

United States of America  
First Circuit Court of Appeals

NO. 2013-1612

UNITED STATES OF AMERICA

Appellee,

v.

CARMELO RONDON-FELICIANO

Defendant/Appellant.

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APPEAL FROM PUERTO RICO FEDERAL DISTRICT COURT  
BRIEF OF DEFENDANT

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## **STATEMENT OF JURISDICTION**

The First Circuit Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On November 7, 2012, Carmelo Rondon-Feliciano was found guilty after pleading guilty in the United States District Court for the District of Puerto Rico to one violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), contrary to 21 U.S.C. § 1962(d).

On April 12, 2013, the court (*José A. Fusté, J.*), sentenced him to 262 months, committed, plus five years of supervised release.

A notice of appeal was filed on April 22, 2013.

## **STATEMENT OF ISSUES**

- I. The sentencing court erred in imposing an ambiguous sentence.
- II. Mr. Rondon-Feliciano's offense level in the instant case is based entirely on conduct for which he is currently serving an undischarged term of imprisonment, and thus his sentence in the instant case must run fully concurrent with that undischarged term.

## STATEMENT OF FACTS

### I. Undischarged Term of Imprisonment

In 2006 Carmelo Rondon-Feliciano, otherwise employed as an elevator mechanic, was part of a ring smuggling drugs from Puerto Rico to New England. Using phone intercepts, the Government caught him and others at the airport seeking to transport drugs by air and mail, including the use of weapons. PLEA AGREEMENT (Dec. 21, 2007), *Appx.* at 2; *Change of Plea Hearing* (Dec. 21, 2007) at 5, 32-34, 42-52; PRESENTENCE INVESTIGATION REPORT (Oct. 9, 2008) at 7-9, *Sealed Appx.* at 175. Mr. Rondon-Feliciano was taken into custody on September 26, 2006, and he and others were charged with federal crimes in both the Puerto Rico and Connecticut federal districts.

All the criminal conduct with which Mr. Rondon-Feliciano was charged in those two cases occurred during 2006. Several counts in the indictments alleged criminal conduct from January through June 2006, and other counts alleged three separate dates in September 2006. INDICTMENT ¶¶ 3-6 (June 29, 2006), *Appx.* at 23; PLEA AGREEMENT (Dec. 21, 2007) at 1-3, *Appx.* at 2; *Change of Plea Hearing* (Dec. 21, 2007) at 25-26, 46-47.

The two federal cases, clearly related, were consolidated in the Puerto Rico District Court for plea and sentencing. CONSENT TO TRANSFER OF CASE FOR PLEA AND SENTENCE UNDER RULE 20 (Dec. 21, 2007), *Appx.* at 42 (Connecticut district docket 06-197 transferred to Puerto Rico district docket 08-290); *Change of Plea Hearing* (Dec. 21, 2007) at 3, 7, 18-19; ORDER (Aug. 15, 2008), *Appx.* at 65 (noting PR 06-336 and

PR 08-290 dockets had been consolidated for plea).

In the case originating in the Puerto Rico District, Mr. Rondon-Feliciano pled guilty to two counts of possessing with intent sell drugs; one count of possessing a firearm in furtherance of drug trafficking; and, along with his co-defendants, four counts of “*aiding and abetting each other*” to possess and sell drugs. PLEA AGREEMENT (Dec. 21, 2007) at 1-3, *Appx.* at 2 (emphasis added); ORDER (Aug. 15, 2008), *Appx.* at 65. In the case originating in the Connecticut District, Mr. Rondon-Feliciano pled guilty to one count of “*conspiracy to possess with intent to distribute*” drugs. INDICTMENT ¶¶ 8-9 (June 29, 2006), *Appx.* at 23 (emphasis added); ORDER (Aug. 15, 2008), *Appx.* at 65.

Because they were related and consolidated, the 2006 court sentenced Mr. Rondon-Feliciano concurrently for those convictions, plus a mandatory-minimum. *Change of Plea Hearing* (Dec. 21, 2007) at 4, 7, 27-29 13-14, 30, 45. It imposed a sentence of 87 months, plus 60 months mandatory-minimum, for a total of 147 months committed. JUDGMENT (Nov. 13, 2008), *Appx.* at 18; MINUTE ENTRY OF SENTENCING (Nov. 13, 2008), *Appx.* at 71. The 2006 court also credited Mr. Rondon-Feliciano with time served since his initial incarceration on September 26, 2006. JUDGMENT (Nov. 13, 2008), *Appx.* at 66; *see also* WARRANT FOR ARREST (July 21, 2008) (noting incarceration date); PRESENTENCE INVESTIGATION REPORT (Oct. 9, 2008) at 2, *Sealed Appx.* at 175 (noting defendant incarcerated since arrest).



## II. Timing and Substance of Instant Offense

Three years later in October 2009, while Mr. Rondon-Feliciano was incarcerated, there was a shoot-out at La Tombola, a bar and grocery in the coastal town of Toa Baja in Puerto Rico, in what was believed to be internecine drug-gang conflict. PRESENTENCE INVESTIGATION REPORT ¶ 11 (Feb. 19, 2013), *Sealed Appx.* at 202. Among the nine dead and 20 injured was Mr. Rondon-Feliciano's stepson, with whom he shared a close emotional bond. PRESENTENCE INVESTIGATION REPORT ¶ 18 (Feb. 19, 2013), *Appx.* at 202; *Sentencing Hearing* (Apr. 12, 2013) at 9.

After Mr. Rondon-Feliciano refused to cooperate in the investigation of that crime, in 2012 his name was added to the 2009 indictment, charging him under the Racketeer Influenced and Corrupt Organizations (RICO) statute, the instant case. THIRD SUPERSEDING INDICTMENT (Oct. 19, 2012) at 3, *Appx.* at 73. The RICO allegations spanned the period from 1993 through October 2009. THIRD SUPERSEDING INDICTMENT (Oct. 19, 2012), *Appx.* at 73; PLEA AGREEMENT (Nov. 7, 2012) at 1-2, *Appx.* at 144; *Change of Plea Hearing* (Nov. 7, 2012) at 19. The RICO allegations asserted that Mr. Rondon-Feliciano was engaged in a criminal enterprise stretching over many years involving not only narcotics trafficking and the use of weapons in that business, THIRD SUPERSEDING INDICTMENT ¶ 5 (Oct. 19, 2012), *Appx.* at 73, but also the murders and attempted murders at the La Tombola bar. *Id.* ¶¶ 7o- 7rr.

Mr. Rondon-Feliciano stipulated that he was a member of a criminal organization engaged in drugs and violence, that the enterprise was in existence from 1993 to 2009,

and that he possessed firearms in connection with it. PLEA AGREEMENT (Nov. 7, 2012) at 8, 11-12, *Appx.* at 144. But there is no dispute that he was continuously incarcerated for over three years at the time of the La Tombola massacre, that he was in a Florida jail at the time, and that he was arrested on the RICO charges while in prison. WARRANT FOR ARREST (Sept. 26, 2006), *Appx.* at 1; PRESENTENCE INVESTIGATION REPORT (Oct. 9, 2008) at 2, *Sealed Appx.* at 175; *Change of Plea Hearing* (Nov. 7, 2012) at 7; PRESENTENCE INVESTIGATION REPORT ¶¶ 11, 15 (Feb. 19, 2013), *Sealed Appx.* at 202.

Moreover, while the 2009 RICO indictment specifies murder and attempted murder as overt acts by the other defendants, it does not mention Mr. Rondon-Feliciano in connection with any of these. The overt acts in which Mr. Rondon-Feliciano is alleged to have taken part, and for which he was convicted, were drug trafficking and maintaining an ambience of fear and violence. THIRD SUPERSEDING INDICTMENT (Oct. 19, 2012) at 1-2, 4-10, *Appx.* at 73; PLEA AGREEMENT (Nov. 7, 2012) at 1-2, *Appx.* at 144; *Change of Plea Hearing* (Nov. 7, 2012) at 3-4, 19-20 (defendant agreeing to court's characterization that although he was member of enterprise that committed murder, “[d]uring the period in which you were a member of this enterprise, you possessed on a number of occasions narcotics with the intent to distribute.”).

### **III. Prior Offense is “Relevant Conduct” to Instant Offense and Resulted in “Undischarged Term of Imprisonment”**

It appears indisputable that the period of incarceration stemming from the 2006 consolidated cases which Mr. Rondon-Feliciano was serving at the time he was charged in the 2009 RICO indictment constitutes an “undischarged term of imprisonment” for purposes of USSG §5G1.3. PLEA AGREEMENT ¶ XII (Nov. 7, 2012), *Appx.* at 144 (“The defendant has an undischarged term of imprisonment in Criminal No. 06-336.”); PRESENTENCE INVESTIGATION REPORT (Feb. 19, 2013) at 2, 4, *Sealed Appx.* at 202 (same).

It is also appears indisputable that the 2006 convictions are “relevant conduct to the instant offence” for purposes of USSG §5G1.3. *Sentencing Hearing* (Apr. 12, 2013) at 19 (district court and defendant’s attorney discussing that “Arecibo” refers to stash-house from which 2006 offense conduct was based, and court notes: “Everything that was in Arecibo is relevant conduct in this case.”); *Sentencing Hearing* (Apr. 12 2013) at 12, 19.

#### IV. Calculation of Offense Level

Mr. Rondon-Feliciano's sentence was calculated according to the United States Sentencing Guidelines:

Base Offense Level	34
Aggravating Role	+4
Acceptance of Responsibility	-3
<b>TOTAL</b>	<b>35</b>

PRESENTENCE INVESTIGATION REPORT ¶¶ 19-29- (Feb. 19, 2013), *Sealed Appx.* at 202 (calculation as above but adding additional 2 points for firearms); *Sentencing Hearing* (Apr. 12, 2013) at 25-26 (accepting PSI in all respects except 2 additional points for firearms, and setting offense level to 35); PLEA AGREEMENT (Nov. 7, 2012) at 5, *Appx.* at 144 (stipulation to calculation as above).

At his sentencing hearing, following Mr. Rondon-Feliciano's allocution, the court told him: "[Y]ou are not here for the Tombola massacre. You are here for the drug dealing, along with others. Remember that." *Sentencing Hearing* (Apr. 12, 2013) at 15. The court went on to remind counsel that Mr. Rondon-Feliciano was being sentenced "[f]or everything that happened before La Tombola." *Id.* at 16.

Thus it appears that Mr. Rondon-Feliciano's entire offense level was based on the drug and protection ring, and not the 2009 massacre that occurred while Mr. Rondon-Feliciano was incarcerated.

## V. Imposition of Sentence

Based on the calculated total offense level of 35, and combined with his criminal history, the court used the high end of the sentencing guidelines and imposed a sentence of 262 months.

Regarding concurrency, the court stated: “And that’s going to be concurrent with the sentences imposed in cases 06-336 and 08-290.” *Sentencing Hearing* (Apr. 12, 2013) at 26. Likewise in its judgment the court confirmed: “Two hundred sixty-two (262) months to be served concurrently with the sentences imposed in Criminal cases 06-336 and 08-290.” JUDGMENT IN A CRIMINAL CASE (Apr. 12, 2013), *Addendum* at 20 (capitalization altered, portion of docket numbers omitted.)

The court did not however, specify the beginning date of the concurrency, nor whether it was pursuant to USSG §5G1.3(b) or USSG §5G1.3(c).

At sentencing Mr. Rondon-Feliciano requested his sentence in the instant case be made fully concurrent with the non-discharged sentence he was then (and still is) serving stemming from the 2006 convictions. SENTENCING MEMORANDUM - OBJECTIONS AND COMMENTS TO THE PRE SENTENCE REPORT (Apr. 4, 2013) at 8, 10, *Appx.* at 159; *Sentencing Hearing* (Apr. 12, 2013) at 10-12, 18-20.<sup>1</sup>

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<sup>1</sup>Although Mr. Rondon-Feliciano waived appellate rights, he preserved his ability to address the concurrency issue to this Court. PLEA AGREEMENT ¶¶ XI, XII (Nov. 7, 2012), *Appx.* at 144; *Plea Hearing* (Nov. 7, 2012) at 18.

## STATEMENT OF THE CASE

Mr. Rondon-Feliciano pled guilty to one count pursuant to RICO of being a “member and/or associate of a criminal organization whose members and associates engaged in narcotics distribution and acts of violence, including murder and attempted murder.” PLEA AGREEMENT (Nov. 7, 2012) at 11, *Appx.* at 144; *Change of Plea Hearing* (Nov. 7, 2012), *passim*. After conviction, Mr. Rondon-Feliciano was sentenced as described *supra*, and appealed.

At Mr. Rondon-Feliciano’s request, counsel filed an *Anders* brief. On May 5, 2014 Mr. Rondon-Feliciano filed a motion to expand the record with documents offered, along with a *pro se* brief raising issues relying on those materials. On October 9, 2014 this Court ordered that Mr. Rondon-Feliciano’s *pro se* “motion to supplement the record is provisionally granted.”

This Court also discovered an issue worthy of briefing, and directed counsel to file a brief addressing “the concurrency of appellant’s sentence with the sentence previously imposed,” and “whether the district court’s sentencing order and judgment was sufficiently clear as to which provision of [USSG §5G1.3] should govern.” ORDER OF COURT (Oct. 9, 2014).

## **SUMMARY OF ARGUMENT**

Mr. Rondon-Feliciano first notes that his sentence is ambiguous, and regardless of anything else, his case must be remanded for re-sentencing. He then points out that his offense level is entirely based on conduct for which he has already been sentenced, and that therefore the sentence in the instant case must run fully concurrent with his undischarged term of imprisonment.

## ARGUMENT

The purpose of section 5G1.3 of the federal sentencing guidelines is to “mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant’s sentence.” *Witte v. United States*, 515 U.S. 389, 405 (1995) (decided under earlier version of USSG §5G1.3); *United States v. Caraballo*, 200 F.3d 20, 28 29 (1st Cir. 1999) (intent of § 5G1.3 is “the prevention of duplicative punishment”); 18 U.S.C. § 3584 (authorizing consecutive and concurrent sentences).

Accordingly § 5G1.3 creates three categories of separate-prosecution situations.<sup>2</sup> *Caraballo*, 200 F.3d 20 at 29. When there is no relationship between the two prosecutions, prison time is served consecutively. USSG §5G1.3(a). But when the two prosecutions are related and the earlier “was the basis for an increase in the offense level” for the later, time must be served concurrently. USSG §5G1.3(b); USSG §5G1.3, Application Note 2. And when there is some mix of relatedness, the court has discretion to impose partially concurrent and partially consecutive sentences. USSG §5G1.3(c); USSG §5G1.3, Application Note 3. This Court reviews these matters *de novo*. *United States v. Carrasco De Jesus*, 589 F.3d 22, 27 (1st Cir. 2009) (“Because the claim of error now before us rests upon the interpretation of a guideline provision, that claim engenders *de novo* review.”).

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<sup>2</sup>The text of USSG 5G1.3 and its application notes are included in the addendum hereto.



## **I. Remand Necessary to Clarify When Period of Concurrency Began**

The court specified it sentenced Mr. Rondon-Feliciano in the instant case concurrent with the undischarged term of his incarceration for the 2006 cases. It did not, however, either in its oral pronouncement or its written judgment, specify *when* the concurrency was to begin. Thus, it is unclear whether the sentence in the instant case began *nunc pro tunc* on September 26, 2006 when Mr. Rondon-Feliciano was first incarcerated, on April 12, 2013 when he was sentenced in the instant case, or on some other date – a potential difference of 78 months.

Criminal sanctions must be clear upon pronouncement. *United States v. Daugherty*, 269 U.S. 360, 363 (1926) (“Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them.”). The guidelines do not permit indeterminate sentences. *United States v. Brewer*, 23 F.3d 1317, 1320 (8th Cir. 1994). Moreover, it is important policy to avoid risk that the Bureau of Prisons may not appropriately credit concurrent sentences. USSG §5G1.3(b)(1); *United States v. Ramirez*, 252 F.3d 516, 518 (1st Cir. 2001). Finally, the rule of lenity applies when the application of the sentencing guidelines is ambiguous. *See United States v. Stepanian*, 570 F.3d 51, 57 (1st Cir. 2009).

Accordingly, this Court should find that the concurrency began, *nunc pro tunc*, on September 26, 2006. Moreover, whatever date the sentencing court intended, this case should be remanded for re-sentencing to clarify the ambiguity. *See United States v. Martin*, 180 F. App’x 182 (1st Cir. 2006) (remand due to ambiguity in sentence created by comments at sentencing); *Brewer*, 23 F.3d at 1320.

## II. Sentence Must Run Fully Concurrent

Because the period of incarceration stemming from the 2006 consolidated cases are an “undischarged term of imprisonment,” and because they are “relevant conduct,” the remaining question is whether the 2006 convictions were “the basis for an increase in the offense level for the instant offense” pursuant to USSG §5G1.3; USSG §5G1.3, Application Note 2.

In the typical case concerning the application of USSG §5G1.3, the dispute is whether some *portion* of the defendant’s prior conduct was taken into account in fashioning the sentence in the subsequent case. *See, e.g., United States v. Santiago Burgos*, 750 F.3d 19, 25 (1st Cir. 2014) (whether conduct as drug runner was basis for increase in offense level); *Carrasco De Jesus*, 589 F.3d at 27 (whether certain counterfeit check was used to calculate offense level); *United States v. Cruz Rodriguez*, 541 F.3d 19, 36 (1st Cir. 2008) (whether use of firearm was basis for increase in offense level); *United States v. Austin*, 239 F.3d 1, 4 (1st Cir. 2001) (whether certain bank robbery was basis for increase in offense level); *United States v. Caraballo*, 200 F.3d 20, 23 (1st Cir. 1999) (whether certain burglary in burglary conspiracy was fully accounted for); *United States v. Gondek*, 65 F.3d 1, 2 (1st Cir. 1995) (whether firearms possession was fully taken into account).

Here the court held that Mr. Rondon-Feliciano’s conduct in the criminal enterprise was limited to drug distribution and maintaining a complexion of violence. It is thus apparent that Mr. Rondon-Feliciano’s *entire* 35-point offense level in the instant case is attributable to his pre-incarceration conduct, and *none* is attributable to the

murders and attempted murders that occurred after he was incarcerated.

Accordingly, Mr. Rondon-Feliciano's entire 2006 conduct is "relevant conduct to the instant offense of conviction," and his entire sentence in the instant case is predicated on his 2006 convictions.

USSG §5G1.3(b) specifies that in these circumstances, the sentence in the instant case "shall be imposed to run concurrently" with that of the prior case. Moreover, the concurrency must be *fully* concurrent. Because Mr. Rondon-Feliciano's entire sentence in the instant case is based on his 2006 convictions, the beginning date of the concurrency must be the initial date of his incarceration for those charges – September 26, 2006.

This Court should thus remand to clarify Mr. Rondon-Feliciano's sentence, with instructions to specify September 26, 2006, *nunc pro tunc*, as the beginning date of Mr. Rondon-Feliciano sentence for the instant offense.

### **III. Incorporation of Matters Stated in *Pro Se* Brief**

After counsel was directed to file and filed an *Anders* brief, the defendant filed a *pro se* brief in which he argued various issues. The content of that *pro se* brief, and the arguments made therein, are incorporated herein, as though presented by counsel.

## **CONCLUSION**

For the foregoing reasons, this Court should remand for re-sentencing with instructions to impose the sentence in the instant case fully concurrent with the undischarged term stemming from Mr. Rondon-Feliciano's earlier conviction.

Respectfully submitted,

Carmelo Rondon-Feliciano  
By his Attorney,

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/s/

Dated: February 11, 2015

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**REQUEST FOR ORAL ARGUMENT AND CERTIFICATION**

Carmelo Rondon-Feliciano requests that Attorney Joshua L. Gordon be allowed oral argument.

I certify that on February 11, 2015, I will forward via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to the office of the United States Attorney.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version X6, and that it contains no more than 3,469 words, exclusive of those portions which are exempted.

/s/

Dated: February 11, 2015

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Joshua L. Gordon, Esq.

**ADDENDUM**

USSG §5G1.3. . . . . 16  
JUDGMENT IN CRIMINAL CASE (April 17, 2013). . . . . 20

**§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment**

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:
  - (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
  - (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

- (c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Commentary

Application Notes:

1. Consecutive Sentence - Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.
2. Application of Subsection (b).—
  - (A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).
  - (B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).
  - (C) Imposition of Sentence.—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.
  - (D) Example.—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

*The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of level 16 for sale of 55 grams of cocaine; 3 level reduction*

*for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.*

3. Application of Subsection (c).—

- (A) In General.—Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:
- (i) *the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));*
  - (ii) *the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;*
  - (iii) *the time served on the undischarged sentence and the time likely to be served before release;*
  - (iv) *the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and*
  - (v) *any other circumstance relevant to the determination of an appropriate sentence for the instant offense.*
- (B) Partially Concurrent Sentence.—In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.
- (C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.
- (D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may

*exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.*

- (E) *Downward Departure.—Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.*

*To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(c), rather than as a credit for time served.*

4. *Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).*

*Background: Federal courts generally "have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." See Setser v. United States, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. See Setser, 132 S. Ct. at 1468. Exercise of that discretion, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.*

*Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 289); November 1, 1991 (see Appendix C, amendment 385); November 1, 1992 (see Appendix C, amendment 465); November 1, 1993 (see Appendix C, amendment 494); November 1, 1995 (see Appendix C, amendment 535); November 1, 2002 (see Appendix C, amendment 645); November 1, 2003 (see Appendix C, amendment 660); November 1, 2010 (see Appendix C, amendment 747); November 1, 2013 (see Appendix C, amendment 776).*





DEFENDANT: CARMELO RONDON-FELICIANO  
CASE NUMBER: 3:09-CR-00947-002 (JAF)

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

**TWO HUNDRED SIXTY-TWO (262) MONTHS TO BE SERVED CONCURRENTLY WITH THE SENTENCES IMPOSED IN CRIMINAL CASES 06-336 (GAG) AND 08-290 (GAG).**

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

- That the defendant be designated to Coleman, FL or Fort Dix.

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

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

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_ .

as notified by the United States Marshal.

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

before 2 p.m. on \_\_\_\_\_ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

a \_\_\_\_\_ , with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CARMELO RONDON-FELICIANO

CASE NUMBER: 3:09-CR-00947-002 (JAF)

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

**FIVE (5) YEARS.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

**STANDARD CONDITIONS OF SUPERVISION**

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CARMELO RONDON-FELICIANO  
CASE NUMBER: 3:09-CR-00947-002 (JAF)

### **ADDITIONAL SUPERVISED RELEASE TERMS**

1. The defendant shall not commit another Federal, state, or local crime, and shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court.
2. The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release and thereafter, submit to random drug test, no less than 3 samples during the supervision period and not to exceed 104 samples per year under the coordination of the U.S. Probation Officer. If any such samples detect substance abuse, the defendant shall participate in a in-patient or out-patient substance abuse program, for evaluation and/or treatment, as arranged by the U.S. Probation Officer until duly discharged. The defendant is required to contribute to the cost of services rendered (co-payment) in an amount arranged by the U.S. Probation Officer based on the ability to pay or availability of third party payment.
3. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.
4. The defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. §1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation of release. Defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
5. The defendant shall cooperate in the collection of a DNA sample as directed by the U.S. Probation Officer, pursuant to the Revised DNA Collection Requirements, and the Title 18, U.S. Code § 3563(a)(9).
6. The defendant shall participate in a vocational training and/or job placement program recommended by the U.S. Probation Officer.

DEFENDANT: CARMELO RONDON-FELICIANO

CASE NUMBER: 3:09-CR-00947-002 (JAF)

**CRIMINAL MONETARY PENALTIES**

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$ 100.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until \_\_\_\_\_. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

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

<b>TOTALS</b>	\$ <u>0.00</u>	\$ <u>0.00</u>
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Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_

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

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

the interest requirement is waived for the  fine  restitution.

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

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