatía del prematuro etc.

Tuvo consulta fuera del hospital con el oftalmólogo me le hicieron una pequeña cirugía inyectándole en ambos ojos por que el doctor me decían que se podía quedar ciego si yo no aceptaba para proceder con la cirugía y gracias a dios ya está estable pero igual con su consulta en Guayaquil mi suegro FRANKLIN RAFAEL LOPEZ TOALA al a verme preocupada a movilizarme de un lugar a otro con mi hijo con tan poco de peso le podía pasar algo por su prematuridad el señor FRANKLIN RAFAEL LOPEZ TOALA angustiado con dolor y tristeza él me apoyaba con lo que tenía talvez por eso sintió desesperado cometió un error que él es incapaz de cometer



DIANA YULETZI PINCAY CHOEZ

C.I. 1350592398

Number 7

Ecuador- Manta, 07 de marzo del 2019

Yo, JOSTIN FRANKLIN LOPEZ CASTRO con cedula de identidad N# 131636007-0, le escribo antemano a mi papá FRNKLIN RAFAEL LOPEZ TOALA, él es incapaz de cometer un error porque él es incapaz de hacer ese error talvez se sintió angustiado preocupado al haberme a mí por sufrir por mi hijo que nació prematuro de 26 semana de gestación con infección retinopatía del prematuro etc.

Mi papa es muy respetuoso responsable y un buen ejemplo de padre de padre por eso lo extraño mucho porque él siempre nos ha ayudado a mi mujer por eso lo apreciamos lo único que le pido a dios que mi papa venga a ECUADOR.

*Jostin Lopez*

JOSTIN FRANKLIN LOPEZ CASTRO

C.I. 131636007-0

Number 7

I, Diana Yuletzi Pincay Choez, with identity card 1350592398, send greetings to my father-in-law, Mr. Franklin Rafael Lopez Toala, to let him know that we support him because he is a respectful and hard-working person. He helped us and worked with us and supported me, his daughter-in-law.

I was pregnant, my son was delivered after 26 weeks of gestation and was so small that the doctors told me any day I could die so much anguish and sadness interned two months

Sometimes days of joy as of sadness my child became very sick was with retinopathy of prematurity etc.

We had a consultation outside the hospital with the ophthalmologist, and there was a small surgery in both eyes because the doctor told me that he could go blind if I did not accept the surgery and thank God he is stable but the same with his son in Guayaquil, my father-in-law Franklin Rafael Lopez Toala, to see me worried to move from one place to another with my son with so little weight, something could happen to him because of his prematurity. Mr. Franklin Rafael Lopez Toala, in anguish, sorrow and sadness, he supported me with what he had for that, he felt desperate, an error that he is unable to correct.

I Jostin Franklin Lopez Castro with identity card 131636007-0. I write beforehand to my father Franklin Rafael Lopez Toala is unable to make a mistake because maybe he felt anxious and worried to have me suffering for my son born preterm, 26 weeks gestation with retinopathy of prematurity infection etc.

My father is very respectful and responsible and a good example of father so I miss him a lot because he has always helped my wife, so we appreciate him. The only thing I ask God is that my father comes back to Ecuador.

NO.

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**In the Supreme Court of the United States**

FRANKLIN RAFAEL LOPEZ TOALA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION APPENDIX  
(Volume 2 of 2)**

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**Pet. App. N**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 8:18-cr-511-T-23JSS  
March 27, 2019  
Tampa, Florida  
8:35 - 10:20 a.m.

FRANKLIN RAFAEL LOPEZ TOALA,

Defendant.

1

TRANSCRIPT OF SENTENCING HEARING  
BEFORE THE HONORABLE STEVEN D. MERRYDAY  
CHIEF UNITED STATES DISTRICT JUDGE

## APPEARANCES:

For the Government: THOMAS NELSON PALERMO, ESQ.  
Assistant U.S. Attorney  
400 N. Tampa Street, Suite 3200  
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813/274-6000

For the Defendant: BRIAN P. BATTAGLIA, ESQ.  
Bleakley, Bavol & Denman  
15170 North Florida Avenue  
Tampa, Florida 33613  
813/221-3759

Interpreter: James Plunkett

Court Reporter: Howard W. Jones, RPR, FCRR  
801 N. Florida Avenue, Suite 15A  
Tampa, Florida 33602  
813/301-5024

Proceedings reported and transcribed by computer-aided stenography.

## PROCEEDINGS

(Court called to order.)

THE COURT: Good morning. Perhaps counsel, the defendant, and the interpreter will step forward to the Clerk's table.

(All comply).

THE COURT: Well, good morning. We are together in Case 18-criminal-511, the United States of America vs. Franklin Rafael Lopez Toala.

I note the presence of an interpreter and I would ask the Deputy Clerk to administer to him the oath of an interpreter.

(Interpreter sworn by the Deputy Clerk.)

THE INTERPRETER: Yes, I do. James Plunkett, Spanish interpreter. Good morning.

And good morning, Your Honor.

THE COURT: Good morning, Mr. Plunkett, and thank you for being with us.

Who speaks for the United States?

MR. PALERMO: Good morning, Your Honor, Thomas Palermo on behalf of the United States. And present at counsel table is the case agent, Robert Luria (ph) from the FBI.

THE COURT: Good morning.

Who speaks for the defense?

1 MR. BATTAGLIA: Brian Battaglia, Your Honor.

2 THE COURT: Good morning, Mr. Battaglia.

3 MR. BATTAGLIA: Good morning, Your Honor.

4 THE COURT: And you are Franklin Rafael Lopez  
5 Toala?

6 THE DEFENDANT: Exactly, yes.

7 THE COURT: Well, good morning.

8 THE DEFENDANT: Good morning.

9 THE COURT: Well, Mr. Lopez Toala, on January 8 of  
10 this year you pleaded guilty to Count One of an indictment.  
11 Count One charges you with conspiracy; in particular, Count  
12 One charges a conspiracy to possess with the intent to  
13 distribute five kilograms or more of cocaine in violation of  
14 parts of Section 70503 and 70506 of Title 46 of the United  
15 States Code.

16 In addition, you pleaded guilty to Count Two of  
17 the indictment. Count Two charges you with possession with  
18 intent to distribute, again, five kilograms or more of  
19 cocaine while aboard a vessel subject to the jurisdiction of  
20 the United States, again in violation of parts of  
21 Section 70503 and 70506 of Title 46 of the United States  
22 Code.

23 Earlier I entered an order that accepts your plea  
24 of guilty to both Count One and Count Two and that adjudges  
25 you guilty of Count One and Count Two. So your guilt is

1 determined and it remains this morning to determine your  
2 sentence.

3 As I know Mr. Battaglia has explained, I will  
4 determine your sentence by first determining an advisory  
5 sentence under the United States Sentencing Guidelines and  
6 by next inviting both the United States and the defense to  
7 direct my attention to any matter, including those that  
8 appear at 18 U.S.C. 3553(a), that I should consider in  
9 arriving at a final and reasonable sentence in accord with  
10 applicable law.

11 I will begin by asking Mr. Palermo if he's had an  
12 opportunity on behalf of the United States to review and  
13 evaluate the presentence report and, if so, whether the  
14 United States objects either to the factual content of the  
15 presentence report or to the application of the Sentencing  
16 Guidelines that is recommended by the United States  
17 Probation Office?

18 MR. PALERMO: Your Honor, on behalf of the United  
19 States, I have reviewed the presentence report. I have no  
20 objection to the facts or the application of the Guidelines.

21 THE COURT: Mr. Battaglia, have you and Mr. Lopez  
22 Toala had an opportunity together to review and evaluate the  
23 presentence report?

24 MR. BATTAGLIA: Yes, Your Honor.

25 THE COURT: Mr. Lopez Toala, have you seen the

1 presentence report and discussed it with your lawyer,  
2 Mr. Battaglia?

3 THE DEFENDANT: Yes.

4 THE COURT: All right. First, Mr. Battaglia, is  
5 there any objection to the factual content of the  
6 presentence report?

7 MR. BATTAGLIA: No, Your Honor, other than what I  
8 have referenced in any of the correspondence that I have  
9 submitted to the United States Probation and Parole  
10 department. There were a couple of letters that I did  
11 submit.

12 Just for the record, I did submit another letter  
13 to Officer Shaw on March 23rd and spoke to her about it with  
14 some additional information and also the information that  
15 was originally in my I believe March 5th letter to the draft  
16 PSR. And I just made reference again to that material and  
17 we discussed it I believe on Monday and she was going to  
18 take a look at that. So I wanted to make sure that the  
19 March 23rd letter and March 5th letter was in the record.

20 THE COURT: Well, I don't know whether they're in  
21 the record or not. My question is directed to the content  
22 of the presentence report. Is there any objection to the  
23 factual content of the presentence report?

24 MR. BATTAGLIA: No, Your Honor.

25 THE COURT: All right. Then the factual content

1 of the presentence report is accepted without objection from  
2 either side.

3 I think you had at least one objection to the  
4 guideline calculation and maybe others, but let me recognize  
5 you to advance any objection to the guideline calculation,  
6 which was recommended by the Probation Office at Offense  
7 Level 31 and Criminal History Category I.

8 MR. BATTAGLIA: Do you want me to address that  
9 now, Your Honor?

10 THE COURT: Yes, sir.

11 MR. BATTAGLIA: Okay. Yes. With regard to the  
12 factual content in the report and the objections that I  
13 propounded, Your Honor, I did make reference to those in my  
14 letter of March 5th as I mentioned. And again, to the  
15 extent that those additional facts that relate to what my  
16 position is and my client's position is on this particular  
17 matter, they're contained therein.

18 THE COURT: Well, I can't rule on them by  
19 reference. So my question is, do you have an objection to  
20 the guideline calculation? I know you had a role --

21 MR. BATTAGLIA: On the calculation?

22 THE COURT: Yes. I've accepted the facts  
23 without -- because there was no objection, but I'm now  
24 recognizing you to advance any objection to the offense  
25 level of 31 and criminal history category of I. I know

1 you've got a role objection.

2 MR. BATTAGLIA: Yeah, there was a minor role  
3 objection, Your Honor, that I referenced in my letter and  
4 the additional information that I submitted to Officer Shaw  
5 on March 25th that I can address. I also had other matters  
6 that I raised in my original letter.

7 THE COURT: Let's do it to the first -- to the  
8 first -- to the minor role. Do you want to be heard on the  
9 minor role objection?

10 MR. BATTAGLIA: I can do that now, if you would  
11 like me to, Your Honor.

12 THE COURT: Yes, sir.

13 MR. BATTAGLIA: Okay. I know the Court is aware,  
14 obviously, of the case law, the *Cruickshank* case and the  
15 other decisions that I've referenced in my memorandum and  
16 motion, Your Honor, the *Cruickshank* case at 837 F.3d 1182  
17 and I believe the *De Varon* case.

18 In these particular cases, Your Honor, obviously  
19 the Court looks at the totality of circumstances and  
20 compares from others and they talk about identifiable and  
21 discernible from the evidence, from the actual evidence, as  
22 referenced in *De Varon*.

23 In the *Cruickshank* case, as you look at 3B1.2 and  
24 there's a reference in Note 3C to determine if the defendant  
25 warrants a minor role, the Court should consider in

1 subsection two little I's the degree to which the defendant  
2 participated in planning or organizing the criminal  
3 activity.

4 And just to make reference to my client, Your  
5 Honor -- and again, this is with -- in no way intended to  
6 deviate from his acceptance of responsibility, as I pointed  
7 out in my memorandum, but as it relates to the issue of  
8 sentencing. I want to make that clear to the Court.

9 Franklin was on this particular boat. He was not  
10 part of the planning or organizing of it. From one of the  
11 statements of the co-defendant, Mr. Mera, shows that he  
12 was -- the defendant, Mr. Franklin Lopez Toala, was brought  
13 to a location and essentially looking at it all was told  
14 what to do. But he wasn't directing, in charge, or anything  
15 like that.

16 In subsection little I of that particular  
17 provision, it states that is the defendant's understanding  
18 of the scope and structure of the criminal activity? When  
19 there was the proffer, debriefing, Franklin provided  
20 truthful information and the information was based on  
21 observations, what he saw, as it related to what transpired  
22 during this window of his involvement in this particular  
23 matter, which he has pled guilty to. He was driven to a  
24 location and they got on a boat. So it's very limited.

25 And then if you go to three little I's, it states

1 that the degree to which the defendant exercised decision-  
2 making authority or influenced decisions. And I think with  
3 regard to that, again, looking at the totality of  
4 circumstances in the PSR -- well, in the information that I  
5 provided to Officer Shaw, the statement from, again, one of  
6 the co-defendants was that this particular defendant,  
7 Franklin Rafael Lopez Toala, was essentially receiving -- on  
8 the receiving end of the decision making for the orders  
9 while on the vessel or at the location where the vessel was  
10 embarking and departing.

11 Mr. Franklin Rafael Lopez Toala was not in charge  
12 of -- the captain of the vessel. He didn't handle the GPS.  
13 Actually, in reviewing the materials, it appeared that  
14 another co-defendant ordered -- made the order to jettison  
15 the cargo from the vessel. And I think that was confirmed  
16 in the statement.

17 I believe there was another statement, Your Honor,  
18 that -- and this is in the record, I believe in terms of the  
19 statements that were taken in discovery, but Franklin at one  
20 point was driving the vessel, was directed to drive the  
21 vessel and, from his indication, couldn't do it correctly,  
22 so he was relieved of that, my recollection. And that just  
23 goes to the fact that he wasn't a fisherman, he had not had  
24 that type of employment in the past. And I laid that out in  
25 my sentencing memorandum, Your Honor, about his longstanding

1 history of employment in a factory, a tuna factory, and also  
2 as a security guard. So that I think reflects that  
3 particular fact.

4 In regard to the --

5 THE COURT: Thirteen years in a tuna factory, as I  
6 remember, and six years as a security guard?

7 MR. BATTAGLIA: Yes, Your Honor.

8 THE DEFENDANT: Yes.

9 MR. BATTAGLIA: So in Roman -- in IV, Roman  
10 numeral IV, those particular elements, it reflects that  
11 really there was no discretion in any of the activities.  
12 From looking at the video, essentially when the Coast Guard  
13 stopped the vessel he was not driving the vessel, it was  
14 another individual. I think it was the other co-defendant,  
15 I believe Zambrano. They did use force to shoot the motors  
16 out, as you I'm sure saw on the video, Your Honor. Franklin  
17 was in the front of the boat, scared out of his wits on the  
18 front of the bow.

19 Again, you've heard in some of these cases, Your  
20 Honor --

21 THE COURT: I didn't see the video. Were they  
22 firing the .50-caliber --

23 MR. PALERMO: (Nodding affirmatively.)

24 THE COURT: Anyone on the receiving end of  
25 50-caliber fire is entitled to be scared out of his wits.

1                   MR. BATTAGLIA: Even with his military service,  
2 Judge, sure.

3                   THE COURT: Yes, sir.

4                   MR. BATTAGLIA: No proprietary interest in the  
5 criminal activity, but was paid obviously a small amount.

6                   And so I think, Your Honor, with regard to those  
7 particular elements and the overall scenario and totality of  
8 circumstances --

9                   THE COURT: How much was he paid? He was paid  
10 5,000 up front and how much on the receiving end,  
11 Mr. Battaglia, on completion?

12                  MR. BATTAGLIA: Your Honor, I think -- I might  
13 have to go back and look. Obviously, it was more than that  
14 if it was completed, but I believe it was 5,000.

15                  THE COURT: Five up front and --

16                  Five and 15, Mr. Palermo?

17                  MR. PALERMO: Normally. We could never get a  
18 solid confirmation of what the payment upon the completion  
19 was. We know the anticipo was 5,000, but we don't know what  
20 his ultimate remuneration was promised to be.

21                  MR. BATTAGLIA: I think that was discussed with  
22 Agent Ray in the safety valve proffer, Your Honor, but I'm  
23 sorry, I don't recall the specifics.

24                  THE COURT: Does the agent know?

25                  MR. PALERMO: The only thing we could confirm was

1 the 5,000 up front. We don't know how much he was promised  
2 at the end, Your Honor, I apologize.

3 MR. BATTAGLIA: I can look at that if you would  
4 like me to supplement the record, Your Honor.

5 THE COURT: That's okay. It was somewhere in the  
6 range of 15 to 25, depending on what kind of deal got cut.

7 MR. BATTAGLIA: So again, in the totality of this  
8 particular matter, Judge, and looking at the case law that  
9 I've cited in our memorandum and what I've pointed out in  
10 our motion and memorandum for the downward departure, I do  
11 feel that my analysis of the case and the facts here, that  
12 in this particular case that Franklin Lopez Toala would fall  
13 within that parameter for a departure. I think obviously  
14 for the minor role, not a minimal role, but a minor role.  
15 And the Probation and Parole has not agreed with our  
16 objection on that point, but I do think, based on the  
17 factual information that I have provided and the summary  
18 I've provided and in our memorandum, it is appropriate under  
19 the law under these particular facts as relates to this  
20 particular defendant and I would request, at least as it  
21 relates to that particular provision, that there be a  
22 departure as it relates to the minor role application of two  
23 points, Your Honor.

24 THE COURT: All right. The minor role objection  
25 to paragraph 21, Mr. Palermo?

1 MR. PALERMO: Your Honor, under *United States vs.*  
2 *De Varon* at 175 F.3d 930, the defendant hasn't met his  
3 burden here. This defendant is similarly situated to  
4 Mr. Zambrano, who the Court has already sentenced. The  
5 defendant in his argument and also in the presentence  
6 report, frankly, is -- is fortunate in that normally the  
7 captain enhancement also includes the concept of pilot and  
8 copilot, which is someone who takes control of the vessel.  
9 We went through this -- or I went through this before Judge  
10 Bucklew and the Eleventh Circuit affirmed the application of  
11 the enhancement to those defendants for doing the same  
12 thing; that is, taking a turn at the helm.

23                   The last thing I would just note is in this  
24 particular case you also have the additional aspect of,  
25 frankly, obstruction; that is, the tossing of the cocaine

1 over the side of the vessel. It's so routine for us,  
2 because we see this all the time, the jettisoning the load,  
3 and the truth is there's probably a fair argument to make  
4 under the obstruction guideline that these sentences should  
5 be enhanced.

6                   Here we're holding the defendant accountable for  
7 331 kilos, because that's what we were able to recover from  
8 the jettison field. I don't know that we ever knew for sure  
9 how much cocaine they were actually hauling. So the reality  
10 is rather than a minor role, I think the defendant -- U.S.  
11 Probation got it right under *De Varon*, the defendant has not  
12 met his burden to show to the Court that he is a minor  
13 participant compared to the others within this conspiracy  
14 and I would ask the Court to overrule the objection.

15                   THE COURT: All right. Thank you, Mr. Palermo.

16                   MR. BATTAGLIA: Your Honor, if I may briefly?

17                   THE COURT: You may. Yes, sir.

18                   MR. BATTAGLIA: In everything that I reviewed in  
19 the documentation provided by the government, it appeared to  
20 me that everything was recovered. There was no indication  
21 that the -- whatever was thrown over was not recovered. It  
22 appeared, again, that they did a pretty good job in  
23 recovering everything, because it was all observed in terms  
24 of the Coast Guard.

25                   And with regard to comparison of the particular

1 defendants, I would just point out that if you look at the  
2 factual pattern as it relates to Mr. Zambrano and then  
3 Mr. Mera, I believe, the captain, Mr. Mera, was -- and I  
4 pointed this out in my memorandum. I think in the original  
5 memorandum to the Court there was a reference to he led a  
6 largely, I mean, something along the lines of law abiding  
7 life. And with all due respect to --

8 THE COURT: This defendant?

9 MR. BATTAGLIA: I'm sorry?

10 THE COURT: This defendant?

11 MR. BATTAGLIA: No, the other defendant.

12 THE COURT: Mr. Mera or Mr. Zambrano.

13 MR. BATTAGLIA: Mera, I believe it was.

14 THE COURT: Yes, Mr. Mera. He was the captain.

15 MR. BATTAGLIA: Yes, largely law abiding life.

16 THE COURT: Of course, we don't know that.

17 MR. BATTAGLIA: My point --

18 THE COURT: We don't really have much way to  
19 confirm any reliable information about any of the defendants  
20 in the boat cases for the most part. As you pointed out  
21 earlier -- point out in your memorandum, I've been doing  
22 these cases for 25 years, or 20 anyway of my 27 or 28, how  
23 long I've been doing this, almost every one of these -- in  
24 fact, I think it is the case, every single one of these  
25 defendants I've ever had have been a Criminal History

1 Category I offender in these boat cases, unless they have  
2 previously been arrested in a boat case and have come back.  
3 And we've had some of those, so --

4 MR. BATTAGLIA: But the reason I point that out,  
5 Judge, just quickly, that wasn't really the case from  
6 everything I observed and read as it relates to that  
7 particular defendant. And that would be the captain. And  
8 based on -- and I pointed this out in my memo, based on his  
9 previous activities and transporting humans to another  
10 geographical location, apparently having a lot of knowledge  
11 of other things that were going on. I don't need to get  
12 into it all, but it appeared to me that that is a very  
13 distinct fact separating this gentleman, my client, from the  
14 captain. And then with Mr. Zambrano --

15 THE COURT: Nobody is trying to enhance this  
16 defendant for being captain of this vessel.

17 MR. BATTAGLIA: I understand. And then with  
18 Zambrano, the other co-defendant, having more interaction in  
19 terms of what he was doing, with the GPS, giving orders,  
20 driving the boat. And again, I think that my recollection,  
21 Your Honor, is that whether Mr. Franklin Lopez Toala was  
22 interviewed, yes, he indicated and he was truthful and Agent  
23 Ray indicated that he was very cooperative and truthful in  
24 the statements, but he did point out that he was very  
25 quickly relieved from steering because he didn't know how to

1 steer a boat. He had never done it before.

2 So that's all I have to say. And again, I would  
3 just stand on our memorandum and my comments today as it  
4 relates to this particular issue and the departure as it  
5 relates to the case law and our argument for a two-level  
6 departure downward from the PSR for this particular  
7 defendant under these particular facts and under the  
8 totality of the circumstances, Judge.

9 THE COURT: All right. Back on the question of  
10 this role, under the en banc decision of the Eleventh  
11 Circuit in *De Varon*, actually it's Isabella Rodriguez  
12 *De Varon*, which achieved more fame I'm sure than she ever  
13 expected she would, but it is the responsibility of -- the  
14 burden of the defendant to show that he's substantially less  
15 culpable than the average participant in the conspiracy.

16 Typically, and as a matter of fact, almost  
17 necessarily in these so-called boat cases, it's necessary to  
18 regard the pertinent class of comparators as the persons  
19 onboard the vessel. The crime is, of course, the  
20 transportation on the high seas, the reception and  
21 transportation to some -- toward some rendezvous point or  
22 point of delivery of a large quantity of high-purity  
23 cocaine. So typically in these cases, we look at the crew,  
24 because if you begin to go outside the crew, first of all,  
25 the identification and enumeration of the other participants

1 all of a sudden becomes a very complex and difficult task,  
2 because there are people who were planting, growing cocaine  
3 in the forests, there were people who cut and processed,  
4 there were people who refined and transported, there were  
5 people who packaged, there were people who put the -- who  
6 selected the boat to put the -- bought and mounted the  
7 engines, who crafted the interior of the vessel in such a  
8 way that it would successfully house the cargo, there are  
9 the people who actually encased the cargo in its seaworthy  
10 packaging, there were people who provisioned the vessel.  
11 Many of those would probably be less culpable than the  
12 people who actually -- two or three people who put the  
13 multimillion-dollar cargo on the vessel, took full  
14 responsibility and control over it and headed to the high  
15 seas where they were encountered by the United States  
16 military.

17           Of course, there would also be people who were  
18 probably more culpable than the defendants, the lords of the  
19 operation, the leaders of these criminal organizations, and  
20 their enforcers and their captains and the like, who --  
21 there are recruiters, there are enforcers. It's an  
22 unmanageable number and not within our capacity to assess  
23 very effectively.

24           Also, that organization is responsible for a much  
25 larger quantity and I believe boundlessly larger quality of

1 cocaine in all probability than this. We don't know one way  
2 or the other. So what we typically deal with here is the  
3 crewmen aboard the vessel and their relative standing in the  
4 somewhat loose organizations.

5 Of course, the entire organization from the field  
6 through the refinery and up into the command structure and  
7 everywhere else is sort of loose. It's not an American  
8 corporation where they publish the organizational chart.  
9 But we look at the relative culpability of the persons in  
10 the vessel, because that is something that we can manage and  
11 which is reasonable and which is consistent with the spirit  
12 and the letter of the Sentencing Guidelines and the other  
13 applicable sentencing factors.

14 In general, the persons are grouped into the --  
15 someone who may be -- on the one hand, someone who may be  
16 exercising control as the captain or perhaps in some  
17 instances exercising control because the presence of a  
18 firearm or doing so by force or exercising control because  
19 they are the owner's representative of the cargo or  
20 something like that.

21 In this instance, we appear to have a captain and  
22 two crewmembers. The crewmembers may have some minor  
23 distinctions between them, but they are both available labor  
24 for general purpose labor on the vessel and, in that  
25 respect, they are similarly situated. So for that reason, I

1 tend to think that the defendant is not entitled to a minor  
2 role reduction in his offense level under 3B1.2.

3 You mentioned *Cruickshank*. It's a case that  
4 always amuses me. It was a bit of a slight of hand by the  
5 Circuit Court of Appeals in converting a mistake of theirs  
6 into a mistake of mine. In *Rodriguez De Varon*, they  
7 announced in bold print for all to read that quantity alone  
8 could be disqualifying for minor role. It's right there.

9 For many years, I never once, including in  
10 *Cruickshank*, disqualified anyone from a minor role for  
11 that -- on the basis of the statements of *De Varon* for the  
12 simple reason that there was no quantity announced. And I  
13 regularly said on the record that it was very difficult to  
14 imagine drawing any such bright line quantity and always  
15 made my decision based upon some other factor, but often  
16 said in those cases that I thought, for instance, if you  
17 were hauling a ton of high-purity cocaine, which would be  
18 the equivalent of three or four tons on the street, that  
19 that likely -- if the Circuit Court ever were to draw a  
20 line, that that would probably be north of that line and  
21 disqualifying. Although, never once, even in *Cruickshank*,  
22 did I disqualify someone based on quantity. Although, I  
23 think based on *De Varon* there were hundreds of times when I  
24 could have done it, except I thought *De Varon* was wrong in  
25 making that statement that quantity alone could be

1 disqualifying.

2                   So in *Cruickshank I*, yet again, did not disqualify  
3 that defendant based on role -- excuse me, based on  
4 quantity. Once again, I said that *De Varon* was -- had said  
5 that quantity alone could be disqualifying and that I  
6 suspected that the quantity in *Cruickshank* case was probably  
7 north of an amount that they might announce if they ever did  
8 so.

9                   The Circuit Court of Appeals failed to read the  
10 transcript and understand it and said in the opinion that I  
11 had disqualified someone based on quantity, which is not the  
12 case, yet they used that -- they did not acknowledge having  
13 made the statement that they made in *De Varon*, that quantity  
14 alone is disqualifying, and then they said what I have been  
15 saying all along, which was that quantity was a factor that  
16 should be considered. So, of course, they vacated the  
17 sentence, remanded it, I entered the exact same sentence for  
18 the exact same reason and they affirmed on appeal having  
19 misunderstood and misstated the sentence on the first -- in  
20 the first instance.

21                   But I'll say again, quantity is a -- is something  
22 that can be considered in arriving at a minor role  
23 determination or in denying it. And as Mr. Palermo  
24 suggests, those of us in this particular -- who receive  
25 these so-called boat cases get a little bit anesthetized to

1 the quantities involved here, because we've had -- we've had  
2 cases with 20 tons of cocaine and ten tons of cocaine and  
3 eight tons of cocaine. So getting one that's in the 300s  
4 compared to some of these cases is a smaller operation and a  
5 go-fast vessel here is a smaller boat than some of the cargo  
6 vessels that have been turned into conveyances at the behest  
7 of organized crime for cocaine. But still most of the  
8 Judges in the United States of America, almost all of them,  
9 will never sentence a case involving a quantity as high as  
10 331 kilograms of high-purity cocaine.

11 So this is a large quantity of cocaine, roughly a  
12 thousand kilograms probably on the street, which is about a  
13 ton, right? It's about a ton of street cocaine that was  
14 involved in this vessel. Hardly a minor amount. It's a  
15 minor amount compared to the aggregate moved by the cartels  
16 and their subordinates in any period of time, a year say,  
17 but in terms of the average apprehension that occurs in the  
18 United States, it's still a very large quantity of cocaine.

19 Let me say emphatically I do not disqualify this  
20 defendant from a minor role based upon the quantity of  
21 cocaine on this vessel, period. But I think it is a factor  
22 that augers -- gravitates against a minor role under the  
23 circumstances. The reason being this is a very, very major  
24 crime. And the three people -- while we don't know a whole  
25 lot about these individuals who show up as crewmen on these

1       vessels, there is one thing we know about all of them: That  
2       responsible people in organized crime entrusted them to take  
3       a very valuable cargo by themselves out into the Pacific  
4       Ocean or sometimes another body of water. But that is just  
5       one factor.

6                   So anyway, my resolution is that the defendant has  
7       failed to bear his burden of proving that he is less  
8       culpable than the average participant.

9                   I just want to add a couple of things under 3B1.2,  
10      Application Note 3C. You know, you can approach some of  
11      these application notes from a couple different directions.

12                  Concerning C Romanette one, or Romanette (i), this  
13      defendant understood exactly the scope and structure of the  
14      criminal activity that he was involved in, which was to take  
15      this very valuable cargo into the ocean. He understood how  
16      it was going to be done, who was going to do it, and very  
17      strong evidence that he understood the nature of what he was  
18      doing was the price that was being paid for his  
19      participation. This is a very large payday in this  
20      defendant's world and he understood that this was some large  
21      criminal organization that could boat a large cargo of  
22      cocaine.

23                  I would suspect that his -- his participation in  
24      planning and organizing the criminal activity is not great,  
25      although I do think he was knowledgeable if you remember

1 that the criminal activity that we're talking about is the  
2 transportation of this cocaine.

3 I don't know anything about his turn at the wheel.  
4 Actually driving a boat of this size, particularly if it's  
5 well ballasted in the middle with a heavy load of cocaine,  
6 is not really all that difficult. But the reason you have  
7 three people on these vessels is so that they can take turns  
8 doing the things that need to be done to maintain the vessel  
9 and crew during a strenuous voyage on the high seas.

10 And these are typically strenuous voyages, just  
11 pounding the hull on the water, the noise from the engines,  
12 the wind in your face, it is a relentless process. But  
13 that's true of all of us who have ever driven a vessel on  
14 the ocean or ridden in one on the ocean, particularly one  
15 this size. I can attest even if it was a fishing trip, it  
16 can be strenuous.

17 We don't know the degree to which the defendant  
18 exercised decision-making authority, to influence the  
19 exercise of decision-making authority. It's worth noting  
20 that when the three crewmen are on the vessel and law  
21 enforcement and the military are on the horizon that  
22 apprehension is almost a certainty and they do one thing for  
23 sure, they choose to flee or choose to yield.

24 And when they are -- when warning shots are fired  
25 across the bow, and .50-caliber fire is unmistakable, the

1 explosion that occurs or the eruption that occurs when a  
2 .50-caliber shell hits the water in front of the boat cannot  
3 be missed by the human eye, the gunfire, even the engines  
4 will not drown out the noise, and they decide to continue to  
5 follow their orders, throw the cargo overboard, to throw  
6 their telephones, navigational paraphernalia overboard, and  
7 otherwise frustrate law enforcement. They could have easily  
8 yielded, but one or more of them made the decision to flee  
9 and to continue that fleeing under gunfire from an obviously  
10 superior force.

11 I have discussed the nature and extent of his  
12 participation. And finally a little V or little five, the  
13 degree to which the defendant stood to benefit. Some people  
14 say -- point out that the defendant had no ownership  
15 interest in the cargo. I accept that as almost certainly  
16 true. However, I will point out that he did have an  
17 interest in the success of the voyage, because his pay in a  
18 sense was contingent. So he had a strong inducement to  
19 succeed in delivering the cargo. It was financial and it  
20 was quite tangible, although he was never to receive it.

21 So I guess when an attorney takes a contingent fee  
22 case, it probably can't be said that they have an ownership  
23 interest in the cause of action, but they do have a very  
24 strong economic interest in the outcome or the result, so  
25 that's a very motivational interest.

1                   So I would, for all those reasons, respectfully  
2 deny the motion for a two-level downward adjustment.

3                   And, Mr. Battaglia, I apologize to you for the  
4 length of that -- of that explanation, but as has been  
5 demonstrated a few times, including *Cruickshank*, you can't  
6 take anything for granted in these things, so I need to  
7 explain to the best of my ability, although it's  
8 extemporaneous with what I have done and I know some of you  
9 have heard these exact same words many times, but you never  
10 know when they need to be repeated subsequently. So I'm  
11 sorry.

12                  Did you have any other objection to the guideline  
13 calculation?

14                  MR. BATTAGLIA: Yes, Your Honor.

15                  THE COURT: All right.

16                  MR. BATTAGLIA: If I may move on to the next  
17 argument in the memorandum and motion, Your Honor, it's in  
18 subsection A or Section A, page five. And before I do that  
19 if I may just make a few comments, Your Honor, as it relates  
20 to my client, Franklin Rafael Lopez Toala. I did submit the  
21 information to Parole and Probation, I submitted our  
22 objection.

23                  THE COURT: Mr. Battaglia, let's not be confused  
24 here a second. I am at the moment in need of making a  
25 correct guideline calculation.

1 MR. BATTAGLIA: Yes, Your Honor.

2 THE COURT: Before we consider departures and  
3 variances, I need to get the guideline calculation right.

4 MR. BATTAGLIA: Okay.

5 THE COURT: So the Probation Office has  
6 recommended a 31 offense level and Criminal History  
7 Category I. I assume you have no objection to the Criminal  
8 History Category I. Did you have any other objection to the  
9 Offense Level 31?

10 MR. BATTAGLIA: What I indicated already, Your  
11 Honor, and obviously that particular objection was overruled  
12 on the two-level departure --

13 THE COURT: On the minor role?

14 MR. BATTAGLIA: And as it relates to the other  
15 arguments in my memorandum, to the extent the Court can  
16 grant departures. Your Honor, I've looked at the  
17 calculations and, again, as I stated with regard to the  
18 reduction for the minor role, which has been overruled, at  
19 this point, with the 31, I understand that's 108 months on  
20 the low end. And then we have additional arguments as it  
21 relates --

22 THE COURT: For departures and variances?

23 MR. BATTAGLIA: Yes, Your Honor.

24 THE COURT: For the guideline calculation and  
25 subject to Mr. Battaglia's objection to the role, the Court

1 adopts the Criminal History -- Offense Level 31, Criminal  
2 History Category I.

3 Now, you did have some -- a request for departures  
4 in your sentencing memorandum.

5 MR. BATTAGLIA: Yes, Your Honor.

6 THE COURT: So you wanted to discuss those?

7 MR. BATTAGLIA: Yes, Judge. If I may proceed?

8 THE COURT: Yes, sir.

9 MR. BATTAGLIA: Thank you. If it pleases the  
10 Court, just briefly, Your Honor, I would like to digress a  
11 bit and talk a little bit about, because it's relevant to  
12 this particular argument, as it relates to this defendant,  
13 Mr. Toala, Lopez Toala, and the matters that relate to what  
14 transpired prior to on or about October 18th and shortly  
15 before that, obviously, with regard to my argument for  
16 additional departures -- downward departures and variances.

17 With regard to Mr. Lopez Toala, Your Honor, it's  
18 interesting there's a show on Netflix, it's called Manifest.  
19 I don't know if the judge has seen that.

20 THE COURT: I have not.

21 MR. BATTAGLIA: And it's a commercial airliner  
22 full of passengers and it takes off one day and it simply  
23 disappears. No explanation, no trace. And then five and a  
24 half years later the plane and the passengers return to the  
25 same airport from which they left.

1                   Based on that story line, each episode depicts the  
2 impact that the absence of these passengers have had on  
3 their families, communities, and workplaces. It also shows  
4 the reaction and interactions that these returning  
5 passengers experience with members of the public, their  
6 friends, loved ones, upon their return. Not surprisingly,  
7 many of those interactions are not positive. In many ways,  
8 that particular story line in Manifest is a reality that  
9 Franklin has lived with since the moment he made a decision  
10 to get on a boat shortly before October 18th of 2018.

11                   So we have a clear demarcation point, Your Honor,  
12 the point prior to shortly before October 18th, 2018, and  
13 the point in time after October 18th, 2019.

14                   And what comes next for Franklin is obviously in  
15 part within the great responsibility of this Court. And I  
16 would ask Your Honor as I go through these particular  
17 reasons for a departure or variance, I would ask this Court  
18 to view what I am about to discuss from the perspective of  
19 granting this defendant mercy. And only this Court can do  
20 that. And mercy would be within the obvious requirements of  
21 the law, requirements of the totality of facts and the  
22 reasonableness of the sentence.

23                   Now, with regard to Franklin and his positive  
24 characteristics in history before he made that fateful  
25 decision, I would point out that the decision that was made

1 was a confluent of things that related to -- and I put this  
2 in the record -- his grandchild. An infant that was born  
3 premature and significantly premature based on the World  
4 Health Organization guidelines that I put into the record,  
5 26 weeks.

6 And with respect to that, Your Honor, I think I  
7 did put in the supplemental filing I did yesterday, the  
8 letters. If I may I would like to, if I can, give this to  
9 the Clerk and just put this in. I got this from the  
10 translator this morning and it was another letter I got  
11 from -- I think it's consistent with what we already  
12 submitted, but it's just something that she had sent me this  
13 morning, actually she was able to get to it last night, our  
14 interpreter. So I wanted to make sure that's in the record.

15 But if I may, Your Honor, the decision to try and  
16 save the premature infant, his grandchild, the baby is doing  
17 well from what I understand and you'll see that in the  
18 correspondence thankfully. But that decision wrought about  
19 Franklin and his loved ones misery and shame. And he's  
20 accepted that. And he's accepted responsibility and he's  
21 acted honorably throughout this process from all of my  
22 observations and my experience in practicing law in this  
23 particular jurisdiction for 32 years.

24 But it's not by words, but by actions. His  
25 remorse, acceptance of responsibility, and, again, what he

1 has done prior to a terrible decision back in October of  
2 2018.

3 Now, I've talked about some of the distinctions  
4 with regard to these other co-defendants and I have pointed  
5 out in my memorandum that Franklin had a loving mother,  
6 Sylvia Toala, and she instilled in him a work ethic, a work  
7 ethic that helps him basically have consistent employment  
8 throughout his life until he was laid off at his position at  
9 the tuna factory in I believe it was the summer -- early  
10 summer, spring of 2018, Your Honor. But he did work as a  
11 security guard, as I pointed out, and also in the tuna  
12 factory, canning, et cetera, slicing fish. He wasn't a  
13 fisherman, he had not done that type of work.

14 When he was young he baked bread, sold bread,  
15 shined shoes, cleaned tables at the restaurant his mother  
16 worked in. He also helped her, she was a cook there. He  
17 helped raise his brother, close to his mother. He was  
18 diagnosed with a learning disability when he was young, but  
19 he did learn how to read and write. He wasn't able to get  
20 any assistance for that.

21 I talked about his consistent work history,  
22 self-sufficiency, his pride, and pride sometimes is a bad  
23 thing. For all of us. Unfortunately, when he was laid off,  
24 again, as I pointed out, there was a situation that arose  
25 with his son, Justin, and the birth of a premature child,

1 infant, 26 weeks. And he had lost his job, the child needed  
2 medical care, there wasn't sufficient funds to provide for  
3 that and he made a bad decision, which he's accepted  
4 responsibility for. But again, I think under the -- some of  
5 the case law I've cited and the facts and the distinctions  
6 as it relates to this case, that is a very important matter  
7 to consider for this Court.

8 I would also point out that, again, as you pointed  
9 out, Your Honor, that he doesn't have a criminal record, and  
10 you've pointed out that many times when they come back the  
11 second time, you're able to determine if there was a  
12 criminal record. But he has indicated and I believe  
13 truthfully that he does not have any criminal record in his  
14 past. He's been self-sufficient, productive, longstanding  
15 continuous employment, he has supported his family, and he  
16 has done something that he thought he had to do as it  
17 related to this young infant.

18 So I wanted to point out those things for the  
19 record as it relates to the materials that I filed. And I  
20 pointed out there was some materials that I submitted from  
21 the fact book as it relates to mortality rate in these  
22 countries. They're significantly higher, obviously, than a  
23 country that is more advanced. And the reason for that is  
24 because of the lack of medical care or the inability to get  
25 medical care, which obviously costs money.

1                   And so with regard to that, Judge, I wanted to  
2 point out in the Guidelines and the comments, Section 5H1.5,  
3 5H1.5, 5H1.6, 5H1.11, and 5K2.0, in those particular cases  
4 and how they relate to some of the case law that I reviewed.  
5 And I know the Court is familiar with these cases,  
6 obviously, and they talk about -- I talked about outside the  
7 realm or the heartland of these cases. And I think that in  
8 this particular instance, and I submitted some materials,  
9 again, as I pointed out earlier in the record, Franklin  
10 did -- was compelled in his mind to help his country and  
11 serve during what was called the -- during the period of  
12 time that there was a conflict between Peru and Ecuador. It  
13 was called the Cenepa War. And I have some materials here,  
14 if I can put in the record, but that was the, the Cenepa  
15 War, where apparently there was a dispute between boundaries  
16 with I believe Peru and Ecuador. I have a photograph of  
17 Franklin as it relates to his service in the Ecuadorian  
18 military and from the materials provided or the information  
19 provided, there is no indication that he served in any  
20 dishonorable manner and he was proud of his service as it  
21 relates to his country.

22                   With regard to the issues that concern consistent  
23 employment history, familial ties, military service, it is  
24 expressly referenced in the comments in the Guidelines. He  
25 has no history of alcohol or -- alcohol or drug abuse, as he

1 stated. He is obviously not requesting any type of  
2 substance abuse. I know that happens a lot in these type of  
3 cases, because he doesn't have any substance abuse problem.  
4 He worked. He didn't abuse alcohol. He took care of his  
5 family. No prior criminal record.

6 So if you look at those factors and compare it to,  
7 say, the boat cases and taking the example of these two  
8 particular co-defendants, I prepared a chart, Your Honor,  
9 and in that chart I went through those --

10 THE COURT: I saw it. It was an attachment to  
11 your sentencing memo.

12 MR. BATTAGLIA: Yes, sir.

13 THE COURT: I actually looked through, read the  
14 sentencing memorandum and looked at all the attachments.

15 MR. BATTAGLIA: And I tried to point out the  
16 distinctions as it related to this particular situation.

17 And the Guidelines, they do talk about, as this  
18 Court knows, looking at the exceptional circumstances. They  
19 look at, for example, when there are two or more of these  
20 factors involved and they're substantial, they talk about in  
21 those particular situations that the Court should consider  
22 those combinations of the offender characteristics that take  
23 it outside they call it the heartland or outside the realm  
24 of these particular cases that you hear. And in those  
25 particular situations, and I pointed out the Big Chief case

1 or *Big Crow* case, I believe it was, where in a similar  
2 circumstance the individual, they granted -- the judge  
3 granted a downward departure, a variance of a *Big Crow* case,  
4 I've cited that in my memo and provided a copy to  
5 Mr. Palermo, where the Court did note the longstanding  
6 consistent history of employment for the particular  
7 defendant and the other factors that allowed, based on the  
8 Court's evaluation to depart or vary from the sentence, to  
9 reduce it below the advisory guideline range.

10 And in this particular case, with regard to  
11 Mr. Lopez Toala, there are those factors. There's probably  
12 two or three actually in the combination.

13 THE COURT: Right.

14 MR. BATTAGLIA: And if you look at the Guidelines,  
15 you can look at that.

16 And then the other interesting point was that in  
17 the notes they talked about -- they didn't really say it was  
18 the intent, but they looked at maybe the mitigation factor  
19 under the particular guideline provision, which was -- let's  
20 see here, I think it's 5K2.0. And in this particular  
21 instance, Your Honor, I think it's on that particular area  
22 in evaluation and comment. For example, in the comment they  
23 talked about the teacher who brought drugs into a school to  
24 try to teach the children why drugs were bad. I guess the  
25 comment was more like to show them I guess and I guess she

1 got arrested for bringing drugs in the school.

2 THE COURT: Probably was not a good idea.

3 MR. BATTAGLIA: Right. And so then there's  
4 another example --

5 THE COURT: I'm sure you wouldn't be upset if  
6 teacher brought drugs to your children's school.

7 MR. BATTAGLIA: But they talked about, you know,  
8 again, what the mindset was.

9 THE COURT: Right.

10 MR. BATTAGLIA: So in this situation we did have a  
11 situation where it was with regard to the infant and the  
12 thought process going on at that time. And he had been  
13 through that before from my understanding in the -- his wife  
14 had delivered two children who had -- stillborn. And so I  
15 think all these things going through somebody's mind can  
16 have an impact on them.

17 And so I think based on the factors that we've  
18 pointed to, the information that I provided to the Court,  
19 those particular elements, and based upon the application of  
20 those to this particular defendant, who based on these  
21 particular facts, from my estimation and evaluation of the  
22 facts and the case law, is outside -- is outside the  
23 heartland of these cases that obviously Mr. Palermo handles,  
24 you handle, in this particular District.

25 So with that, Your Honor, I would request -- and I

1 pointed out what I felt based on some of the statistical  
2 data from the U.S. Sentencing Commission in this particular  
3 District, in the Southern District and the Middle District,  
4 what would be a reasonable range as it relates to the  
5 application of these factors, whether by departure or  
6 variance under *Booker*. And in those particular --

7 THE COURT: We are not at the moment talking about  
8 a *Booker* variance.

9 MR. BATTAGLIA: I'm sorry.

10 THE COURT: I'm trying to get the guideline  
11 calculation. So we're talking about I think a departure  
12 under 5H1.5 and 6 and 11. 5H1.5, 6, and 11. And considered  
13 together under 5K2.0.

14 So, Mr. Palermo, would you want to be heard on  
15 these matters, the departure matters.

16 MR. PALERMO: Your Honor, I suspect that my input  
17 is not necessary other than to say that we oppose the  
18 base -- the defendant has not presented an adequate basis  
19 for departure under any of the sections of the Guidelines  
20 that he cited. I see no reason to depart.

21 THE COURT: All right. With respect to the  
22 departure request, this defendant apparently has an  
23 employment history that accounts for quite a few years, but  
24 I'm not sure the extent to which that is mitigation of the  
25 sort likely to result in a change in this sentence. There's

1 nothing really extraordinary about that. It can relate to  
2 the probability of rehabilitation and things such as that.

3 He does have family and responsibilities  
4 apparently and has a number of dependents, children and  
5 their mothers. Again, that is not at all unusual in these  
6 cases. He does have no apparent history of substance abuse,  
7 no prior criminal record that is known anyway. But those  
8 are typical circumstances and I think whether considered  
9 individually or collectively, none of these factors is  
10 present to a degree or to an extent or is related in such a  
11 way that it would prompt a departure in these circumstances.

12 MR. BATTAGLIA: Your Honor, the military element.

13 THE COURT: And he does say that he served in the  
14 military. It's not my intention to engage in a debate about  
15 these factors, but there are -- there is a way of looking at  
16 this that's very real that suggests that someone who is --  
17 had a long and consistent employment history and is  
18 employable has every reason in the world not to do what was  
19 done here and the capacity not to do it, that someone who  
20 has special responsibilities at home has every motivation in  
21 the world not to engage in reckless and high-risk behavior  
22 with what we are led to believe is an unknown employer and  
23 to, in effect, gamble his liberty in exchange for one  
24 premium payday, someone with military service has been  
25 exposed presumably to discipline and organization and

1 accountability in his conduct and should have every reason  
2 to know of the danger of engaging in this kind of scheme.

3 Again, similarly, someone with no prior criminal  
4 record that presumably owed nothing to these -- this  
5 organization and was free of it was -- had every reason in  
6 the world not to do what he's done, didn't have debts to  
7 these folks and required to cooperate with them.

8 These factors, all of them I think at one time or  
9 the other have prompted me to make some sort of departure in  
10 a particular case, but that was because there was some  
11 extraordinary and verifiable and causally connected reason  
12 to effect the sentence based upon one of these factors. I  
13 don't believe they are present here.

14 The discussion was of a learning disability. With  
15 all due respect, I have no usable information about the  
16 nature or extent of this disability. I don't know that, at  
17 any rate, it is pertinent to our proceedings here today.  
18 There is -- it does not appear to have interfered with his  
19 ability to conduct employment, to his ability to engage with  
20 his family and his community, it doesn't appear to  
21 have led him into any form of incapacity elsewhere in his  
22 conduct, and its role, if any, in this offense is a matter  
23 of the most tangential speculation.

24 So again, I don't think there's any reason here to  
25 depart based upon any of those factors or any combination of

1 those factors, which, again, are not present in any  
2 remarkable extent or degree or proximacy (ph) of causation.  
3 So those sundry motions for a departure are denied.

4 I believe that's the only items that would affect  
5 the guideline calculation. A variance might affect the  
6 sentence, but again, I'm talking about the guideline  
7 calculation.

8 MR. BATTAGLIA: Yes, Your Honor.

9 THE COURT: The minimum mandatory is not going to  
10 be -- this matter on page 12 with respect to the First Step  
11 Act, that's not pertinent, is it?

12 MR. BATTAGLIA: No, Your Honor, he pled after the  
13 application -- or the plea and acceptance was after  
14 December 21.

15 THE COURT: So the minimum mandatory is not a  
16 factor here.

17 MR. BATTAGLIA: And he did a safety valve proffer  
18 too.

19 THE COURT: Right. He's got the safety valve.  
20 And there's no other matter that I see that affects the  
21 guideline calculation and a departure.

22 Have I omitted anything, Mr. Battaglia?

23 MR. BATTAGLIA: No, Your Honor.

24 THE COURT: Mr. Palermo?

25 MR. PALERMO: No, Your Honor.

1                   THE COURT: Look like I've got it?

2                   All right. So we still are at the original  
3 calculation of 31 and I.

4                   So I am mindful that you have made arguments for a  
5 variance already, Mr. Battaglia, but if you would like to  
6 add anything to what you already said under 3553(a) or  
7 introduce any other matter in mitigation, I'll recognize you  
8 for that purpose, after which I'll recognize Mr. Lopez Toala  
9 in allocution.

10                  MR. BATTAGLIA: Thank you, Your Honor. With  
11 regard to those factors, Your Honor, 18 U.S.C. 3553 and  
12 variances, again, Your Honor, I think as I've discussed  
13 today with the Court, as it relates to the sentence  
14 ultimately to be rendered by this Court as it relates to  
15 this particular defendant, as I said earlier, I would ask  
16 for mercy, Judge, in these particular circumstances based  
17 upon the totality of this particular defendant, as it  
18 relates to his history and characteristics. I think those  
19 are very, very critical and important in this case.

20                  And I can tell the Court that I did spend a lot of  
21 time evaluating it, going through the information, trying to  
22 provide that to the Court, the information presented from  
23 his loved ones, the information relating to his military  
24 service, the child, infant child, and the data that, again,  
25 without in any way, Your Honor -- and I'm sure this

1 defendant will talk to you in a moment about that, but in no  
2 way trying to make any excuse here.

3 THE COURT: Right. I understand that.

4 MR. BATTAGLIA: But as it relates to the sentence,  
5 one that would be reasonable under the circumstances, at  
6 this point, on the low end -- I don't think the government  
7 has any objection to this -- he's looking at nine years.  
8 And I do believe that with regard to the factors under this  
9 particular provision that we're discussing now, those  
10 characteristics, his history, all the matters outlined in  
11 those particular elements will still be supported and met by  
12 this Court as it relates to obviously trying to impose  
13 respect for the law and protecting the public as it relates  
14 to this particular matter. And none of those things will in  
15 any way be overcome or overruled by this Court by a reduced  
16 sentence as it relates to this defendant, Your Honor. And  
17 so we could call that a variance, we could call that the  
18 *Booker* factors, we can call that mercy.

19 And I will tell this Court that, again, based on  
20 my observations and from everything that I've seen and  
21 interactions and review of this data, that this particular  
22 individual is not going to be back in front of this Court  
23 when he does eventually return to the place that he left six  
24 months ago and now is essentially like the folks on the  
25 airplane in *Manifest*, disappeared. One day he will go back

1 and he will appear again and he'll have to deal with the  
2 decision he made in October of 2018.

3                   But notwithstanding that, these other factors are  
4 things that this Court should consider and the -- in the  
5 great weight of those factors I believe based on the law,  
6 the scale is tipped in favor of this defendant, Franklin  
7 Rafael Lopez Toala, Your Honor.

8                   THE COURT: All right. Thank you, Mr. Battaglia.

9                   Mr. Palermo, I did not ask you, I think I  
10 overlooked to do so, whether the United States had a motion  
11 on behalf of this defendant under 5K1 or otherwise.

12                  MR. PALERMO: No, Your Honor. That motion was  
13 filed with respect to Mr. Mera in this case.

14                  THE COURT: Mr. Lopez Toala, you do have an  
15 opportunity to speak on your own behalf this morning.  
16 You're not required to say anything, of course, but if you  
17 would like to say something, I would be happy to hear from  
18 you. And I promise you that nothing you say is going to  
19 hurt you in any way.

20                  THE DEFENDANT: Yes, Your Honor.

21                  THE INTERPRETER: The interpreter has briefly  
22 paused.

23                  THE DEFENDANT: I know that I made a mistake and I  
24 accept my guilt. But I was going through a very difficult  
25 time in my family and, as you know, the thing about

1 discipline, even in my poverty, I went through a good role  
2 of discipline. I served my country. But I was in a very  
3 difficult situation. In my life I have lost -- I have lost  
4 children before. For example, in this situation with my  
5 child where his baby was in a very serious situation, six  
6 months of pregnancy and he decided to come into the world.  
7 And it was, therefore, very difficult for us, the doctors  
8 were telling me that he was between life and death --I -- I  
9 was not going to let anything happen to my little  
10 grandchild.

11 Since I was eight years old I have worked and I've  
12 worked making bread, shoe shining, even peeling onions in  
13 the market in the wee hours of the morning. I am not  
14 ashamed of that. I am not ashamed for the life that I've  
15 had before and I've always tried to get ahead in life. I  
16 did -- I start from not having anything, I didn't have  
17 anything even in the world of poverty that I had. But it  
18 was through my efforts, I made the effort to succeed and I  
19 tried to instill that to my children to protect and to give  
20 to them.

21 I have a 22-year-old son who finished his high  
22 school, he has become a nurse, but he doesn't have any work  
23 in Ecuador. It's very difficult. You know, I tell him not  
24 to do the silly nonsense that I did. It was very silly for  
25 me to do it. And what he does is he sells ice cream at the

1 stadium at the soccer matches over the weekend just so he  
2 can earn some money. And I tell him, you know what, earn  
3 your money the right way, honestly, don't do it like I did  
4 it. You know, I'd rather be the one in trouble, but not  
5 you. I don't want you to do that life -- the mistake that I  
6 made.

7 Your Honor, I've lived my life already. I am  
8 already an adult, but for my kids, I will give them even my  
9 life. I have always been the head of the household and I  
10 have always wanted to bring my family out of poverty. I  
11 didn't have anything before.

12 But anyway, I ask you for mercy and I need to go  
13 back to my home country in Ecuador so I can keep guiding my  
14 son and tell him, you know, so they can see the foolishness  
15 in what I did so that they don't do the same thing.

16 Your Honor, so I ask you to forgive me. To  
17 forgive me, that's all I ask. That you show mercy to me,  
18 please. I know that I'm guilty. I know that I did this  
19 wrong and I need to pay for it, so I ask for mercy. That's  
20 all.

21 THE COURT: All right. Thank you, sir.

22 Mr. Palermo, what says the United States with  
23 respect to a reasonable sentence?

24 MR. PALERMO: Your Honor, the defendant pled here  
25 without a plea agreement, but I would recommend to the Court

1 a sentence similar to that which was given to Mr. Zambrano,  
2 which was 108 months to avoid any what I would perceive as  
3 unwarranted disparities.

4 I will tell the Court, as a human being listening  
5 to the defendant, I certainly was, you know, moved by his  
6 eloquence and appreciated the way he was approaching the  
7 Court early on in his presentation. I mean, I -- it always  
8 frustrates me when defendants describe what they did as a  
9 mistake, because mistake implies a degree of absent moral  
10 autonomy in the choice they make, which is always sort of  
11 frustrating to me, because here the defendant made a bad  
12 decision, he is correct in that. He was hauling at least  
13 331 kilograms of extremely pure high-grade Colombian cocaine  
14 out of Ecuador and heading to the United States.

15 The factors that the defendant was citing --  
16 defense counsel was citing earlier in mitigation, I would  
17 perceive them in many ways as aggravating compared to the  
18 other boat defendants we normally see. Every boat defendant  
19 I've ever had so far has presented the sort of smuggler's  
20 blues, woes that they come to the Court with of the poverty.  
21 And I don't want to be inured to their suffering,  
22 anesthetized to it, if you will, but at the same time, I  
23 look back at the Florida Department of Law Enforcement  
24 medical examiner commission report showing drug overdose  
25 deaths in the State of Florida alone. And the most recent

1 data there's over a thousand cocaine-related deaths in the  
2 State of Florida in the most recent report. It's a poison  
3 that he was bringing to our children. And I'm not so sure  
4 that it's virtuous to harm others in order to obtain money  
5 to care for one's own family. It's a making a moral choice  
6 and I am firmly convinced it is the wrong moral choice,  
7 especially in this circumstance.

8 Now, I am -- I don't want to take up too much more  
9 time other than to say there is a vast pool of these cases.  
10 This Court has presided over an enormous of them. I'm  
11 confident whatever sentence the Court the fixes here will be  
12 reasonable.

13 To the extent that my assessment has any value to  
14 the Court, I certainly think a low end guideline sentence is  
15 appropriate and I'm sorry I can't offer more.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you, Mr. Palermo.  
18 Is there anything further from the United States?

19 MR. PALERMO: No, Your Honor. Thank you.

20 THE COURT: Any reason not to proceed to sentence?

21 MR. PALERMO: No, Your Honor.

22 THE COURT: Mr. Battaglia, anything further from  
23 the defense?

24 MR. BATTAGLIA: Your Honor, just based on my  
25 comments and the defendant's comments, as well as our

1 memorandum, materials we submitted, as well as the, again,  
2 factors in this case, I would suggest to this Court that  
3 those factors support a divergence, a variance, from the  
4 current potential sentence of 108 months, which would be in  
5 the PSR. I do believe that -- anything less than that,  
6 which I've pointed out a bracket, so to speak, or a zone  
7 would be reasonable and would be appropriate and would still  
8 satisfy the elements that this Court must evaluate in  
9 imposing a sentence.

10 So again, I thank you for your time, Your Honor.  
11 I thank Mr. Palermo for his professionalism in this case and  
12 zealousness, and thank the staff of the Court for allowing  
13 me to speak as long as I did.

14 Thank you.

15 THE COURT: All right. Any other reason not to  
16 proceed to sentence or any reason not to proceed to  
17 sentence?

18 MR. BATTAGLIA: No.

19 THE COURT: All right. Thank you.

20 Well, I guess I alluded a few minutes ago to  
21 having been sentencing these boat cases for a couple of  
22 decades and I think I remember well the first one. I  
23 remember a lot of other ones. I did not advertise that it  
24 got any easier, because they don't. And I want to make it  
25 clear that although we have referred, all of us, in terms in

1 shorthand fashion to, quote, these boat cases, unquote, or,  
2 quote, this sort of case, unquote, of course, every case and  
3 every defendant is entitled to consideration on that case  
4 and that defendant's individual facts and merits, which is  
5 why I read all this material beginning about 6:00 o'clock  
6 this morning and became quite familiar with it and learned  
7 as much as is possible for me to learn about this defendant,  
8 including seeing photos of his family and himself in earlier  
9 days and reading what those who know him say about him.

10           And if you are a United States District Judge in  
11 the Middle District of Florida, particularly in the Tampa  
12 Division, you're aware that these cases are tragic, because  
13 we see this cash-driven, heartless, blood thirsty criminal  
14 organization in Central and South America viciously preying  
15 on vulnerable citizens in Colombia, Ecuador, and Peru, and  
16 in some other places in Central America the way they have  
17 been doing for decades. And that it continues to the extent  
18 that it does and in the manner that it does is very  
19 difficult to understand. The crop is grown within full  
20 sight of our satellites and our aircraft and its presence is  
21 tolerated by governments and persons who are known to the  
22 United States and the damage that is done, both in the  
23 nations where the crop is grown and refined and damage that  
24 it's done here are almost incomprehensible. Yet it  
25 continues.

1                   And people make I assume hundreds of millions of  
2 dollars, if reports are true, billions of dollars,  
3 stockpiled wildly beyond the dreams of avarice. Apparently,  
4 are unable to make a dent in it.

5                   So there's a sadness here that accompanies these  
6 cases and that accompany Mr. Lopez Toala as he's awaiting  
7 sentence based on the laws of the United States. And I  
8 would say two things to him.

9                   I want to say two things to you, Mr. Toala, just  
10 person to person:

11                  One, you asked that I forgive you. As a human  
12 being, as a person, as an individual, I forgive you. I'm in  
13 no position to judge you as a human being. Perhaps someone  
14 else is, but I don't undertake to do that. So I will  
15 forgive you your misconduct and hope that if that day comes  
16 He would forgive me mine.

17                  But as a judge of the United States, I am not in a  
18 position to and not inclined to grant forgiveness for an  
19 offense of this magnitude. So the first thing I want to say  
20 to you is I forgive you are as a person.

21                  Second, you need to understand that I've had a lot  
22 of stories told to me and I credit them. I believe what you  
23 say and I believe what many other people have told me about  
24 conditions in Colombia and Ecuador, in Manta. These days  
25 you can by -- on computer drive the streets of Manta and

1 look around and see the towns, see the highways. And I've  
2 done that. I've gone around on the streets there by Google  
3 Earth or whatever they call it in Buenaventura and some of  
4 these other ports of exit and I see what the streets look  
5 like. And in some of the inland towns that you can do the  
6 same.

7 So I have some understanding of the conditions  
8 that are there. I understand how \$5,000 that you got is  
9 vitally important and I recognize the degree of temptation  
10 involved in that, 15 or 20 or whatever else you were bound  
11 to get if the vessel had succeeded. But I need to call on  
12 you to understand something too; that is, the United States  
13 of America is a target, a big rich target, to which a lot of  
14 people in other countries, particularly the drug lords in  
15 Central and South America want to bring their products. And  
16 the damage that it's doing to young people and adults in the  
17 United States is just incomprehensible.

18 So in the same sense that you did what you did  
19 because you thought it was necessary for the wellbeing of  
20 your family, the Congress of the United States has done what  
21 it thinks it must do to protect the families of the United  
22 States, and that includes enact laws that heavily punish the  
23 offense that you have committed; that is, the importation of  
24 the large quantity of cocaine toward the markets, more  
25 specifically toward the families and children and adults in

1 the United States.

2 So it's one of those things difficult to explain,  
3 that you did what you had to do, the United States did what  
4 it had to do, and as a result of that, you've committed a  
5 felony that's going to land you up in federal prison.

6 So I do not apologize for the Congress enacting  
7 the laws that it has enacted and I don't apologize for the  
8 President having signed it. I don't apologize to you for  
9 the United States defending itself against the importation  
10 of this poison and I don't apologize for sentencing you to  
11 prison. I forgive you for your offense, but the law is what  
12 it is and the country is entitled to have them; that is,  
13 those laws.

14 So I have carefully considered the material that  
15 has been presented. So pursuant to the Sentencing Reform  
16 Act of 1984, to the extent it's applicable after *United*  
17 *States vs. Booker*, and pursuant to 18 U.S.C. 3553, the  
18 defendant, Franklin Lopez Toala, is committed to the Bureau  
19 of Prisons for 108 months. The term consists -- comprises  
20 108 months as to Count One and 108 as to Count Two. The  
21 terms are concurrent.

22 Upon release, the defendant must serve a five-year  
23 term of supervision during -- comprising five years as to  
24 Count One and five years as to Count Two. Those terms are  
25 concurrent.

1                   While on supervision, the defendant must comply  
2 with the standard conditions adopted by the Court in the  
3 Middle District of Florida, as well as the special condition  
4 that if he is deported, he must not re-enter the United  
5 States without the express permission of the United States.

6                   As a qualifying felon, the defendant must  
7 cooperate in the collection of his DNA as directed by the  
8 probation officer.

9                   The mandatory drug testing requirements of the  
10 Violent Crime Control Act are imposed not to exceed 104 per  
11 year and to include one test within 15 days of placement on  
12 supervision.

13                   I'll waive the imposition of a fine, but I am  
14 required and do levy the special assessment of \$200, which  
15 is due immediately.

16                   As I said a moment ago, in arriving at the  
17 announced sentence, I have considered the policies and  
18 Guidelines of the United States Sentencing Commission and  
19 I've considered the advisory guideline range that's derived  
20 from it. I have considered the submissions, both oral and  
21 written, of counsel and I have considered the factors at  
22 18 U.S.C. 3553(a), with respect to which just a few brief  
23 comments.

24                   First, I include some of my earlier comments with  
25 respect to the nature of the offense. But the 3553(a)

1 factors include, for example, consideration of the nature of  
2 the offense. As I've already said, this is a large scale  
3 transoceanic importation of a large quantity of high-purity  
4 cocaine conducted at the instance of an international  
5 criminal organization and requiring the interdiction by the  
6 United States military, including a hot pursuit that  
7 resulted in the forcible disability of this vessel and the  
8 frustration of its occupants' attempt to dispose of this  
9 cargo of cocaine. Needless to say, that is a very serious  
10 offense that no one should be surprised to find the United  
11 States does not regard as minor.

12 Second, the nature of the defendant, the  
13 characteristics of the defendant as have been aptly argued  
14 by the defense counsel and I think conceded by all. His  
15 individual circumstances are much more sympathetic and would  
16 counsel under any circumstances a more lenient understanding  
17 of the offense here were it not so especially serious.

18 Any sentence under 3553 includes consideration of  
19 enhancing respect for the law, of deterring those who would  
20 consider similar conduct, and I think especially important  
21 in this circumstance, protecting the community from  
22 offenses, including the one at issue. All of those I think  
23 counsel in favor of at least a guideline sentence here.

24 Lastly, the last factor that I'll comment on  
25 directly is the avoidance of unwarranted disparity. These

1 so-called boat cases are sentenced almost uniformly here in  
2 the Middle District of Florida in the Tampa Division. With  
3 the exception of a determination of which category the  
4 quantity causes the sentence -- as a base offense level,  
5 causes it to begin, the sentences typically are about  
6 135 months for a crewmen, about 168 months for a captain or  
7 owner's representative or load guard or the like. This load  
8 was less, so the offense level ticks down a couple notches,  
9 resulting in a crewmen with a 108-month sentence.

10 That is perfectly in accord with the unbroken line  
11 of cases over the past 20 years numbering easily into the  
12 hundreds and almost all of which are affirmed and most  
13 cases, when they aren't, it's for the variance -- strike  
14 technical sentence, strike variance, not sentencing in  
15 accord with the established and, as I say, often affirmed  
16 sentences. So I am convinced this sentence avoids any  
17 unwarranted disparity.

18 In saying that I acknowledge the many sympathetic  
19 attributes of this human being's biography, but there are  
20 many others who have been, believe it or not, much worse.  
21 He lives in a brick home with three bedrooms with a wife and  
22 children. I have had defendants guilty of this who live in  
23 tin lean-tos with no plumbing, no electricity and the like.  
24 I've had defendants who had physical disabilities, I've had  
25 all sorts of defendants in these boat cases, which, frankly,

1 in gross affirm my assessment that the employer here is  
2 especially blood thirsty and predatory when it takes  
3 advantage of vulnerable victims. But notwithstanding that,  
4 I think that this sentence still avoids any unwarranted  
5 disparity and is altogether reasonable under the  
6 circumstances.

7                   Does counsel for the United States or the defense  
8 object to the sentence or the manner of its announcement  
9 other than it took so long?

10                   Mr. Palermo?

11                   MR. PALERMO: No, Your Honor. No objection.

12 Thank you.

13                   THE COURT: Mr. Battaglia?

14                   MR. BATTAGLIA: Again, Your Honor, I just renew my  
15 objection concerning procedural substantive issues,  
16 reasonableness issues, and the memorandum I submitted.

17                   THE COURT: All right. Sir.

18                   The defendant is remanded to the custody of the  
19 United States Marshal to await designation by the Bureau of  
20 Prisons.

21                   I believe in the sentencing memorandum,  
22 Mr. Battaglia, you recommended Mccray and Coleman in that  
23 order.

24                   MR. BATTAGLIA: Yes, Your Honor. With regard to  
25 that first request, I read something where it looks like

1       they're pulling away from I guess these -- I guess that was  
2       a private operation, but under contract with the Bureau of  
3       Prisons.

4                   THE COURT: I believe that was, yes.

5                   MR. BATTAGLIA: And I don't know what the status  
6       is of that, but I would like to amend it, if I may, for  
7       Coleman.

8                   THE COURT: I'll recommend that he be housed at  
9       Coleman, Florida.

10                  There was a request for ESOL class, vocational  
11       training?

12                  MR. BATTAGLIA: Yes, Your Honor.

13                  THE COURT: And I will recommend both of those  
14       happily. As you say, there's no need for any drug program,  
15       which is good. And if he is diagnosed with any special  
16       needs disability and if there is some treatment for it, then  
17       I would certainly recommend that he have -- that he have  
18       that.

19                  Mr. Lopez Toala, you do have a right to appeal  
20       from this judgment and sentence. With respect to any appeal  
21       there are two matters that I need to explain:

22                  Number one, you always have a right to a lawyer on  
23       direct appeal. If you can't afford a lawyer, one would be  
24       provided for you at public expense. As it stands now,  
25       Mr. Battaglia would be required to preserve and pursue any

1 appeal unless other counsel is substituted for him by an  
2 order of the Court. That's number one.

3 Number two, to begin an appeal, you must file with  
4 the Clerk of this Court a written notice of appeal. That  
5 notice must be filed within 14 days and that notice must be  
6 accompanied by a filing fee. If you have no money to pay  
7 the fee, Mr. Battaglia can ask the Court to waive the fee  
8 and, if that's granted, you can appeal without payment.

9 Anything further from the United States?

10 MR. PALERMO: No, Your Honor. Thank you.

11 THE COURT: Anything further from the defense?

12 MR. BATTAGLIA: Just issue with paroled into the  
13 United States, Your Honor.

14 THE COURT: I will note on the judgment he was  
15 paroled into the United States.

16 Good luck to you, Mr. Lopez Toala.

17 And we are in adjournment.

18 (Proceedings concluded.)

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1 UNITED STATES DISTRICT COURT )  
2 MIDDLE DISTRICT OF FLORIDA )

REPORTER TRANSCRIPT CERTIFICATE

5 I, Howard W. Jones, Official Court Reporter for  
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Official Court Reporter  
United States District Court  
Middle District of Florida  
Tampa Division  
Date: 6-3-2019

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**Pet. App. O**

**No. 19-11335-JJ**

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA,  
*Plaintiff - Appellee,***

**v.**

**FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant - Appellant***

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA**

**No. 8:18-CR-00511-SDM-JSS-2**

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**INITIAL BRIEF OF CRIMINAL CASE  
FOR  
FRANKLIN RAFAEL LOPEZ TOALA**

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July 12, 2019

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*United States v. Franklin Rafael Lopez Toala*  
No. 19-11335-JJ

**CERTIFICATE OF 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-Appellant in lower court and for this appeal;

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

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

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

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

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-appellant; and

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

No publicly traded company or corporation has an interest in the outcome of this appeal.

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant, Franklin Rafael Lopez Toala (“Toala”), respectfully requests oral argument. It is submitted that, in light of the legal issues involved in this appeal, this Honorable Court may be aided by argument by counsel fully familiar with the facts, the record, and the issues raised.

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**STATEMENT OF SUBJECT-MATTER AND APPELLATE  
JURISDICTION**

The district court had jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant was charged with an offense against the laws of the United States. This is a direct appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case, entered on March 27, 2019. Doc. 78. Toala filed a timely notice of appeal on April 5, 2019. Doc. 80. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which gives the court of appeals jurisdiction over all final decisions and sentences of the district courts of the United States.

## **STATEMENT OF THE ISSUES**

This appeal challenges Toala's sentence under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 960), and presents the following issues:

- I. Whether the district court issued a procedurally unreasonable sentence by not finding that the appellant had a minor role in the offense?
- II. Whether the district court issued a substantively unreasonable sentence by committing a clear error in judgement in considering the 18 U.S.C. § 3553(a) factors and by weighing the factors against their statutory purpose?

## STATEMENT OF THE CASE

This is the direct criminal appeal of Toala's judgment and sentence. Doc.78. On October 30, 2018, the grand jury returned a two-count indictment against Toala and two other codefendants. Doc. 1. Count One charges that while aboard a vessel subject to the jurisdiction of the United States, the defendants conspired to possess with the intent to distribute five kilograms or more of cocaine, all in violation of 46 U.S.C. § 70503(a), 70506(a), 70506(b); and 21 U.S.C. § 960(b)(1)(B)(ii). Doc.1. Count Two charges that while aboard a vessel subject to the jurisdiction of the United States, the defendants possessed with the intent to distribute five kilograms or more of cocaine, all in violation of 46 U.S.C. § 70503(a), 70506(a), 70506(b); 18 U.S.C. § 2; and 21 U.S.C. § 960(b)(1)(B)(ii). Doc. 1.

On January 8, 2019, Toala entered a plea of guilty to both counts without a written plea agreement. Doc. 43. On February 4, 2019, the district court accepted the plea. Doc. 52 On March. 27, 2019 the district court heard arguments from the CJA appointed counsel for Toala and the United States. Doc. 94. The district court sentenced Toala to 108 months in prison, followed by 60 months of supervised release. Doc.78. Toala is currently incarcerated pursuant to this judgment. Doc. 86.

## STATEMENT OF FACTS

### A. Toala's Circumstances in Ecuador

The Appellant, Franklin Rafael Lopez Toala (“Toala”), was born on December 26, 1977, in Manta, Ecuador. Doc. 72 at ¶38. 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.* at ¶39. His mother, Juana Sylvia Toala, instilled in him a very good work ethic. His mother raised the family on her own after Toala’s father abandoned the family when Toala was very young. *Id.* To support his family, he went to work baking, selling bread, shining shoes, and cleaning tables at the restaurant where his mother worked as a cook. *Id.* Toala helped raise his brother, Enrique Alberto Lopez Toala, and is close to his mother. *Id.* at ¶38-39. He reported having a sister, Susan Lopez Toala, who passed away when she was still an infant. *Id.* at ¶38. During his childhood, Toala was diagnosed with a learning disability, was unable to get assistance, but managed to earn a 6<sup>th</sup> grade education and learned to read and write in Spanish. *Id.* at ¶49.

Despite having a learning disability, Toala persevered and found work as a security guard for six years. Doc. 72 at ¶¶52-53. Then he worked as a tuna packer for 13 years. *Id.* He was proud of his self-sufficiency and ability to support his family. Doc. 72 at ¶¶52 -53; Doc. 75 at p.2. Unfortunately, he was laid off from his job earlier last year (2018) and it was difficult to find work. Doc. 72 at ¶53; Doc. 75

at p.2. There were the added strains 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. *Id.* at ¶40. There is a \$4,500 medical debt pertaining to his grandson's medical care. Doc. 72 at ¶54; *See Also* Doc. 76-1 at p.7.

Toala has always been the provider to his family and is close to them. Doc. 75-8 at p.1-19. He had two children with his first wife. The two children are named Joe and Justin. Doc. 72 at ¶40. Also, Toala has been in a relationship with Gladys Guerrero Serano for nine years and has helped raise her younger children, Adriana and Adrian, even though they are from a previous marriage. *Id.* at ¶41. Altogether he takes responsibility for four children. Of course, Toala's arrest has had a serious negative impact on his family's finances and stability. Toala's family has consistently reached out through letters, understanding his actions were to pay for the grandson's expensive medical procedures and praying for Toala's safe return soon as he is the "sole provider" in the family. Doc. 75-8 at p.1-19.

Toala is not only a family man but also a responsible and upstanding patriarch. The presentence investigation report (hereinafter "PSI") shows Toala 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. Doc. 72 at ¶52; *See Also* Doc. 97-1 at p.2-10. Toala felt compelled

to help his country and joined the military. Doc. 94 at p.33. Currently Toala is considered to be in the reserves. Doc. 72 at ¶52; Doc. 76-1 at p.2. Toala performed his military duties as required and properly. Doc. 75 at p.3 As well, Toala does not drink very much, maybe three times a year and has not used or abused drugs. *Id.* at ¶47. Prior to his arrest, Toala has not been arrested for any criminal misconduct; he has lived a very just and honorable life, with one exception, the current proceedings. Doc. 72 at ¶¶29-36; Doc. 75-8 at p.2.

## **B. The Go-Fast Vessel Incident**

As reflected in the PSI, 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. Doc. 72 at ¶7. The seizure totaled 331 kilograms. *Id.* at ¶9. The three individuals on board were interviewed and arrested. *Id.* at ¶¶8-12. Other participants included Eddy Jimy Pinargote Mera (hereinafter “Mera”) and Ramon Elias Zambrano (hereinafter “Zambrano”). *Id.* at ¶8. It was confirmed that Mera was the captain and navigator of the vessel who gave the orders and coordinates. *Id.* at ¶11-12. Mera also took the helm when the vessel was spotted. *Id.* at ¶12. On a related note, Zambrano was driving the vessel before he handed the helm to Mera after being spotted by the Coast Guard. *Id.* at ¶12. Besides Mera’s statement that Mera was to share the helm with Zambrano and Toala, there is no indication Toala navigated the vessel. *Id.* at ¶10.

Toala “did point out that he was quickly relieved from steering because he didn’t know how to steer a boat.” Doc. 94 at p.16-17. “He did not know how.” *Id.* at 17. It was confirmed that Toala was a mariner on the boat. Doc.72 at ¶11. Except for this serious violation of the law, Toala did not have a previous criminal record. *Id.* at ¶¶ 30-31. At all times since his arrest, Toala has accepted complete and full responsibility for his actions. (“*The defendant has clearly demonstrated acceptance of responsibility for the offense*”) (Doc. 46, 52, 72 at ¶¶15, 25-26). Toala fully complied, prior to his sentencing, with the requirements of 18 U.S.C. § 3553(f) and qualified for the “safety valve” with regards to his sentencing. Doc. 72 at ¶56.

## **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 U.S.S.G. § 5H1.5 (Employment Record), U.S.S.G. § 5H1.6 (Family Ties and Responsibilities), U.S.S.G. § 5H1.11 (Military Service), U.S.S.G. § 5K2.0 (Grounds for Departures) and other pertinent policy statements would be appropriate under a “heartlands” analysis. Doc. 75; Doc. 94-3. 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. Doc. 94 at p.31, 34-35. Toala also pointed out his robust familial ties and responsibilities, especially how

his grandson's condition and medical payments fell on his shoulders and precipitated his involvement in the aforementioned illegal, exigent circumstance. *Id.* at p.30, 32. Toala emphasized his military service that he registered at 18 years old and trained to defend his country's honor. *Id.* at p.33; 97-1 at p. 2-13 Also, Toala has no history of drug and alcohol abuse. *Id.* When two or more of the aforementioned factors are involved and substantial, then the district should consider a downward departure regarding the sentence.

The government did not provide input and merely reiterated that the adequate basis for departure was not met. *Id.* at 37. The sentencing court addressed each factor, agreed that the basis was not met, and did not award a downward departure. *Id.* at p.40. Specifically, the sentencing court did not find the factors substantially present to depart. *Id.* at p.38. Finally, after having already objected on the basis of a departure in his sentencing memoranda and PSI objections, Toala reassured his objection regarding the court's decision not to grant departures and the court's heartland analysis. Doc. 72 at ¶¶22-27. Doc. 75 at p.5; Doc. 97-3 at p.2-5; Doc.94 at p.56.

## **2. The “Minor Role” Discussion**

Prior to the sentencing hearing, a United States probation officer prepared a PSI that contained sentencing guidelines calculations. Doc. 72 ¶¶1-27. The calculations yielded a total offense level of 31, a criminal history category of I, and

a sentencing guidelines range of 108 – 135 months. In his amended sentencing memorandum, his written objections to the PSI, and during the sentencing hearing, Toala objected to the offense level on the basis of a minor role. Doc. 72 at ¶¶22-27, Doc. 75 at p.12; Doc. 97-3 at p.2-5; Doc. 94 at p.7. Based on his minor role, Toala argued that the base offense level should have been reduced 2 levels pursuant to U.S.S.G. § 3B1.2(b). Doc. 72, p. 5. Toala argued that he was not the planner or mastermind. Doc. 75 at p.12. 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. Doc. 72 at ¶11. During the sentencing hearing, Toala also argued that his involvement in the conspiracy was less than his codefendants' because Toala was not giving orders, navigating the boat, and had the least overall knowledge regarding the transportation plan. Doc. 94 at p.26.

In response to Toala's arguments, the government submitted that Toala was similarly situated to Zambrano because they both took "a turn at the helm." *Id.* 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. *Id.* Ultimately, the district court found that there was a captain and two crewmembers charged with general purpose labor. *Id.* at p.19. Notwithstanding the codefendants, the district court denied the minor role reduction under 3B1.2 because Toala and Zambrano were viewed as similarly situated. *Id.* at p.19-20. Also, in its

rejection of Toala's minor role departure 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..." Doc. 94 at p.18.

### **3. The "Reasonableness" Discussion**

At the sentencing hearing Toala rearticulated, for the reasons outlined in the sentencing court's heartlands consideration, that due to his character traits, employment history, unlikelihood to recidivate, and exigent circumstances pertaining to his grandson's perilous medical condition, the PSI's recommendation of a 108-month sentence would not be reasonable. *Id.* at p.42.

When asked what the government had to say with respect to a reasonable sentence, 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 reraised his objections regarding procedural and substantive issues with respect to sentencing. *Id.* at p.56.

### **STANDARDS OF REVIEW**

After *United States v. Booker*, 543 U.S. 220 (2004), this Court reviews a criminal sentence on appeal "for procedural or substantive unreasonableness." *United States v. Hunt*, 459 F.3d 1180,1182 n.3 (11th Cir. 2006). This Court reviews

for procedural reasonableness before reviewing for substantive reasonableness. *See United States v. Luster*, 388 F. App'x 936, 938 (11<sup>th</sup> Cir. 2010) (“We will not review the substantive reasonableness of a defendant’s sentence where a remand is necessary to cure procedural errors, we have identified are addressed by the district court.”)

### **Procedural Reasonableness of the Sentence**

First, this Court must “ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the 18 U.S.C. § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. *Id.* (emphasis added). This Court reviews a district court’s factual determination that a defendant had not played a minimal or minor role in a drug trafficking conspiracy for clear error. *See United States v. Rodriguez De Varon*, 175 F.3d 930, 937 (11th Cir. 1999) (en banc). On a related note, “with regard to sentencing guideline calculation, [this Court] reviews for clear error a district court’s factual findings, and review[s] *de novo* the application of the law to those facts. *United States v. De La Cruz Suarez*, 601 F.3d 1202, 1221 (11th Cir. 2010).

U.S.S.G. § 3B1.2 permits a minor role adjustment to the applicable Guidelines range for a defendant who is substantially less culpable than the average

participant due to a minor role. U.S.S.G. § 3B1.2, cmt. n. 3. The defendant bears the burden of establishing that his role was minimal or minor by a preponderance of the evidence. *Rodriguez De Varon*, 175 F.3d at 939. In determining whether a defendant meets the burden of demonstrating a mitigating role, a district court examines (1) the defendant's role based on the relevant conduct for which he was held accountable and (2) the defendant's role in comparison to the other participants. *United States v. Bonilla-Tello*, 270 F. App'x 982, 983 (11th Cir. 2008) (citing to *Rodriguez De Varon*). Remand is required when a district court commits a procedural error in denying a mitigation role reduction. *United States v. Luster*, 288 F. App'x 936, 939 (11th Cir. 2010).

### **Substantive Reasonableness of the Sentence**

“Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Gall v. United States*, 552 U.S. 38, 51 (2007). This deferential standard “appreciate[s] the institutional advantage that district courts have in applying and weighing the [§] 3553(a) factors in individual cases.” *United States v. Pugh*, 515 F.3d 1179, 1190–91 (11th Cir. 2008) (referencing *Gall*). Of course, the district court's discretion is not “unbridled,” for “looking at sentencing decisions through the prism of discretion is not the same thing

as turning a blind eye to unreasonable ones.” *United States v. McQueen*, 727 F.3d 1144, 1156 (11th Cir. 2013).

“When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.” *Gall*, 552 U.S. at 51 (2007). Notably, a district court abuses its discretion in a substantive reasonable analysis when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors by balancing them unreasonably. *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (emphasis added). Additionally, a sentence is substantively unreasonable if it fails to carry out the statutory purposes of sentencing under 18 U.S.C. §3553(a). *United States v. Dean*, 635 F.3d 1200, 1209 (11th Cir. 2011) (emphasis added.)

## SUMMARY OF THE ARGUMENTS

### Procedural Reasonableness of the Sentence

I: The district court procedurally erred in refusing to recalculate Toala’s sentence on the basis of a minor role reduction. Toala’s codefendant’s Zambrano and Mera did not share equal roles with Toala based on the division of responsibilities onboard the boat. Also, the court acknowledged that there are other

participants in these types of cases that are more culpable than Toala and his codefendants.

### **Substantive Reasonableness of the Sentence**

II: Toala's sentence is not substantively reasonable. First, the district court committed clear error regarding how it weighed the factors in Toala's case. Where the sentencing court should have departed Toala's sentence downward for factors that exist outside the typical "heartland" of the United States Sentencing Commission's guidelines because Toala's family ties and responsibilities, employment record, military service and other factors outlined in the 18 U.S.C. § 3553(a)(5) policy statements, the court unreasonably weighed these factors by assigning blameworthiness to each of them. Second, the sentencing court did not reasonably weigh another 18 U.S.C. § 3553(a) factor, that is the unwarranted disparities in sentences between Toala and his codefendants. Third, the sentencing court did not issue a sentence that followed the statutory purposes underlying 18 U.S.C. § 3553(a) regarding rehabilitation.

### **ARGUMENT AND CITATIONS OF AUTHORITY**

#### **I. The district court erred in its Sentencing guideline calculation regarding a mitigating role reduction**

"With regard to sentencing guideline calculation, [this Court] reviews for clear error a district court's factual findings, and review *de novo* the application of

the law to those facts. *United States v. De La Cruz Suarez*, 601 F.3d 1202, 1220–21 (11th Cir. 2010). Toala maintains that he should be eligible to receive a 2-level decrease for being a minor participant. *See USSG §3B1.2(b)*. The burden of showing a role reduction by a preponderance of the evidence has been satisfied. *Rodriguez De Varon*, 175 F.3d at 939. Comparison of participants is limited to others “identifiable or discernable from the evidence.” *Id.* at 944. The scope of who is “identifiable or discernable” from the evidence in this case includes Toala’s codefendants (addressed in Part I(A)) and other, substantially more significant co-conspirators leading and organizing the particular smuggling venture for which Toala has been convicted (addressed in Part I(B)).

**A. Toala’s role relative to his codefendant’s was minor since Mera was the captain, Zambrano was the *de facto* navigator, and Toala merely provided general labor to the vessel**

Regarding those “identifiable or discernable” on the boat, Toala was one of three mariners on a go-fast vessel. Doc. 72 at ¶8. He was not the planner or mastermind; he was merely a minor cog in a larger operation. Unlike Mera, Toala did not give orders or recruit other participants and was being paid a very small portion of boat’s contents’ total worth. Although it cannot be said that Toala did not participate in the endeavor, his role was minimal under the circumstances.

As it was mentioned during the sentencing hearing, Toala merely assisted in the transportation of narcotics. Toala did not navigate using the GPS or helm like

the other codefendants. Doc. 72 at ¶¶10-12; Doc. 94 at p.16. Toala had no fishing background and did not even know how to pilot boats. Doc. 94 at p.9. Therefore, he was removed from the helm by the other codefendants. It cannot be said that Toala, as the government put it, took the helm in any meaningful sense. Doc. 94 at p. 13. Toala's own codefendants saw that he did not have the knowledge or skill for that task. Even if there was an intention for Toala to pilot the vessel, he could not. It should be noted that Toala did not navigate the boat like Zambrano did. Zambrano used the GPS and was actually was steering the vessel when it was intercepted, making him the vessel's de facto navigator. Similarly, Mera was the vessel's captain who gave orders, reviewed GPS coordinates, and steered the vessel at the helm. Doc. 94 at 13. Toala was a mere deckhand. Based off of his lessor role in the offense, and as compared against the actual navigator and the captain, Toala is entitled to a lower sentence.

**B. Toala's role relative to members of the conspiracy who orchestrated the illicit shipment is minor**

Furthermore, those "identifiable or discernible" as more culpable in these conspiracies include persons that orchestrate these illegal shipments of narcotics to the United States. The sentencing court noted this as follows:

"we see this cash-driven, heartless, blood thirsty criminal organization in Central and South America viciously preying on vulnerable citizens in Colombia, Ecuador, and Peru, and in some other places in Central America the way they have been doing for decades. And that it continues to the extent that it does and in the manner that it

does is very difficult to understand. The crop is grown within full sight of our satellites and our aircraft and its presence is tolerated by governments and persons who are known to the United States....” Doc. 94 at 49. (emphasis added)

This is important because, “[i]n considering a § 3B1.2 adjustment, a court must measure the defendant's role [against others] whether or not other defendants are charged.” *United States v. Cruickshank*, 837 F.3d 1182, 1193 (11th Cir. 2016) (quoting *Rodriguez De Varon*). *Cruikshank* goes on to quote from 2015 language added to U.S.S.G. § 3B1.2 in Application Note 3(C).<sup>1</sup> The factors as explained by that court are included below. An analysis of each factor pointed to a downward role adjustment for Toala in comparison to “the lords of the operation, the leaders of these criminal organizations, and their enforcers, and their captains and the like...” Doc. 94 at p.18.

In determining whether [a defendant is a minimal or minor participant] or an intermediate adjustment, the court should consider the following list of factors:

- (i) the degree to which the defendant understood the scope and structure of the criminal activity;

While Toala has some information concerning the co-conspirators and their smuggling operation, he has nowhere near a full, comprehensive understanding of the full “scope and structure of the criminal activity.” Doc. 94 at p. 8. He was picked up off the street, dropped off at the boat, and told what to do. *Id.*

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<sup>1</sup> U.S.S.G. App. C. Amend. 794.

(ii) the degree to which the defendant participated in planning or organizing the criminal activity;

Toala received instructions from others and did as he was told—he had no role in “planning or organizing” the activity. For example, while he was certainly aware that he was transporting drugs, he had no knowledge regarding the amount contained in the vessel. He was merely told where to go and what to do after being picked up off the streets and deposited at the debarkation point. *Id.* Toala had no prior involvement of any kind with the drug smuggling business or any criminal venture. Doc. 74 at ¶¶29-36; Doc. 75 at p.5.

(iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

Toala exercised *no* decision-making authority nor did he have any such influence. Both Mera and Zambrano prevented and relieved Toala from steering the vessel. Doc. 94 at p.9. Also, it is known that at least Mera issued direct authority over Toala’s actions on the vessel as the captain, and Zambrano gave the order to throw cocaine overboard. Doc. 72 at ¶¶10,12.

(iv) the nature and extent of the defendant’s participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;

Toala and his boat-mate were arguably the lowest-ranking (and obviously most expendable) participants in this drug-smuggling venture. They had no discretion in performing those acts that made them criminally culpable in this crime.

Toala was told what to do under the orders of Mera, Zambrano, and the larger criminal organization.

(v) the degree to which the defendant stood to benefit from the criminal activity. For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply paid to perform certain tasks should be considered for an adjustment under this guideline. The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative.

Toala received a badly needed \$5,000 flat fee in advance for his service as a mariner. He in no way had a "proprietary interest" or any kind of ownership stake in this voyage. Doc. 94 at p.11. "A defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks "should be considered for an adjustment under this guideline." *See Cruikshank*, 837 F.3d at 1193 (quoting U.S.S.G. App. C. Amend. 794). Furthermore, as the Application Note above points out, finding that a defendant's particular role was "essential" is "not determinative."

Since the sentencing court did not adequately consider U.S.S.G. § 3B1.2 in Application Note 3(C) and Toala's mitigating role when compared to the more reprehensible criminal organization, remand is compelled for procedural error.

## **II. The district court erred by assigning Toala a sentence that is substantively unreasonable.**

After performing the required procedural analysis, this Court may vacate the sentence if there is "a definite and firm conviction that the district court committed

a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.”

*United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (quoting *Pugh*, 515 F.3d at 1191). Additionally, a sentence may be substantively unreasonable if it fails to achieve the statutory purposes of sentencing. *United States v. Dean*, 635 F.3d 1200, 1209 (11th Cir. 2011).

In this case the sentencing court examined policy statement factors that were traditional and statutory grounds for downward departures (i.e. Toala’s family ties and responsibilities, employment record and military service) as reasons to assign blameworthiness to Toala. The sentencing court made a clear error in examining these factors negatively while also *ignoring or discounting the details that compelled Toala’s criminal act in the first place*. These considerations would reasonably lead to a downward departure which is not in the “ballpark” of permissible outcomes. *See Ledford v. Peeples*, 605 F.3d 871, 922 (11th Cir. 2010) (“[T]he relevant question [when reviewing for abuse of discretion] is not whether we would have come to the same decision if deciding the issue in the first instance. The relevant inquiry, rather, is whether the district court’s decision was tenable, or, we might say, ‘in the ballpark’ of permissible outcomes.”).

Prior to issuing Toala’s sentence, the district court stated in relevant part:

“It’s not my intention to engage in a debate about these factors, but there are -- there is a way of looking at this that’s very real that

suggests that someone who is -- had a long and consistent employment history and is employable has every reason in the world not to do what was done here and the capacity not to do it, that someone who has special responsibilities at home has every motivation in the world not to engage in reckless and high-risk behavior with what we are led to believe is an unknown employer and to, in effect, gamble his liberty in exchange for one premium payday, someone with military service has been exposed presumably to discipline and organization and accountability in his conduct and should have every reason to know of the danger of engaging in this kind of scheme. Again, similarly, someone with no prior criminal record that presumably owed nothing to these – this organization and was free of it was -- had every reason in the world not to do what he's done, didn't have debts to these folks and required to cooperate with them." Doc. 94 at p.38-39.

Not only did the court not depart based on the exceptional factors in this case, but its weighing of these traditional "heartland" and policy statement factors constituted clear error which yielded a sentence that was substantively unreasonable.

This Court may find Toala's sentence substantively unreasonable based on the discussions below: the exceptional characteristics outlined in the 18 U.S.C. § 3553(a)(5) policy statements (discussed in Part II (A)); the unwarranted sentence disparities under 18 U.S.C. § 3553(a)(6) (discussed in Part II (B)); and the disregard for the statutory purposes underlying 18 U.S.C. § 3553(a) sentencing considerations (discussed in Part II (C)).

**A. The sentencing court committed clear error by weighing the 18 U.S.C. § 3553(a)(5) factor on policy statements and offender characteristics unreasonably**

As set forth in U.S.S.G. § 5K2.0 a combination of two or more offender characteristics, if when taken together, make the case an exceptional one, does allow the Court to depart or vary, with respect to downward sentencing ranges. In this case, Toala's exceptional offender characteristics and other circumstances include, (i) a long and consistent employment history (U.S.S.G. § 5H1.5) (Doc. 72 at ¶¶52-53); (ii) special family ties and responsibilities (U.S.S.G. § 5H1.6) (*Id.* at ¶¶38-39); (*Id.* at ¶40); (*Id.* at 41); (iii) military service (U.S.S.G. § 5H1.11) (*Id.* at ¶52); (iv) no history of drug or alcohol abuse (*Id.* at ¶47); (v) no prior criminal record (*Id.* at ¶¶29-34); and, (vi) a previously diagnosed learning disability. *Id.* at ¶49. The relevant provisions under the U.S.S.G.'s are as follows:

(c) LIMITATION ON DEPARTURES BASED ON MULTIPLE CIRCUMSTANCES.<sup>2</sup>—

The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

- (1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and
- (2) each such offender characteristic or other circumstance is—
  - (A) present to a substantial degree; and
  - (B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

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<sup>2</sup> U.S.S.G. § 5K2.0: (Application Notes C).

However, the sentencing court did not weigh these exceptional offender characteristics reasonably. Instead, the sentencing court stated:

“These factors, all of them I think at one time or the other have prompted me to make some sort of departure in a particular case, but that was because there was some extraordinary and verifiable and causally connected reason to effect the sentence based upon one of these factors. I don’t believe they are present here.” Doc.94 at 39 (emphasis added).

If the offender characteristics were weighed properly and according to the sentencing court’s own standard, it is readily discernable that *but for* Toala’s grandson’s extraordinary, premature birth and the exorbitant medical expenses contingent on that event, Toala would not have participated in the criminal act.

**i. Pursuant to U.S.S.G. § 5H1.6, Family Ties and Responsibilities were present to a substantial degree in Toala’s case**

Under U.S.S.G. § 5K2.0, a departure may be granted with any combination of listed factors. It is apparent from the facts that Toala’s decision was to pay for the medical care of his premature grandson and is evidence of Toala’s strong family ties and responsibilities. Under U.S.S.G. § 5H1.6 is it an exceptional, exigent factor that alone or together with other factors removes this case from the “heartland” of cases normally dealt with under the United States Sentencing Guidelines thereby demonstrating that Toala’s sentence was unreasonable in light of his family ties and responsibilities.

It should be noted that Toala's grandson had only *26 weeks of gestation*, a high likeliness of blindness or death, and insufficient financial support for his medical bills. Through their letters, Toala's wife, his son, and his daughter-in-law express their gratitude to Toala for his support and suspect Toala's error was propelled by his love for his grandson. Doc. 75-8 at p.1-19; Doc. 76-1 at p.1-10. The threat of his grandson's death was a very real possibility, especially when considering the grandchild's prematurity in combination with the level of medical care available to a family of low economic standing in Ecuador. According to a Global Action Report delivered by the United Nations Inter-Agency Group for Child Mortality Estimation, in low-income settings, half the babies born at the 32-week mark of a pregnancy die from lack of feasible, cost-effective care. Doc. 75-4 at p.26. Toala's grandson had not even reached 32 weeks of gestation and was born *six months* prior to the age threshold for the UN's 50% mortality estimate. From a statistical standpoint, without costly medical intervention there was a less than 50% chance Toala's grandson would live. In fact, according to the report, over 90% of extremely premature babies (< 28 weeks) born in low income countries will die. Toala sought out medical treatment to give his grandson a chance against all odds.

Furthermore, based on his own personal experience, Toala had every reason to worry and intervene in the perilous medical circumstances his grandson was facing. Toala had already experienced the profound pain of losing children due to

birthing complications and did not want his son to suffer as he did; “his wife had delivered two children who [were] stillborn.” Doc. 94 at p.36. Moreover, he had a sister, Susan Lopez Toala, who passed away in infancy. Doc. 72 at ¶38. In Toala’s own words at his sentencing hearing: “I – I was not going to let anything happen to my little grandchild.” Doc. 94 at p.44. It was this sudden birthing complication that plunged the family deep into debt and emotionally compelled Toala to take part in the drug trafficking.

Toala was unemployed and at least \$4,500 in medical debt for care that helped with his grandson’s critical condition. Doc. 72 at ¶54. Relatedly, the amount we know Toala was to be paid for his involvement was \$5,000 upfront. *Id.* at ¶11. The only reason Toala committed this crime was to pay for medical debts that he could not hope to pay off without employment. He had no assets to sell. *Id.* at ¶54. Even if he regained his old position at the fish packing plant making \$384 a month, it would take him *12 months*, without any money going towards food, family, clothing, shelter, interest, or any other expense, for the debt to be repaid. *Id.* at ¶53. Without any other viable fiscal alternatives, Toala was compelled to join on this embarkation to the United States because of dire medical and financial conditions that threatened his grandson. Doc. 76-1 at p.7; Doc. 76-1 at p.5.

The sudden dire medical and financial conditions that precipitated Toala’s actions are further supported by the numerous statements made in the letters his

family sent the sentencing court. Out of the six family members who sent the sentencing court letters full of their personal photos and desperate pleas, four individual letters emphasize that the grandson's sudden birth and resulting medical debt were the precipitating event in Toala's decision. His wife, Gladys Elizabeth Guerro Cedeno, emphasized that her husband had "no other alternatives but to go on the embarkation" because the grandson was born premature and needed medical attention. Doc. 75-8 at p.2. His mother-in-law, Bernarda Lourdes Cedeno Mero, stressed that "he made a mistake due to urgent causes" and is likely referencing the sudden onset of medical debt the family incurred. Doc. 75-8 at p.5. Jostin Lopez Castro Toala, the father of Toala's grandson, wrote that Toala made the mistake because "he felt anxious [and] worried to see me suffer because my son was born at 26 weeks of gestation." Doc. 76-1 at p.10. Diana Yuletzi Pincay Choez, the mother of Toala's grandson, stated:

"my father-in-law Franklin Rafael Lopez Toala, to see me worried to move from one place to another with my son with so little weight, something could happen to him because of his prematurity. Mr. Franklin Rafael Lopez Toala, in anguish, sorrow and sadness, he supported me with what he had for that, he felt desperate, an error that he is unable to correct." *Id.*

It is abundantly clear that the sudden medical debt associated with his grandson compelled Toala to commit the crimes for which he has accepted full responsibility. A grandfather's desperate attempt to provide for his family, the exceptional strong family ties and responsibilities connected to that decision, and

lesser reprehensibility therein demonstrates the sentencing court weighed the factors unreasonably. Even the presentence investigation report officer, in their final PSI, suggested a possible downward departure based on the defendant's family ties and responsibilities. *Id.* at ¶ 73.

**ii. Pursuant to U.S.S.G. § 5H1.5, Toala's Employment Record was substantial**

In addition to his family ties and responsibilities, Toala has had a consistent and excellent track record of employment over the years, and although under U.S.S.G. § 5H1.5 one's employment record is *not ordinarily relevant* in determining whether a departure is warranted, the term "*not ordinarily*," does not mean that it may never be considered. These characteristics, in combination are the key factor to consider and apply with respect to Toala. *See United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990).

As noted in the PSI, Toala had a 13-year longstanding and continuous working record at a Tuna Factory, and prior to that 6 years as a security guard. Doc. 72 at ¶¶52-53. Toala was let go from his position at the tuna factory and was unemployed approximately six months prior to his arrest. *Id.* at ¶53. He had no assets to his name but worked dutifully to raise his four children. *Id.* at ¶54. The decision to board the go-fast vessel, which Toala has acknowledged was a terrible and wrong decision, was not sparked by greed or other similar circumstance. Rather it was to try and help

his grandchild, a premature infant that was in serious need of medical care.<sup>3</sup> *Id.* at ¶¶40, 42. From a sentencing perspective, this factor does add to and make Toala's totality of characteristics and circumstances exceptional and his sentence unreasonable, when viewed in the light of the other characteristics referenced herein, and the exigent circumstances and serious medical harm (or death) facing the premature infant. *Id.* at ¶¶40, 42.

Additionally, it is clear from the facts that the sentencing court weighed Toala's employment history and the extent his family depends upon his income unreasonably. As indicated by the letters of support from family members and the PSI, Toala is very much needed home as soon as possible in that he is the "sole means of support." Doc. 75-5 at p.5. Toala's sister in law, Bella Angela Guerrero Cedeno, pled to the court: "help us so my brother in law can return to be with his family at home because they really need him. He was the sole provider of his home." *Id.* His daughter, Adriana, addressed a letter to the sentencing court to let the judge know that her "dad is a very honorable person, [and] always has supported [the] family with honorable work...I beg you to help my daddy especially since we miss him very much at home." *Id.* Bernarda Lourdes Cedeno Mero, Toala's mother-in-law wrote the court to state that her son-in-law "has always worked honorably and supported his family." *Id.* These statements support the fact that Toala has always

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<sup>3</sup> See, U.S.S.G. § 5K2.0 and 5K2.11(Lesser harms)

been a provider to his family. Even when Toala was just a child he went to work to fill in for his absent father and helped to raise his brother. He had consistent employment up until six months before his arrest. Doc. 72 at ¶15. The Court should not punish Toala’s many dependents by allowing Toala’s 108-month sentence to stand. A lesser sentence would allow him to return to his family sooner and provide the financial support they desperately need from him.

The sentencing court noted that Toala’s employment history goes towards his probability of rehabilitation but did not depart downwards. Doc. 94 at 37-38. However, other sentencing courts have recognized that a downward departure may be necessary where the defendant is the primary provider to their family and the defendant’s incarceration threatens the family unit. *See United States v. Alba*, 933 F.2d 1117 (2d Cir. 1991) (finding that incarceration might result in destruction of an otherwise strong family unit); *see also United States v. Galante*, 111 F.3d 1029 (2d. Cir. 1997), reh’g in banc denied, 128 F.3d 788 (2d Cir. 1997) (departure on family ties was warranted because the defendant was the primary source of financial support for the family). Toala has similarly demonstrated long standing employment and a robust commitment to providing for his family. Doc. 72 at ¶¶52-53. When he was a child, he went to work baking bread, shining shoes, and cleaning tables to help his mother support the family all while helping to raise his brother. *Id.* at ¶39. His family’s letters described him as the “sole provider” who worked “honorably” to

provide for his family. Now, Toala's mother has fallen ill, requiring medical attention, and his son, Joe, is starving to the point of hospitalization without his father. *Id.* at ¶42. Toala's innocent dependents and family members should be spared from the negative impact of Toala's absence as much as possible. Ultimately, it was clear error in judgement not to assign Toala a lower sentence based on his substantial employment record.

**iii. Pursuant to U.S.S.G. § 5H1.11, Military Service were present to a substantial degree in Toala's case.**

Existing alone, Toala's military service may not have merited such a downward departure, but this Court may find his sentence warrants downward departure when combined with other factors. Doc. 97-1 at p.2-13. In *United States v. Paradies*, 14 F. Supp. 2d 1315, 1322 (N.D. Ga. 1998), the court noted that the defendant's military service was not extraordinary in isolation; however, after taking into account his military service during World War II, contributions to the community, and age, his sentence was entitled to a downward departure. Similarly, Toala enlisted in the military during the Cenepa War, continues to pledge himself to the reserves, and has the aforementioned additional factors that promote a downward departure. Toala's past and continued military commitment (Doc. 76-1 at p.2), in conjunction with his outstanding employment history and his family's profound

economic reliance on him demonstrate how a sentence with a downward departure would have been reasonable.

The record reflects that Toala demonstrated consistent and longstanding employment records (Doc. 72, at ¶¶52, 53), military service (Doc. *Id.* at ¶52), special family ties and responsibilities (*Id.* at ¶¶39-42; 52-53), near-complete abstention from drugs and alcohol (*Id.* at ¶47), no previous criminal record and a law-abiding life as Toala's. *Id.* As set forth in record and the arguments above, it was clearly demonstrated that these characteristics, in combination, were exceptional and substantially present to depart. The motivating factor, although ill-conceived, was *a grandfather's attempt to save his premature grandchild*. The combination of any of these factors should have been sufficient to warrant a downward departure in Toala's case and demonstrates that Toala's 108-month sentence is unreasonable.

**B. The sentencing court committed clear error by weighing 18 U.S.C. § 3553(a)(6) unreasonably**

An additional factor the sentencing court weighed unreasonably was the “need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” under 18 U.S.C. § 3553(a)(6). Specifically, the sentencing judge did not adequately account for the disparities in the records between Toala and his codefendants. All three individuals received a sentence of 108 months, regardless of their role or responsibility in the drug trafficking. To that end, “[i]t is worth noting

that equal treatment consists not only of treating like things alike, but also of treating unlike things differently according to their differences.” *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999) (en banc).

While each codefendant in this case received a sentence of 108 months, the codefendants were not treated equally “according to their differences.” *Id.* For example, Mera captained the vessel at issue, engaged in human trafficking, possessed connections to drug-running recruiters, refueled drug-laden boats in the past and did not have a “largely law-abiding life” as claimed in his sentencing memoranda. Doc.75-7 at p.1-2; Doc. 94 at p.16; Doc. 68 at p.4. Toala was a mere deckhand trying to remedy his family’s medical debts. Mera and Toala’s reprehensibility differ substantially; but, according to the comparison chart attached in the amended sentencing memoranda, they received the same sentence. Doc.75-7 at p.1-2. Similarly, Zambrano, the de-facto navigator and another individual who lacks the substantial, distinguishing policy statement considerations that Toala has, received the exact same sentence. Doc. 75-7 at p.1-2; Doc. 58 at p.1-5. A comparison of their condemnable conduct on the record is markedly disproportionate yet all three sentences are equal.

Toala should be entitled to a lighter sentence for his lesser culpability on the record in comparison to either Mera or Zambrano. By not departing Toala’s sentence downwards the sentencing court failed to treat “unlike things differently” according

to 18 U.S.C. § 3553(a)(6) and rendered a substantively unreasonable sentence. *Lyes*, 166 F.3d at 1342.

**C. The district court's sentence is not substantively reasonable considering the statutory purposes regarding the 18 U.S.C § 3553(a) factors**

A sentence is substantively unreasonable if it fails to carry out the statutory purposes of sentencing under 18 U.S.C. § 3553(a). *United States v. Dean*, 635 F.3d 1200, 1209 (11th Cir. 2011). During the sentencing hearing, the court seemingly frowned upon and punished Toala's employment history, military service, and family ties, thereby going against the statutory purposes of sentencing. More specifically, the sentencing court stated that "someone who has special responsibilities at home has every motivation in the world not to engage in reckless and high-risk behavior" and "someone with military service has been exposed presumably to discipline and organization and accountability for his conduct and should have every reason to know of the danger of engaging in this kind of scheme." Doc. 94 at p. 38-39. The statutory purpose that the sentencing court failed to carry out was the consideration of *rehabilitation*.

To meet this statutory purpose, policy statements directing the analysis of family ties and responsibilities, employment record, and military service have been traditionally used to depart downward. Even the sentencing court noted that the employment record factor relates "to the probability of rehabilitation and things such

as that.” Doc. 94 at p.38. The assumption is that someone with such strong familial ties, employability, and military service is more readily rehabilitated and less likely to recidivate. An individual with strong family ties is less likely to want to risk incarceration, an individual with a long employment record suggests the person will seek legal, gainful employment upon leaving prison, and an individual with military service will take the court’s discipline to heart and not recidivate. An individual with these characteristics should not be considered blameworthy because of them, rather they are reasons the court should have exercised less deterrence in Toala’s sentencing.

The *First Step Act* evinces Congress’ statutory purpose of rehabilitation for non-violent offenders like Toala. Doc. 75-6 at p.2, 3. The *First Step Act* has two goals to “lower the recidivism rate and reduce sentences for nonviolent offenders which allows us to direct resources towards truly dangerous criminals.” *Id.* at p.3. Toala had no prior criminal record, did not commit a violent crime, and his specific offender characteristics indicate he will be easily rehabilitated. Doc. 72 at ¶¶18, 34. If the intent of the recent act is to “strike a balance that reduces crime and recidivism, and the associated taxpayer burden, while ensuring that dangerous and career criminals face steep consequences for their actions” then assigning blameworthiness to Toala because of his robust family ties, strong employment record, and selfless military service is impermissible. *Id.* at p.2.

Because the sentencing court failed to carry out one of the statutory purposes for sentencing (i.e. rehabilitation), Toala's sentence is substantively unreasonable.

## **CONCLUSION**

Based on the foregoing, Franklin Rafael Lopez Toala respectfully requests that this Court vacate his sentence and remand this case for resentencing consistent with the U.S.S.G.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

This brief, which contains 9,281 countable words, written in 14-point or larger Times New Roman font, and is in compliance with Fed. R. App. P. 32(a)(7)(B)(i).

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that an original and six true and correct paper copies have been furnished by U.S. Mail to the U.S. Court of Appeals, Eleventh Circuit, at 56 Forsyth Street, N.W., Atlanta, GA 30303, on July 12, 2019. Additionally, this brief and the notice of electronic filing were sent by CM/ECF on July 12, 2019, to opposing counsel:

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**Pet. App. P**

No. 19-11335-JJ

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In the  
**United States Court of Appeals  
for the Eleventh Circuit**

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**UNITED STATES OF AMERICA,**  
*Plaintiff-Appellee,*

v.

**FRANKLIN RAFAEL LOPEZ TOALA,**  
*Defendant-Appellant*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
No. 8:18-CR-511-T-23JSS-2

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**BRIEF OF THE UNITED STATES**

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September 26, 2019

*United States v. Franklin Rafael Lopez Toala*  
No. 19-11335-JJ

**Certificate of Interested Persons  
and Corporate Disclosure Statement**

In addition to the persons identified in the Certificate of Interested Persons and Corporate Disclosure Statement in Franklin Rafael Lopez Toala's principal brief, the following persons have an interest in the outcome of this case:

1. Palermo, Thomas Nelson, former Assistant United States Attorney; and
2. Thresher Taylor, Michelle, Assistant United States Attorney.

No publicly traded company or corporation has an interest in the outcome of this appeal.

## **Statement Regarding Oral Argument**

The United States does not request oral argument.

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## **Statement of Jurisdiction**

This is an appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case. That court had jurisdiction. *See* 18 U.S.C. § 3231. The court entered the judgment against Franklin Rafael Lopez Toala on March 27, 2019, Doc. 78, and Lopez Toala timely filed a notice of appeal on April 5, 2019, Doc. 80. *See* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal, *see* 28 U.S.C. § 1291, and authority to review Lopez Toala's sentence, *see* 18 U.S.C. § 3742(a).

## **Statement of the Issues**

- I. Whether the district court clearly erred by finding that Lopez Toala failed to establish, for purposes of USSG §3B1.2, that he was a “minor participant” in his drug-trafficking offenses.
- II. Whether the district court abused its discretion in balancing the factors required by 18 U.S.C. § 3553(a) and imposing a sentence.

## **Statement of the Case**

This is a drug-trafficking “boat case.”<sup>1</sup> Franklin Rafael Lopez Toala pleaded guilty to conspiring to possess and possessing—with intent to distribute—five kilograms or more of cocaine aboard a vessel subject to United States jurisdiction. Docs. 1, 78. He appeals his sentence. He argues that the district court should have granted him a two-level “minor” role reduction under USSG §3B1.2(a) and, moreover, should have balanced the factors in 18 U.S.C. § 3553(a) differently and imposed a shorter sentence, regardless.

### *Course of Proceedings*

A grand jury indicted Lopez Toala on counts of conspiring to possess

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<sup>1</sup>The Coast Guard caught Lopez Toala and two accomplices in a go-fast boat in the Pacific Ocean attempting to smuggle cocaine from Ecuador to North America. PSR ¶¶ 7–12.

and possessing—with intent to distribute—five kilograms or more of cocaine aboard a vessel subject to United States jurisdiction, in violation of 46 U.S.C. §§ 70503(a) and 70506, 18 U.S.C. § 2, and 21 U.S.C. § 960(b)(1)(B)(ii). Doc. 1. He pleaded guilty to both counts without a plea agreement. Docs. 46, 52.

The probation office calculated an advisory sentencing-guidelines range of 108–135 months’ imprisonment based on an offense level of 31 and criminal history category I. PSR ¶ 57. (The ten-year statutory-minimum term of imprisonment was disregarded because Lopez Toala qualified for safety-valve relief under 18 U.S.C. § 3553(f). PSR ¶ 56.) The district court accepted the factual content of the PSR without objection from either side. *Id.* at 5–6. Lopez Toala argued that his offense level should be reduced by two pursuant to USSG §3B1.2(b) because he was a “minor participant” in the drug-trafficking offenses. Doc. 75 at 11–12; Doc. 94 at 7–11. The district court disagreed. It found that Lopez Toala had “failed to bear his burden of proving that he is less culpable than the average participant”; denied his request for a minor-role reduction; and adopted the 108–135 months guidelines range proposed in the PSR. Doc. 94 at 15–28.

Lopez Toala further argued that he was entitled to a departure below that range, pursuant to USSG §§5H1.5, 6, and 11, because he had a good employment record, because his participation in the drug-trafficking

conspiracy had been motivated by his need to pay for medical treatment for his premature infant grandson, and because he had served in his country’s military. Doc. 94 at 30–37. The district court considered Lopez Toala’s arguments but found no reason to depart from the guidelines range “based upon any of those factors or any combination of those factors, which … are not present in any remarkable extent or degree or [proximity] of causation.” *Id.* at 39–40.

The district court then turned to the factors required by 18 U.S.C. § 3553(a). Lopez Toala argued that a below-guidelines sentence was warranted under § 3553(a) “based upon the totality of this particularly defendant, as it relates to his history and characteristics,” including his family and his military service. Doc. 94 at 41–42. The district court again considered Lopez Toala’s arguments but concluded that a within-guidelines sentence was necessary and appropriate to comply with the § 3553(a) factors—in particular, the need to promote respect for the law, deter criminal conduct, protect the public, and avoid unwarranted sentencing disparities. Doc. 94 at 52–56. The district court sentenced Lopez Toala to concurrent terms of 108 months in prison on each count (the bottom of his guidelines range), to be followed by five years of supervised release. *Id.* at 52. Lopez Toala renewed his objections “concerning procedural substantive issues [and] reasonableness issues,” *id.* at 56, and timely

appealed, Doc. 80.

### ***Statement of the Facts***

On October 18, 2018, the U.S. Coast Guard spotted a go-fast boat in the Pacific Ocean, approximately 230 nautical miles west of Manta, Ecuador. PSR ¶ 7. On board the small vessel were Lopez Toala, two others, and more than 300 kilograms of cocaine. *Id.* ¶ 8. The smugglers began dumping bales of cocaine and electronic devices overboard when they realized they had been spotted. *Id.* ¶¶ 7–9. They ignored warning shots from a helicopter. *Id.* ¶ 7. So the Coast Guard fired on the boat’s engines, disabled them, and boarded the vessel. *Id.* ¶¶ 7–9. They recovered ten bales of jettisoned cocaine weighing 331 kilograms, a cell phone, and a satellite phone. *Id.* ¶ 9.

The boat’s crew—Lopez Toala and two men named Zambrano and Mera—admitted to smuggling cocaine from Ecuador to North America. Lopez Toala told the Coast Guard that he and Zambrano each had been given an “advance payment” of \$5,000 to serve as “mariner[s]” on the voyage, while Mera was the captain and navigator. *Id.* ¶ 11. Lopez Toala further admitted that he had briefly driven the boat (although he claimed he “couldn’t do it correctly”), Doc. 94 at 9, and that he had helped Zambrano throw 10–12 bales of cocaine overboard when they were spotted, PSR ¶ 11. He had also thrown his cell phone and passport overboard. *Id.* Lopez Toala claimed that he had

“committed the offense out of financial necessity,” because he “had been unemployed for six months prior to his arrest and needed money to pay for his mother’s medical treatment and his grandson’s medical expenses because he was born premature.” *Id.* ¶ 15.

Mera admitted that he was the captain of the vessel and that he had been given a \$5,000 advance payment with the promise of \$35,000 more upon his return. *Id.* ¶ 10. According to Mera, he “initially took the helm but shared it with Zambrano and Toala.” *Id.* Zambrano admitted that he, too, had been given a \$5,000 advance with the promise of another payment (another \$5,000) upon his successful return. *Id.* ¶ 12.

### ***Standard of Review***

I. This Court reviews the district court’s denial of a minor-role reduction for clear error. *See United States v. Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016).

II. This Court reviews the district court’s balancing of the § 3553(a) factors, and the reasonableness of the sentence imposed, for abuse of discretion. *See United States v. Sarras*, 575 F.3d 1191, 1219 (11th Cir. 2009).

### ***Summary of the Argument***

I. Lopez Toala and two accomplices were caught smuggling more than 300 kilograms of cocaine from Ecuador to North America. The district

court reasonably and correctly denied Lopez Toala’s request for a two-level reduction under USSG §3B1.2 because he failed to demonstrate by a preponderance of the evidence that his participation was “minor” compared to the other men on the boat. Lopez Toala ignores facts in the record and, moreover, improperly compares his role in the offense to a broader drug-trafficking conspiracy beyond the scope of the conduct for which he was held accountable and sentenced. He identifies no clear error in the district court’s finding that he and his accomplices played comparable roles in these offenses.

II. Nor does Lopez Toala identify any abuse of discretion in his sentence. The district court appropriately considered and addressed the relevant factors under 18 U.S.C. § 3553(a) and imposed a within-guidelines sentence at the very bottom of the advisory range. Lopez Toala’s sentence was not unreasonable. It should be affirmed.

### **Argument and Citations of Authority**

#### **I. The district court reasonably found that Lopez Toala failed to demonstrate that he was a “minor participant.”**

Part B of the United States Sentencing Guidelines “provides adjustments to the offense level based upon the role the defendant played in committing the offense.” USSG Ch.3, Pt.B, intro. comment. A. A defendant qualifies for a reduced offense level under USSG §3B1.2 if he was a “minimal participant” in

the offense (four-level reduction), a “minor participant” (two-level reduction), or something in between (three-level reduction). A defendant may qualify for one of the reductions in this section if he is “substantially less culpable than the average participant in the criminal activity.” §3B1.2, comment. (n.3(A)). More specifically, the “minor participant” reduction—which Lopez Toala claims—applies to a defendant “who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.” §3B1.2, comment. (n.5).<sup>2</sup>

A defendant’s degree of participation “is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.” §3B1.2, comment. (n.3(C)). In making this determination, the sentencing court should generally consider, among other things: (i) “the degree to which the defendant understood the scope and structure of the criminal activity”; (ii) “the degree to which the defendant participated in planning or organizing the criminal activity”; (iii) “the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority”; (iv) “the nature and extent of the

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<sup>2</sup>“Minimal” participation means “plainly among the least culpable of those involved in the conduct of a group.” §3B1.2, comment. (n.4). “Lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minimal participant.” *Id.*

defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts"; and (v) "the degree to which the defendant stood to benefit from the criminal activity." *Id.*

The application of these factors should be guided by "the defendant's role in the relevant conduct for which he has been held accountable at sentencing" and a comparison of his role to the roles of "other participants in [the defendant's] relevant conduct." *United States v. Valois*, 915 F.3d 717, 732 (11th Cir. 2019), *petition for cert. filed*, No. 19-5166 (U.S. July 12, 2019); *see also United States v. Presendieu*, 880 F.3d 1228, 1249 (11th Cir. 2018) (same); *United States v. Rodriguez De Varon*, 175 F.3d 930, 941 (11th Cir. 1999) (same). In other words, degree of participation under §3B1.2 depends on the defendant's relevant degree of involvement in the particular conduct for which he has been held accountable and will be sentenced, compared to the other participants in that conduct—not a larger scheme or conspiracy for which the defendant has not been held accountable. *Valois*, 915 F.3d at 732; *see also* USSG App. C, amend. 635 ("In considering a §3B1.2 adjustment, a court must measure the defendant's role against the relevant conduct for which the defendant is held accountable at sentencing, whether or not other defendants are charged."). "The defendant bears the burden of establishing his minor role in the offense

by a preponderance of the evidence.” *Valois*, 915 F.3d at 731. This Court reviews the district court’s denial of a minor-role reduction for clear error. *Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016).

The record in this case supports the district court’s finding that Lopez Toala failed to prove that he was a minor participant based on the criteria above. Lopez Toala’s role “in the relevant conduct for which he has been held accountable” was neither “substantially less culpable than [that of] the average participant” in that activity nor less culpable than that of “most other participants.” *Valois*, 915 F.3d at 732; §3B1.2, comment. (n.3(A)); §3B1.2, comment. (n.5). Lopez Toala was held accountable for transporting 331 kilograms of cocaine from Ecuador to North America on a boat. PSR ¶ 18. The record shows that he manned the boat, helped to pilot the boat, and dumped cocaine and other contraband overboard when confronted by the Coast Guard. *Id.* ¶¶ 10–11. The only other participants were Zambrano and Mera. *Id.* ¶¶ 10–12. Lopez Toala’s role was materially indistinguishable from Zambrano’s. *Id.*; *accord* Lopez Toala’s brief at 18 (conceding that he and Zambrano “were arguably the lowest-ranking (and obviously most expendable) participants in this drug-smuggling venture”). Mera was the captain of the vessel, but that only made Lopez Toala less culpable than Mera. It did not necessarily make him *substantially* less culpable than the average participant,

and certainly not less culpable than *most* other participants (i.e., Mera and Zambrano). §3B1.2, comment. nn.(3(A), 5). *See Valois*, 915 F.3d at 732 (“The fact that a defendant’s role may be less than that of other participants engaged in the relevant conduct may not be dispositive of role in the offense, since it is possible that none are minor or minimal participants.”).

The factors specified in (n.3(C)) of the commentary to §3B1.2 further support the district court’s finding. Lopez Toala was held accountable for possessing with intent to distribute 331 kilograms of cocaine on a boat subject to the jurisdiction of the United States. Nothing in the record suggests that his understanding of, participation in, or expected benefit from this activity was any different from Zambrano’s, nor substantially different from Mera’s. *Id.* Each participant admittedly received a \$5,000 advance to serve on a small boat transporting cocaine from Ecuador to North America; each expected additional payment upon the crew’s successful return; each took turns piloting the boat; and each cooperated to jettison the drugs and other evidence when spotted by the Coast Guard. PSR ¶¶ 10–12. Mera apparently expected to receive more than Zambrano and Lopez Toala upon their return, to be sure. *Id.* ¶ 10. And he presumably had more responsibility, discretion, and decision-making authority as the boat’s captain. *See USSG* §3B1.2, comment. (n.3(C)).<sup>3</sup>

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<sup>3</sup>Indeed, Mera received a two-level enhancement for importing a

Nevertheless, the district court has broad discretion in weighing these factors. Whether or not a defendant is entitled to a minor-role reduction depends on “the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.” *Id.* That is why this Court reviews the district court’s finding for clear error. *Cruickshank*, 837 F.3d at 1192. A “district court’s choice between two permissible views of the evidence as to the defendant’s role in the offense will rarely constitute clear error so long as the basis of the trial court’s decision is supported by the record and does not involve a misapplication of a rule of law.” *Id.* A district court’s finding cannot be clearly erroneous unless this Court is “left with a definite and firm conviction that a mistake has been committed.” *Id.* Here, the district court’s finding that Lopez Toala failed to establish a minor role by a preponderance of the evidence based on the totality of the circumstances—including the factors in §3B1.2, comment. (n.3(C))—was reasonably supported by the undisputed facts above, and Lopez Toala identifies no legal error in the court’s analysis.

This Court recently affirmed the denial of a minor-role reduction in virtually identical circumstances in *Valois*, 915 F.3d at 732–33. There, too, three men were caught transporting cocaine on a go-fast boat. *Id.* at 723–26.

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controlled substance as the pilot of a craft or vessel pursuant to USSG §2D1.1(b)(3)(C). Mera’s PSR ¶ 24.

This Court rejected the argument that the two men who had not captained the boat played only minor roles because the record showed, as it does in this case, that all three “knowingly participated in the illegal transportation of a large quantity of cocaine,” were “important to that scheme,” and were “held responsible only for that conduct.” *Id.* at 732. The result here should be no different.

Lopez Toala claims he was a minor participant because he was not the captain of the vessel and because he lacked “a full, comprehensive understanding of the full scope and structure” of the larger drug-trafficking scheme in Ecuador. Lopez Toala’s brief at 14–19. But his subordinate role on the boat is but a single, non-dispositive factor in the analysis, and the fact that he was not involved in producing the cocaine or delivering it to the boat is irrelevant because he was not held accountable for those things. To demonstrate entitlement to a minor-role reduction under §3B1.2, Lopez Toala was required to prove by a preponderance of the evidence that he was substantially less culpable than the average participant *in the transportation of the 331 kilograms of cocaine on the boat* (§3B1.2, comment. (n.3(A))), and, moreover, that he was less culpable than *most of those participants* (§3B1.2, comment. (n.5.)), based on the totality of the circumstances, including the factors in §3B1.2, comment. (n.3(C)). The best that Lopez Toala can show is that he was

somewhat less culpable than *one* of the other participants (Mera), as explained above. And we know from *Valois*, 915 F.3d at 732–33, that the district court did not clearly err on that basis.

Lopez Toala also misinterprets the sentencing colloquy. He suggests that his role should be viewed as a small part in a larger conspiracy beyond the cocaine that he, Zambrano, and Mera transported because the district court made reference at sentencing to the “cash-driven, heartless, blood thirsty criminal organization in Central and South America,” and “the lords of the operations, the leaders of these criminal organizations, and their enforcers, and their captains and the like . . . .” Lopez Toala’s brief at 16–17 (quoting Doc. 94 at 18, 49). But the district court in fact held the opposite of what Lopez Toala suggests; that is, that in evaluating a defendant’s relevant role under §3B1.2 in drug-trafficking boat cases, it is “necessary to regard the pertinent class of comparators as the persons onboard the vessel”—consistent with the authority above—because “the crime is . . . the transportation on the high seas,” and the lords, leaders, enforcers, and captains of the larger criminal organizations are “an unmanageable number and not within our capacity to assess.” Doc. 94 at 17–18. Accordingly, the district court reasonably and correctly found that Lopez Toala had not demonstrated that he was a minor participant because “we appear to have a captain and two crewmembers,” and “the crewmembers

may have some minor distinctions between them, but they are both available ... for general purpose labor on the vessel and, in that respect, they are similarly situated.” Doc. 94 at 19–20.

Lopez Toala’s remaining arguments likewise do not suggest that the district court erred, much less clearly erred. He argues that he was “paid a very small portion of the boat’s contents’ total worth”; that he did not “helm” the boat “like the other codefendants” because “he did not have the knowledge or skill for that task”; that he did not know precisely how much cocaine was on the boat; that he had no “‘proprietary interest’ or any kind of ownership stake” in the cocaine”; and that he “should be considered for an adjustment” under §3B1.2. Lopez Toala’s brief at 15–19. But the record shows that Lopez Toala received the same advance as Zambrano and Mera (\$5,000 each), PSR ¶¶ 10–12; that Lopez Toala and Zambrano both took turns operating the boat when Mera was not at the helm, PSR ¶¶ 10–12, Doc. 94 at 9; that all of them had an interest and stake in the cargo because they had been promised, and expected to receive, additional payments upon their successful return to Ecuador, PSR ¶¶ 10–12, Doc. 94 at 11–12; and that the district court thoroughly considered Lopez Toala’s request for a minor-role reduction under §3B1.2 before denying it, Doc. 94 at 7–27. Moreover, the district court found that “driving a boat of this size, particularly if it’s well ballasted in the middle with a heavy load of

cocaine, is not really all that difficult,” and “the reason you have three people on these vessels is so that they can take turns doing the things that need to be done to maintain the vessel and crew during a strenuous voyage on the high seas.” Doc. 94 at 24. Accordingly, Lopez Toala identifies no clear error in the district court’s finding that he failed to prove that he was a minor participant in these drug-trafficking offenses pursuant to §3B1.2.

**II. The district court expressly considered and appropriately balanced all of the § 3553(a) factors, and imposed a reasonable sentence.**

Lopez Toala also argues that his sentence is substantively unreasonable because the district court erroneously weighed some of the § 3553(a) factors. *See* Lopez Toala’s brief at 19–34. Section 3553(a) addresses the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence, and to protect the public; the kinds of sentences available; the sentencing range recommended by the guidelines; and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. *See* 18 U.S.C. § 3553(a)(1)–(6). A district court’s balancing of these factors, and the reasonableness of the sentence imposed, are reviewed for abuse of discretion. *United States v. Sarras*,

575 F.3d 1191, 1219 (11th Cir. 2009).

This Court first examines whether the district court considered each of the factors. *Gall v. United States*, 552 U.S. 38, 51 (2007). The district court need not “state on the record that it has explicitly considered each of the § 3553(a) factors or,” indeed, “discuss each of the § 3553(a) factors” at all. *United States v. Docampo*, 573 F.3d 1091, 1100 (11th Cir. 2009) (internal quotation marks omitted). Rather, the district court’s acknowledgment that it has considered the section 3553(a) factors and the defendant’s arguments is sufficient. *Id.*; *see also United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008).

Here, the district court expressly stated that “in arriving at the announced sentence” it had considered the policies and guidelines of the United States Sentencing Commission; the resulting advisory guidelines range; the oral and written submissions of counsel; and “the factors at 18 U.S.C. § 3553(a).” Doc. 94 at 53. The court then specifically addressed the most significant of those factors in further detail: the nature and characteristics of the offense (“this is a large-scale transoceanic importation of a large quantity of high-purity cocaine . . .”); the nature and characteristics of the defendant (“his individual circumstances are much more sympathetic and would counsel under any circumstances a more lenient understanding of the offense here, were [the offense] not so especially serious”); the need to promote respect for

the law, to deter criminal conduct, and to protect the public (“all of those I think counsel in favor of at least a guideline sentence here”); and the need to avoid unwarranted sentencing disparities (“boat cases are sentenced almost uniformly here in the Middle District of Florida in the Tampa Division”; they “typically are about 135 months for a crewman, about 168 months for a captain,” but “this load was less, so the offense level ticks down a couple notches, resulting in a crewman with a 108-month sentence”). Doc. 94 at 53–55. Accordingly, the district court more than sufficiently considered and addressed the § 3553(a) factors.

A defendant challenging the length of his sentence bears the burden of establishing that it is unreasonable. *Sarras*, 575 F.3d at 1219. This Court ordinarily expects a sentence within the guidelines range to be reasonable. *Id.* at 1219–20. “Because of its ‘institutional advantage’ in making sentence determinations,” a district court has “‘considerable discretion’ in deciding whether the § 3553(a) factors justify a variance,” and this Court must give the district court’s decision “due deference.” *United States v. Shaw*, 560 F.3d 1230, 1238 (11th Cir. 2009).

The sentence that the district court imposed here was at the very bottom of Lopez Toala’s advisory guidelines range (108 months). Lopez Toala cites no case in which this Court has found that a district court abused its discretion by

imposing a bottom-of-the-guidelines sentence. Nevertheless, Lopez Toala claims that his sentence is substantively unreasonable for three reasons. First, because the district court “weigh[ed] the 18 U.S.C. § 3553(a)(5) factor on policy statements and offender characteristics unreasonably.” Lopez Toala’s brief at 21. That subsection states that the sentencing court should consider “any pertinent policy statement issued by the Sentencing Commission pursuant to [28 U.S.C. § 994(a)(2)], subject to any amendments . . . .” § 3553(a)(5). But the provision referenced in that subsection—§ 994(a)(2)—addresses “general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation *that, in the view of the Commission, would further the purposes set forth in [§ 3553(a)(2)]*” (emphasis added). Section 3553(a)(2), in turn, specifically addresses the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to deter criminal conduct; to protect the public from the defendant; and to provide the defendant with appropriate training or treatment.

Lopez Toala argues that the district court improperly applied § 3553(a)(5) because the court failed to give sufficient weight to his family ties and responsibilities, his employment record, and his military service. Lopez Toala’s brief at 23–30. Such considerations, however, fall under § 3553(a)(1)

because they relate to “the history and characteristics of the defendant,” not to the sentencing goals in § 3553(a)(2) (to which the policy statements mentioned in § 3553(a)(5) refer).

Regardless, Lopez Toala identifies no abuse of discretion in how the district court weighed his family circumstances, his employment history, or his military service. The district court first acknowledged all of these things in denying Lopez Toala’s request for a downward departure, but found no reason to depart from the guidelines range “based upon any of those factors or any combination of those factors, which … are not present in any remarkable extent or degree or [proximity] of causation.” Doc. 94 at 38–40. “A district court’s refusal to apply a downward departure is within the court’s discretion and may not be appealed, provided the court recognized that it had the power to so depart from the guideline range.” *United States v. Torres*, 531 F. App’x 964, 975 (11th Cir. 2013)). Lopez Toala then cited the same considerations in requesting a variance. The district court denied that request for similar reasons based on the factors in § 3553(a). This certainly was not an abuse of discretion. Indeed, the provisions in USSG §5H1 that Lopez Toala cites (Lopez Toala’s brief at 23–30) make clear that a defendant’s employment record, family ties and responsibilities, and military service are “*not* ordinarily relevant in determining whether a departure is warranted,” USSG §§5H1.5, 6, 11

(emphasis added), consistent with the reasonable manner in which the district court considered these factors in evaluating both Lopez Toala's request for a departure and his request for a variance.

Lopez Toala further claims that the district court improperly viewed these factors "negatively" and as "reasons to assign blameworthiness" to him. Lopez Toala's brief at 20. Not so. The district court neither increased Lopez Toala's guidelines range nor varied or departed above it based on his employment history, family situation, military service, or any other factor for that matter. To the contrary, the district court overruled Lopez Toala's sole objection to the PSR (i.e., his request for a minor-role reduction), adopted the otherwise undisputed advisory guidelines range proposed in the PSR, and imposed a term of imprisonment at the very bottom of that range. *See supra* Course of Proceedings. Accordingly, Lopez Toala identifies no abuse of discretion in how the district court weighed or considered Lopez Toala's family circumstances, employment history, or military service under § 3553(a).

Lopez Toala next claims that his sentence is substantively unreasonable because the district court "weigh[ed] 18 U.S.C. § 3553(a)(6) unreasonably." Lopez Toala's brief at 31. That subsection states that the sentencing court should consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar

conduct.” § 3553(a)(6). The district court specifically addressed this factor in the sentencing colloquy and explained that Lopez Toala’s sentence appropriately avoided unwarranted disparities given the quantity of drugs involved and the “almost uniform[]” sentences given to “boat case” defendants in this district, as described above. *See* Doc. 94 at 54–55. Lopez Toala identifies no other case in which a comparably situated defendant received a sentence disparate from his. Nevertheless, he claims that the district court unreasonably weighed this factor because he “should be entitled to a lighter sentence” than Zambrano and Mera, both of whom also received 108 months in prison. Lopez Toala’s brief at 32.

As for Zambrano, the district court reasonably found that his role in these offenses was indistinguishable from Lopez Toala’s for the reasons explained above. Doc. 94 at 19–20. Lopez Toala essentially concedes as much. Lopez Toala’s brief at 18. And nothing in the record suggests otherwise. Indeed, Zambrano’s advisory guidelines range was the same as Lopez Toala’s (*compare* Zambrano’s PSR ¶ 60 *with* Lopez Toala’s PSR ¶ 57).

As for Mera, he received a higher advisory guidelines range due to an enhancement for his role as the captain, *see* Mera’s PSR ¶¶ 24, 65, but, on the other hand, he pleaded guilty pursuant to a negotiated plea agreement and received a downward departure for having provided substantial assistance,

Docs. 28, 67, 71; Mera's PSR ¶ 9. Negotiating a plea agreement and cooperating with the government is often beneficial at sentencing. *See United States v. Dixon*, 901 F.3d 1322, 1351 (11th Cir. 2018). Lopez Toala did not negotiate a plea agreement or provide substantial assistance. Accordingly, Lopez Toala identifies no unwarranted disparity between his sentence and any other sentence, and no error at all, much less an abuse of discretion, in how the district court weighed § 3553(a)(6).

Finally, Lopez Toala repeats his argument that his sentence is substantively unreasonable because the district court allegedly “punished” his family circumstances, employment history, and military service. Lopez Toala’s brief at 33. But again, Lopez Toala does not explain how he was punished, and the record shows he was not. The district court simply denied his request for a downward departure or variance based on these factors. Lopez Toala appears to suggest that the district court’s weighing of these factors further caused the court to “fail[] to carry out … the consideration of rehabilitation.” *Id.* Section 3553(a)(2)(D) requires the district court to consider the need for the sentence imposed to provide certain rehabilitative goals such as training and medical care. To the extent that Lopez Toala argues that the district court erroneously weighed this factor, he again fails to demonstrate an abuse of discretion or, indeed, any error at all. His bottom-of-the-guidelines sentence for trafficking

almost a third of a metric ton of cocaine was reasonable and should be affirmed in all respects.

## Conclusion

The United States requests that this Court affirm the sentence imposed by the district court.

Respectfully submitted,

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## Certificate of Service

I certify that a copy of this brief and the notice of electronic filing was sent by CM/ECF on September 26, 2019, to:

BRIAN P. BATTAGLIA, ESQ.

*Counsel for Franklin Rafael Lopez Toala*

s/ Sean Siekkinen

SEAN SIEKKINEN  
Assistant United States Attorney

gkpr/no/09/23/19

**Pet. App. Q**

No. 19-11335-JJ

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In the  
United States Court of Appeals  
for the Eleventh Circuit

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
No. 8:18-CR-511-T-23JSS-2

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**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**

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October 14, 2019

*United States v. Franklin Rafael Lopez Toala*  
No. 19-11335-JJ

**Certificate of 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-Appellant in lower court and for this appeal;

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

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

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

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

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-appellant;

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

All those listed in Appellee's CIP.

No publicly traded company or corporation has an interest in the outcome of this appeal.

**In the**  
**United States Court of Appeals**  
**for the Eleventh Circuit**

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

No. 19-11335-JJ

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

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**Appellant's Motion for Order to Unseal on a Limited Basis and/or  
Permit Appellant's Counsel Limited Inspection to Review of the  
Sealed Presentence Investigation Report of Pinargote Mera and  
alternatively other relief**

The Appellant, Franklin Rafael Lopez Toala (who is currently incarcerated), through his undersigned counsel, and pursuant to Fed. R. App. P. 27 files this Motion to Unseal and/or permit Limited Inspection of the Presentence Investigation Report of Pinargote Mera by Appellant's counsel, which is included in the Appellee's supplemental appendix filed on October 1, 2019, or alternatively an Order from this Court striking said PSR of Pinargote Mera, in that good cause exists<sup>1</sup>, and says as follows:

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<sup>1</sup> The Appellant has simultaneously filed its Motion for Extension of Time to File its Reply Brief, in light of this Motion. The Appellee, United States does not oppose the Appellant's Motion for Extension of Time to File its Reply Brief.

1. The undersigned attorney is primarily responsible for preparing and filing the Appellant's Reply Brief in this Appeal. Good Cause exists, as set forth below, for the following reasons:

2. On October 1, 2019 Appellee, the United States filed a supplemental appendix listing the Pinargote Mera Sealed Presentence Investigation Report (hereinafter "Mera PSR") as an exhibit to this pending Appeal. The sealed Mera PSR was filed under seal with the Clerk of the Court for the Eleventh Circuit on October 2, 2019. The undersigned contacted counsel for the United States on or about October 2, 2019 and was advised that the undersigned could contact the Clerk of the Court to access the Mera PSR, which was not an attached Exhibit to the supplemental appendix. The Mera PSR referenced in the United States supplemental appendix was that of another defendant in the lower court.

3. The undersigned contacted a Clerk of the Court for the Eleventh Circuit Court of Appeals and was advised that the undersigned could not access the Mera PSR on the docket. The undersigned has been unable to access or review the Mera PSR filed by the United States. The undersigned then contacted appellate counsel for the United States on October 2, 2019 via email to advise that the undersigned could not access the Mera PSR, and inquired if counsel for the United States would make the Mera PSR available to the undersigned for review. On October 3, 2019 counsel

for the United States advised the undersigned in an email that “... I am looking into whether the rules allow me to send a PDF version by e-mail. I will let you know when I have an answer.” On October 4, 2019 the undersigned advised counsel for the United States that he would be willing to stop by the U.S. Attorney’s Office to inspect the Mera PSR. On the same day counsel for the United States advised the undersigned that “that would not be necessary that I should be able to mail it to you or e-mail it to you. I’m just waiting on confirmation. Sorry for the delay.”

4. On October 7, 2019 the undersigned was advised by counsel for the United States that the Mera PSR could not be shared with the undersigned, but that access could be through the District Court or alternatively from the Eleventh Circuit or from counsel for Pinargote Mera.

5. As of the filing of this Motion, the undersigned has not been able to obtain a copy of the Mera PSR from counsel for Pinargote Mera, and after evaluating this matter, has filed this Motion with the Eleventh Circuit Court of Appeals, in that the United States supplemental appendix was filed in this Court.

6. The undersigned has also simultaneously filed a Motion for Extension of Time to file the Reply Brief in light of this Motion to Unseal and/or permit Limited Inspection of the Presentence Investigation Report of Pinargote Mera by Appellant’s counsel, which is included in the Appellee’s supplemental appendix filed on October 1, 2019, or alternatively striking said PSR of Pinargote Mera.

7. The exigent and unique circumstances that support and show that good cause exists for the granting off this Motion (and the motion for extension) are the undersigned's, and the parties to this Appeal's good faith efforts, in attempting to resolve the matters involving the Mera PSR with counsel for the United States.

8. As of Friday October 11, 2019, the undersigned had conferred with counsel for the United States via telephone to determine if the United States had any objection to this Motion seeking an Order from the Eleventh Circuit Court of Appeals, allowing counsel for the Appellant to review the Mera PSR attached to the United States supplemental appendix.

9. In that counsel for the United States had advised the undersigned he was out of town during the phone call on October 11, 2019, the undersigned followed up with an email to counsel for the United States on Sunday, October 13, 2019 and was advised in a return email on October 13, 2019 from counsel for the United States that the United States had no objection as to an extension of time for the filing of Appellant's Reply Brief, but as to the Mera PSR issue in this Motion, that the undersigned could advise this Court that the Appellant's counsel is still awaiting a position from the United States on the other requested relief i.e. access to the Mera PSR.

10. Also, the undersigned did attempt to contact counsel for the United States on Monday, October 14, 2019 concerning the additional relief of striking some

or all or portions of the United States supplemental appendix containing the Mera PSR and the United States, and as of the filing of this Motion, has not responded with a response and position on this issue.

11. In light of the above, good cause exists for the granting of Appellant's Motion and the undersigned attempted to resolve this matter without seeking relief from this Court, prior to the filing of this Motion.

12. In addition, the undersigned represents to this Court that appellate counsel for the United States, Sean Siekkinen, Esq. has also acted in a good faith effort to resolve and/or address this matter, and that Mr. Siekkinen, Esq. also advised the undersigned on October 13, 2019 via email that he would attempt to obtain an answer by Monday October 14, 2019 as to the United States position as to the Appellant's Motion for limited review of the Mera PSR (but he acknowledged that October 14, 2019 was a Federal holiday, which could delay a response).

13. Therefore, in an abundance of caution, and in light of the upcoming Reply Brief deadline, the undersigned is filing this Motion and requesting the relief sought herein and Order allowing the undersigned to review and/or inspect the PSR of Pinargote Mera, or alternatively that this Court direct the United States to withdraw the PSR of Pinargote Mera or that this Court strike same from the supplemental appendix of the United States.

14. In order for the undersigned to properly review and evaluate the Mera

PSR included in the United States supplemental appendix and formulate a Reply, Appellant requests an Order from this Court to unseal, on a limited basis, the Pinargote Mera Sealed PSR or alternatively direct the United States to allow counsel for the Appellant to inspect the Pinargote Mera Sealed Presentence Investigation Report at the offices of the United States Attorney in Tampa, Florida, upon entry of an Order by this Court granting the relief requested herein.

15. Alternatively, the undersigned on behalf of the Appellant would request that if the Eleventh Circuit cannot grant the relief requested herein as to the Mera PSR [in that this Court holds it must be heard in the lower court], that this Court direct the lower court to entertain a Motion by Appellant/Defendant seeking authorization to review and/or inspect the PSR of Pinargote Mera.

16. In *United States v. Gomez*, 323 F. 3d 1305 (11<sup>th</sup> Cir. 2003) this Court referred to the general presumption that courts will not grant third parties' access to the presentence reports of other individuals. However, in *Gomez, supra*, this Court allowed the state of Florida limited access to the presentence investigation report where it had shown a compelling need. In the instant case, the United States has submitted the entire presentence investigation report of another defendant. In its Answer Brief at page 10-11 at footnote 3, the United States refers to para. 24 of actual Mera PSR. Thus, to the extent that this Court will allow the Appellant's counsel access to the PSR, then it can do so on a limited basis for the compelling reason that

the United States has included the confidential PSR of another defendant in this Appeal.<sup>2</sup>

17. Appellant's counsel should have access to said PSR. However, if Appellant's request does not arise to the level of a showing of a "compelling need", then this Court should strike those portions of the PSR upon which the United States did not rely upon in its Answer Brief as being irrelevant or contrary to the protections and policy of confidentiality or strike from the record as contained in the supplemental appendix the PSR of Pinargote Mera in its totality in that the contents of the PSR are simply not a part of the Appellant's sentencing record in this particular Appeal.

18. In support of the striking of the Mera PSR that has been included as part of the United States supplemental appendix, this Court should note that as referenced in *Gomez, supra*, Pinargote Mera's PSR was not provided to Toala or his counsel for review in the lower court. Most importantly, the sentencing judge never referred to Pinargote Mera's PSR at the sentencing of Toala. See, Doc. 94

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<sup>2</sup> Local Rule of the Middle District of Florida at 4.12 (i) entitled "Pre-Sentence Investigation Report; Pre-Sentencing Procedures states that "**Any party** filing an appeal or cross appeal in any criminal case in which it is expected that an issue will be asserted pursuant to 18 U.S.C. Section 3742 concerning the sentence imposed by the Court shall immediately notify the probation officer who shall then file with the Clerk for inclusion in the record in camera a copy of the presentence investigation report. **The probation officer shall also furnish, at the same time, a copy of the presentence report to the Government and to the defendant.** (Emphasis supplied)

19. Additionally, the undersigned in its separate Motion for Extension of Time to File a Reply Brief will require an additional 12 days within which to submit Appellant's Reply Brief in light of this Motion, and is also requesting the 12 days begin running from the entry of an Order on this Motion from this Honorable Court.

20. As to the relief sought in this Motion by Appellant with respect to the PSR issue, the undersigned as set forth above, made a good faith effort to determine the position of the United States, but as of the filing of this Motion was unable to obtain an answer as to the United States position concerning the PSR issue and the relief sought specifically relating hereto.

**WHEREFORE**, the Appellant respectfully requests that the Court issue an Order as follows:

- a. Unsealing on a limited basis the Pinargote Mera Sealed Presentence Investigation Report so that that counsel for the Appellant may review same; and/or
- b. Entering an Order unsealing the Pinargote Mera Sealed Presentence Investigation Report on a limited basis so that counsel for the Appellant may review and inspect said report at the Offices of the United States Attorney in Tampa, Florida upon entry of an Order from this Court granting this Motion and authorizing said review by Appellant's counsel; and
- c. That the Eleventh Circuit Court of Appeals (if it so holds, that this Court relinquish jurisdiction temporarily) and grant the U.S. District Court limited jurisdiction during

the pendency of this Appeal to allow the Appellant/Defendant to file a Motion in the lower court in United States District Court for the Middle District of Florida for the filing of a Motion to unseal, on a limited basis, the Pinargote Mera PSR or alternatively direct the United States to allow counsel for the Appellant to inspect the Pinargote Mera Sealed Presentence Investigation Report at the offices the United States Attorney in Tampa, Florida.

d. Alternatively, that this Court Strike the supplemental appendix that contains the PSR of Pinargote Mera in that said PSR is confidential and should not be included in the appellate record of the Appellant and that the portions of the United States Answer brief that refers to the PSR of Pinargote Mera should be withdrawn.

e. That this Honorable Court find that Good Cause exists for the separate Motion for Extension of Time to file a Reply Brief filed simultaneously with the above Motion and grant the Appellant a 12-day extension within which to file its Reply Brief in the above Appeal, running from the entry of an Order from this Honorable Court granting Appellant/Defendant's Motion to review and/or inspect on a limited basis the PSR of Pinargote Mera or striking same.

Respectfully submitted on this 14<sup>th</sup> day of October 2019.

By: s/ Brian P. Battaglia  
Brian P. Battaglia  
Fla. Bar #0557978  
Bleakley Baval Denman & Grace  
15316 N. Florida Avenue

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CJA Counsel

**Certificate of Compliance with Type-Volume Limitation**

This motion, which contains 2,582 countable words, complies with Fed. R. App. P. 27(d)(2)(A) and Fed. R. App. P. 32(a)(5), (6).

**Certificate of Service**

I certify that a copy of this motion and the notice of electronic filing was sent by CM/ECF on October 14, 2019, to counsel for the United States:

SEAN SIEKKINEN, Assistant *United States Attorney*

s/ Brian P. Battaglia

Brian P. Battaglia  
Fla. Bar 0557978  
Bleakley Baval Denman & Grace  
15316 N. Florida Avenue  
Tampa, FL 33613  
(813) 221-3759  
[bbattaglia@bbdglaw.com](mailto:bbattaglia@bbdglaw.com)

**Pet. App. R**

In the  
**United States Court of Appeals  
for the Eleventh Circuit**

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
No. 8:18-CR-511-T-23JSS-2

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**SUPPLEMENTAL APPENDIX**

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MARIA CHAPA LOPEZ  
United States Attorney

DAVID P. RHODES  
Assistant United States Attorney  
Chief, Appellate Division

SEAN SIEKKINEN  
Assistant United States Attorney  
Appellate Division  
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October 1, 2019

## **Index of Appendix**

District Court Docket Sheet.....Docket

Pinargote Mera's Sealed Presentence Investigation Report

Certificate of Service

# **District Court Docket Sheet**

**US District Court Criminal Docket**

**U.S. District - Florida Middle  
(Tampa)**

**8:18cr511**

**USA v. Pinargote Mera et al**

**This case was retrieved from the court on Tuesday, October 01, 2019**

Date Filed: **10/30/2018** Class Code: **CLOSED**  
Other Docket: **None** Closed: **yes**

**Defendants**

**Name**

Eddy Jimy Pinargote Mera(1)  
[Term: 03/14/2019]  
Spanish interpreter required

**Attorneys**

Sara Lenore Mieczkowski  
LEAD ATTORNEY; ATTORNEY TO BE NOTICED  
Federal Public Defender's Office  
400 N Tampa St Ste 2700  
Tampa, FL 33602-4726  
USA  
813-228-2715  
Fax: 813-228-2562  
Designation: Public Defender or Community Defender  
Appointment  
Email: sara\_mieczkowski@fd.org

**Charges**

Complaints: none

**Disposition**

Pending: 46:70503.F MANUFACTURE, DISTRIBUTION OR  
POSSESSION OF CONTROLLED SUBSTANCE ON  
VESSELS(2) IMPRISONMENT--one hundred eight months;  
SUPERVISED RELEASE--sixty months; FINE--waived;  
SPECIAL ASSESSMENT--\$100

**Offense Level (Opening): Felony**

Terminated: 46:70503.F MANUFACTURE, DISTRIBUTION OR  
POSSESSION OF CONTROLLED SUBSTANCE ON  
VESSELS(1)

Dismissed in accord with the plea agreement

**Offense Level (Terminated): Felony**

Case Assigned to: Judge Steven D. Merryday

Case Referred to: Magistrate Judge Julie S. Sneed

**Name**

Franklin Rafael Lopez Toala(2)  
[Term: 03/27/2019]  
Appeals court case number: 19-11335-J Eleventh Circuit  
Spanish interpreter required

**Attorneys**

Brian P. Battaglia  
LEAD ATTORNEY; ATTORNEY TO BE NOTICED  
Bleakley, Baval & Denman  
15170 N Florida Ave  
Tampa, FL 33613  
USA  
813-221-3759  
Fax: 813-221-3198  
Designation: CJA Appointment  
Email: bbattaglia@bleakleybaval.com

**Charges**

**Disposition**

Complaints: none

Pending: 46:70503.F MANUFACTURE, DISTRIBUTION OR POSSESSION OF CONTROLLED SUBSTANCE ON VESSELS(1-2)  
**Offense Level (Opening): Felony**

IMPRISONMENT--one hundred eight months, comprising concurrent terms of one hundred eight months as to each of counts one and two; SUPERVISED RELEASE--sixty months, comprising concurrent terms of sixty months as to each of counts one and two; FINE--waived; SPECIAL ASSESSMENT--\$200

Terminated: none

Case Assigned to: Judge Steven D. Merryday  
Case Referred to: Magistrate Judge Julie S. Sneed

#### Name

Ramon Elias Zambrano Zambrano(3)  
[Term: 03/05/2019]  
Spanish interpreter required

#### Attorneys

[Summer Rae Goldman](#)  
LEAD ATTORNEY; ATTORNEY TO BE NOTICED  
[Goldman Wetzel, PLLC](#)  
915 First Ave N  
St Petersburg, FL 33705  
USA  
727-828-3900  
Fax: 727-828-3901  
Designation: CJA Appointment  
Email: summer@goldmanwetzel.com

#### Charges

Complaints: none

Pending: 46:70503.F MANUFACTURE, DISTRIBUTION OR POSSESSION OF CONTROLLED SUBSTANCE ON VESSELS(2)  
**Offense Level (Opening): Felony**

#### Disposition

IMPRISONMENT--one hundred eight months; SUPERVISED RELEASE--sixty months; FINE--waived; SPECIAL ASSESSMENT--\$100

Terminated: 46:70503.F MANUFACTURE, DISTRIBUTION OR POSSESSION OF CONTROLLED SUBSTANCE ON VESSELS(1)  
**Offense Level (Terminated): Felony**

Dismissed in accord with the plea agreement

Case Assigned to: Judge Steven D. Merryday  
Case Referred to: Magistrate Judge Julie S. Sneed

#### U. S. Attorneys

##### Thomas Nelson Palermo

LEAD ATTORNEY; ATTORNEY TO BE NOTICED  
[U.S. Attorneys Office](#)  
400 N. Tampa Street  
Tampa, FL 33602-4798  
USA  
813-274-6000  
Fax: 813-274-6187  
Designation: Retained  
Email: TPADOCKET.Mailbox@usdoj.gov

Date	#	Proceeding Text
10/30/2018	1	INDICTMENT returned in open court as to Eddy Jimy Pinargote Mera (1) count(s) 1-2, Franklin Rafael Lopez Toala (2) count(s) 1-2, Ramon Elias Zambrano Zambrano (3) count(s) 1-2. (CTR) (Entered: 10/31/2018)
11/05/2018	5	Arrest Warrant Returned Executed on 11/9/2018 as to Ramon Elias Zambrano Zambrano. (CTR) (Entered: 11/05/2018)
11/05/2018	6	Arrest Warrant Returned Executed on 11/4/2018 as to Eddy Jimy Pinargote Mera. (CTR) (Entered: 11/05/2018)
11/05/2018	7	Arrest Warrant Returned Executed on 11/4/2018 as to Franklin Rafael Lopez Toala. (CTR)

11/05/2018 Arrest of Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano on 11/5/2018 (MS) (Entered: 11/05/2018) Date Filed: 11/01/2019 Page: 6 of 11

11/05/2018	12	***CJA 23 Financial Affidavit by Eddy Jimy Pinargote Mera. (DMS) (Entered: 11/06/2018)
11/05/2018	13	***CJA 23 Financial Affidavit by Franklin Rafael Lopez Toala. (DMS) (Entered: 11/06/2018)
11/05/2018	14	***CJA 23 Financial Affidavit by Ramon Elias Zambrano Zambrano. (DMS) (Entered: 11/06/2018)
11/05/2018	15	Minute Entry for proceedings held before Magistrate Judge Thomas G. Wilson: Initial Appearance as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano held on 11/5/2018. ARRAIGNMENT as to Eddy Jimy Pinargote Mera (1) Count 1-2 and Franklin Rafael Lopez Toala (2) Count 1-2 and Ramon Elias Zambrano Zambrano (3) Count 1-2 held on 11/5/2018: Defendants pled not guilty. Detention Hearing as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano held on 11/5/2018. (DIGITAL) (Interpreter/Language: James Plunkett, Victoria Spellman/Spanish) (DMS) (Entered: 11/06/2018)
11/06/2018	8	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as to Eddy Jimy Pinargote Mera. Signed by Magistrate Judge Thomas G. Wilson on 11/6/2018. (Wilson, Thomas) (Entered: 11/06/2018)
11/06/2018	9	ORDER of Appointment of CJA Counsel as to Franklin Rafael Lopez Toala: Appointment of Attorney Brian Battaglia. Signed by Magistrate Judge Thomas G. Wilson on 11/6/2018. (Wilson, Thomas) (Entered: 11/06/2018)
11/06/2018	10	ORDER of Appointment of CJA Counsel as to Ramon Elias Zambrano Zambrano: Appointment of Attorney Summer Goldman. Signed by Magistrate Judge Thomas G. Wilson on 11/6/2018. (Wilson, Thomas) (Entered: 11/06/2018)
11/06/2018	11	NOTICE OF ATTORNEY APPEARANCE: Sara Lenore Mieczkowski appearing for Eddy Jimy Pinargote Mera and Substitution of Counsel (Mieczkowski, Sara) (Entered: 11/06/2018)
11/07/2018	16	PRETRIAL Discovery Order and Notice as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, and Ramon Elias Zambrano Zambrano. This case is set before the Honorable Steven D. Merryday, Chief United States District Judge, for the January 2019 trial term beginning January 7, 2019, in Tampa Courtroom 15 A. In lieu of a scheduled status conference, the parties shall file a joint status report by the 10th day of each month. Signed by Magistrate Judge Julie S. Sneed on 11/7/2018. (JRB) (Entered: 11/07/2018)
11/08/2018	17	NOTICE OF ATTORNEY APPEARANCE: Summer Rae Goldman appearing for Ramon Elias Zambrano Zambrano (Goldman, Summer) (Entered: 11/08/2018)
11/08/2018	18	STATUS REPORT by USA as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano (Palermo, Thomas) (Entered: 11/08/2018)
11/08/2018	22	ORDER OF DETENTION PENDING TRIAL as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano. Signed by Magistrate Judge Thomas G. Wilson on 11/8/2018. (DMS) (Entered: 11/13/2018)
11/15/2018	23	NOTICE OF ATTORNEY APPEARANCE: Brian P. Battaglia appearing for Franklin Rafael Lopez Toala (Battaglia, Brian) (Entered: 11/15/2018)
11/29/2018	24	PLEA AGREEMENT re: count(s) Two of the Indictment as to Ramon Elias Zambrano Zambrano (Palermo, Thomas) (Entered: 11/29/2018)
11/29/2018	25	NOTICE OF HEARING as to Ramon Elias Zambrano Zambrano: Change of Plea Hearing set for 12/17/2018 at 2:00 PM in Tampa Courtroom 11 A before Magistrate Judge Julie S. Sneed. (JRB) (Entered: 11/29/2018)
11/29/2018	26	WAIVER of speedy trial through 4/8/19 by Franklin Rafael Lopez Toala (Battaglia, Brian) (Entered: 11/29/2018)
12/10/2018	27	STATUS REPORT by USA as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano (Palermo, Thomas) (Entered: 12/10/2018)
12/10/2018	28	PLEA AGREEMENT re: count(s) Two of the Indictment as to Eddy Jimy Pinargote Mera (Palermo, Thomas) (Entered: 12/10/2018)
12/10/2018	29	NOTICE OF HEARING as to Eddy Jimy Pinargote Mera: Change of Plea Hearing set for 12/17/2018 at 2:00 PM in Tampa Courtroom 11 A before Magistrate Judge Julie S. Sneed. (JRB) (Entered: 12/10/2018)
12/12/2018	30	First MOTION to continue trial by Franklin Rafael Lopez Toala. (Battaglia, Brian) (Entered: 12/12/2018)
12/17/2018	31	ORDER denying 30--motion by Franklin Rafael Lopez Toala(2) to continue trial from January 2019 to February 2019. Signed by Judge Steven D. Merryday on 12/17/2018. (BK) (Entered: 12/17/2018)
12/17/2018	32	Minute Entry for proceedings held before Magistrate Judge Julie S. Sneed: Change of Plea Hearing as to Eddy Jimy Pinargote Mera and Ramon Elias Zambrano Zambrano held on 12/17/2018. (DIGITAL) (Interpreter/Language: James Plunkett/Spanish) (JRB) (Entered: 12/17/2018)
12/17/2018	33	CONSENT regarding entry of a plea of guilty as to Eddy Jimy Pinargote Mera (JRB) (Entered:

		12/17/2018)
12/17/2018	34	CONSENT to institute presentence investigation report as to Eddy Jimy Pinargote Mera. (JRB) (Entered: 12/17/2018) <a href="#">Case 19-11305</a> <a href="#">Date Filed: 10/01/2019</a> <a href="#">Page: 7 of 11</a>
12/17/2018	35	REPORT AND RECOMMENDATIONS concerning Plea of Guilty re: Count Two of the Indictment as to Eddy Jimy Pinargote Mera. Signed by Magistrate Judge Julie S. Sneed on 12/17/2018. (JRB) (Entered: 12/17/2018)
12/17/2018	36	CONSENT regarding entry of a plea of guilty as to Ramon Elias Zambrano Zambrano (JRB) (Entered: 12/17/2018)
12/17/2018	37	CONSENT to institute presentence investigation report as to Ramon Elias Zambrano Zambrano. (JRB) (Entered: 12/17/2018)
12/17/2018	38	REPORT AND RECOMMENDATIONS concerning Plea of Guilty re: Count Two of the Indictment as to Ramon Elias Zambrano Zambrano. Signed by Magistrate Judge Julie S. Sneed on 12/17/2018. (JRB) (Entered: 12/17/2018)
12/27/2018	40	TRIAL CALENDAR for January 2019 trial term. Signed by Judge Steven D. Merryday on 12/27/2018. (GSO) (Entered: 12/27/2018)
12/28/2018	41	NOTICE OF HEARING as to Franklin Rafael Lopez Toala: Change of Plea Hearing set for 1/8/2019 at 10:00 AM in Tampa Courtroom 11 A before Magistrate Judge Julie S. Sneed. (JRB) (Entered: 12/28/2018)
01/08/2019	42	NOTICE of maximum penalty, elements of offense, personalization of elements and factual basis by USA as to Franklin Rafael Lopez Toala (Palermo, Thomas) (Entered: 01/08/2019)
01/08/2019	43	Minute Entry for proceedings held before Magistrate Judge Julie S. Sneed: Change of Plea Hearing as to Franklin Rafael Lopez Toala held on 1/8/2019. (DIGITAL) (Interpreter/Language: Pedro Marino/Spanish) (JRB) (Entered: 01/08/2019)
01/08/2019	44	CONSENT regarding entry of a plea of guilty as to Franklin Rafael Lopez Toala (JRB) (Entered: 01/08/2019)
01/08/2019	45	CONSENT to institute presentence investigation report as to Franklin Rafael Lopez Toala. (JRB) (Entered: 01/08/2019)
01/08/2019	46	REPORT AND RECOMMENDATIONS concerning Plea of Guilty re: Counts One and Two of the Indictment as to Franklin Rafael Lopez Toala. Signed by Magistrate Judge Julie S. Sneed on 1/8/2019. (JRB) (Entered: 01/08/2019)
01/08/2019	48	ACCEPTANCE OF PLEA of guilty and adjudication of guilt re: count two of the indictment as to Ramon Elias Zambrano Zambrano signed by Judge Steven D. Merryday on 1/8/2019. See document for important notice and date and time of sentencing. (BK) (Entered: 01/08/2019)
01/08/2019	49	ACCEPTANCE OF PLEA of guilty and adjudication of guilt re: count two of the indictment as to Eddy Jimy Pinargote Mera signed by Judge Steven D. Merryday on 1/8/2019. See document for important notice and date and time of sentencing. (BK) (Entered: 01/08/2019)
02/04/2019	52	ACCEPTANCE OF PLEA of guilty and adjudication of guilt re: counts one and two of the indictment as to Franklin Rafael Lopez Toala signed by Judge Steven D. Merryday on 2/4/2019. See document for important notice and date and time of sentencing. (GSO) (Entered: 02/04/2019)
03/02/2019	58	SENTENCING MEMORANDUM by Ramon Elias Zambrano Zambrano (Goldman, Summer) (Entered: 03/02/2019)
03/05/2019	59	NOTICE canceling sentencing hearing scheduled for 03/06/19 as to Eddy Jimy Pinargote Mera. Sentencing will be rescheduled by separate notice. (BK) (Entered: 03/05/2019)
03/05/2019	60	MINUTE ENTRY for 3/5/2019 sentencing of Ramon Elias Zambrano Zambrano (3) before Judge Steven D. Merryday; count one, dismissed in accord with the plea agreement; count two, IMPRISONMENT--one hundred eight months; SUPERVISED RELEASE--sixty months; FINE--waived; SPECIAL ASSESSMENT--\$100. Court Reporter: Bill Jones (Interpreter/Language: James Plunkett / Spanish) (GSO) (Entered: 03/05/2019)
03/05/2019	61	NOTICE OF RESCHEDULING HEARING: The sentencing of Eddy Jimy Pinargote Mera previously scheduled for 3/6/2019 is rescheduled for 3/14/2019 at 08:30 AM in Tampa Courtroom 15A before Judge Steven D. Merryday. (BK) (Entered: 03/05/2019)
03/05/2019	62	JUDGMENT as to Ramon Elias Zambrano Zambrano (3); count one, dismissed in accord with the plea agreement; count two, IMPRISONMENT--one hundred eight months; SUPERVISED RELEASE--sixty months; FINE--waived; SPECIAL ASSESSMENT--\$100. Signed by Judge Steven D. Merryday on 3/5/2019. (GSO) (Entered: 03/05/2019)
03/06/2019	64	Unopposed MOTION to Continue Sentencing Hearing by Eddy Jimy Pinargote Mera. (Mieczkowski, Sara) (Entered: 03/06/2019)
03/07/2019	65	ORDER granting 64--motion to re-schedule the sentencing of Eddy Jimy Pinargote Mera(1). Signed by Judge Steven D. Merryday on 3/7/2019. (BK) (Entered: 03/07/2019)
03/07/2019	66	NOTICE OF RESCHEDULING HEARING: The sentencing of Eddy Jimy Pinargote Mera previously scheduled for 3/14/2019 is rescheduled for 3/13/2019 at 10:00 AM in Tampa Courtroom 15A before Judge Steven D. Merryday. (BK) (Entered: 03/07/2019)

03/12/2019	67	MOTION for downward departure by USA as to Eddy Jimy Pinargote Mera. (Palermo, Thomas) (Entered: 03/12/2019)
03/12/2019	68	SENTENCING MEMORANDUM by Eddy Jimy Pinargote Mera (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Mieczkowski, Sara) (Entered: 03/12/2019)
03/13/2019	69	MINUTE ENTRY for 3/13/2019 sentencing of Eddy Jimy Pinargote Mera before Judge Steven D. Merryday; granting the 67--motion for downward departure; count one, dismissed in accord with the plea agreement; count two, IMPRISONMENT--one hundred eight months; SUPERVISED RELEASE--sixty months; FINE--waived; SPECIAL ASSESSMENT--\$100. Court Reporter: Bill Jones (Interpreter/Language: James Plunkett / Spanish) (GSO) (Entered: 03/13/2019)
03/14/2019	70	JUDGMENT as to Eddy Jimy Pinargote Mera (1); count one, dismissed in accord with the plea agreement; count two, IMPRISONMENT--one hundred eight months; SUPERVISED RELEASE--sixty months; FINE--waived; SPECIAL ASSESSMENT--\$100. Signed by Judge Steven D. Merryday on 3/14/2019. (GSO) (Entered: 03/14/2019)
03/22/2019	74	MOTION for downward departure and Variances and Supporting Memorandum of Law by Franklin Rafael Lopez Toala. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E, # 6 Exhibit Exhibit F, # 7 Exhibit Exhibit G, # 8 Exhibit Exhibit H)(Battaglia, Brian) Item terminated due to the filing of 75. Modified on 3/25/2019 (DG). (Entered: 03/22/2019)
03/22/2019	75	Amended MOTION for downward departure and Variances and Supporting Memorandum of Law by Franklin Rafael Lopez Toala. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E, # 6 Exhibit Exhibit F, # 7 Exhibit Exhibit G, # 8 Exhibit Exhibit H)(Battaglia, Brian) (Entered: 03/22/2019)
03/26/2019	76	SUPPLEMENT re 75 Amended MOTION for downward departure and Variances and Supporting Memorandum of Law (Attachments: # 1 Exhibit H)(Battaglia, Brian) (Entered: 03/26/2019)
03/27/2019	77	MINUTE ENTRY for 3/27/2019 sentencing of Franklin Rafael Lopez Toala (2) before Judge Steven D. Merryday; denying the 75--motion for downward departures and variances; counts one and two, IMPRISONMENT--one hundred eight months, comprising concurrent terms of one hundred eight months as to each of counts one and two; SUPERVISED RELEASE--sixty months, comprising concurrent terms of sixty months as to each of counts one and two; FINE--waived; SPECIAL ASSESSMENT--\$200. Court Reporter: Bill Jones (Interpreter/Language: James Plunkett / Spanish) (GSO) (Entered: 03/27/2019)
03/27/2019	78	JUDGMENT as to Franklin Rafael Lopez Toala (2); counts one and two, IMPRISONMENT--one hundred eight months, comprising concurrent terms of one hundred eight months as to each of counts one and two; SUPERVISED RELEASE--sixty months, comprising concurrent terms of sixty months as to each of counts one and two; FINE--waived; SPECIAL ASSESSMENT--\$200. Signed by Judge Steven D. Merryday on 3/27/2019. (GSO) (Entered: 03/27/2019)
04/05/2019	80	NOTICE OF APPEAL by Franklin Rafael Lopez Toala re 78 Judgment Filing fee not paid. (Battaglia, Brian) (Entered: 04/05/2019)
04/08/2019	81	TRANSMITTAL of initial appeal package as to Franklin Rafael Lopez Toala to USCA consisting of copies of notice of appeal, docket sheet, order/judgment being appealed, and motion, if applicable to USCA re 80 Notice of Appeal. Eleventh Circuit Transcript information form forwarded to pro se litigants and available to counsel at www.flmd.uscourts.gov under Forms and Publications/General. (CTR) (Entered: 04/08/2019)
04/08/2019	82	First MOTION for Leave to Appeal In Forma Pauperis by Franklin Rafael Lopez Toala. (Battaglia, Brian) (Entered: 04/08/2019)
04/10/2019		USCA Case Number as to Franklin Rafael Lopez Toala. USCA Number: 19-11335-J for 80 Notice of Appeal filed by Franklin Rafael Lopez Toala. (KE) (Entered: 04/10/2019)
04/18/2019	83	TRANSCRIPT information form filed by Franklin Rafael Lopez Toala for proceedings held on 1/8/19; 3/27/19 before Judge Snead/ Merryday re 80 Notice of Appeal. USCA number: 19-11335-J (Battaglia, Brian) (Entered: 04/18/2019)
04/18/2019	84	TRANSCRIPT information form filed by Franklin Rafael Lopez Toala for proceedings held on 1/8/19; 3/27/19 before Judge Snead/ Merryday re 80 Notice of Appeal. USCA number: 19-11335-J (Battaglia, Brian) (Entered: 04/18/2019)
04/19/2019	85	ORDER granting 82 Motion for Leave to Appeal In Forma Pauperis as to Franklin Rafael Lopez Toala. Signed by Magistrate Judge Julie S. Snead on April 19, 2019. (BRC) (Entered: 04/19/2019)
05/02/2019	86	Judgment Returned Executed as to Franklin Rafael Lopez Toala on 04/25/19. Institution: D Ray James Correctional. (BES) (Entered: 05/03/2019)
05/09/2019	87	Judgment Returned Executed as to Ramon Elias Zambrano Zambrano on 4/25/2019. Institution: D.Ray James. (CTR) (Entered: 05/09/2019)
05/14/2019	88	COURT REPORTER ACKNOWLEDGEMENT by Tracey Aurelio re 80 Notice of Appeal as to Franklin Rafael Lopez Toala. Estimated transcript filing date: Upon Receipt of CJA. USCA number: 19-11335-J. (TVA) (Entered: 05/14/2019)
05/14/2019	89	NOTIFICATION that transcript has been filed by Tracey Aurelio re: 80 Notice of Appeal as to

		Franklin Rafael Lopez Toala USCA number: 19-11335-J (TVA) (DG). (Entered: 05/14/2019)
05/14/2019	90	NOTICE to counsel of filing of OFFICIAL TRANSCRIPT. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter or view the document at the clerk's office public terminal as to Franklin Rafael Lopez Toala. Court Reporter: Tracey Aurelio (TVA) (Entered: 05/14/2019)
05/14/2019	91	TRANSCRIPT of hearing as to Franklin Rafael Lopez Toala held on 1/8/19 before Judge Sneed. Court Reporter/Transcriber Tracey Aurelio, Telephone number 813-301-5380. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 6/4/2019, Redacted Transcript Deadline set for 6/14/2019, Release of Transcript Restriction set for 8/12/2019. (TVA) (Entered: 05/14/2019)
05/17/2019	92	COURT REPORTER ACKNOWLEDGEMENT by Bill Jones re 80 Notice of Appeal as to Franklin Rafael Lopez Toala. Estimated transcript filing date: 5-24-19. USCA number: 19-11335-J. (HWJ) (Entered: 05/17/2019)
05/22/2019	93	Judgment Returned Executed as to Eddy Jimy Pinargote Mera on 5/14/2019. Institution: D.Ray James. (CTR) (Entered: 05/22/2019)
06/04/2019	94	TRANSCRIPT of Sentencing for dates of 03-27-19 held before Judge Steven D. Merryday, re: 80 Notice of Appeal as to Franklin Rafael Lopez Toala. Court Reporter/Transcriber Bill Jones, Telephone number 813-301-5024. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 6/25/2019, Redacted Transcript Deadline set for 7/5/2019, Release of Transcript Restriction set for 9/3/2019. (HWJ) (Entered: 06/04/2019)
06/04/2019	95	NOTICE to counsel of filing of OFFICIAL TRANSCRIPT. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter or view the document at the clerk's office public terminal as to Franklin Rafael Lopez Toala. Court Reporter: Bill Jones (HWJ) (Entered: 06/04/2019)
06/04/2019	96	NOTIFICATION that transcript has been filed by Bill Jones re: 80 Notice of Appeal as to Franklin Rafael Lopez Toala USCA number: 19-11335-J (HWJ) (Entered: 06/04/2019)
06/28/2019	97	Joint MOTION to supplement Court Record on Appeal from the Sentencing by Franklin Rafael Lopez Toala. (Attachments: # 1 Exhibit Cenepa War, # 2 Exhibit Translation Letter, # 3 Exhibit Correspondence)(Battaglia, Brian) (Entered: 06/28/2019)
06/28/2019	98	ENDORSED ORDER granting 97 the agreed motion by Franklin Rafael Lopez Toala (2) to supplement the record-on-appeal. Signed by Judge Steven D. Merryday on 6/28/2019. (Entered: 06/28/2019)
07/16/2019	99	Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Middle District of Florida certifies that the record is complete for purposes of this appeal re: 80 Notice of Appeal as to Franklin Rafael Lopez Toala. The following documents will be forwarded in paper format upon the request for the record on appeal by the USCA in addition to the electronic record. Folder of Sealed pleadings: 1. USCA number: 19-11335-JJ. (CTR) (Entered: 07/16/2019)
07/23/2019		ACKNOWLEDGMENT by USCA of receiving 1 Folder of Sealed Pleadings on 7/18/2019 re 80 Notice of Appeal. USCA number: 19-11335-JJ. (CTR) (Entered: 07/23/2019)

[Order documents](#) from our nationwide document retrieval service.  
- OR - Call **1.866.540.8818**.

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# **Certificate of Service**

## Certificate of Service

I certify that a copy of this appendix and the notice of electronic filing was sent by CM/ECF on October 1, 2019, to:

BRIAN P. BATTAGLIA, ESQ.

*Counsel for Franklin Rafael Lopez Toala*

s/ Sean Siekkinen  
SEAN SIEKKINEN  
Assistant United States Attorney

**Pet. App. S**

In the  
United States Court of Appeals  
for the Eleventh Circuit

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
No. 8:18-CR-511-T-23JSS-2

**UNITED STATES' RESPONSE TO LOPEZ TOALA'S  
MOTION TO UNSEAL OR PERMIT INSPECTION OF  
CO-DEFENDANT'S PRESENTENCE INVESTIGATION REPORT**

MARIA CHAPA LOPEZ  
United States Attorney

LINDA JULIN McNAMARA  
Assistant United States Attorney  
Deputy Chief, Appellate Division

SEAN SIEKKINEN  
Assistant United States Attorney  
Appellate Division  
USA No. 192  
400 N. Tampa St., Ste. 3200  
Tampa, FL 33602  
(813) 274-6000

October 17, 2019

**Certificate of Interested Persons  
and Corporate Disclosure Statement**

In addition to the persons identified in the certificate of interested persons and corporate disclosure statement in Franklin Rafael Lopez Toala's motion to unseal or permit inspection of co-defendant's Presentence Investigation Report, the following persons have an interest in the outcome of this case:

1. McNamara, Linda Julin, Assistant United States Attorney, Deputy Chief, Appellate Division; and
2. Palermo, Thomas Nelson, former Assistant United States Attorney.

No publicly traded company or corporation has an interest in the outcome of this appeal.

**In the United States Court of Appeals  
for the Eleventh Circuit**

---

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

No. 19-11335-JJ

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

---

**United States' Response to Lopez Toala's Motion to Unseal or Permit  
Inspection of Co-Defendant's Presentence Investigation Report**

The United States agrees that Lopez Toala's counsel should be allowed to review the portions of his co-defendant's sealed Presentence Investigation Report ("PSR") that are relevant to the issues on appeal. The district court has discretion to grant such access. Lopez Toala has not requested access in the district court, however. His motion in this Court should be denied or held in abeyance until the district court has had the opportunity to rule on Lopez Toala's request in the first instance (at which point the present motion could then be denied as moot or construed as a request to review the district court's ruling, if necessary). There is no need to strike any portion of the United States' brief or supplemental appendix.

**Background**

Lopez Toala and two co-defendants (Mera and Zambrano) pleaded

guilty to attempting to smuggle cocaine from Ecuador to North America on a small boat. Docs. 48, 49, 52. Lopez Toala argues on appeal that the district court erroneously rejected his request for a two-level “minor role” reduction, and, moreover, imposed a substantively unreasonable sentence. *See* Lopez Toala’s brief at 14–35.

In our response brief, we cited portions of Zambrano’s and Mera’s sealed PSRs showing that: (1) Lopez Toala and Zambrano had the same advisory guidelines range, and (2) Mera appropriately received a two-level enhancement for captaining the vessel (which Lopez Toala did not receive), but (3) Mera received a downward departure for substantial assistance (which Lopez Toala also did not receive). *See* United States’ brief at 10–11 n.3, 21 –22 (citing Mera’s PSR ¶¶ 9, 24, 65 and Zambrano’s PSR ¶ 60). These portions of the PSRs rebut Lopez Toala’s contention that he played a less culpable role than Zambrano and his further contention that his overall sentence should have been less than Mera’s and Zambrano’s sentences. We included Mera’s PSR in the supplemental appendix filed under seal with our brief in this Court, but we inadvertently omitted Zambrano’s PSR. Both should have been included in our supplemental appendix. We will seek leave to file a corrected supplemental appendix (although Zambrano’s PSR is not relevant to the present motion).

## Discussion

Lopez Toala seeks access to his co-defendant's PSR. PSRs are filed under seal in the district court because they may contain sensitive and confidential information about the defendant's upbringing, family, finances, and mental and physical condition, among other things. *See Fed. R. Crim. P. 32(d); M.D. Fla. Local Rule 4.12(h).* The district court's local rule prohibits the probation office from disclosing a PSR except upon court order. *M.D. Fla. Local Rule 4.12(h).* A party seeking access to a PSR should file a "written petition to the [district] court establishing with particularity the need for specific information believed to be contained in such records."

*Id.*

This Court has recognized that "other circuit courts [require that] a third party requesting disclosure of a [PSR] must demonstrate a 'compelling, particularized need for disclosure.'" *United States v. Gomez*, 323 F.3d 1305, 1308 (11th Cir. 2003) (quoting *United States v. Corbitt*, 879 F.2d 224, 238 (7th Cir. 1989)). And, if such need is demonstrated, those courts typically require "the district court [to] take care—usually by way of in camera review—to ensure that the disclosure is limited to 'those portions of the report which are directly relevant to the demonstrated need.'" *Id.* (quoting *Corbitt*, 879 F.2d at 238).

This Court reviews the district court's exercise of its discretion to disclose a PSR for abuse of discretion. *Id.* at 1307. We are not aware of any

case in which this Court has granted a *de novo* request for access to a PSR that was filed under seal in the district court.

In this case, the portions of Mera's PSR that we cited rebut material contentions in Lopez Toala's brief. There is nothing prejudicial, personal, or sensitive in those sections of the PSR; they simply help to explain the role that Mera played in these offenses and his resulting sentence. Mera's involvement and sentence, in turn, relate to Lopez Toala's relevant degree of culpability and punishment as compared to that of his co-defendants. Lopez Toala raises both issues on appeal.

The United States therefore agrees that Lopez Toala's counsel should be granted access to the relevant portions of Mera's PSR for purposes of this appeal, but we respectfully submit that such request should be filed in the district court, not here. The district court retains jurisdiction "in aid of the appeal" after the notice of appeal has been filed. *United States v. Diveroli*, 729 F.3d 1339, 1341 (11th Cir. 2013). Accordingly, this Court should simply deny the present motion and allow Lopez Toala to present his request to the district court in the first instance.

Lopez Toala alternatively requests that Mera's PSR and all references thereto be stricken from the United States' brief and supplemental appendix. There is no reason or need to do so given the parties' agreement that Lopez

Toala's counsel should be granted access to the relevant portions of Mera's PSR. The United States will not oppose such a request in the district court.

Respectfully submitted,

MARIA CHAPA LOPEZ  
United States Attorney

LINDA JULIN McNAMARA  
Assistant United States Attorney  
Deputy Chief, Appellate Division

By: *s/ Sean Siekkinen*  
SEAN SIEKKINEN  
Assistant United States Attorney  
Appellate Division  
USA No. 192  
400 N. Tampa St., Ste. 3200  
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(813) 274-6000  
[sean.siekkinen@usdoj.gov](mailto:sean.siekkinen@usdoj.gov)

**Certificate of Compliance with Type-Volume Limitation**

This response, which contains 846 countable words, complies with Fed. R. App. P. 27(d)(2)(A) and Fed. R. App. P. 32(a)(5), (6).

## **Certificate of Service**

I certify that a copy of this response and the notice of electronic filing was sent by CM/ECF on October 17, 2019, to:

BRIAN P. BATTAGLIA, ESQ.

*Counsel for Franklin Rafael Lopez Toala*

*s/ Sean Siekkinen*

SEAN SIEKKINEN  
Assistant United States Attorney

**Pet. App. T**

In the  
United States Court of Appeals  
for the Eleventh Circuit

---

UNITED STATES OF AMERICA,  
*Plaintiff-Appellant,*

v.

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellee*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
No. 8:18-CR-511-T-23JSS-2

---

**UNITED STATES' MOTION FOR LEAVE  
TO FILE CORRECTED SUPPLEMENTAL APPENDIX**

---

MARIA CHAPA LOPEZ  
United States Attorney

LINDA JULIN McNAMARA  
Assistant United States Attorney  
Deputy Chief, Appellate Division

SEAN SIEKKINEN  
Assistant United States Attorney  
Appellate Division  
USA No. 192  
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Tampa, FL 33602  
(813) 274-6000

October 17, 2019

*United States v. Franklin Rafael Lopez Toala*  
No. 19-11335-JJ

**Certificate of Interested Persons  
and Corporate Disclosure Statement**

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

1. Battaglia, Brian P., Esq.;
2. Lopez, Maria Chapa, United States Attorney;
3. McNamara, Linda Julin, Assistant United States Attorney, Deputy Chief, Appellate Division;
4. Merryday, Hon. Steven D., United States District Judge;
5. Palermo, Thomas Nelson, former Assistant United States Attorney;
6. Rhodes, David P., Assistant United States Attorney, Chief, Appellate Division;
7. Siekkinen, Sean, Assistant United States Attorney; and
8. Sneed, Hon. Julie S., United States Magistrate Judge;
9. Toala, Franklin Rafael Lopez, defendant-appellant; and
10. Wilson, Hon. Thomas G., United States Magistrate Judge.

No publicly traded company or corporation has an interest in the outcome of this appeal.

In the United States Court of Appeals  
for the Eleventh Circuit

---

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

No. 19-11335-JJ

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

---

**United States' Motion for Leave to File  
Corrected Supplemental Appendix**

The United States respectfully requests leave to file the corrected supplemental appendix that accompanies this motion for the following reasons:

1. We filed our brief in this appeal on September 26, 2019.
2. Our brief cited to the sealed Presentence Investigation Reports (“PSRs”) of both of appellant’s co-defendants (Mera and Zambrano).
3. We filed Mera’s PSR under seal with this Court, as part of our supplemental appendix filed on October 1, 2019.
4. Lopez Toala filed a motion asking this Court to grant him access to Mera’s sealed PSR on October 15, 2019.
5. In the course of preparing our response to Lopez Toala’s motion, undersigned counsel for the United States discovered that he had inadvertently

omitted Zambrano's sealed PSR from the supplemental appendix filed on October 1, 2019.

Therefore, the United States respectfully requests leave to file the attached corrected supplemental appendix, including the inadvertently omitted PSR. Counsel for appellant Franklin Rafael Lopez Toala opposes this motion.

Respectfully submitted,

MARIA CHAPA LOPEZ  
United States Attorney

LINDA JULIN McNAMARA  
Assistant United States Attorney  
Deputy Chief, Appellate Division

By: s/ Sean Siekkinen  
SEAN SIEKKINEN  
Assistant United States Attorney  
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**Certificate of Compliance with Type-Volume Limitation**

This motion, which contains 158 countable words, complies with Fed. R. App. P. 27(d)(2)(A) and Fed. R. App. P. 32(a)(5), (6).

## Certificate of Service

I certify that a copy of this motion and the notice of electronic filing was sent by CM/ECF on October 17, 2019, to:

BRIAN P. BATTAGLIA, ESQ.

*Counsel for Franklin Rafael Lopez Toala*

s/ Sean Siekkinen

SEAN SIEKKINEN  
Assistant United States Attorney

In the  
**United States Court of Appeals  
for the Eleventh Circuit**

---

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
No. 8:18-CR-511-T-23JSS-2

---

**CORRECTED SUPPLEMENTAL APPENDIX**

---

MARIA CHAPA LOPEZ  
United States Attorney

DAVID P. RHODES  
Assistant United States Attorney  
Chief, Appellate Division

SEAN SIEKKINEN  
Assistant United States Attorney  
Appellate Division  
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October 17, 2019

## **Index of Appendix**

District Court Docket Sheet.....Docket

Pinargote Mera's Sealed Presentence Investigation Report

Zambrano Zambrano's Sealed Presentence Investigation Report

Certificate of Service

# **District Court Docket Sheet**

**U.S. District - Florida Middle  
(Tampa)**

**8:18cr511**

**USA v. Pinargote Mera et al**

**This case was retrieved from the court on Tuesday, October 01, 2019**

**Date Filed: 10/30/2018 Class Code: CLOSED**  
**Other Docket: None Closed: yes**

**Defendants**

**Name**

Eddy Jimy Pinargote Mera(1)  
[Term: 03/14/2019]  
Spanish interpreter required

**Attorneys**

Sara Lenore Mieczkowski  
LEAD ATTORNEY;ATTORNEY TO BE NOTICED  
Federal Public Defender's Office  
400 N Tampa St Ste 2700  
Tampa, FL 33602-4726  
USA  
813-228-2715  
Fax: 813-228-2562  
Designation: Public Defender or Community Defender  
Appointment  
Email: sara\_mieczkowski@fd.org

**Charges**

**Complaints:** none

**Disposition**

**Pending:** 46:70503.F MANUFACTURE, DISTRIBUTION OR  
POSSESSION OF CONTROLLED SUBSTANCE ON  
VESSELS(2)  
**Offense Level (Opening): Felony**  
**IMPRISONMENT--one hundred eight months;  
SUPERVISED RELEASE--sixty months; FINE--waived;  
SPECIAL ASSESSMENT--\$100**

**Terminated:** 46:70503.F MANUFACTURE, DISTRIBUTION OR  
POSSESSION OF CONTROLLED SUBSTANCE ON  
VESSELS(1)  
**Offense Level (Terminated): Felony**

Dismissed in accord with the plea agreement

**Case Assigned to:** Judge Steven D. Merryday

**Case Referred to:** Magistrate Judge Julie S. Sneed

**Name**

Franklin Rafael Lopez Toala(2)  
[Term: 03/27/2019]  
Appeals court case number: 19-11335-J Eleventh Circuit  
Spanish interpreter required

**Attorneys**

Brian P. Battaglia  
LEAD ATTORNEY;ATTORNEY TO BE NOTICED  
Bleakley, Baval & Denman  
15170 N Florida Ave  
Tampa, FL 33613  
USA  
813-221-3759  
Fax: 813-221-3198  
Designation: CJA Appointment  
Email: bbattaglia@bleakleybaval.com

**Charges**

**Disposition**

Complaints: none

Pending: 46:70503.F MANUFACTURE, DISTRIBUTION OR POSSESSION OF CONTROLLED SUBSTANCE ON VESSELS(1-2)

**Offense Level (Opening): Felony**

IMPRISONMENT--one hundred eight months, comprising concurrent terms of one hundred eight months as to each of counts one and two; SUPERVISED RELEASE--sixty months, comprising concurrent terms of sixty months as to each of counts one and two; FINE--waived; SPECIAL ASSESSMENT--\$200

Terminated: none

Case Assigned to: Judge Steven D. Merryday

Case Referred to: Magistrate Judge Julie S. Sneed

#### Name

Ramon Elias Zambrano Zambrano(3)

[Term: 03/05/2019]

Spanish interpreter required

#### Attorneys

[Summer Rae Goldman](#)

LEAD ATTORNEY; ATTORNEY TO BE NOTICED

[Goldman Wetzel, PLLC](#)

915 First Ave N

St Petersburg, FL 33705

USA

727-828-3900

Fax: 727-828-3901

Designation: CJA Appointment

Email: summer@goldmanwetzel.com

#### Charges

Complaints: none

Pending: 46:70503.F MANUFACTURE, DISTRIBUTION OR POSSESSION OF CONTROLLED SUBSTANCE ON VESSELS(2)

**Offense Level (Opening): Felony**

#### Disposition

IMPRISONMENT--one hundred eight months; SUPERVISED RELEASE--sixty months; FINE--waived; SPECIAL ASSESSMENT--\$100

Terminated: 46:70503.F MANUFACTURE, DISTRIBUTION OR POSSESSION OF CONTROLLED SUBSTANCE ON VESSELS(1)

**Offense Level (Terminated): Felony**

Dismissed in accord with the plea agreement

Case Assigned to: Judge Steven D. Merryday

Case Referred to: Magistrate Judge Julie S. Sneed

#### U. S. Attorneys

[Thomas Nelson Palermo](#)

LEAD ATTORNEY; ATTORNEY TO BE NOTICED

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400 N. Tampa Street

Tampa, FL 33602-4798

USA

813-274-6000

Fax: 813-274-6187

Designation: Retained

Email: TPADOCKET.Mailbox@usdoj.gov

Date	#	Proceeding Text
10/30/2018	1	INDICTMENT returned in open court as to Eddy Jimy Pinargote Mera (1) count(s) 1-2, Franklin Rafael Lopez Toala (2) count(s) 1-2, Ramon Elias Zambrano Zambrano (3) count(s) 1-2. (CTR) (Entered: 10/31/2018)
11/05/2018	5	Arrest Warrant Returned Executed on 11/9/2018 as to Ramon Elias Zambrano Zambrano. (CTR) (Entered: 11/05/2018)
11/05/2018	6	Arrest Warrant Returned Executed on 11/4/2018 as to Eddy Jimy Pinargote Mera. (CTR) (Entered: 11/05/2018)
11/05/2018	7	Arrest Warrant Returned Executed on 11/4/2018 as to Franklin Rafael Lopez Toala. (CTR)

11/05/2018 Arrest of Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano on 11/5/2018. (MS) (Entered: 11/05/2018) [Case# 18-11335 Date Filed 10/07/2019 Page: 6 of 11](#)

11/05/2018	12	***CJA 23 Financial Affidavit by Eddy Jimy Pinargote Mera. (DMS) (Entered: 11/06/2018)
11/05/2018	13	***CJA 23 Financial Affidavit by Franklin Rafael Lopez Toala. (DMS) (Entered: 11/06/2018)
11/05/2018	14	***CJA 23 Financial Affidavit by Ramon Elias Zambrano Zambrano. (DMS) (Entered: 11/06/2018)
11/05/2018	15	Minute Entry for proceedings held before Magistrate Judge Thomas G. Wilson: Initial Appearance as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano held on 11/5/2018. ARRAIGNMENT as to Eddy Jimy Pinargote Mera (1) Count 1-2 and Franklin Rafael Lopez Toala (2) Count 1-2 and Ramon Elias Zambrano Zambrano (3) Count 1-2 held on 11/5/2018: Defendants pled not guilty. Detention Hearing as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano held on 11/5/2018. (DIGITAL) (Interpreter/Language: James Plunkett, Victoria Spellman/Spanish) (DMS) (Entered: 11/06/2018)
11/06/2018	8	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as to Eddy Jimy Pinargote Mera. Signed by Magistrate Judge Thomas G. Wilson on 11/6/2018. (Wilson, Thomas) (Entered: 11/06/2018)
11/06/2018	9	ORDER of Appointment of CJA Counsel as to Franklin Rafael Lopez Toala: Appointment of Attorney Brian Battaglia. Signed by Magistrate Judge Thomas G. Wilson on 11/6/2018. (Wilson, Thomas) (Entered: 11/06/2018)
11/06/2018	10	ORDER of Appointment of CJA Counsel as to Ramon Elias Zambrano Zambrano: Appointment of Attorney Summer Goldman. Signed by Magistrate Judge Thomas G. Wilson on 11/6/2018. (Wilson, Thomas) (Entered: 11/06/2018)
11/06/2018	11	NOTICE OF ATTORNEY APPEARANCE: Sara Lenore Mieczkowski appearing for Eddy Jimy Pinargote Mera and Substitution of Counsel (Mieczkowski, Sara) (Entered: 11/06/2018)
11/07/2018	16	PRETRIAL Discovery Order and Notice as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, and Ramon Elias Zambrano Zambrano. This case is set before the Honorable Steven D. Merryday, Chief United States District Judge, for the January 2019 trial term beginning January 7, 2019, in Tampa Courtroom 15 A. In lieu of a scheduled status conference, the parties shall file a joint status report by the 10th day of each month. Signed by Magistrate Judge Julie S. Sneed on 11/7/2018. (JRB) (Entered: 11/07/2018)
11/08/2018	17	NOTICE OF ATTORNEY APPEARANCE: Summer Rae Goldman appearing for Ramon Elias Zambrano Zambrano (Goldman, Summer) (Entered: 11/08/2018)
11/08/2018	18	STATUS REPORT by USA as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano (Palermo, Thomas) (Entered: 11/08/2018)
11/08/2018	22	ORDER OF DETENTION PENDING TRIAL as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano. Signed by Magistrate Judge Thomas G. Wilson on 11/8/2018. (DMS) (Entered: 11/13/2018)
11/15/2018	23	NOTICE OF ATTORNEY APPEARANCE: Brian P. Battaglia appearing for Franklin Rafael Lopez Toala (Battaglia, Brian) (Entered: 11/15/2018)
11/29/2018	24	PLEA AGREEMENT re: count(s) Two of the Indictment as to Ramon Elias Zambrano Zambrano (Palermo, Thomas) (Entered: 11/29/2018)
11/29/2018	25	NOTICE OF HEARING as to Ramon Elias Zambrano Zambrano: Change of Plea Hearing set for 12/17/2018 at 2:00 PM in Tampa Courtroom 11 A before Magistrate Judge Julie S. Sneed. (JRB) (Entered: 11/29/2018)
11/29/2018	26	WAIVER of speedy trial through 4/8/19 by Franklin Rafael Lopez Toala (Battaglia, Brian) (Entered: 11/29/2018)
12/10/2018	27	STATUS REPORT by USA as to Eddy Jimy Pinargote Mera, Franklin Rafael Lopez Toala, Ramon Elias Zambrano Zambrano (Palermo, Thomas) (Entered: 12/10/2018)
12/10/2018	28	PLEA AGREEMENT re: count(s) Two of the Indictment as to Eddy Jimy Pinargote Mera (Palermo, Thomas) (Entered: 12/10/2018)
12/10/2018	29	NOTICE OF HEARING as to Eddy Jimy Pinargote Mera: Change of Plea Hearing set for 12/17/2018 at 2:00 PM in Tampa Courtroom 11 A before Magistrate Judge Julie S. Sneed. (JRB) (Entered: 12/10/2018)
12/12/2018	30	First MOTION to continue trial by Franklin Rafael Lopez Toala. (Battaglia, Brian) (Entered: 12/12/2018)
12/17/2018	31	ORDER denying 30--motion by Franklin Rafael Lopez Toala(2) to continue trial from January 2019 to February 2019. Signed by Judge Steven D. Merryday on 12/17/2018. (BK) (Entered: 12/17/2018)
12/17/2018	32	Minute Entry for proceedings held before Magistrate Judge Julie S. Sneed: Change of Plea Hearing as to Eddy Jimy Pinargote Mera and Ramon Elias Zambrano Zambrano held on 12/17/2018. (DIGITAL) (Interpreter/Language: James Plunkett/Spanish) (JRB) (Entered: 12/17/2018)
12/17/2018	33	CONSENT regarding entry of a plea of guilty as to Eddy Jimy Pinargote Mera (JRB) (Entered:

12/17/2018

12/17/2018 34 CONSENT to institute presentence investigation report as to Eddy Jimy Pinargote Mera. (JRB) (Entered: 12/17/2018) [Case 19-11305](#) [Date Filed: 10/17/2019](#) [Page: 7 of 11](#)

12/17/2018 35 REPORT AND RECOMMENDATIONS concerning Plea of Guilty re: Count Two of the Indictment as to Eddy Jimy Pinargote Mera. Signed by Magistrate Judge Julie S. Sneed on 12/17/2018. (JRB) (Entered: 12/17/2018)

12/17/2018 36 CONSENT regarding entry of a plea of guilty as to Ramon Elias Zambrano Zambrano (JRB) (Entered: 12/17/2018)

12/17/2018 37 CONSENT to institute presentence investigation report as to Ramon Elias Zambrano Zambrano. (JRB) (Entered: 12/17/2018)

12/17/2018 38 REPORT AND RECOMMENDATIONS concerning Plea of Guilty re: Count Two of the Indictment as to Ramon Elias Zambrano Zambrano. Signed by Magistrate Judge Julie S. Sneed on 12/17/2018. (JRB) (Entered: 12/17/2018)

12/27/2018 40 TRIAL CALENDAR for January 2019 trial term. Signed by Judge Steven D. Merryday on 12/27/2018. (GSO) (Entered: 12/27/2018)

12/28/2018 41 NOTICE OF HEARING as to Franklin Rafael Lopez Toala: Change of Plea Hearing set for 1/8/2019 at 10:00 AM in Tampa Courtroom 11 A before Magistrate Judge Julie S. Sneed. (JRB) (Entered: 12/28/2018)

01/08/2019 42 NOTICE of maximum penalty, elements of offense, personalization of elements and factual basis by USA as to Franklin Rafael Lopez Toala (Palermo, Thomas) (Entered: 01/08/2019)

01/08/2019 43 Minute Entry for proceedings held before Magistrate Judge Julie S. Sneed: Change of Plea Hearing as to Franklin Rafael Lopez Toala held on 1/8/2019. (DIGITAL) (Interpreter/Language: Pedro Marino/Spanish) (JRB) (Entered: 01/08/2019)

01/08/2019 44 CONSENT regarding entry of a plea of guilty as to Franklin Rafael Lopez Toala (JRB) (Entered: 01/08/2019)

01/08/2019 45 CONSENT to institute presentence investigation report as to Franklin Rafael Lopez Toala. (JRB) (Entered: 01/08/2019)

01/08/2019 46 REPORT AND RECOMMENDATIONS concerning Plea of Guilty re: Counts One and Two of the Indictment as to Franklin Rafael Lopez Toala. Signed by Magistrate Judge Julie S. Sneed on 1/8/2019. (JRB) (Entered: 01/08/2019)

01/08/2019 48 ACCEPTANCE OF PLEA of guilty and adjudication of guilt re: count two of the indictment as to Ramon Elias Zambrano Zambrano signed by Judge Steven D. Merryday on 1/8/2019. See document for important notice and date and time of sentencing. (BK) (Entered: 01/08/2019)

01/08/2019 49 ACCEPTANCE OF PLEA of guilty and adjudication of guilt re: count two of the indictment as to Eddy Jimy Pinargote Mera signed by Judge Steven D. Merryday on 1/8/2019. See document for important notice and date and time of sentencing. (BK) (Entered: 01/08/2019)

02/04/2019 52 ACCEPTANCE OF PLEA of guilty and adjudication of guilt re: counts one and two of the indictment as to Franklin Rafael Lopez Toala signed by Judge Steven D. Merryday on 2/4/2019. See document for important notice and date and time of sentencing. (GSO) (Entered: 02/04/2019)

03/02/2019 58 SENTENCING MEMORANDUM by Ramon Elias Zambrano Zambrano (Goldman, Summer) (Entered: 03/02/2019)

03/05/2019 59 NOTICE canceling sentencing hearing scheduled for 03/06/19 as to Eddy Jimy Pinargote Mera. Sentencing will be rescheduled by separate notice. (BK) (Entered: 03/05/2019)

03/05/2019 60 MINUTE ENTRY for 3/5/2019 sentencing of Ramon Elias Zambrano Zambrano (3) before Judge Steven D. Merryday; count one, dismissed in accord with the plea agreement; count two, IMPRISONMENT--one hundred eight months; SUPERVISED RELEASE--sixty months; FINE--waived; SPECIAL ASSESSMENT--\$100. Court Reporter: Bill Jones (Interpreter/Language: James Plunkett / Spanish) (GSO) (Entered: 03/05/2019)

03/05/2019 61 NOTICE OF RESCHEDULING HEARING: The sentencing of Eddy Jimy Pinargote Mera previously scheduled for 3/6/2019 is rescheduled for 3/14/2019 at 08:30 AM in Tampa Courtroom 15A before Judge Steven D. Merryday. (BK) (Entered: 03/05/2019)

03/05/2019 62 JUDGMENT as to Ramon Elias Zambrano Zambrano (3); count one, dismissed in accord with the plea agreement; count two, IMPRISONMENT--one hundred eight months; SUPERVISED RELEASE--sixty months; FINE--waived; SPECIAL ASSESSMENT--\$100. Signed by Judge Steven D. Merryday on 3/5/2019. (GSO) (Entered: 03/05/2019)

03/06/2019 64 Unopposed MOTION to Continue Sentencing Hearing by Eddy Jimy Pinargote Mera. (Mieczkowski, Sara) (Entered: 03/06/2019)

03/07/2019 65 ORDER granting 64--motion to re-schedule the sentencing of Eddy Jimy Pinargote Mera(1). Signed by Judge Steven D. Merryday on 3/7/2019. (BK) (Entered: 03/07/2019)

03/07/2019 66 NOTICE OF RESCHEDULING HEARING: The sentencing of Eddy Jimy Pinargote Mera previously scheduled for 3/14/2019 is rescheduled for 3/13/2019 at 10:00 AM in Tampa Courtroom 15A before Judge Steven D. Merryday. (BK) (Entered: 03/07/2019)

03/12/2019	67	MOTION for downward departure by USA as to Eddy Jimy Pinargote Mera. (Palermo, Thomas) (Entered: 03/12/2019)
03/12/2019	68	SENTENCING MEMORANDUM by Eddy Jimy Pinargote Mera (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Mieczkowski, Sara) (Entered: 03/12/2019)
03/13/2019	69	MINUTE ENTRY for 3/13/2019 sentencing of Eddy Jimy Pinargote Mera before Judge Steven D. Merryday; granting the 67--motion for downward departure; count one, dismissed in accord with the plea agreement; count two, IMPRISONMENT--one hundred eight months; SUPERVISED RELEASE--sixty months; FINE--waived; SPECIAL ASSESSMENT--\$100. Court Reporter: Bill Jones (Interpreter/Language: James Plunkett / Spanish) (GSO) (Entered: 03/13/2019)
03/14/2019	70	JUDGMENT as to Eddy Jimy Pinargote Mera (1); count one, dismissed in accord with the plea agreement; count two, IMPRISONMENT--one hundred eight months; SUPERVISED RELEASE--sixty months; FINE--waived; SPECIAL ASSESSMENT--\$100. Signed by Judge Steven D. Merryday on 3/14/2019. (GSO) (Entered: 03/14/2019)
03/22/2019	74	MOTION for downward departure and Variances and Supporting Memorandum of Law by Franklin Rafael Lopez Toala. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E, # 6 Exhibit Exhibit F, # 7 Exhibit Exhibit G, # 8 Exhibit Exhibit H)(Battaglia, Brian) Item terminated due to the filing of 75. Modified on 3/25/2019 (DG). (Entered: 03/22/2019)
03/22/2019	75	Amended MOTION for downward departure and Variances and Supporting Memorandum of Law by Franklin Rafael Lopez Toala. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E, # 6 Exhibit Exhibit F, # 7 Exhibit Exhibit G, # 8 Exhibit Exhibit H)(Battaglia, Brian) (Entered: 03/22/2019)
03/26/2019	76	SUPPLEMENT re 75 Amended MOTION for downward departure and Variances and Supporting Memorandum of Law (Attachments: # 1 Exhibit H)(Battaglia, Brian) (Entered: 03/26/2019)
03/27/2019	77	MINUTE ENTRY for 3/27/2019 sentencing of Franklin Rafael Lopez Toala (2) before Judge Steven D. Merryday; denying the 75--motion for downward departures and variances; counts one and two, IMPRISONMENT--one hundred eight months, comprising concurrent terms of one hundred eight months as to each of counts one and two; SUPERVISED RELEASE--sixty months, comprising concurrent terms of sixty months as to each of counts one and two; FINE--waived; SPECIAL ASSESSMENT--\$200. Court Reporter: Bill Jones (Interpreter/Language: James Plunkett / Spanish) (GSO) (Entered: 03/27/2019)
03/27/2019	78	JUDGMENT as to Franklin Rafael Lopez Toala (2); counts one and two, IMPRISONMENT--one hundred eight months, comprising concurrent terms of one hundred eight months as to each of counts one and two; SUPERVISED RELEASE--sixty months, comprising concurrent terms of sixty months as to each of counts one and two; FINE--waived; SPECIAL ASSESSMENT--\$200. Signed by Judge Steven D. Merryday on 3/27/2019. (GSO) (Entered: 03/27/2019)
04/05/2019	80	NOTICE OF APPEAL by Franklin Rafael Lopez Toala re 78 Judgment Filing fee not paid. (Battaglia, Brian) (Entered: 04/05/2019)
04/08/2019	81	TRANSMITTAL of initial appeal package as to Franklin Rafael Lopez Toala to USCA consisting of copies of notice of appeal, docket sheet, order/judgment being appealed, and motion, if applicable to USCA re 80 Notice of Appeal. Eleventh Circuit Transcript information form forwarded to pro se litigants and available to counsel at www.flmd.uscourts.gov under Forms and Publications/General. (CTR) (Entered: 04/08/2019)
04/08/2019	82	First MOTION for Leave to Appeal In Forma Pauperis by Franklin Rafael Lopez Toala. (Battaglia, Brian) (Entered: 04/08/2019)
04/10/2019		USCA Case Number as to Franklin Rafael Lopez Toala. USCA Number: 19-11335-J for 80 Notice of Appeal filed by Franklin Rafael Lopez Toala. (KE) (Entered: 04/10/2019)
04/18/2019	83	TRANSCRIPT information form filed by Franklin Rafael Lopez Toala for proceedings held on 1/8/19; 3/27/19 before Judge Snead/ Merryday re 80 Notice of Appeal. USCA number: 19-11335-J (Battaglia, Brian) (Entered: 04/18/2019)
04/18/2019	84	TRANSCRIPT information form filed by Franklin Rafael Lopez Toala for proceedings held on 1/8/19; 3/27/19 before Judge Snead/ Merryday re 80 Notice of Appeal. USCA number: 19-11335-J (Battaglia, Brian) (Entered: 04/18/2019)
04/19/2019	85	ORDER granting 82 Motion for Leave to Appeal In Forma Pauperis as to Franklin Rafael Lopez Toala. Signed by Magistrate Judge Julie S. Snead on April 19, 2019. (BRC) (Entered: 04/19/2019)
05/02/2019	86	Judgment Returned Executed as to Franklin Rafael Lopez Toala on 04/25/19. Institution: D Ray James Correctional. (BES) (Entered: 05/03/2019)
05/09/2019	87	Judgment Returned Executed as to Ramon Elias Zambrano Zambrano on 4/25/2019. Institution: D.Ray James. (CTR) (Entered: 05/09/2019)
05/14/2019	88	COURT REPORTER ACKNOWLEDGEMENT by Tracey Aurelio re 80 Notice of Appeal as to Franklin Rafael Lopez Toala. Estimated transcript filing date: Upon Receipt of CJA. USCA number: 19-11335-J. (TVA) (Entered: 05/14/2019)
05/14/2019	89	NOTIFICATION that transcript has been filed by Tracey Aurelio re: 80 Notice of Appeal as to

		Franklin Rafael Lopez Toala USCA number: 19-11335-J (TVA) (DG). (Entered: 05/14/2019)
05/14/2019	90	NOTICE to counsel of filing of OFFICIAL TRANSCRIPT. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter or view the document at the clerk's office public terminal as to Franklin Rafael Lopez Toala. Court Reporter: Tracey Aurelio (TVA) (Entered: 05/14/2019)
05/14/2019	91	TRANSCRIPT of hearing as to Franklin Rafael Lopez Toala held on 1/8/19 before Judge Sneed. Court Reporter/Transcriber Tracey Aurelio, Telephone number 813-301-5380. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 6/4/2019, Redacted Transcript Deadline set for 6/14/2019, Release of Transcript Restriction set for 8/12/2019. (TVA) (Entered: 05/14/2019)
05/17/2019	92	COURT REPORTER ACKNOWLEDGEMENT by Bill Jones re 80 Notice of Appeal as to Franklin Rafael Lopez Toala. Estimated transcript filing date: 5-24-19. USCA number: 19-11335-J. (HWJ) (Entered: 05/17/2019)
05/22/2019	93	Judgment Returned Executed as to Eddy Jimy Pinargote Mera on 5/14/2019. Institution: D.Ray James. (CTR) (Entered: 05/22/2019)
06/04/2019	94	TRANSCRIPT of Sentencing for dates of 03-27-19 held before Judge Steven D. Merryday, re: 80 Notice of Appeal as to Franklin Rafael Lopez Toala. Court Reporter/Transcriber Bill Jones, Telephone number 813-301-5024. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 6/25/2019, Redacted Transcript Deadline set for 7/5/2019, Release of Transcript Restriction set for 9/3/2019. (HWJ) (Entered: 06/04/2019)
06/04/2019	95	NOTICE to counsel of filing of OFFICIAL TRANSCRIPT. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter or view the document at the clerk's office public terminal as to Franklin Rafael Lopez Toala. Court Reporter: Bill Jones (HWJ) (Entered: 06/04/2019)
06/04/2019	96	NOTIFICATION that transcript has been filed by Bill Jones re: 80 Notice of Appeal as to Franklin Rafael Lopez Toala USCA number: 19-11335-J (HWJ) (Entered: 06/04/2019)
06/28/2019	97	Joint MOTION to supplement Court Record on Appeal from the Sentencing by Franklin Rafael Lopez Toala. (Attachments: # 1 Exhibit Cenepa War, # 2 Exhibit Translation Letter, # 3 Exhibit Correspondence)(Battaglia, Brian) (Entered: 06/28/2019)
06/28/2019	98	ENDORSED ORDER granting 97 the agreed motion by Franklin Rafael Lopez Toala (2) to supplement the record-on-appeal. Signed by Judge Steven D. Merryday on 6/28/2019. (Entered: 06/28/2019)
07/16/2019	99	Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Middle District of Florida certifies that the record is complete for purposes of this appeal re: 80 Notice of Appeal as to Franklin Rafael Lopez Toala. The following documents will be forwarded in paper format upon the request for the record on appeal by the USCA in addition to the electronic record. Folder of Sealed pleadings: 1. USCA number: 19-11335-JJ. (CTR) (Entered: 07/16/2019)
07/23/2019		ACKNOWLEDGMENT by USCA of receiving 1 Folder of Sealed Pleadings on 7/18/2019 re 80 Notice of Appeal. USCA number: 19-11335-JJ. (CTR) (Entered: 07/23/2019)

[Order documents](#) from our nationwide document retrieval service.  
- OR - Call **1.866.540.8818**.

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# **Certificate of Service**

## **Certificate of Service**

I certify that a copy of this appendix and the notice of electronic filing was sent by CM/ECF on October 17, 2019, to:

BRIAN P. BATTAGLIA, ESQ.

*Counsel for Franklin Rafael Lopez Toala*

s/ Sean Siekkinen

SEAN SIEKKINEN  
Assistant United States Attorney

**Pet. App. U**

No. 19-11335-JJ

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In the  
United States Court of Appeals  
for the Eleventh Circuit

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF FLORIDA  
No. 8:18-cr-511-T-23JSS-2

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**Appellant's Response in Opposition to United States Motion for Leave  
to File "Corrected" Supplemental Appendix**

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October 18, 2019

*United States v. Franklin Rafael Lopez  
Toala  
No. 19-11335-JJ*

**Certificate of 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-Appellant in lower court and for this appeal;

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

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

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

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

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-appellant;

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

All those listed in Appellee's CIP.

No publicly traded company or corporation has an interest in the outcome of this appeal.

In the  
United States Court of Appeals  
for the Eleventh Circuit

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

No. 19-11335-JJ

FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant-Appellant*

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**Appellant's Response in Opposition to United States Motion for Leave  
to File "Corrected" Supplemental Appendix**

The Appellant, Franklin Rafael Lopez Toala (who is currently incarcerated), through his undersigned counsel, files this his Response in Opposition to the United States Motion for Leave to File "Corrected" Supplemental Appendix, to which the Appellant and undersigned oppose, and says as follows<sup>1</sup>:

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<sup>1</sup> On October 14, 2019, the Appellant's counsel filed his Motion to Either Unseal the PSR of Mera or Strike said PSR from the United States supplemental appendix in this Appeal. That Motion is pending and constitutes the same issue with respect to the United current Motion to "Correct" and Supplement its Appendix with another PSR, that of Mr. Zambrano. The undersigned, respectfully requests that this Court Strike from this Appeal Record the PSR's of Mr. Zambrano [and Mera], for all the reasons below.

1. The United States request for leave of this Court to file a “corrected” supplemental appendix to include the presentence investigation report (hereinafter “PSR”) of Mr. Zambrano, as with the previous original appendix filed by the United States, that contained the sealed presentence investigation report of Mr. Mera creates a dangerous precedent and the proverbial “slippery slope, and this Court should reject and deny the United States Motion to File a “corrected” supplemental appendix containing the sealed presentence report of Mr. Zambrano.

2. As this Court is aware, there is another pending Motion filed by the Appellant on October 14, 2019 that addresses the United States original appendix filed on October 1, 2019 that included the sealed PSR of Mr. Mera. In the United States response to Appellant’s Motion that is pending as to Mr. Mera’s PSR, the United States urges that this Court to remand these matters back to the district court for consideration.

3. At the beginning of this appeal, the undersigned as counsel for the Appellant submitted to the United States his proposed appendix as well as proposed motion to supplement the record, which said Motion was presented to the District Court and approved. The Federal Rules of Appellate Procedure encourage the parties to agree on the contents of the appendix in advance. See,

Fed. R. App. P. 30 (b) (1). The United States did not at that point early on in this appeal suggest to the undersigned that the presentence reports of 2 other individuals, that were not presented in the sentencing hearing of the Appellant, Toala, be made a part of the appendix in his Appeal. This is contrary to Federal Rule of Criminal Procedure 32 (i).

4. As well, the United States did not confer with the undersigned before filing its supplemental appendix filed on October 1, 2019 [and may not have been required to do so under the rules]. It did so, before filing its proposed “corrected” supplemental appendix, to which the undersigned has objected.

5. If the United States had conferred with the undersigned at sentencing or at the beginning of this appeal, the undersigned would have objected to the filing of the 2 PSR’s of the 2 other individuals that were not part of the Appellant’s sentencing hearing.

6. The reason the undersigned would have objected to these PSR’s being filed into this appellate record is twofold. First, essentially it is against court rules<sup>2</sup>, case law and policy to provide PSR’s to third parties. *See, United States v. Gomez*, 323 F. 3d 1305 (11<sup>th</sup> Cir. 2003) where this Court referred to the general presumption that courts will not grant third parties’ access to the

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<sup>2</sup> Fed. R. Crim. P. 32 (e) (3).

presentence reports of other individuals. Second, if they were to be submitted into the record, the burden is on the United States to show a compelling need or reason for their use. The United States injected these two PSR's into this record, not the Appellant. And what is the purpose? The United States does not clearly say, other than, it referred to the PSR, in its Answer Brief.<sup>3</sup> Thus, the United States has shown no compelling need or reason to inject 2 other PSR's (not Toala's) into this Appeal. See, *Gomez*, 323 F.3d at 1308. Presentence investigation reports, or more simply, presentence reports or PSI's, are generally considered to be confidential documents and are only disclosed to third parties under limited circumstances. *See, U.S. Dept. of Justice v. Julian*, 486 U.S. 1, 12, 108 S. Ct. 1606, 100 L.Ed.2d 1 (1988) ("the courts have typically required some showing of special need before they will allow a third party to obtain a copy of a presentence report"). "[A]s a general rule, criminal defendants have no right to see or examine the PSI's of their co-defendants." *United States v. Simmonds*, 235 F.3d 826, 837 (3d Cir. 2000).

7. The United States, suggests that by its unilaterally injecting these 2 PSR's (Mera and Zambrano) into this record, that the Appellant should now go before the district court in Tampa for an Order to review the PSR's. The

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<sup>3</sup> The Answer Brief of the United Sates seems to indicate that Mera received points reducing his sentence, but why does that require his sealed PSR or for that matter, Zambrano's be injected into this appeal? The United States provides

case law says the standard is “a compelling reason”. However, it is the United States that has the burden, not the Appellant, for it is the United States that now wants to use other PSR’s for an unstated or unarticulated purpose. (Emphasis supplied)

8. Actually, it is the United States that should have gone to the district court, at Toala’s sentencing or at the outset of this Appeal, if it intended to inject the PSR’s of Mera and Zambrano into this Appeal. It did not do so. It is now simply too late.

9. As stated above, if this reverse procedure or process (as suggested by the United States), is allowed to stand, this creates not only a dangerous precedent, but it also will result in delays in appeals, and the Government in the future using the PSR’s of other defendants, co-defendants, or possibly PSR’s from unrelated cases without showing any compelling need or reason, when in fact, they should not be used at all. See, *United States v. Gomez, supra*; See, *United States v. Simmonds, supra*.

10. Now this Court finds itself having to become an arbitrator of information that the Appellant’s counsel has never seen (has not asked for), and which was not discussed or made a part of the record at his clients sentencing; and just before the Appellant’s Reply Brief was due to be

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no compelling reason why.

submitted pursuant to this Court's Briefing Schedule.

11. The United States now wants to place the burden on defense counsel who did not request the PSR's, when [in reality it is the burden of the United States] the United States long ago could have filed its own Motion in the district court (assuming it can do so at all), before Toala's sentencing, or long before this Court issued the Briefing Schedule in this Appeal.

12. The United States chose not to do so, but rather unilaterally filed a sealed PSR of another party, not a party to this Appeal. The case law not only suggests, but holds that the type of information contained in PSR's is not to be shared with third parties in order to protect confidentiality, sources, and the sanctity of the confidences placed in the hands of employees of United States Probation and Parole. This is so that they can perform their jobs and not worry that the information obtained will one day be used by a third party, or used in another party's appellate brief.

13. Now, the undersigned is placed in the untenable position of, as suggested by the United States, going back to the district court seeking to unseal these 2 PSR's, and if such relief is granted then what? Is counsel for the Appellant in this appeal allowed to use and reference that confidential information in his Reply Brief? If not, then who will decide what information can be used? This Honorable Court? The district court below? Maybe an

employee of United States Probation and Parole? Better yet, the attorney's for Mera and Zambrano who thought the information contained in their clients PSR would remain confidential.

14. Respectfully, these issues now suggested by the United States and injected into this Appeal are truly a *Pandora's Box*<sup>4</sup> as outlined above. The reasons for confidentiality and the public policy and law behind not using other individuals PSR's (and not a party to this Appeal) has now become crystal clear to the undersigned (during the drafting this Response) as this matter quickly evolved since October 2, 2019.

**WHERFORE**, based upon all of the foregoing reasons, the undersigned on behalf of the Appellant, Toala respectfully requests:

- a. that this Court deny the United States Motion for Leave to File "Corrected" Supplemental Appendix, and strike the Zambrano PSR proposed to be filed, [and Mera's PSR already filed]; and
- b. Alternatively, the undersigned would request that if this Court grants the United States Motion for Leave to File "Corrected" Supplemental Appendix, that the Appellant's counsel be permitted by this Court to review the PSR of Mera for purposes of preparing Appellant's Reply Brief.

---

<sup>4</sup> A source of many troubles: something that will lead to many problems.  
Source: Merriam Webster On Line Dictionary at <https://www.merriam-webster.com/dictionary/Pandora's%20box>

Respectfully submitted on this 18<sup>th</sup> day of October 2019.

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**Certificate of Compliance with Type-Volume Limitation**

This motion, which contains 1,784 countable words, complies with Fed. R. App. P. 27(d)(2)(A) and Fed. R. App. P. 32(a)(5), (6).

**Certificate of Service**

I certify that a copy of this Response and the notice of electronic filing were sent by CM/ECF on October 18<sup>th</sup> 2019, to counsel for the United States:

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**Pet. App. V**

**No. 19-11335-JJ**

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA,  
*Plaintiff - Appellee,***

**v.**

**FRANKLIN RAFAEL LOPEZ TOALA,  
*Defendant - Appellant***

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA**

**No. 8:18-CR-00511-SDM-JSS-2**

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**REPLY BRIEF OF CRIMINAL CASE  
FOR  
FRANKLIN RAFAEL LOPEZ TOALA**

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January 24, 2020

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*United States v. Franklin Rafael Lopez Toala*  
No. 19-11335-JJ

**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

There are no additional persons with an interest in the outcome of this case. Further, no publically traded company or corporation has an interest in the outcome of this appeal.

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**REPLY ARGUMENT AND CITATIONS OF AUTHORITY**

**A. The district court committed clear procedural error in refusing to grant Toala a minor role reduction based on evidence distinguishing him from the larger criminal conspiracy, as well as the other individuals, on-board the vessel.**

U.S.S.G. § 3B1.2 allows a minor role adjustment to the applicable Guidelines range for a defendant who is substantially less culpable than the average participant due to their minor role. Toala bears the burden of establishing that his role was minor by a preponderance of the evidence. *United States v. Rodriguez De Varon*, 175 F. 3d 939 (11th Cir. 1999). This Court reviews the district court's denial of a minor role-reduction for clear error. *United States v. Cruickshank*, 837 F.3d 1182, 1192 (11<sup>th</sup> Cir. 2016).

**I. The district court committed clear error by overlooking key facts that demonstrate Toala was a “minor participant” among all participants in the criminal conspiracy**

On page 13 of the United States brief, it asserts that the sentencing judge was correct in examining only those participants “on-board the vessel” and not the “larger criminal organizations” that are “not within our capacity to assess.” Doc. 94, pg. 17-18. However, the case law mandates that such a determination should be made based on the evidence. In *Rodriguez De Varon, supra*, this Court explained that the scope of participants is limited to others “identifiable or discernable from the evidence.” *Rodriguez De Varon* at 939. Furthermore, “[i]n considering a §

3B1.2 adjustment, a court must measure the defendant's role [against others] *whether or not other defendants are charged.*" *United States v. Cruickshank*, 837 F.3d 1182, 1193 (11th Cir. 2016) (quoting *Rodriguez De Varon*) (Emphasis supplied). When a sentencing court looks at the other participants who are identifiable and discernable from the evidence, regardless of whether or not such individuals were charged, those that had a role in the illegal drug's transportation may be evaluated in the minor role analysis. See, Doc. 94, pg. 18, 49.

**II. The district court overlooked important details that show Toala was a “minor participant” among the participants on the go-fast vessel.**

A defendant's degree of participation “is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.” U.S.S.G. § 3B1.2, comment. (n.3 (C)). In making this determination, the sentencing court should generally consider, among other things, the 5 elements set out in U.S.S.G. § 3B1.2 (C) (i)-(v). By applying each of the “minor role” elements to the participants who were on board the vessel, there exists a lack of articulable substantive facts, to support the sentencing court’s rejection of a minor role reduction to Toala’s sentence, as well as the United States argument in its Answer Brief at pg. 9 that Toala was not “*substantially less culpable than the average participant*” or “*less culpable than that of most other participants*”. The United States concedes that “participation” is based upon the “*totality of circumstances*” and heavily dependent upon “*facts*” in a

particular case. See, Answer Brief at pg. 7. (Emphasis supplied) The United States also acknowledges and admits that Toala was certainly *less culpable* than Captain Mera. See pg. 9 of Answer Brief. (Emphasis supplied) However, without articulating substantive facts, the United States summarily concludes that “nothing in the record” suggests that Toala’s conduct was “substantially different” from Captain Mera or any different from co-defendant, Zambrano. See pg.10 of Answer Brief.

This is an overstatement. Zambrano and Mera had a substantially higher degree of understanding regarding “the scope and the structure of the criminal activity.” First, Mera, who the court has already recognized as the ship’s captain, would have a greater understanding of the scope and structure of the criminal activity, because the captain would be responsible for evading capture and delivering the illicit cargo. Second, Zambrano gave the order to Toala to jettison cargo overboard. Doc. 72 at ¶¶ 10, 12. Zambrano’s prompting the order to Toala demonstrates Toala did not understand the scope, and Zambrano’s actions and orders suggest he possessed a greater understanding of the scope of the cocaine transportation, and necessity to jettison the cargo. With regard to the “*degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority*,” Zambrano gave the order to Toala to jettison the cargo overboard, indicative of Zambrano having greater authority with regard to

decision-making, than Toala. Doc. 72 at ¶¶10, 12. Additionally, it was Zambrano who provided the GPS coordinates to Mera to steer the vessel. Zambrano’s role as the de-facto navigator is indicative of his influence over Mera’s decision-making authority with regard to piloting the vessel and the transportation of narcotics. Toala did not use the GPS and did not have the same role in navigating the boat that Zambrano did. Doc. 94 at pg. 13.

Mera the captain, and Zambrano, both had greater levels of participation and responsibility concerning the transportation of narcotics. Both men were experienced mariners. In the past, (although claiming he lead for the most part a law abiding life, Doc. 68, pg. 31) Mera apparently had in the past worked for a “drug-trafficking organization and also refueled drug laden go-fast boats.” Doc 75-7, pg. 2. Zambrano was experienced in a “business transporting passengers on his two small boats.” Doc. 58, pg. 1. On the other hand, according to Toala’s PSR, he had spent his life earning an honest wage as a security guard and tuna packing plant. Doc. 72 at ¶¶52-53. His attempt to steer the vessel in question was apparently so poor, he was replaced by his co-defendants. Doc. 94, pg. 16-17. Simply put, Toala was not the experienced mariner Mera and Zambrano were, and therefore had less responsibility and discretion aboard the vessel. In a similar vein to the manner in which the nature and extent of a defendant’s participation has been considered for a minor role reduction, this Court has frequently looked at the

defendant's importance in completing the offending conduct. *See, United States v. Penalba*, 216 Fed. Appx. 853, 856 (11th Cir. 2007) (Reasoning that the defendant, who served as the machinist on the vessel, needed to demonstrate his responsibilities “*less important* to the enterprise than those of other crew members)

In this case, Toala was not as integral, important, or essential to the transportation of narcotics. He was not an experienced mariner like Mera and Zambrano. This Court has noted at least once before in a similar case that a small boat carrying cocaine to the United States requires “*experienced mariners*” to complete such a journey. *United States v. Alegria*, 144 Fed. Appx. 801, 803 (11th Cir. 2005) (Emphasis supplied). In *Alegria*, the defendant was a machinist and responsible for the repairs during the trip. The other three co-defendants were mariners whose jobs were to “pilot the go-fast boat” and “navigate.” *Id.* The defendant was denied a minor role adjustment because his role as the machinist *was not* demonstrated to be “minor as compared to the other participants in the relevant conduct for which he was held accountable.” *Id.* There is no evidence to suggest Toala had a role on-board the vessel beyond his inability to drive the boat correctly, and being relieved from such role. Doc. 94, pg. 9. The evidence presented by Toala demonstrated that he was clearly less important, less essential, or less necessary to the criminal scheme, and his request for a minor role reduction should have been granted. *See, Alegria, supra.* Simply put, Toala was substantially

less culpable than most of the participants identifiable in the broader criminal conspiracy, and his co-defendants on the go-fast vessel. Doc. 94, pg. 18. The sentencing court committed clear error in not granting the minor role reduction. Respectfully, Toala's sentence should be vacated and this matter remanded for resentencing.

**B. The district court abused its discretion in weighing the §3553(a) factors unreasonably**

The United States at pg. 28 of of 32 of its Answer Brief, incorrectly references Toala's "sole objection". Toala's additional objection involved § 5H1, et seq. of the U.S.S.G. See, Toala PSR at Doc. 72, pg. 22-27; Doc. 97-3 Pg. 197-198; Appendix Docket, item 98 (endorsed order granting stipulation).

Should this Court find that the district court's sentencing decision is procedurally sound, this court "should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007). This deferential standard "appreciate[s] the institutional advantage that district courts have in applying and weighing the [§] 3553(a) factors in individual cases." *United States v. Pugh*, 515 F.3d 1179, 1190–91 (11th Cir. 2008) (referencing *Gall*). Of course, the district court's discretion is not "unbridled," for "looking at sentencing decisions through the prism of

discretion is not the same thing as turning a blind eye to unreasonable ones.” *United States v. McQueen*, 727 F.3d 1144, 1156 (11th Cir. 2013).

A district court abuses its discretion if it fails to follow any of the 3 criteria set forth in *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010). Additionally, a sentence is substantively unreasonable if it fails to carry out the statutory purposes of sentencing under 18 U.S.C. §3553(a). *United States v. Dean*, 635 F.3d 1200, 1209 (11th Cir. 2011). The United States in its answer brief, has not adequately addressed how the sentencing court committed clear error when it considered the proper factors but weighed them unreasonably, nor has it refuted that the district court failed to consider the statutory purposes of sentencing, under 18 U.S.C. §3553(a). Specifically, the goals of sentencing illustrated under 18 U.S.C §3553 (a)(2) are substantially skewed in Toala’s favor when one considers how his relevant policy statement factors under 18 U.S.C. §3553 (a)(2) relate to the imposed sentence. Toala had a long and consistent employment history. See, U.S.S.G. § 5H1.5. (Doc. 72 at ¶¶52-53), and special family ties and responsibilities that did gravitate in favor of a downward departure in his sentence. (U.S.S.G. § 5H1.6) (*Id.* at ¶¶38-39); (*Id.* at ¶40); (*Id.* at 41). As previously mentioned in Toala’s Initial Brief at page 32, his grandson was highly likely to die. Considering Toala’s special family ties and responsibilities, it is apparent that the sentencing court weighed such characteristics unreasonably.

The sentencing court overlooked the causally-connected behavior behind Toala's involvement in the criminal endeavor. It is not just punishment to punish Toala for taking what he believed were necessary steps to save his grandson's life. Nor is it likely that such a hardworking, provider will commit further crimes against the United States. Toala is not in need in further deterrence. Toala needs to return to his family as soon as possible. His special family ties and responsibilities compelled a downward departure in his sentence. Doc. 94, pg.155-157

Toala's military service is also a notable factor in Toala's favor when considering the sentencing goals of 18 U.S.C. 3553(a)(2). First, Toala already seemed to possess "respect for the law"; he enlisted in the Ecuadorian military. Doc. 72, ¶ 52. Additionally, someone who has performed military service has the proven capacity such a person has experience in following the rules, and would not need as much "deterrence" in their punishment to correct their behavior. As such, Toala, based on his military service should have had his sentence departed downward.

These characteristics, noted in Toala's PSR Doc. 72 at ¶47, and ¶¶29-34 respectively, also add to Toala's exceptional circumstances and suggest his sentence is unreasonable. Doc. 72 at ¶47, and ¶¶ 29-34 respectively. Toala's characteristics were exceptional. Notwithstanding, these factors in his favor, rather than departing downward, the sentencing court cited these factors, in an adverse

manner, contrary to the policy goals. See, Doc. 94, pg. 38-39. According to the sentencing goals in 18 U.S.C. 3553(a)(2) Toala's current prison sentence in this case is unjust, and unreasonable, as it excessively tries to deter any future criminal conduct on his part when all evidences suggests this will be his one and only offense.

Finally, a sentence is substantively unreasonable if it fails to carry out the statutory purposes of sentencing under 18 U.S.C. §3553(a). *United States v. Dean*, 635 F.3d 1200, 1209 (11<sup>th</sup> Cir. 2011). One of the statutory purposes of the guidelines was the *rehabilitation* of criminal offenders, to forestall such individuals from future criminal behavior and avoid recidivism. The sentencing court noted that [Toala's] employment record factor relates "to the probability of rehabilitation and things such as that." Doc. 94, pg. 38. Toala's strong familial ties, employability, and military service make him more readily rehabilitated, less likely to recidivate. The actual record in Toala's sentencing supports the relief sought in this appeal; not the isolated and redacted paragraphs of the 2 PSR's submitted after the fact by the United States, which were never filed in or used at Toala's sentencing. By denying his request for a downward variance based on these characteristics, the U.S.S.G's, legislative amendments since their enactment, the sentencing court failed to carry out one of the statutory purposes for sentencing of rehabilitation, rendering Toala's sentence is substantively unreasonable.

Respectfully, the sentence should be vacated.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief, which contains 2787 countable words, written in 14-point or larger Times New Roman font, and is in compliance with Fed. R. App. P. 32(a)(7)(B)(ii).

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that an original and six true and correct paper copies have been furnished by U.S. Mail to the U.S. Court of Appeals, Eleventh Circuit, at 56 Forsyth Street, N.W., Atlanta, GA 30303, on January 24, 2020. Additionally, this brief and the notice of electronic filing were sent by CM/ECF on January 24, 2020, to Counsel for the United States, as follows: SEAN SIEKKINEN, Esq., ASSISTANT UNITED STATES ATTORNEY *Counsel for the United States of America.*

*S/Brian P. Battaglia*  
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**Pet. App. W**

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In the Supreme Court of the United States

FRANKLIN RAFAEL LOPEZ TOALA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION APPENDIX W**  
**(Title 28 § U.S.C. 1254 – Courts of appeals; certiorari; certified questions)**

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section 9 of Pub. L. 95-393, set out as an Effective Date note under section 254a of Title 22, Foreign Relations and Intercourse.

**STATUTES GOVERNING WRITS OF ERROR TO APPLY TO APPEALS**

Act Jan. 31, 1928, ch. 14, § 2, 45 Stat. 54, amended Apr. 26, 1928, ch. 440, 45 Stat. 466; June 25, 1948, ch. 646, § 23, 62 Stat. 990, provided that "All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error." See also, notes preceding section 1 of this title.

**[§ 1252. Repealed. Pub. L. 100-352, § 1, June 27, 1988, 102 Stat. 662]**

Section, acts June 25, 1948, ch. 646, 62 Stat. 928; Oct. 31, 1951, ch. 655, § 47, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), (f), 72 Stat. 348; Mar. 18, 1959, Pub. L. 86-3, § 14(a), 73 Stat. 10, provided for direct appeals to Supreme Court from decisions invalidating Acts of Congress.

**EFFECTIVE DATE OF REPEAL**

Repeal effective ninety days after June 27, 1988, except that such repeal not to apply to cases pending in Supreme Court on such effective date or affect right to review or manner of reviewing judgment or decree of court which was entered into before such effective date, see section 7 of Pub. L. 100-352, set out as a note under section 1254 of this title.

**§ 1253. Direct appeals from decisions of three-judge courts**

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

(June 25, 1948, ch. 646, 62 Stat. 928.)

**HISTORICAL AND REVISION NOTES**

Based on title 28, U.S.C., 1940 ed., §§ 47, 47a, 380 and 380a (Mar. 3, 1911, ch. 231, §§ 210, 266, 36 Stat. 1150, 1162; Mar. 4, 1913, ch. 160, 37 Stat. 1013; Oct. 22, 1913, ch. 32, 38, Stat. 220; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938; Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752).

This section consolidates the provisions of sections 47, 47a, 380, and 380a of title 28, U.S.C., 1940 ed., relating to direct appeals from decisions of three-judge courts involving orders of the Interstate Commerce Commission or holding State or Federal laws repugnant to the Constitution of the United States.

For distribution of other provisions of the sections on which this revised section is based, see Distribution Table.

The language in section 380 of title 28, U.S.C., 1940 ed., referring to restraining the enforcement or execution of an order made by an administrative board or a State officer was omitted as covered by this revised section and section 2281 of this title.

Words in section 380a of title 28, U.S.C., 1940 ed., "This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law," were omitted as unnecessary.

Section 217 of title 7, U.S.C., 1940 ed., Agriculture, provides for a three-judge court in proceedings to suspend or restrain the enforcement of orders of the Secretary of Agriculture under the Packers and Stockyards Act of 1921.

The final proviso of section 502 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters, for direct appeal in certain criminal cases for failure to alter bridges obstructing navigation, is recommended for express re-

peal in view of its implied repeal by section 345 of title 28, U.S.C., 1940 ed. (See *U.S. v. Belt*, 1943, 63 S.Ct. 1278, 319 U.S. 521, 87 L.Ed. 1559. See reviser's note under section 1252 of this title.)

Section 28 of title 15, U.S.C., 1940 ed., Commerce and Trade, and section 44 of title 49, U.S.C., 1940 ed., Transportation, are identical and provide for convening of a three-judge court to hear and determine civil cases arising under the Sherman anti-trust law and the Interstate Commerce Act, respectively, wherein the United States is plaintiff and when the Attorney General deems such cases of general public importance.

Section 401(d) of title 47, U.S.C., 1940 ed., Telegraphs, Telephones, and Radiotelegraphs, made the provisions of sections 28 and 29 of title 15, U.S.C., 1940 ed., Commerce and Trade, sections 44 and 45 of title 49, U.S.C., 1940 ed., Transportation, and section 345(1) of title 28, U.S.C., 1940 ed., relating to three-judge courts and direct appeals, applicable to orders of the Federal Communications Commission enforcing the Communications Act of 1934.

**§ 1254. Courts of appeals; certiorari; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, 62 Stat. 928; Pub. L. 100-352, § 2(a), (b), June 27, 1988, 102 Stat. 662.)

**HISTORICAL AND REVISION NOTES**

Based on title 28, U.S.C., 1940 ed., §§ 346 and 347 (Mar. 3, 1911, ch. 231, §§ 239, 240, 36 Stat. 1157; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926).

Section consolidates sections 346 and 347 of title 28, U.S.C., 1940 ed.

Words "or in the United States Court of Appeals for the District of Columbia" and "or of the United States Court of Appeals for the District of Columbia" in sections 346 and 347 of title 28, U.S.C., 1940 ed., were omitted. (See section 41 of this title.)

The prefatory words of this section preceding paragraph (1) were substituted for subsection (c) of said section 347.

The revised section omits the words of section 347 of title 28, U.S.C., 1940 ed., "and with like effect as if the case had been brought there with unrestricted appeal", and the words of section 346 of such title "in the same manner as if it had been brought there by appeal". The effect of subsections (1) and (3) of the revised section is to preserve existing law and retain the power of unrestricted review of cases certified or brought up on certiorari. Only in subsection (2) is review restricted.

Changes were made in phraseology and arrangement.

**AMENDMENTS**

1988—Pub. L. 100-352, § 2(b), struck out "appeal;" after "certiorari;" in section catchline.

Pars. (2), (3). Pub. L. 100-352, § 2(a), redesignated par. (3) as (2) and struck out former par. (2) which read as follows: "By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the re-

view on appeal shall be restricted to the Federal questions presented;”.

#### EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100-352, §7, June 27, 1988, 102 Stat. 664, provided that: “The amendments made by this Act [amending sections 1254, 1257, 1258, 2101, 2104, and 2350 of this title, section 136w of Title 7, Agriculture, section 1631e of Title 22, Foreign Relations and Intercourse, section 652 of Title 25, Indians, section 988 of Title 33, Navigation and Navigable Waters, section 1652 of Title 43, Public Lands, sections 719, 743, and 1105 of Title 45, Railroads, and section 30110 of Title 52, Voting and Elections, and repealing sections 1252 and 2103 of this title] shall take effect ninety days after the date of the enactment of this Act [June 27, 1988], except that such amendments shall not apply to cases pending in the Supreme Court on the effective date of such amendments or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date.”

#### [§§ 1255, 1256. Repealed. Pub. L. 97-164, title I, § 123, Apr. 2, 1982, 96 Stat. 36]

Section 1255, act June 25, 1948, ch. 646, 62 Stat. 928, authorized Supreme Court to review cases in Court of Claims by writ of certiorari and by certification of questions of law.

Section 1256, act June 25, 1948, ch. 646, 62 Stat. 928, authorized Supreme Court to review cases in Court of Customs and Patent Appeals by writ of certiorari.

#### EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

#### § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term “highest court of a State” includes the District of Columbia Court of Appeals.

(June 25, 1948, ch. 646, 62 Stat. 929; Pub. L. 91-358, title I, § 172(a)(1), July 29, 1970, 84 Stat. 590; Pub. L. 100-352, § 3, June 27, 1988, 102 Stat. 662.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §344 (Mar. 3, 1911, ch. 231, §§236, 237, 36 Stat. 1156; Dec. 23, 1914, ch. 2, 38 Stat. 790; Sept. 6, 1916, ch. 448, §2, 39 Stat. 726; Feb. 17, 1922, ch. 54, 42 Stat. 366; Feb. 13, 1925, ch. 229, §1, 43 Stat. 937; Jan. 31, 1928, ch. 14, §1, 45 Stat. 54).

Provisions of section 344 of title 28, U.S.C., 1940 ed., relating to procedure for review of decisions of State courts are incorporated in section 2103 of this title. Other provisions of such section 344 of title 28, U.S.C., 1940 ed., are incorporated in section 2106 of this title.

The revised section applies in both civil and criminal cases. In *Twitchell v. Philadelphia*, 1868, 7 Wall. 321, 19 L.Ed. 223, it was expressly held that the provisions of section 25 of the Judiciary Act of 1789, 1 Stat. 85, on which title 28, U.S.C., 1940 ed., §344, is based, applied to criminal cases, and many other Supreme Court deci-

sions impliedly involve the same holding inasmuch as the Court has taken jurisdiction of criminal cases on appeal from State courts. See, for example, *Herndon v. Georgia*, 1935, 55 S.Ct. 794, 295 U.S. 441, 79 L.Ed. 1530 and *Ashcraft v. Tennessee*, 1944, 64 S.Ct. 921, 322 U.S. 143, 88 L.Ed. 1192.

Provision, in section 344(b) of title 28, U.S.C., 1940 ed., for review and determination on certiorari “with the same power and authority and with like effect as if brought up by appeal” was omitted as unnecessary. The scope of review under this section is unrestricted.

Words “and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied.” in said section 344(b), were omitted as surplusage.

The last sentence in said section 344(b) relating to the right to relief under both subsections of said section 344, was omitted as unnecessary.

Changes were made in phraseology.

#### AMENDMENTS

1988—Pub. L. 100-352 struck out “appeal;” before “certiorari” in section catchline and amended text generally. Prior to amendment, text read as follows: “Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

“(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

“(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

“(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

“For the purposes of this section, the term ‘highest court of a State’ includes the District of Columbia Court of Appeals.”

1970—Pub. L. 91-358 provided that for the purposes of this section, the term “highest court of a State” includes the District of Columbia Court of Appeals.

#### EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-352 effective ninety days after June 27, 1988, except that such amendment not to apply to cases pending in Supreme Court on such effective date or affect right to review or manner of reviewing judgment or decree of court which was entered before such effective date, see section 7 of Pub. L. 100-352, set out as a note under section 1254 of this title.

#### EFFECTIVE DATE OF 1970 AMENDMENT

Pub. L. 91-358, title I, §199(a), July 29, 1970, 84 Stat. 597, provided that: “The effective date of this title (and the amendments made by this title) [enacting sections 1363, 1451, and 2113 of this title and amending this section, sections 292 and 1869 of this title, section 5102 of Title 5, Government Organization and Employees, and section 260a of Title 42, The Public Health and Welfare] shall be the first day of the seventh calendar month which begins after the date of the enactment of this Act [July 29, 1970].”

#### § 1258. Supreme Court of Puerto Rico; certiorari

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in ques-

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In the Supreme Court of the United States

FRANKLIN RAFAEL LOPEZ TOALA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION APPENDIX W  
(Federal Rules of Appellate Procedure – Rule 10 – Record on Appeal)**

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who sought permission must file a statement in circuit clerk naming the parties that the attorney acts on appeal.

(25, 1989, eff. Dec. 1, 1989; amended Apr. 30, 1991, eff. Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 2009, eff. Dec. 1, 2009; Apr. 25, 2014, eff. Dec. 1, 2014.)

## RULE 7. BOND FOR COSTS ON APPEAL IN A CIVIL CASE

case, the district court may require an appellant to or provide other security in any form and amount to ensure payment of costs on appeal. Rule 8(b) surety on a bond given under this rule.

(Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 24, 1998, eff. Dec. 1,

## RULE 8. STAY OR INJUNCTION PENDING APPEAL

### on for Stay.

**Initial Motion in the District Court.** A party must move first in the district court for the following

a stay of the judgment or order of a district court of appeal;

approval of a bond or other security provided to a stay of judgment; or

an order suspending, modifying, restoring, or g an injunction while an appeal is pending.

**Motion in the Court of Appeals; Conditions on** A motion for the relief mentioned in Rule 8(a)(1) made to the court of appeals or to one of its judges.

The motion must:

show that moving first in the district court would impracticable; or

state that, a motion having been made, the dis- court denied the motion or failed to afford the f requested and state any reasons given by the ict court for its action.

The motion must also include:

the reasons for granting the relief requested and acts relied on;

originals or copies of affidavits or other sworn ements supporting facts subject to dispute; and

relevant parts of the record.

The moving party must give reasonable notice of tion to all parties.

A motion under this Rule 8(a)(2) must be filed with circuit clerk and normally will be considered by a of the court. But in an exceptional case in which requirements make that procedure impracticable, the may be made to and considered by a single judge.

The court may condition relief on a party's filing a r other security in the district court.

**(b) Proceeding Against a Security Provider.** If a party gives security with one or more security providers, each provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as its agent on whom any papers affecting its liability on the security may be served. On motion, a security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly send a copy to each security provider whose address is known.

**(c) Stay in a Criminal Case.** Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 26, 2018, eff. Dec. 1, 2018.)

## RULE 9. RELEASE IN A CRIMINAL CASE

### (a) Release Before Judgment of Conviction.

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

(2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed.

(3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.

**(b) Release After Judgment of Conviction.** A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

**(c) Criteria for Release.** The court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Oct. 12, 1984; Pub.L. 98-473, Title II, § 210, 98 Stat. 1987; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

## RULE 10. THE RECORD ON APPEAL

**(a) Composition of the Record on Appeal.** 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.

**(b) The Transcript of Proceedings.**

**(1) Appellant's Duty to Order.** Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

**(2) Unsupported Finding or Conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

**(3) Partial Transcript.** Unless the entire transcript is ordered:

(A) the appellant must—within the 14 days provided in Rule 10(b)(1)—file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

**(4) Payment.** At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

**(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee,

who may serve objections or proposed amendments days after being served. The statement and any proposed amendments must then be submitted to the court for settlement and approval. As settled, the statement must be included by the district court on appeal.

**(d) Agreed Statement as the Record on Appeal.** If the record on appeal as defined in Rule 10(a), may prepare, sign, and submit to the district court of the case showing how the issues presented by arose and were decided in the district court. This must set forth only those facts averred and prove to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it—together with the additions that the district court may consider necessary for a full presentation of the issues on appeal—must be filed with the district court and must then be certified to the circuit clerk as the record on appeal. The district clerk must send it to the circuit clerk within the time provided. A copy of the agreed statement may be filed in the appendix required by Rule 30.

**(e) Correction or Modification of the Record.**

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by the parties and the record conformed accordingly.

(2) If anything material to either party is omitted or misstated in the record by error or accident, the misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1980; Apr. 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1992; Apr. 27, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Mar. 26, 2009, eff. Dec. 1, 2009.)

**RULE 11. FORWARDING THE RECORD**

**(a) Appellant's Duty.** An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever is necessary to enable the clerk to assemble and file a record. If there are multiple appeals from a single order, the clerk must forward a single record.

**(b) Duties of Reporter and District Clerk.**

**(1) Reporter's Duty to Prepare and File a Transcript.** The reporter must prepare and file a transcript

(A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the reporter's receipt and the expected completion date and must so endorse, to the circuit clerk.

(B) If the transcript cannot be completed within 14 days of the reporter's receipt of the order, the reporter

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In the Supreme Court of the United States

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

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**PETITION APPENDIX W  
(Federal Rules of Appellate Procedure – Rule 28 – Briefs)**

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*Counsel for Petitioner*

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overned by Rule 27(a)(3)(A) and (a)(4). The title of response must alert the court to the request for relief.

**Reply to Response.** Any reply to a response must be thin 7 days after service of the response. A reply t present matters that do not relate to the response.

**position of a Motion for a Procedural Order.** The act on a motion for a procedural order—including aider Rule 26(b)—at any time without awaiting a and may, by rule or by order in a particular case, its clerk to act on specified types of procedural A party adversely affected by the court's, or the tion may file a motion to reconsider, vacate, or it action. Timely opposition filed after the motion is whole or in part does not constitute a request to , vacate, or modify the disposition; a motion rehat relief must be filed.

**Power of a Single Judge to Entertain a Motion.** A ge may act alone on any motion, but may not dismiss isue determine an appeal or other proceeding. A appeals may provide by rule or by order in a case that only the court may act on any motion or tions. The court may review the action of a single

#### **Format of Papers; Length Limits; Number of Copies.**

**Reproduction.** A motion, response, or reply may produced by any process that yields a clear black on light paper. The paper must be opaque and zed. Only one side of the paper may be used.

**Cover.** A cover is not required, but there must be a n that includes the case number, the name of the the title of the case, and a brief descriptive title ting the purpose of the motion and identifying the or parties for whom it is filed. If a cover is used, it be white.

**Binding.** The document must be bound in any er that is secure, does not obscure the text, and ts the document to lie reasonably flat when open.

**Paper size, line spacing, and margins.** The doc- t must be on 8½ by 11 inch paper. The text must be e-spaced, but quotations more than two lines long be indented and single-spaced. Headings and foot- may be single-spaced. Margins must be at least inch on all four sides. Page numbers may be placed margins, but no text may appear there.

**Typeface and type styles.** The document must y with the typeface requirements of Rule 32(a)(5) ie type-style requirements of Rule 32(a)(6).

**Length Limits.** Except by the court's permission, luding the accompanying documents authorized by a)(2)(B):

a motion or response to a motion produced using a iter must not exceed 5,200 words;

a handwritten or typewritten motion or response to ion must not exceed 20 pages;

(C) a reply produced using a computer must not exceed 2,600 words; and

(D) a handwritten or typewritten reply to a response must not exceed 10 pages.

**(3) Number of Copies.** An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

**(e) Oral Argument.** A motion will be decided without oral argument unless the court orders otherwise.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2016, eff. Dec. 1, 2016.)

## **RULE 28. BRIEFS**

**(a) Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's sub- ject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

- (9) a short conclusion stating the precise relief sought; and
- (10) the certificate of compliance, if required by Rule 32(g)(1).

**(b) Appellee's Brief.** The appellee's brief must conform to the requirements of Rule 28(a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

- (1) the jurisdictional statement;
- (2) the statement of the issues;
- (3) the statement of the case; and
- (4) the statement of the standard of review.

**(c) Reply Brief.** The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the reply brief where they are cited.

**(d) References to Parties.** In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

**(e) References to the Record.** References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(e). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

**(f) Reproduction of Statutes, Rules, Regulations, etc.** If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

**(g) [Reserved]**

**(h) [Reserved]**

**(i) Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

**(j) Citation of Supplemental Authorities.** If pertinent significant authorities come to a party's attention after party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit court, with a copy to all other parties, setting forth citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to the point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and is similarly limited.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. Aug. 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 16, 2013, eff. Dec. 1, 2013; Apr. 2016, eff. Dec. 1, 2016; Apr. 25, 2019, eff. Dec. 1, 2019.)

## RULE 28.1 CROSS-APPEALS

**(a) Applicability.** This rule applies to a case in which a cross-appeal is filed. Rules 28(a)–(c), 31(a)(1), 32(a)(1)–(3), 32(a)(7)(A)–(B) do not apply to such a case, except as otherwise provided in this rule.

**(b) Designation of Appellant.** The party who files the notice of appeal first is the appellant for the purposes of this rule. Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These provisions may be modified by the parties' agreement or by order.

**(c) Briefs.** In a case involving a cross-appeal:

**(1) Appellant's Principal Brief.** The appellant may file a principal brief in the appeal. That brief must comply with Rule 28(a).

**(2) Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal. That brief must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant's statement.

**(3) Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(8) and (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

- (A) the jurisdictional statement;
- (B) the statement of the issues;
- (C) the statement of the case; and
- (D) the statement of the standard of review.

**(4) Appellee's Reply Brief.** The appellee may file a reply brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (10) and may be limited to the issues presented by the cross-appeal.

**(5) No Further Briefs.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

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In the Supreme Court of the United States

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*Petitioner,*

v.

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*Respondent.*

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

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**PETITION APPENDIX W  
(Federal Rules of Appellate Procedure – Rule 30 – Appendix to the Briefs)**

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*Counsel for Petitioner*

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(8) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

(b) **During Consideration of Whether to Grant Rehearing.**

(1) **Applicability.** This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) **Contents, Form, and Length.** Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 26, 2018, eff. Dec. 1, 2018.)

## RULE 30. APPENDIX TO THE BRIEFS

(a) **Appellant's Responsibility.**

(1) **Contents of the Appendix.** The appellant must prepare and file an appendix to the briefs containing:

- (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.

(2) **Excluded Material.** Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) **Time to File; Number of Copies.** Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) **All Parties' Responsibilities.**

(1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant

must, within 14 days after the record is filed, serve the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. Parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellee or a cross-appellee.

(2) **Costs of Appendix.** Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. If any party causes unnecessary parts of the record included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) **Deferred Appendix.**

(1) **Deferral Until After Briefs Are Filed.** The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix is deferred, Rule 30(b) applies, except that a party may designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

(2) **References to the Record.**

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to pages in the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that case, within 14 days after the appendix is filed, the party may serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to references to the pertinent pages of the record. In that case, for the correction of typographical errors, no changes may be made to the brief.

(d) **Format of the Appendix.** The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included

Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(e) **Reproduction of Exhibits.** Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.

(f) **Appeal on the Original Record Without an Appendix.** The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

### RULE 31. SERVING AND FILING BRIEFS

#### (a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

(2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) **Number of Copies.** Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(c) **Consequence of Failure to File.** If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 10, 1986, eff. July 1, 1986; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 26, 2018, eff. Dec. 1, 2018.)

### RULE 32. FORM OF BRIEFS, APPENDICES, AND OTHER PAPERS

#### (a) Form of a Brief.

##### (1) **Reproduction.**

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or *amicus curiae*'s, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) **Binding.** The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) **Paper Size, Line Spacing, and Margins.** The brief must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) **Typeface.** Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) **Type Styles.** A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) **Length.**

(A) **Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B).

(B) **Type-Volume Limitation.**

(i) A principal brief is acceptable if it:

- contains no more than 13,000 words; or

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In the Supreme Court of the United States

FRANKLIN RAFAEL LOPEZ TOALA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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PETITION APPENDIX W  
(Federal Rules of Criminal Procedure – Rule 32 – Sentencing and Judgment)

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United States Code Annotated

Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)

Title VII. Post-Conviction Procedures

Federal Rules of Criminal Procedure, Rule 32

Rule 32. Sentencing and Judgment

Currentness

**(a) [Reserved.]**

**(b) Time of Sentencing.**

**(1) In General.** The court must impose sentence without unnecessary delay.

**(2) Changing Time Limits.** The court may, for good cause, change any time limits prescribed in this rule.

**(c) Presentence Investigation.**

**(1) Required Investigation.**

**(A) In General.** The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

**(B) Restitution.** If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

**(2) Interviewing the Defendant.** The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

**(d) Presentence Report.**

**(1) Applying the Advisory Sentencing Guidelines.** The presentence report must:

- (A)** identify all applicable guidelines and policy statements of the Sentencing Commission;
- (B)** calculate the defendant's offense level and criminal history category;
- (C)** state the resulting sentencing range and kinds of sentences available;
- (D)** identify any factor relevant to:
  - (i)** the appropriate kind of sentence, or
  - (ii)** the appropriate sentence within the applicable sentencing range; and
- (E)** identify any basis for departing from the applicable sentencing range.

**(2) Additional Information.** The presentence report must also contain the following:

- (A)** the defendant's history and characteristics, including:
  - (i)** any prior criminal record;
  - (ii)** the defendant's financial condition; and
  - (iii)** any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;
- (B)** information that assesses any financial, social, psychological, and medical impact on any victim;
- (C)** when appropriate, the nature and extent of nonprison programs and resources available to the defendant;
- (D)** when the law provides for restitution, information sufficient for a restitution order;
- (E)** if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;
- (F)** a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

**(3) Exclusions.** The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

**(e) Disclosing the Report and Recommendation.**

**(1) Time to Disclose.** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

**(2) Minimum Required Notice.** The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

**(3) Sentence Recommendation.** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

**(f) Objecting to the Report.**

**(1) Time to Object.** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

**(2) Serving Objections.** An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

**(3) Action on Objections.** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

**(g) Submitting the Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

**(h) Notice of Possible Departure from Sentencing Guidelines.** Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

**(i) Sentencing.**

**(1) In General.** At sentencing, the court:

**(A)** must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

**(B)** must give to the defendant and an attorney for the government a written summary of--or summarize in camera--any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

**(C)** must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

**(D)** may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

**(2) Introducing Evidence; Producing a Statement.** The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

**(3) Court Determinations.** At sentencing, the court:

**(A)** may accept any undisputed portion of the presentence report as a finding of fact;

**(B)** must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

**(C)** must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

**(4) Opportunity to Speak.**

**(A) By a Party.** Before imposing sentence, the court must:

- (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;
- (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and
- (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

**(B) By a Victim.** Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

**(C) In Camera Proceedings.** Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

**(j) Defendant's Right to Appeal.**

**(1) Advice of a Right to Appeal.**

**(A) Appealing a Conviction.** If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

**(B) Appealing a Sentence.** After sentencing--regardless of the defendant's plea--the court must advise the defendant of any right to appeal the sentence.

**(C) Appeal Costs.** The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

**(2) Clerk's Filing of Notice.** If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

**(k) Judgment.**

**(1) In General.** In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

**(2) Criminal Forfeiture.** Forfeiture procedures are governed by Rule 32.2.

## CREDIT(S)

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(31)-(34), 89 Stat. 376; Apr. 30, 1979, eff. Aug. 1, 1979, Dec. 1, 1980; Oct. 12, 1982, Pub.L. 97-291, § 3, 96 Stat. 1249; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, Pub.L. 98-473, Title II, § 215(a), 98 Stat. 2014; Nov. 10, 1986, Pub.L. 99-646, § 25(a), 100 Stat. 3597; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Sept. 13, 1994, Pub.L. 103-322, Title XXIII, § 230101(b), 108 Stat. 2078; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1996, Pub.L. 104-132, Title II, § 207(a), 110 Stat. 1236; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 23, 2008, eff. Dec. 1, 2008; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 26, 2011, eff. Dec. 1, 2011.)

## RULE APPLICABLE TO OFFENSES COMMITTED PRIOR TO NOV. 1, 1987

This rule as in effect prior to amendment by Pub.L. 98-473 read as follows:

### “Rule 32. Sentence and Judgment

#### “(a) Sentence.

“(1) **Imposition of Sentence.** Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

“(A) determine that the defendant and the defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

“(B) afford counsel an opportunity to speak on behalf of the defendant; and

“(C) address the defendant personally and ask the defendant if the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.

“(2) **Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

#### “(b) Judgment.

“(1) **In General.** A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

“(2) **Criminal Forfeiture.** When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

#### “(c) Presentence Investigation.

**“(1) When Made.** The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

“The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

**“(2) Report.** The presentence report shall contain--

“(A) any prior criminal record of the defendant;

“(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

“(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

“(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

**“(3) Disclosure.**

“(A) At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

“(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

“(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

“(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

“(E) Any copies of the presentence investigation report made available to the defendant and the defendant's counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

**“(F)** The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

**“(d) Plea Withdrawal.** If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

**“(e) Probation.** After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

**“(f) [Revocation of Probation.]** (Abrogated Apr. 30, 1979, eff. Dec. 1, 1980.)

For applicability of sentencing provisions to offenses, see Effective Date and Savings Provisions, etc., note, section 235 of Pub.L. 98-473, as amended, set out under section 3551 of Title 18, Crimes and Criminal Procedure.

#### ADVISORY COMMITTEE NOTES

##### 1944 Adoption

**Note to Subdivision (a).** This rule is substantially a restatement of existing procedure. Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688]. See Rule 43 relating to the presence of the defendant.

**Note to Subdivision (b).** This rule is substantially a restatement of existing procedure. Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688].

**Note to Subdivision (c).** The purpose of this provision is to encourage and broaden the use of presentence investigations, which are not being utilized to good advantage in many cases. See, “The Presentence Investigation” published by Administrative Office of the United States Courts, Division of Probation.

**Note to Subdivision (d).** This rule modifies existing practice by abrogating the ten-day limitation on a motion for leave to withdraw a plea of guilty. See rule II(4) of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688].

**Note to Subdivision (e).** See 18 U.S.C. former § 724 et seq. [now § 3651 et seq.].

##### 1966 Amendments

**Subdivision (a)(1).**--The amendment writes into the rule the holding of the Supreme Court that the court before imposing sentence must afford an opportunity to the defendant personally to speak in his own behalf. See *Green v. United States*, 365 U.S. 301 (1961); *Hill v. United States*, 368 U.S. 424 (1962). The amendment also provides an opportunity for counsel to speak on behalf of the defendant.

**Subdivision (a)(2).**--This amendment is a substantial revision and a relocation of the provision originally found in Rule 37(a)(2): “When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant.”

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**In the Supreme Court of the United States**

FRANKLIN RAFAEL LOPEZ TOALA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION APPENDIX W**  
**(U.S. SENT'G GUIDELINES MANUAL § 3B1.2(b) (effective November 1, 2018))**

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**U.S. SENT'G GUIDELINES MANUAL § 3B1.2(b) (effective November 1, 2018)**

**§3B1.2. Mitigating Role**

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

Commentary

**Application Notes:**

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2. **Requirement of Multiple Participants.**—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. **Applicability of Adjustment.**—

(A) **Substantially Less Culpable than Average Participant.**—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.

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(C) **Fact-Based Determination.**—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
- (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
- (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
- (v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.

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5. Minor Participant.—Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.

6. Application of Role Adjustment in Certain Drug Cases.—In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1992 (amendment 456); November 1, 2001 (amendment 635); November 1, 2002 (amendment 640); November 1, 2009 (amendment 737); November 1, 2011 (amendments 749 and 755); November 1, 2014 (amendment 782); November 1, 2015 (amendment 794).