

United States of America
First Circuit Court of Appeals

NO. 2013-1612

UNITED STATES OF AMERICA

Appellee,

v.

CARMELO RONDON-FELICIANO

Defendant/Appellant

APPEAL FROM PUERTO RICO FEDERAL DISTRICT COURT
BRIEF IN ACCORD WITH *ANDERS v. CALIFORNIA*

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ANDERS PREAMBLE

I am submitting this brief in accordance with *Anders v. California*, 386 U.S. 738 (1967). After having carefully examined this record and after having researched the relevant statutes and case law, I have concluded this appeal presents only legally frivolous issues. Therefore, I request the Court's permission to withdraw as attorney of record and to allow Appellant Mr. Rondon-Feliciano to file any further briefs he deems necessary.

TABLE OF AUTHORITIES

Federal Cases

<i>Anders v. California</i> , 386 U.S. 738 (1967).....	ii, 1, 10
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Federal Statutes

18 U.S.C. § 3742.....	1
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Federal Rules

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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, 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

My review of the record reveals no issues which can be advanced in good faith. Any arguable points that could exist arise from Mr. Rondon-Feliciano's plea and sentencing. Thus the questions raised in this *Anders* appeal are those that have been suggested by the defendant:

- I. Whether the defendant was unjustly accused because he was incarcerated at the time of the la tombola massacre;
- Ii. Whether the court understood the plea was pursuant to rule 11(c)(1)(C);
- Iii. Whether the court sentenced the defendant with regard to a firearm;
- Iv. Whether the defendant was sentenced consistent with his plea agreement;
- V. Whether the defendant understood his plea;
- Vi. Whether the defendant received effective assistance of counsel;
- Vii. Whether the defendant knowingly waived his appellate rights;

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

In 2009 there was a mass shooting at La Tombola bar in Toa Baja, Puerto Rico, that may have been part of internecine violence among suspected drug dealers. At the time, Mr. Rondon-Feliciano was incarcerated on a previous conviction involving drugs and a firearm.

Mr. Rondon-Feliciano plead 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), DE# 637 at 11; *Change of Plea Hearing* (Nov. 7, 2012), DE# 747, *passim*.

Later Mr. Rondon-Feliciano was sentenced to 262 months committed, plus five years of supervised release. JUDGMENT IN A CRIMINAL CASE (Apr. 12, 2013), DE# 1074; *Sentencing Hearing* (Apr. 12, 2013), DE#1170, *passim*.

SUMMARY OF ARGUMENT

Appellate counsel has reviewed the record and has failed to identify any legally non-frivolous issues. Counsel nonetheless states several issues that the Appellant suggests are raised in his case.

ARGUMENT

I. Whether the Defendant was Unjustly Accused Because he was Incarcerated at the Time of the La Tombola Massacre

The first issue Mr. Rondon-Feliciano suggests is that because he was in jail at the time of La Tombola, he got sentenced for a crime for which he had no involvement. The record shows, however, that Mr. Rondon-Feliciano plead guilty to a RICO charge, the conduct of which occurred over a long period of time including before Mr. Rondon-Feliciano was incarcerated. Thus this issue is frivolous.

II. Whether the Court Understood the Plea was Pursuant to Rule 11(c)(1)(C)

The second issue Mr. Rondon-Feliciano suggests is that the court did not understand his plea was pursuant to Federal Rules of Criminal Procedure 11(c)(1)(C), also known as a “C-plea.” A C-plea means the defendant agrees to a specific sentence range. The record shows, however, that 11(c)(1)(C) is noted in Mr. Rondon-Feliciano’s plea agreement, PLEA AGREEMENT (Nov. 7, 2012), DE# 637 at 1, that Mr. Rondon-Feliciano’s attorney and also the judge mentioned C-pleas in court several times during the many status hearings, *Status Conference* (Mar. 30, 2012), DE# 1156 at 13, 15; *Status Conference* (Sept. 25, 2012), DE# 1152 at 24, 25; *Change of Plea Hearing* (Nov. 7, 2012), DE# 747 at 21, that the court understood what they C-pleas are, and that the court recognized that some of the defendants in the case might use a C-plea. At the end of Mr. Rondon-Feliciano’s sentencing hearing, his attorney told the judge that this was a C-plea, making it apparent the court was apprised. During Mr. Rondon-Feliciano’s sentencing, the judge indicated that “I don’t remember taking a type C plea in this case, but anyway, that’s what the paper says.” *Sentencing Hearing* (Apr. 12, 2013), DE# 1170 at 28. Moreover, even if the judge did not know, he sentenced Mr. Rondon-Feliciano as though he did. Thus this issue is frivolous.

III. Whether the Court Sentenced the Defendant With Regard to a Firearm

The third issue Mr. Rondon-Feliciano suggests is that he was sentenced for a firearm that he had already been sentenced for in a previous crime. The record shows, however, that Mr. Rondon-Feliciano was not sentenced for a firearm in this case. He admitted in his plea agreement he was involved in a RICO criminal enterprise that routinely used firearms, PLEA AGREEMENT (Nov. 7, 2012), DE# 637 at 11, not that a specific gun was used in a particular instance. Mr. Rondon-Feliciano's Pre-Sentence Investigation Report included an enhancement for the use of guns generally, PRE-SENTENCE INVESTIGATION REPORT (Feb. 19, 2013), DE# 871 at ¶ 22, but the judge explicitly rejected the 2-point firearms sentencing enhancement noted in the PSR. *Sentencing Hearing* (Apr. 12, 2013), DE# 1170 at 26 ("So therefore, I am finding that the calculations in the Presentence Report are correct, but I am not considering the two level adjustment for firearms that was properly calculated."). In addition, the court made Mr. Rondon-Feliciano's sentence on the appealed conviction run concurrently with the sentence he was already serving on the allegedly conflicting conviction. *Id.* at 16 Thus this issue is frivolous.

IV. Whether the Defendant was Sentenced Consistent with his Plea Agreement

The fourth issue Mr. Rondon-Feliciano suggests is that he was sentenced for more than he bargained for in his plea agreement. The record shows, however, that he plead to being an “organizer/leader” of the RICO conspiracy, for a total offense level of 35. PLEA AGREEMENT (Nov. 7, 2012), DE# 637 at 5. Mr. Rondon-Feliciano’s plea agreement says that if his criminal history is I or II, he agrees to a sentence of 180 to 210 months. *Id.* It also says that if his criminal history is level III or higher, he agrees to a sentence calculated in the guideline range for offense level 35. *Id.* The guideline range for a criminal history of III is 210 to 262 months. The government argued that Mr. Rondon-Feliciano had an offence level of 37 and a criminal history of IV, which would be 235 to 293 months. The court eliminated the firearms enhancement, however, and thus found Mr. Rondon-Feliciano had a total offense level of 35 and a criminal history of III. *Sentencing Hearing* (Apr. 12, 2013), DE# 1170 at 26. It then sentenced him to the highest end of the guidelines range to which he agreed, 262 months. Therefore he was not sentenced for greater than his bargain, and this issue is frivolous.

V. Whether the Defendant Understood his Plea

The fifth issue Mr. Rondon-Feliciano suggests was whether he understood his plea agreement. He says his trial lawyer didn't explain it to him. The record shows, however, that he knowingly plead. Throughout the hearings Mr. Rondon-Feliciano's lawyers at various times explained to the judge the difficulty they had talking with him about a possible plea and various issues surrounding a possible plea, *Status Conference* (Sept. 13, 2011), DE# 272 at 14, 17; *Status Conference* (Jan. 18, 2012), DE# 1157 at 38, 40, 42, 44; *Status Conference* (Feb. 24, 2012), DE# 1166 at 47; *Status Conference* (Mar. 30, 2012), DE# 1156 at 13, 14, 15; *Hearing* (May 11, 2012), DE# 1159, *passim*; *Status Conference* (Aug. 6, 2012), DE# 1153 at 16, 19; *Status Conference* (Sept. 25, 2012), DE# 1152 at 23, 24, 25, 26; *Status Conference* (Oct. 25, 2012), DE# 720 at 63, the point being that the judge knew Mr. Rondon-Feliciano had been talking with his lawyers about a plea several times during the pendency of this case. In his colloquy answers to the judge, Mr. Rondon-Feliciano said he understood the plea agreement. *Change of Plea Hearing* (Nov. 7, 2012), DE# 747 at 16. In addition, in that colloquy, the court addressed each issue listed in Federal Rule of Criminal Procedure 11(b)(1)(A)-(O); *Change of Plea Hearing* (Nov. 7, 2012), DE# 747, *passim*.

It is thus apparent that Mr. Rondon-Feliciano's lawyers did take at least some time to talk with Mr. Rondon-Feliciano about a plea and sought to ensure he understood it, and that Mr. Rondon-Feliciano indicated he did understand it. Thus the issue is frivolous.

VI. Whether the Defendant Received Effective Assistance of Counsel

Although the record is not developed on this issue, Mr. Rondon-Feliciano told the court that he was satisfied with the services of his attorney. *Change of Plea Hearing* (Nov. 7, 2012), DE# 747 at 9. Thus this issue is either frivolous or unpreserved. If unpreserved, upon a review of the record counsel can discern no plain error.

VII. Whether the Defendant Knowingly Waived his Appellate Rights

The sixth issue Mr. Rondon-Feliciano has raised is whether he knowingly waived his appellate rights. The record shows, however, that although it was expressed in a compound sentence by the judge, the court asked Mr. Rondon-Feliciano whether he understood that by pleading guilty in accord with the written plea agreement, he was waiving his right to appeal. Mr. Rondon-Feliciano answered “yes.” *Sentencing Hearing* (Apr. 12, 2013), DE# 1170 at 15. Thus this issue is frivolous.

CONCLUSION

In conformance with *Anders v. California*, I have examined the record for issues which might arguably support an appeal. In my opinion, there are none. Consequently, I respectfully request the Court rule on this appeal accordingly.

Respectfully submitted,

Mr. Rondon-Feliciano
By his Attorney,

Law Office of Joshua L. Gordon

/s/

Dated: January 30, 2014

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CERTIFICATE OF SERVICE

I certify that on February 4, 2014, 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 certify that on February 4, 2014, I will forward one paper copy of this brief to the Appellant, Carmelo Rondon-Feliciano, Reg. # 30106-069, FCI Coleman Low, P.O. Box 1031, Coleman, FL 33521, both in original English and in his native language Spanish.

Counsel has further apprised Mr. Rondon-Feliciano that he may file his own brief within 30 days from the date of this brief, in which he may argue in support of reversal or modification of the judgment.

Dated: January 30, 2014

/s/

Joshua L. Gordon, Esq.

ADDENDUM

JUDGMENT IN A CRIMINAL CASE (Apr. 12, 2013). 12

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
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CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 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>

TOTALS	\$	_____ 0.00	\$	_____ 0.00
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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.