United States Court of Appeals
For the First Circuit

No. 15-2070

UNITED STATES OF AMERICA,

Appellee,

v.

EDWIN OMAR ALMONTE-NÚÑEZ,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Daniel R. Domínguez, U.S. District Judge]

Before

Torruella, Dyk,* and Thompson,
Circuit Judges.

Michael M. Brownlee, with whom The Brownlee Law Firm, P.A. was on brief, for appellant.

John P. Taddei, Attorney, Criminal Division, Appellate Section, U.S. Department of Justice, with whom W. Stephen Muldrow, United States Attorney, Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, and Julia M. Meconiates, Assistant United States Attorney, were on brief, for appellee.

June 18, 2020

* Of the Federal Circuit, sitting by designation.

DYK, Circuit Judge. Edwin Omar Almonte-Núñez appeals convictions and sentences imposed by the United States District Court for the District of Puerto Rico for robbing an individual of a United States passport in violation of 18 U.S.C. § 2112, brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii), and possessing a firearm in violation of 18 U.S.C. § 922(g)(1) (possession by a convicted felon). We affirm.

I.

This case returns to this court after resentencing following the decision in United States v. Almonte-Núñez ("Almonte I"), 771 F.3d 84 (1st Cir. 2014).

As recounted in the earlier decision, on September 30, 2011, Almonte unlawfully entered the residence of a 78-year-old widow. During this home invasion, Almonte brandished and aimed towards the victim a loaded pistol, threatened to shoot her, twice struck her in the face with the pistol, and kicked her after she fell to the ground. The victim suffered grievous injuries, including the loss of her right eye. Almonte was thereafter arrested by Puerto Rico police officers after a high-speed car chase.

As relevant to this appeal, the Commonwealth of Puerto Rico court charged Almonte with two counts of violating the Puerto Rico Weapons Act: carrying and using a firearm without a license

("Commonwealth count 1") and discharging or pointing a firearm at another person ("Commonwealth count 2"). Almonte pled guilty to those charges and on June 6, 2012, was sentenced to ten years and two years of imprisonment for each count, respectively, to be served consecutively.

Thereafter, a federal grand jury returned an indictment charging Almonte with robbing the victim of her United States passport in violation of 18 U.S.C. § 2112 ("federal count 1"), brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) ("federal count 2"), and possessing a firearm in violation of 18 U.S.C. § 922(g)(1) (possession by a convicted felon) ("federal count 3"). On December 12, 2012, Almonte pled guilty to his federal charges. On June 14, 2013, the district court sentenced him to 150 months for federal counts 1 and 3, to be served concurrently, and 84 months for federal count 2, to be served consecutively with his sentence for federal counts 1 and 3.

Almonte appealed his federal sentence, arguing that his 150-month sentence for federal count 3 exceeded the statutory maximum. Almonte I, 771 F.3d at 91. This court held that Almonte's sentence "constituted clear and obvious error" because it exceeded the "maximum level of imprisonment [of 120 months] established by Congress" under 18 U.S.C. § 924(a)(2), and remanded to the district court with directions "to enter a modified sentence

of 120 months on [federal count 3]." Id. at 91–92.

On August 21, 2015, the district court conducted a sentencing hearing in accordance with the remand order. At the resentencing hearing, Almonte twice expressed a concern that he was not "being adequately represented [by] [his] counsel," because of his belief that he was supposed to be resentenced for time served. App'x 55, 59. Almonte's counsel explained that there was "nothing in [the remand order] that would lea[d] one to believe that [he was supposed to be sentenced for time served]." App'x 57. The district court stated that the issue was waived because Almonte had not raised it in the first appeal. The district court modified Almonte's sentence for federal count 3 to 120 months and ordered that Almonte's federal sentence be served concurrently with the sentence imposed by the Commonwealth.

Almonte now appeals the sentence imposed at his resentencing. In his opening brief, he argues that (1) the district court failed to inquire into his request for substitution of new counsel and (2) his conviction for federal count 1 under 18 U.S.C. § 2112 did not constitute a predicate "crime of violence" under 18 U.S.C. § 924(c)(3)(A) for his conviction for federal count 2 under 18 U.S.C. § 924(c)(1)(A)(ii) and that § 924(c)(3)(B) was unconstitutionally vague under the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). Before the government filed its responsive brief, the Supreme Court decided

Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016), holding that under the Double Jeopardy Clause of the Fifth Amendment, the Commonwealth of Puerto Rico and the United States were not separate sovereigns. Id. at 1876. This court ordered the parties to file supplemental briefs addressing whether Almonte's federal convictions were barred by the Double Jeopardy Clause under Sánchez Valle. After briefing had concluded, the Supreme Court decided United States v. Davis, 139 S. Ct. 2319 (2019), which held that 18 U.S.C. § 924(c)(3)(B) ("the residual clause") was unconstitutionally vague. Id. at 2336. This court again ordered supplemental briefing from the parties, this time to address the effect of Davis on Almonte's conviction for federal count 2.

II.

A.

The government urges that Almonte's arguments are barred by the law of the case doctrine. "Writ large, the law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" United States v. Matthews, 643 F.3d 9, 12 (1st Cir. 2011) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)). "[A] legal decision made at one stage of a civil or criminal case, unchallenged in a subsequent appeal despite the existence of ample opportunity to do so, becomes the law of the case for future stages of the same litigation." United

States v. Bell, 988 F.2d 247, 250 (1st Cir. 1993). This doctrine "bars a party from resurrecting issues that either were, or could have been, decided on an earlier appeal." Matthews, 643 F.3d at 12–13.

"The law of the case doctrine has two branches. The first branch--known colloquially as the mandate rule--'prevents relitigation in the trial court of matters that were explicitly or implicitly decided by an earlier appellate decision in the same case.'" Id. at 13 (emphasis added) (quoting United States v. Moran, 393 F.3d 1, 7 (1st Cir. 2004)). "The second branch of the doctrine binds a 'successor appellate panel in a second appeal in the same case' to honor fully the original decision" and, with some limited exceptions, "contemplates that a legal decision made at one stage of a criminal or civil proceeding should remain the law of that case throughout the litigation, unless and until the decision is modified or overruled by a higher court." Id. (quoting Moran, 393 F.3d at 7). Under this doctrine, "[the appellate court] need not and do[es] not consider a new contention that could have been but was not raised on the prior appeal." AngioDynamics, Inc. v. Biolitec AG, 823 F.3d 1, 4 (1st Cir. 2016) (quoting United States v. Arreguin, 735 F.3d 1168, 1178 (9th Cir. 2013)); see also M. v. Falmouth Sch. Dep't, 875 F.3d 75, 78 (1st Cir. 2017) ("The district court correctly concluded that . . . introducing a claim that could have been raised [in the previous appeal] would be

inappropriate.").

The government argues that both the district court and this court are bound by the law of the case because "the sole purpose of the remand was to impose a 120-month sentence for [federal count 3] so that it would not exceed the statutory maximum for that [c]ount." Government's Br. 9–10 (citing Almonte I, 771 F.3d at 92–93). The government suggests that unless this court "expressly directed otherwise, [the] district court [could] only consider new arguments or facts on remand that [were] made relevant by the Court of Appeals decision." Id. at 10 (citing United States v. Cruzado-Laureano, 527 F.3d 231, 235 (1st Cir. 2008)).

The government relies on United States v. Santiago-Reyes, 877 F.3d 447 (1st Cir. 2017), which stated that the mandate rule "generally requires that a district court conform with the remand order from an appellate court." Id. at 450 (quoting United States v. Ticchiarelli, 171 F.3d 24, 31 (1st Cir. 1999)). However, Santiago-Reyes did not purport to overturn the longstanding First Circuit precedent that "[the mandate] rule cannot apply" to "issue[s] [that] could not have been raised on the appeal from the original sentence." United States v. Bryant, 643 F.3d 28, 34 (1st Cir. 2011). "Whatever [the mandate rule] may preclude as to arguments that were made and lost or should have been made but were not, it can hardly extend to arguments that a party could not reasonably have been expected to make in the prior sentencing."

Id. at 33–34; see also Matthews, 643 F.3d at 14; United States v. García-Ortiz, 904 F.3d 102, 106 (1st Cir. 2018).

B.

Almonte's first argument is that the district court erred when it failed to inquire into his request for substitution of counsel. The government urges that Almonte's argument is barred by the mandate rule. We conclude that Almonte's argument is not barred because it concerns an issue that arose for the first time in the resentencing hearing. See Bryant, 643 F.3d at 34.

We nonetheless conclude that the district court did not abuse its discretion in denying Almonte's request for substitution of counsel. When reviewing a district court's denial of a request for substitution of counsel, this court "considers not only the adequacy of the [district] court's inquiry but also factors such as the timeliness of the motion for substitution and the nature of the conflict between lawyer and client." United States v. Myers, 294 F.3d 203, 207 (1st Cir. 2002). "The extent and nature of the inquiry may vary in each case; it need not amount to a formal hearing." United States v. Woodard, 291 F.3d 95, 108 (1st Cir. 2002). "We . . . limit our focus to whether, in light of the then-existing circumstances, the court erred in denying the motion." United States v. Pierce, 60 F.3d 886, 891 (1st Cir. 1995) (reviewing an "analogous" challenge to a district court's denial of a motion to withdraw as counsel).

Here, the untimeliness of Almonte's request weighs against finding that the district court abused its discretion. Almonte's request was made five months after this court's decision in Almonte I, and he does not provide any explanation for the delay. See Woodard, 291 F.3d at 108 (holding that a request for substitution of counsel was untimely when made "several months" after a conflict was known and with "no explanation for why [the defendant] did not complain earlier").

Further, Almonte's only ground for requesting substitute counsel was the theory that he should have been sentenced for time served. At the resentencing hearing, Almonte stated: "I don't feel I am being adequately represented with this counsel." App'x 55. Almonte's trial counsel explained that Almonte had thought that he was being resentenced "for credit for time served," but that there appeared to be no "legal argument to be made for why [Almonte] should be credit[ed] for time served." App'x 57–58. The district court agreed, and further stated that Almonte had waived this issue by failing to raise it in his first appeal. When the district court asked Almonte if he wanted to make an allocution, Almonte stated: "I don't feel that I'm being adequately represented with this attorney. When I was sentenced the first time, the circuit wrote and said that [the district court] did not count the points for the state cases." App'x 59. Notably, when prompted for further explanation by the district

court, Almonte stated "[t]hat's it," and provided no further justification for his request for substitution of counsel. Id. When Almonte made his request for new counsel, "the trial court . . . conduct[ed] an appropriate inquiry into the source of the defendant's dissatisfaction with his counsel," United States v. Díaz-Rodríguez, 745 F.3d 586, 590 (1st Cir. 2014), in order to ascertain whether the court had "good cause for rescinding the original appointment and interposing a new one." Myers, 294 F.3d at 206. Here, Almonte did not show good cause for the appointment of substitute counsel.

On appeal, Almonte asserts for the first time two additional justifications for his request. First, he argues that his trial counsel failed to raise an objection to his initial sentence that exceeded the statutory maximum. But, as Almonte concedes, that issue was rectified by this court's decision in Almonte I. Second, he argues that his trial counsel's failure to raise an argument under Johnson, 135 S. Ct. 2551, subjects his conviction under federal count 2 to plain error review before this court. But, as we discuss below, there was simply no error here under the Davis/Johnson argument. We have no basis to conclude that the district court abused its discretion by failing to consider these concerns, since Almonte never raised them before the district court. Furthermore, neither of these reasons is sufficient to compel substitution of counsel, even if they had

been raised at the resentencing hearing. See Woodard, 291 F.3d at 108 ("[T]he defendant must provide the court with a legitimate reason for his loss of confidence." (quoting United States v. Allen, 789 F.2d 90, 93 (1st Cir. 1986))).

We conclude that the district court did not abuse its discretion by denying Almonte's request for substitution of counsel.

C.

We next address the government's contention that Almonte's remaining arguments, i.e., that his robbery conviction under 18 U.S.C. § 2112 is not a predicate "crime of violence" under Davis and that his federal sentence violates the Double Jeopardy Clause under Sánchez Valle, are barred by the law of the case doctrine. "A party may [also] avoid the application of the law of the case doctrine . . . by showing that, in the relevant time frame, 'controlling legal authority has changed dramatically.'" Matthews, 643 F.3d at 14 (quoting Bell, 988 F.2d at 251). In criminal cases, "when the law changes between the time of a lower court ruling and the time a subsequent appeal is heard, objections not interposed before the lower court are deemed forfeited and are reviewed for plain error." United States v. McIvery, 806 F.3d 645, 651 (1st Cir. 2015) (citing Johnson v. United States, 520 U.S. 461, 466–70 (1997)); and United States v. Barone, 114 F.3d 1284, 1294 (1st Cir. 1997)); see also Fed. R. Crim. P. 52(b).

"[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration." Henderson v. United States, 568 U.S. 266, 273 (2013) (second alteration in original) (quoting Johnson, 520 U.S. at 468). Conversely, there can be no plain error when the law is unsettled. See United States v. Delgado-Sánchez, 849 F.3d 1, 11 (1st Cir. 2017); Connelly v. Hyundai Motor Co., 351 F.3d 535, 546 (1st Cir. 2003).

The law of the case doctrine is not a bar to Almonte's arguments.

D.

Almonte argues that his sentence under § 924(c)(1)(A)(ii) must be vacated in light of the Supreme Court's decision in Davis. Section 924(c)(3) provides two alternative definitions of "crime of violence":

> (A) [a felony that] has as an element the use, attempted use, or threatened use of physical force against the person or property of another [the "force clause"], or
>
> (B) [a felony] that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense [the "residual clause"].

18 U.S.C. § 924(c)(3).

Before the Supreme Court's Davis decision, a defendant

could be convicted for violating § 924(c)(1)(A)(ii) if he or she had committed a predicate "crime of violence" under either definition in § 924(c)(3). The Supreme Court changed the law by holding in Davis, that the second definition, referred to as the "residual clause," § 924(c)(3)(B), was unconstitutionally vague. Davis, 139 S. Ct. at 2325, 2336. This left the "force clause," § 924(c)(3)(A), as the only operative definition of "crime of violence" in § 924(c).

In this case, Almonte's conviction under 18 U.S.C. § 2112 for robbery serves as the predicate "crime of violence" for his sentence under § 924(c)(1)(A)(ii). Almonte contends that a § 2112 offense is not a "crime of violence" under the force clause. Almonte relies on United States v. Bell, 158 F. Supp. 3d 906 (N.D. Cal. 2016), which held that § 2112 "[was] not categorically a crime of violence under the section 924(c)(3) force clause." Id. at 920–21.

But Bell is not binding on us and, in any case, was before the Supreme Court's decision in Stokeling v. United States, 139 S. Ct. 544 (2019). In Stokeling, the Supreme Court held that 18 U.S.C. § 924(e)(2)(B)(i) encompassed common law robbery offenses. 139 S. Ct. at 549–50, 555. Section 924(e)(2)(B)(i), involved in Stokeling, and section 924(c)(3)(A), involved here, are part of the same statutory section and use nearly identical language. Compare 18 U.S.C. § 924(c)(3)(A) (defining "crime of

violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"), with 18 U.S.C. § 924(e)(2)(B)(i) (defining a "violent felony" as a felony crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). The Supreme Court itself has acknowledged the similarity between the definitions. See Davis, 139 S. Ct. at 2325–26 (stating that § 924(e)(2)(B)(ii) bore "more than a passing resemblance to § 924(c)(3)(B)"). "And [courts] normally presume that the same language in related statutes carries a consistent meaning." Id. at 2329. Thus, if § 924(e)(2)(B)(i) encompasses common law robbery offenses, then so too must § 924(c)(3)(A). The Eighth Circuit has reached the same conclusion. United States v. Morris, 775 F. App'x 828, 828 (8th Cir. 2019). There is no question that the § 2112 robbery offense (on which the defendant was convicted) is defined as a common law robbery offense. See Carter v. United States, 530 U.S. 255, 267 n.5 (2000) (explaining that § 2112 "leav[es] the definition of [robbery] to the common law"). Thus, Almonte's challenge to his conviction on federal count 2 fails as such conviction was not erroneous, much less plainly erroneous.

The defendant argues that resentencing is still required because the district court did not specify which subsection it was relying on, and the residual clause has now been held

unconstitutional. The court's decision in García-Ortiz rejected a similar contention. In García-Ortiz, the defendant asserted that his Hobbs Act robbery conviction under 18 U.S.C. § 1951(a) was not a predicate "crime of violence" under § 924(c)(3). García-Ortiz, 904 F.3d at 104. The district court in that case did not address which clause of § 924(c)(3) it relied on. See id. at 106 ("At the time of García's conviction, there was apparently little reason to doubt that such an offense satisfied the definition of a crime of violence contained in the residual clause of section 924(c) . . . ."). The defendant argued that the residual clause was unconstitutionally vague, and that his Hobbs Act robbery conviction was not a "crime of violence" under the force clause. Id. at 105. This court held that "any possible infirmity of section 924(c)'s residual clause provide[d] [the defendant] with no exculpation because his . . . robbery still qualifie[d] as a crime of violence under the force clause of section 924(c)." Id. at 106; see also United States v. Valdés-Ayala, 900 F.3d 20, 44–45 (1st Cir. 2018) (reaching a similar result when a district court order "did not specify" which of two statutory sections for mandatory and discretionary restitution it relied on, on the basis that it was proper under the mandatory restitution statute). The same is true here.

E.

Almonte next argues that his federal convictions must be

vacated under Sánchez Valle. The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1977) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). "But two prosecutions, [the Supreme] Court has long held, are not for the same offense if brought by different sovereigns--even when those actions target the identical criminal conduct through equivalent criminal laws." Sánchez Valle, 136 S. Ct. at 1870. In Sánchez Valle, the Supreme Court held that the Commonwealth of Puerto Rico and the United States were not separate sovereigns for the purpose of double jeopardy analysis. Id. at 1876.

There are limited exceptions under which a defendant may make a collateral attack on a guilty plea. United States v. Broce, 488 U.S. 563, 574 (1989). Broce set out the standard for double jeopardy challenges to a conviction following a knowing and voluntary plea by the defendant. Id. at 576. Broce highlighted the significance of a guilty plea, explaining that "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime," id. at 570, and cannot voluntarily do so without "possess[ing] an understanding of the law in relation to the facts," id. (quoting McCarthy v. United States, 394 U.S.

459, 466 (1969)). Given the significance of a guilty plea and the admissions inherent within, "a guilty plea forecloses a double jeopardy claim unless 'on the face of the record, the court had no power to enter the conviction or impose the sentence.'" United States v. Stefanidakis, 678 F.3d 96, 99 (1st Cir. 2012) (quoting Broce, 488 U.S. at 569). A defendant must prove his claim by relying on the existing record and without contradicting the indictments or admissions inherent in the guilty plea. Broce, 488 U.S. at 576. This is a high threshold that is not easily met.[1]

Before Sánchez Valle, it was established in this circuit that the United States and the Commonwealth of Puerto Rico were separate sovereigns. See, e.g., United States v. López Andino, 831 F.2d 1164, 1168 (1st Cir. 1987) ("[I]t is established that Puerto Rico is to be treated as a state for purposes of the double jeopardy clause."), overruled by Sánchez Valle, 136 S. Ct. at 1868.

[1] Here, Almonte unconditionally pleaded guilty to federal counts 1, 2, and 3, and he concedes that the record does not contain enough information to conclude that a double jeopardy violation occurred. In fact, he concedes that he cannot discuss the test outlined in Blockburger v. United States, 284 U.S. 299 (1932), because "it depends on information outside of the record on appeal and outside of the district court record." See Appellant's Reply Br. at 5. Although this concession would ordinarily be fatal to his claim, as it makes evident that he cannot comply with the standard imposed in Broce, the government has not argued that Almonte's double jeopardy challenge should be rejected on these grounds. Instead, the government has taken the opposite view, arguing that Almonte's PSR provides the information necessary to address (and reject) his double jeopardy claim on the merits. We thus proceed to review his double jeopardy claim for plain error.

The Supreme Court has now held that "for purposes of the Double Jeopardy Clause, . . . the Commonwealth and the United States are not separate sovereigns." Sánchez Valle, 136 S. Ct. at 1876. We conclude that Sánchez Valle represents a dramatic "intervening change in controlling legal authority" that justifies an exception to the law of the case doctrine. Matthews, 643 F.3d at 14. We therefore address the merits of Almonte's double jeopardy claim under the applicable plain error standard.

Plain error requires four showings: "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001). Almonte cannot prove that the district court plainly erred in sentencing him in federal court despite his state convictions.

Almonte cannot satisfy the first two requirements for plain error because he cannot show that the court committed an error which was clear or obvious. We address three questions in a double jeopardy analysis: "(1) whether jeopardy ever attached; (2) whether the first proceeding was a decision on the merits; and (3) whether the subsequent proceeding involves the 'same offense.'" United States v. Szpyt, 785 F.3d 31, 36 (1st Cir. 2015). Because the parties' arguments center on the third question

of our double jeopardy analysis--"whether the subsequent proceeding involves the 'same offense,'" id.--we do the same.

Almonte argues that his federal firearm convictions must be vacated because the Commonwealth of Puerto Rico had already sentenced him "for the same criminal conduct." Appellant's First Supplemental Br. 3. Almonte's contention that Sánchez Valle stands for the proposition that a defendant cannot be tried in both Puerto Rico and federal courts for crimes arising from the same conduct or transaction misinterprets the Supreme Court's holding. Sánchez Valle merely held that the dual-sovereign doctrine does not bar a defendant from raising a double jeopardy claim when he is being subjected to successive prosecutions in Puerto Rico's local courts and federal courts for the same offense. By so deciding, the Supreme Court did not alter the framework for analyzing a double jeopardy claim under the Fifth Amendment. Our focus on double jeopardy claims continues to be determining whether the successive prosecutions are for the same offense (under equivalent criminal statutes). See Gamble v. United States, 139 S. Ct. 1960, 1965 (2019) (emphasizing that the language of the Fifth Amendment's double jeopardy clause "protects individuals from being twice put in jeopardy 'for the same offence,' not the same conduct or actions" (emphases in original) (citations omitted)). For that, we examine whether each of the offenses requires proof of a fact that the others do not. Blockburger v. United States, 284 U.S.

299, 304 (1932). Yet, Almonte does not even attempt to show that the charges for which he was convicted in federal court do not require different elements than those required to be proven for his state convictions. Thus, he cannot show that an error occurred, much less that a clear or obvious error occurred. The government, by contrast, has persuasively shown that Almonte's state and federal convictions were for different offenses.

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id. at 304. For two statutes to criminalize the same offense, "[t]he conduct described in one offense must necessarily include the conduct of the second offense." United States v. Gerhard, 615 F.3d 7, 19 (1st Cir. 2010) (citing Ball v. United States, 470 U.S. 856, 862 (1985)); United States v. Woodward, 469 U.S. 105, 107–08 (1985).

We begin with the federal § 922(g) offense. As relevant to this case, § 922(g) provides:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g).

"To convict a defendant [under 18 U.S.C. § 922(g)], the [g]overnment . . . must show that the defendant knew he possessed a firearm and also that he knew he [was a prohibited person as contemplated by the statute] when he possessed it." Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019). The government must also show that the firearm was "in or affecting interstate commerce." United States v. Combs, 555 F.3d 60, 65 (1st Cir. 2009).

According to the PSR, the Commonwealth court sentenced Almonte to 120 months of imprisonment for using a firearm without a license in violation of the Puerto Rico Weapons Act. This description makes clear that his conviction was under Article 5.04, which provides that "[a]ny person who transports any firearm or any part thereof without having a weapons license, or carries any firearm without the corresponding permit to carry weapons, shall be guilty of a felony." 25 L.P.R.A. § 458c (Article 5.04). Article 5.04 requires the Commonwealth to show that the defendant (1) transported or carried a firearm (2) without the corresponding state permit to carry weapons.

Section 922(g) does not require a showing that the defendant did not have a license, and Article 5.04 does not require proof that the defendant was a prohibited person or that the firearm was in or affecting interstate commerce. We conclude that

the federal § 922(g) offense and the Commonwealth Article 5.04 offense are separate offenses because each offense requires an element of proof that the other does not. See Blockburger, 284 U.S. at 304.

We now address Almonte's federal § 924(c)(1)(A)(ii) offense. Section 924(c) provides, in relevant part:

> [A]ny person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence . . . if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years.

18 U.S.C. § 924(c)(1)(A)(ii).

To establish a § 924(c)(1)(A)(ii) offense, the government must establish that the defendant "brandished" a firearm "during and in relation to," or "in furtherance of" a "federal 'crime of violence or drug trafficking crime.'" Davis, 139 S. Ct. at 2324 (quoting 18 U.S.C. § 924(c)(1)(A)).

The Commonwealth offense was for violation of Article 5.15 of the Puerto Rico Weapons Act, which in the relevant part provides:

> [A] person shall be guilty of a felony if:
>
> (1) [h]e willfully discharges any firearm in a public place or any other place, although no injury results, or

> (2) he intentionally, although without malice aforethought, aims a weapon towards a person, although no injury results.

25 L.P.R.A. § 458n(a) (Article 5.15(a)).

This court has previously held that Article 5.15 is divisible, and thus defines "two alternative sets of elements for two different crimes": (1) "discharging" a firearm and (2) "pointing" or "aiming" a weapon towards another person. Delgado-Sánchez, 849 F.3d at 9. The PSR shows that Almonte was convicted of aiming a firearm at another person under Article 5.15(a)(2), rather than discharging a firearm under Article 5.15(a)(1).

The federal § 924(c)(1)(A)(ii) offense, unlike Article 5.15(a)(2), requires the proof of a predicate--i.e., separate--crime of violence or drug trafficking crime. Davis, 139 S. Ct. at 2324. Conversely, Article 5.15(a)(2) requires proof that the defendant pointed or aimed a firearm at another person, which § 924(c)(1)(A)(ii) does not require. On the face of the statutes, we cannot conclude that every time a defendant "brandishes" a firearm, he necessarily points the firearm at another person. Congress defined "brandish[ing]" as any act by the defendant that "make[s] the presence of the firearm known to another person, in order to intimidate that person." 18 U.S.C. § 924(c)(4). That definition includes--but is not limited to--pointing or aiming a firearm. Thus, because both federal § 924(c)(1)(A)(ii) and Commonwealth Article 5.15(a)(2) require proof of an element that

the other does not, the two statutes criminalize different offenses. See Blockburger, 284 U.S. at 304.

In sum, Almonte focused most of his energy on undermining the Government's arguments as to why his double jeopardy claim fails, but he did not establish a prima facie nonfrivolous double jeopardy claim. The burden of proof was on him, not on the Government, and Almonte failed to meet it. See United States v. Laguna-Estela, 394 F.3d 54, 56 (1st Cir. 2005) (holding that a defendant claiming double jeopardy "has the burden of presenting evidence to establish a prima facie nonfrivolous double jeopardy claim. Once such a claim is established, the burden shifts to the government to prove by preponderance of the evidence that the indictments charge separate offenses." (quoting United States v. Booth, 673 F.2d 27, 30-31 (1st Cir. 1982))); see also United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).[2]

Almonte has not shown plain error.

III.

We conclude that the district court did not abuse its discretion when it denied Almonte's request for substitution of counsel, that Almonte's conviction under 18 U.S.C. § 2112 was a predicate "crime of violence" under 18 U.S.C. § 924(c)(3)(A), and

[2] In light of our conclusion that Almonte has not shown clear error, we need not reach prongs 3 and 4 of the plain error analysis.

that, under a plain error standard, Almonte has shown no double jeopardy violation.

Affirmed.

UNITED STATES DISTRICT COURT

District of

UNITED STATES OF AMERICA
V.
EDWIN OMAR ALMONTE-NUNEZ

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 3:11-cr-00384-01 (DRD)
USM Number: 38051-069
John Connors, AFPD.
Defendant's Attorney

Date of Original Judgment: 06/14/2013
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☑ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Reconsideration of Sentence by Sentencing Court
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☑ pleaded guilty to count(s) One (1s), Two (2s) and Three (3s)
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§2112 and 2	Aiding and abetting in the robbery of personal property of the United States Passport.	9/30/2011	1s
18 U.S.C. § 924(c)(1)(A)(ii)	Use, carry and brandish a firearm, during and in relation to a crime of violence, namely; robbery	9/30/2011	2s
18 U.S.C. § 922(g)(1) & 924(a)(2)	Prohibited Person in Possession of a Firearm.	9/30/2011	3s

The defendant is sentenced as provided in pages 2 _____ of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 21, 2015
Date of Imposition of Judgment

S/ Daniel R. Dominguez
Signature of Judge

Daniel R. Dominguez — Senior, U.S. District Judge
Name and Title of Judge

August 21, 2015
Date

DEFENDANT: EDWIN OMAR ALMONTE-NUNEZ
CASE NUMBER: 3:11-CR-384-01 (DRD)

IMPRISONMENT

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

150 months as to count 1s, and **120 months as to count 3s **to be served concurrently with each other, and 84 months as to Count 2s to be served consecutively with the term imposed as to Counts 1s, and Count 3s for a total term of 234 months of imprisonment to be served concurrently with Commonwealth of Puerto Rico Cr. Nos. KLA2012G0038 to 39, KIC2012G0006, and KBD2012G0031. Time served under federal custody shall be granted.

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

It is recommended that this defendant be provided while incarcerated the maximum drug program treatment (500 hours), and Vocational Rehabilitation courses.

☑ 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: EDWIN OMAR ALMONTE-NUNEZ
CASE NUMBER: 3:11-CR-384-01 (DRD)

SUPERVISED RELEASE

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

Three (3) years as to Counts One (1s), and Three (3s), and Five (5) years as to Count Two (2s) to be served concurrently with each other.

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 and shall submit a truthful and complete written report within the first five days of each month;
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: EDWIN OMAR ALMONTE-NUNEZ
CASE NUMBER: 3:11-CR-384-01 (DRD)

SPECIAL CONDITIONS OF SUPERVISION

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 controlled substances.

3. The defendant shall refrain from possessing firearms, destructive devices, and other dangerous weapons.

4. The defendant shall refrain from the unlawful use of controlled substances and shall submit to a drug test within fifteen (15) days of release from imprisonment. After his release, he shall submit to random drug testing, no less than three (3) samples during the supervision period but not to exceed 104 samples per year under the coordination of the U.S. Probation Officer. If any sample detects substance abuse, the defendant shall participate in an in-patient or an out-patient substance abuse treatment 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 by means of co-payment, in an amount arranged by the U.S. Probation Officer based on his ability to pay or the availability of third party payment.

5. The defendant shall participate in a vocational training and/or job placement program recommended by the U.S. Probation Officer.

6. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.

7. 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. Defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

8. 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 Title 18, U.S. Code Section 3563(a)(9).

DEFENDANT: EDWIN OMAR ALMONTE-NUNEZ
CASE NUMBER: 3:11-CR-384-01 (DRD)

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$ 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.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

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

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

DEFENDANT: EDWIN OMAR ALMONTE-NUNEZ
CASE NUMBER: 3:11-CR-384-01 (DRD)

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,
Plaintiff,

v.

[1] EDWIN O. ALMONTE NÚÑEZ
Defendant.

CASE NO. 11-384 (DRD)

PLEA AGREEMENT
(Pursuant to Rule 11(c)(1)(A) & (B) F.R.C.P.)

TO THE HONORABLE COURT:

COMES NOW the United States of America through its counsel Rosa Emilia Rodríguez-Vélez, United States Attorney for the District of Puerto Rico, José A. Ruíz-Santiago, Assistant United States Attorney, Chief, Criminal Division, Warren Vázquez, Assistant U.S. Attorney, Chief, Violent Crimes Unit, Ilianys Rivera, Assistant U.S. Attorney, defendant's counsel, John J. Connors, Esq., and the defendant, Edwin O. Almonte Núñez, pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, state to this Honorable Court, that they have reached an agreement, the terms and conditions of which are as follows:

EAN **1. COUNTS TO WHICH DEFENDANT PLEADS GUILTY**

The defendant agrees to plead guilty to Counts One, Two and Three of the Superseding Indictment.

Count One charges: On or about September 30, 2011, in the District of Puerto Rico, the defendant and Jose L. Robles Perez, aiding and abetting each other, did knowingly and unlawfully rob from the presence and possession of L.P.P., by force and violence and by putting in fear of serious bodily injury, personal property of the United States consisting of a United States Passport, all in

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violation of Title 18, United States Code, Sections 2112 and 2.

Count Two charges: On or about September 30, 2011, in the District of Puerto Rico, the defendant and José L. Robles Pérez, aiding and abetting each other, did knowingly use, carry and brandish a firearm, as this term is defined in Title 18, United States Code, Section 921(a)(3), that is, a stolen 9mm Sig Sauer pistol, model P228, serial number B173072, loaded with eight (8) rounds of 9mm caliber ammunition, including one (1) round in the chamber, during and in relation to a crime of violence, as defined in Title 18, United States Code, Section 924(c)(3), namely: a robbery, in violation of Title 18, United States Code, Section 2112, as charged in Count One of this Superseding Indictment, an offense for which the defendants may be prosecuted in a court of the United States, all in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2.

Count Three charges: On or about September 30, 2011, in the District of Puerto Rico, the defendant, having been convicted in a court of the Commonwealth of Puerto Rico of a crime punishable by imprisonment for a term exceeding one (1) year, did knowingly and unlawfully possess in or affecting commerce, a firearm, as that term is defined in Title 18, United States Code, Section 921(a)(3), to wit: a stolen 9mm Sig Sauer pistol, model P228, serial number B173072, loaded with eight (8) rounds of 9mm caliber ammunition, including one (1) round in the chamber, said firearm having been shipped or transported in interstate or foreign commerce, all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

EAN

Forfeiture

Pursuant to Title 18, United States Code, Section 924(d)(1), and Title 28, United States Code, Section 2461(c), defendant agrees to forfeit all rights, title and interest in the following property (hereinafter, the "Property"): 9mm Sig Sauer pistol, model P228, serial number B173072, loaded with eight (8) rounds of 9mm caliber ammunition.

Defendant acknowledges that he used the Property in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 922(g)(1), as alleged in Counts Two and Three of the Superseding Indictment and that the Property is therefore subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c). Defendant further acknowledges that the Property will be subject to forfeiture to the United States upon defendant's conviction for Counts One, Two, and Three.

Defendant waives all interests in and claims to the Property described herein above, and hereby consents to the forfeiture of the Property to the United States in this case. Defendant hereby waives, and agrees to the tolling of, any rule or provision of law limiting the time for commencing, or providing notice of, any administrative or civil judicial forfeiture proceeding with respect to the Property, including, but not limited to, such limitations contained in Title 18, United States Code, Section 924(d)(1), and Title 28, United States Code, Section 2461(c). Defendant agrees to consent promptly upon request to the entry of any orders deemed necessary by the Government or the Court to complete the forfeiture and disposition of the Property. Defendant waives the requirements of Federal Rules of Criminal Procedure 32.2 and 43(a) regarding notice of forfeiture in the charging instrument, announcement of forfeiture in defendant's presence at sentencing, and incorporation of the forfeiture in the judgment. Defendant acknowledges that he understands that forfeiture of the Property will be part of the sentence imposed upon defendant in this case and waives any failure by the Court to advise defendant of this, pursuant to Federal Rule of Criminal Procedure 11 (b)(1)(J), during the change of plea hearing. Pursuant to Rule 32.2(b)(3), defendant will promptly consent to the preliminary order of forfeiture becoming final as to defendant before sentencing if requested by the Government to do so.

EKW

Defendant hereby waives and agrees to hold the United States and its agents and employees harmless from, any and all claims whatsoever in connection with the seizure, forfeiture, and disposal of

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the Property described herein above. Defendant waives all constitutional and statutory challenges of any kind to any forfeiture carried out pursuant to this Plea Agreement. Without limitation, defendant understands and agrees that by virtue of his plea of guilty defendant will waive any rights or cause of action that defendant might otherwise have had to claim that he is a substantially prevailing party for the purpose of recovery of attorney's fees and other litigation costs in any related civil forfeiture proceeding pursuant to Title 28, United States Code, Section 2465(b)(1).

2. MAXIMUM PENALTIES

Pursuant to 18 U.S.C. § 2112, the penalty range for Count One, a Class C felony under 18 U.S.C. § 3559(a)(3), is punishment by imprisonment for not more than fifteen (15) years. See, United States v. Ortiz-Garcia, 665 F.3d 279, 283 (1st Cir. 2011). Pursuant to 18 U.S.C. § 3571(b)(3), a fine of up to two-hundred and fifty thousand dollars ($250,000.00) may be imposed. A supervised release term of not more than three (3) years may be imposed under 18 U.S.C. § 3583(b)(2). A Special Monetary Assessment of one hundred dollars ($100.00) shall be imposed pursuant to 18 U.S.C. § 3013(a)(2)(A).

Pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), the penalty range for Count Two, a Class A felony under 18 U.S.C. § 3559(a)(1), is punishment by imprisonment for not less than seven (7) years and up to life. See, United States v. Ortiz-Garcia, 665 F.3d 279, 283 (1st Cir. 2011). Pursuant to 18 U.S.C. § 3571(b)(3), a fine of up to two-hundred and fifty thousand dollars ($250,000.00) may be imposed. A supervised release term of not more than five (5) years may be imposed under 18 U.S.C. § 3583(b)(1). A Special Monetary Assessment of one hundred dollars ($100.00) shall be imposed pursuant to 18 U.S.C. § 3013(a)(2)(A).

EAN

Pursuant to 18 U.S.C. §§ 922(g)(1) and 924(a)(2), the penalty range for Count Three, a Class C felony under 18 U.S.C. § 3559(a)(3), is punishment by imprisonment for not more than ten (10) years. See, United States v. Ortiz-Garcia, 665 F.3d 279, 283 (1st Cir. 2011). Pursuant to 18 U.S.C. §

3571(b)(3), a fine of up to two-hundred and fifty thousand dollars ($250,000.00) may be imposed. A supervised release term of not more than three (3) years may be imposed under 18 U.S.C. § 3583(b)(2). A Special Monetary Assessment of one hundred dollars ($100.00) shall be imposed pursuant to 18 U.S.C. § 3013(a)(2)(A).

3. APPLICABILITY OF SENTENCING GUIDELINES

Defendant understands that the sentence will be left entirely to the sound discretion of the Court in accordance with 18 U.S.C. §§ 3551-86, and the United States Sentencing Guidelines ("Guidelines"), which are advisory. See United States v. Booker, 543 U.S. 220 (2005). Defendant acknowledges that parole has been abolished and that the imposition of his sentence may not be suspended.

4. SPECIAL MONETARY ASSESSMENT

Defendant agrees to pay a special monetary assessment of one hundred dollars ($100.00) per count of conviction to be deposited in the Crime Victim Fund, pursuant to 18 U.S.C. § 3013(a)(2)(A).

5. FINES AND RESTITUTION

The defendant is aware that the Court may, pursuant to Section 5E1.2 of the Sentencing Guidelines Manual, order the defendant to pay a fine sufficient to reimburse the government for the costs of any imprisonment, probation or supervised release ordered and also the Court may impose restitution. As part of this Plea Agreement, the defendant agrees to produce complete information regarding all restitution victims and defendant agrees to execute a financial statement to the United States (OBD Form 500). The United States will make no recommendations as to the imposition of fines or restitution.

6. RULE 11(c)(1)(B) WARNINGS

EAN The defendant is aware that the defendant's sentence is within the sound discretion of the sentencing judge and the advisory Sentencing Guidelines (including the Guidelines Policy Statements, Application, and Background Notes). The defendant understands and acknowledges that the Court is not

a party to this Plea Agreement and thus, is not bound by this agreement or the sentencing calculations and/or recommendations contained herein. Defendant specifically acknowledges and admits that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offenses to which the defendant pleads guilty. Defendant is aware that the court may accept or reject the Plea Agreement, or may defer its decision whether to accept or reject the Plea Agreement until it has considered the pre-sentence report. Should the Court impose a sentence up to the maximum established by statute, the defendant cannot, for that reason alone, withdraw the guilty plea, and will remain bound to fulfill all of the obligations under this Plea Agreement.

7. SENTENCING GUIDELINES CALCULATIONS

Although the Guidelines are now advisory, United States v. Booker, 125 S.Ct. 738, 744, 160 L.Ed.2d 621 (2005), makes clear the sentencing court is required to consider the Guidelines "sentencing range established for... the applicable category of offense committed by the applicable category of defendant" in imposing sentence. Booker, 125 S.Ct. at 744. Therefore, the United States and the defendant submit the following advisory Sentencing Guidelines calculations:

GUIDELINE SECTION	LEVELS
Base Offense Level [U.S.S.G. § 2B3.1(a)]	20
[redacted]	[redacted]
Permanent body injury to the victim [U.S.S.G. § 2B3.1(b)(3)(C)]	+6
Reckless Endangerment During Flight [U.S.S.G. § 3C1.2]	+2
Acceptance of Responsibility [U.S.S.G. § 3E1.1]	-3
Offense Level	[redacted] 25
Criminal History Category	I
GUIDELINE RANGE	[redacted] 57-71

EAN

The sentence recommendation was amended as approved by Chief Judge Fusté by telephonic means on the date Dec 17, 2012. DRF

8. SENTENCE RECOMMENDATION NC EAN

The parties agree, ~~to recommend to the Court that the defendant be sentenced to seventy eight (78) months of imprisonment as to Count One and Three if he is a Criminal History Category I, or the lowest end of the applicable guideline range for any other Criminal History Category as to Count One and Three.~~ however, that defendant may argue for the lower end of the applicable guideline range and the government may argue for the higher end applicable to defendant as to Count One and Three.

Count Three is to be grouped pursuant to U.S.S.G. § 3D1.2 (b) with Count One. The parties recommend a sentence of eighty four (84) months of imprisonment as to **Count Two** to run consecutive with the term of imprisonment imposed as to Counts One and Three. The recommendation is made pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure. Furthermore, the parties agree that the sentence imposed in this case, is to run concurrent to the sentence imposed in the Commonwealth of Puerto Rico case related to the same home invasion and robbery.

9. WAIVER OF APPEAL

The defendant knowingly and voluntarily waives the right to appeal the judgment and sentence in this case, provided that the defendant is sentenced in accordance with the terms and conditions set forth in the Sentence Recommendation provisions of this Plea Agreement.

10. NO FURTHER ADJUSTMENTS OR DEPARTURES

The United States and the defendant agree that no further adjustments or departures to the defendant's base offense level shall be sought by the parties. The parties agree that any request by the defendant for a downward departure or adjustment for a sentence below that stipulated by the parties, will be considered a material breach of this Plea Agreement. To that effect, both parties agree to refrain from arguing further guideline adjustments or departures as well as reduction, enhancements or variances under Title 18, United States Code, Section 3553.

EAN

11. NO STIPULATION AS TO CRIMINAL HISTORY CATEGORY

The parties do not stipulate any assessment as to the defendant's Criminal History Category.

NC

12. DISMISSAL OF REMAINING COUNTS

Not applicable.

13. SATISFACTION WITH COUNSEL

The defendant represents to the Court to be satisfied with defendant's counsel, John J.Connors, Esq, and indicates that counsel has rendered effective legal assistance.

14. RIGHTS SURRENDER BY DEFENDANT THROUGH GUILTY PLEA

Defendant understands that by entering into this Plea Agreement he surrenders certain rights as provided in this agreement. Defendant understands that the rights of criminal defendants include the following:

a. If defendant had persisted in a plea of not guilty to the charges, defendant would have had the right to a speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if defendant, the United States and the judge agree.

b. If a jury trial is conducted, the jury would be composed of twelve lay persons selected at random. Defendant and defendant's attorney would assist in selecting the jurors by removing prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges. The jury would have to agree, unanimously, before it could return a verdict of either guilty or not guilty. The jury would be instructed that defendant is presumed innocent, that it could not convict defendant unless, after hearing all the evidence, it was persuaded of defendant's guilt beyond a reasonable doubt, and that it was to consider each charge separately.

c. If a trial is held by the judge without a jury, the judge would find the facts and, after hearing all the evidence and considering each count separately, determine whether or not the evidence established defendant's guilt beyond a reasonable doubt.

d. At a trial, the United States would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those witnesses and defendant's attorney would be able to cross-examine them. In turn, defendant could present witnesses and other evidence on defendant's own behalf. If the witnesses for defendant would not appear voluntarily, defendant could require their attendance through the subpoena power of the Court.

e. At a trial, defendant could rely on the privilege against self-incrimination to decline to testify, and no inference of guilt could be drawn from defendant's refusal to testify. If defendant desired to do so, defendant could testify on defendant's own behalf.

15. STATEMENT OF FACTS

The accompanying Statement of Facts signed by the defendant is hereby incorporated into this Plea Agreement. Defendant adopts the Statement of Facts and agrees that the facts therein are accurate in every respect and, had the matter proceeded to trial, that the United States would have proven those facts beyond a reasonable doubt.

16. LIMITATIONS OF PLEA AGREEMENT

This plea agreement binds only the United States Attorney's Office for the District of Puerto Rico and the defendant; it does not bind any other federal district, state or local authorities

17. IMPACT UPON IMMIGRATION STATUS: Defendant's conviction might have an impact on his immigration status.

18. ENTIRETY OF PLEA AGREEMENT

This written agreement constitutes the complete Plea Agreement between the United States, the defendant, and the defendant's counsel. The United States has made no promises or representations except as set forth in writing in this plea agreement and deny the existence of any other term and conditions not stated herein.

19. AMENDMENTS TO PLEA AGREEMENT

No other promises, terms, conditions will be entered unless in writing, signed by all parties.

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20. VOLUNTARINESS OF GUILTY PLEA

The defendant acknowledges that no threats have been made against the defendant and that the defendant is pleading guilty freely and voluntarily because the defendant is guilty.

RESPECTFULLY SUBMITTED.

ROSA EMILIA RODRIGUEZ-VELEZ
United States Attorney

José A. Ruíz-Santiago
Assistant U.S. Attorney
Chief, Criminal Division
Dated: 11/26/12

John J. Connors, Esq.
Counsel for Defendant
Dated: 12/12/12

for: Warren Vázquez
Assistant U.S. Attorney
Chief, Violent Crimes Unit
Dated: 11/26/12

Edwin Almonte

Edwin O. Almonte Núñez
Defendant
Dated: 12/12/12

Ilianys Rivera
Assistant U.S. Attorney,
Dated: 11/25/2012

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I have consulted with my counsel and fully understand all of my rights with respect to the Information pending against me. Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the Sentencing Guidelines, Policy Statements, Application, and Background Notes which may apply in my case. I have read this Plea Agreement and carefully reviewed every part of it with your attorney. My counsel has translated the plea agreement to me in the Spanish language and I have no doubts as to the contents of the agreement. I fully understand this agreement and I voluntarily agree to it.

Date: 12/12/12

Edwin Almonte

Edwin O. Almonte Núñez
Defendant

I am the attorney for the defendant. I have fully explained to the defendant his rights with respect to the pending Information. Further, I have reviewed the provisions of the Sentencing Guidelines, Policy Statements, Application, and Background Notes, and I have fully explained to the defendant the provisions of those guidelines which may apply in this case. I have carefully reviewed every part this Plea Agreement with the defendant. I have translated the plea agreement and explained it in the Spanish language to the defendant who has expressed having no doubts as to the contents of the agreement. To my knowledge, the defendant is entering into this agreement voluntarily, intelligently and with full knowledge of all consequences of defendant's plea of guilty.

Date: 12/12/12

John J. Connors, Esq
Counsel for Defendant

STATEMENT OF FACTS

In conjunction with the submission of the accompanying Plea Agreement in this case, the United States of America submits the following statement setting forth the United States' version of the facts leading to the defendant's acceptance of criminal responsibility for defendant's violation of Title 18, United States Code, Sections 2112, 924(c)(1)(A)(ii), 922(g)(1), 924(a)(2) and 2.

On September 30, 2011, in the early morning hours, a Police of Puerto Rico (POPR) Officer, was off duty at his residence in Calle Estancias, Caparra Heights, San Juan, Puerto Rico. The Officer observed two individuals trying to force entry into a house located at Calle Estancias, Caparra Heights, San Juan, Puerto Rico and called the police station. The Officer observed the individuals get into a dark colored Toyota Yaris (license plate number GXN-216).

Shortly after, another POPR Officer arrived at the scene and observed a dark colored Toyota Yaris leave the scene with its lights off and at a high rate of speed. The Officer pursued the Toyota Yaris until it crashed into a pole. Immediately thereafter the Officer observed an individual later identified as Edwin Omar Almonte Núñez getting out of the driver's side of the vehicle and throwing a black object on the floor. The object landed in close proximity to the vehicle and was later identified as a Sig Sauer pistol, model P228, serial number B173072, 9mm caliber loaded with eight (8) rounds of 9mm caliber ammunition including one in the chamber. The Officer immediately placed defendant under arrest. An individual later identified to be José Luis Robles Pérez was the passenger of the vehicle and was arrested by yet another POPR Officer.

The Officers had heard over the radio that a robbery had occurred at a certain house in Calle Estancia, and that a woman (the "victim") had been injured. The officers conducted a search incident to arrest of Almonte-Núnez and Robles Pérez. The officers found jewelry, money, and other items which belong to the victim of the home invasion, L.P.P. Officers also observed in plain view inside the Toyota

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Yaris a plasma television and a passport that was found to belong to the victim, along with other property of the victim.

The defendant admits that he participated in the commission of the robbery (home invasion) at the residence located in Calle Estancias, Caparra Heights, during which he possessed and brandished the above described firearm, and used the firearm to injure L.P.P., an elderly female, during the robbery. As a result of the injuries caused by defendant to L.P.P., she suffered permanent bodily injury, namely, the loss of her right eye.

Investigation revealed that the aforementioned firearm was not manufactured in Puerto Rico. Therefore, the firearm was shipped or transported in interstate or foreign commerce. The investigation further revealed that defendant had been previously convicted of a felony crime punishable by imprisonment for a term exceeding one (1) year. Also, the investigation revealed that defendant's sentence has not been pardoned or expunged by the Commonwealth of Puerto Rico and that he has not received relief from disability.

The defendant further admits that during the robbery he made a threat of death to L.P.P, and thereafter, during his flight from law enforcement officers, he recklessly created a substantial risk of death or serious bodily injury to other persons, including POPR Officers. Also, the defendant stipulates to the forfeiture of the above described firearm as set forth in the Plea Agreement.

At trial the government would have proven beyond a reasonable doubt that the defendant is guilty as charged in Counts One, Two and Three by presenting the firearm, and ballistic evidence described herein, defendant's admissions, warning of rights form, crime scene photographs, victim's testimony, as well as the testimony of Police of Puerto Rico Officers, FBI and ATF agents, and the testimony of forensic experts concerning crime scene findings, ballistic and fingerprint analysis and conclusions, among other relevant evidence.

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Discovery has been provided to the defendant.

Ilianys Rivera
Assistant U.S. Attorney
Dated: 11-25-2012

John J. Connors, Esq
Counsel for Defendant
Dated: 12/12/12

Edwin Almonte
Edwin O. Almonte Núñez
Defendant
Dated: 12/12/12

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

THE UNITED STATES OF AMERICA, Plaintiff, vs. EDWIN OMAR ALMONTE-NUNEZ, (01) Defendant.	Case No. 11-384(DRD)(01) Resentencing Hearing

TRANSCRIPT OF PROCEEDINGS
HELD IN OLD SAN JUAN, PUERTO RICO
HELD BEFORE THE HONORABLE JUDGE DANIEL R. DOMINGUEZ
FRIDAY, AUGUST 21, 2015, 2:54 P.M.

A P P E A R A N C E S

For the United States:

Victor O. Acevedo-Hernandez, AUSA

For Defendant:

John Connors, AFPD

THE CLERK: United States of America versus Edwin Omar Almonte-Nunez. Criminal case 11-384. Resentencing hearing. On behalf of the Government, AUSA Victor Acevedo. On behalf of the defendant, Attorney John Connors.

Defendant is present in court and will be assisted by the official court interpreter.

MR. ACEVEDO: United States is ready.

THE COURT: Now, we're going to use the same presentence report so I don't have to ask you any questions as to that; right?

MR. CONNORS: That's correct, Your Honor.

John Connors appearing with Mr. Almonte. Your Honor, as I understand it, we're here for --

THE COURT: A resentence.

MR. CONNORS: -- a resentence on Count III.

THE COURT: Relating to an extra baggage that the Court put on the sentence.

MR. CONNORS: Relating to Count III, yes.

THE COURT: Relating to Count III, which is the count we were sort of enamored with the guideline and we forgot that there was a statutory maximum.

So what the mandate from the circuit court is is very simple. The mandate is that the Court modify the sentence as to Count III. And the matter is remanded to enter a modified sentence of 120 months on that count.

So the Court does not have to touch anything else.

MR. CONNORS: That's my understanding, Your Honor.

And just for the record, I did have a chance to meet with Mr. Almonte. The Court probably remembers this was a fairly contested sentencing hearing. It was obviously a serious and aggravated case in many respects.

Mr. Almonte informs me that his understanding from appellate counsel was that the First Circuit had directed that he be sentenced to credit for time served. I explained to him that's not my understanding based on having read the Court of Appeal's opinion. And I'm not sure what his conversation with his appellate lawyer would have been. But, in any event, I'm just alerting the Court to the fact that that was his understanding.

My legal understanding is just as the Court outlined; we're here for what's essentially a correction on Count III, lowering the sentence from 130 months to 120 months.

THE COURT: That's it. But I don't give him -- I give him 120 months as to that. And it's being served consecutively with a weapon; right?

MR. CONNORS: Right.

THE COURT: And the weapon was -- and that was approved by the Court of Appeals.

Ana, can I have a copy of the sentence?

THE CLERK: The judgment, Your Honor?

THE COURT: Yes.

MR. CONNORS: I believe it was 84 months on that count.

THE COURT: It's 120 and 84 as to the other. So it's 120 plus 84.

MR. ACEVEDO: And the 120, the 120 is concurrent.

THE COURT: Is concurrent with the 84.

MR. ACEVEDO: No. Concurrent with the Count I. I think you entered a sentence of 150 months for Count I. It was a three count -- he pled guilty to three counts.

THE COURT: So hold it. Hold it.

The Court is to enter a sentence based on a Level 27, with a Category VI. So the guideline in this particular case is 130 to 165 with a fine range of 12,000 to -- 12,500 to 150. And there is a maximum term of imprisonment of 120 and a supervised release term of at least one, but not more than three years.

So what I think I have to do is basically reduce this 120 months, this 150 to 120. Is that it?

MR. ACEVEDO: Yes. Yes, Your Honor, that's all you have to do. But just to clarify for the record, he is already serving a sentence which the Court of Appeals did not reverse for 150 months for Count I. And this 120 months is to run concurrent with that 150 months, consecutive to the 84 months.

THE COURT: Okay. So that's what I have to do.

MR. ACEVEDO: Yes.

THE COURT: So, but this sentence is as if I gave it to him originally.

MR. ACEVEDO: Exactly.

THE COURT: So if I gave him originally all the time that he has served, he is still going to get all the time that he has served.

MR. ACEVEDO: Of course.

MR. CONNORS: That's correct, Your Honor. Since it's 150 and 84 consecutive, it really doesn't matter that Count III has been changed to 120, but --

THE COURT: That's right.

MR. CONNORS: -- the Court of Appeals stated reasons why that was important. So --

THE COURT: That's why they --

All right. So does he want to make a further allocution? He's entitled to, so I'm going to allow him to make a --

THE DEFENDANT: Yes. I just want to state that I don't feel I am being adequately represented with this counsel.

THE COURT: All right. So, the sentence that this Court is going to impose -- so I want to know the exact position of the parties -- is 120 months as to Count III, to

be served concurrently with the sentence imposed as to Count I. Those two run concurrently, so that becomes 150 sentence as to both, running concurrent, and then 84 months, which are running consecutively. Right?

MR. CONNORS: Judge, you just said 150 to both. That gets us back in the same predicament. What you mean in reality, he's going to serve 150 --

THE COURT: That's right.

MR. CONNORS: -- plus 84. But Count III needs to be 120.

THE COURT: Yes. Count III has to be 120. Right? That's for sure. That's how I started.

It says, for a term of 120 for Count III. And then to be served concurrently with the sentence imposed in Count I, which is 150.

MR. CONNORS: Correct.

THE COURT: And then, however, it runs consecutively to 84 months in Count II. That's my sentence.

Now, I want to know what the position is, first, of the United States.

MR. ACEVEDO: We agree with you, with the Court's position. That is correct, Your Honor. 84 months for Count II, 150 for Count I, and 120 for Count III.

THE COURT: All right. Okay. So anything further, counsel?

MR. CONNORS: No, Your Honor.

THE COURT: What I don't understand is this matter of granting time for the sentences for all time served.

MR. CONNORS: Your Honor.

THE COURT: I really don't understand what that story is all about.

MR. CONNORS: All I can say is that Mr. Almonte has had a lot of concerns. If the Court remembers, the victim in the case was a relative of a prominent FBI authority.

THE COURT: Yes.

MR. CONNORS: He was sentenced in state court for very similar charges and felt strongly that his federal sentence should be concurrent. And as I said, somewhere along the line he was given the understanding or misunderstood his appellate lawyer and somehow thought he was coming back to be sentenced for credit for time served. There's nothing in the First Circuit's opinion that would leave one to believe that.

THE COURT: That the time that he served in the local Court is going to count here?

MR. CONNORS: It shouldn't.

I'm just trying to explain to the Court what might be the basis of his confusion. But there's nothing in the First Circuit's opinion that lends itself to that interpretation.

THE COURT: I'm following what the Court of Appeals

has said. This is the findings -- the final mandate is the following: "We direct the district court on remand to enter a modified sentence of 120 months on that count."

All right. And "that count", that count is Count III.

MR. CONNORS: Judge, I'm not disagreeing with anything you've done. I just -- you explained to my client he had the right to allocute. He's not the most articulate person. I just wanted the Court to have the benefit of knowing what he expressed to me. As I said, I don't think there's any legal argument to be made for why it should be credit for time served.

THE COURT: Well, I don't know either. There's nothing there. And I'm concerned that if that was not made in this appeal, that is lost.

MR. CONNORS: It's not.

THE COURT: It's not.

Because they're going to say why wasn't this brought up before? The appeal from now on should be to any errors of the Court now. I don't think that they are going to get two bites at the apple, but that's not my -- that's up to the First Circuit, not up to me.

Can I proceed to resentence? Sir, can I proceed?

No, if he wants to make an allocution, he should make it at this time.

THE INTERPRETER: He started saying something.

THE COURT: Okay. Then, sir, please continue with your allocution.

THE DEFENDANT: That I don't feel that I'm being adequately represented with this attorney. When I was sentenced the first time, the circuit wrote and said that he did not count the points for the state cases.

THE COURT: Anything further?

THE DEFENDANT: That's it. If you can change counsel, that would be better for me.

THE COURT: Yes. The Court of Appeals may designate another lawyer, just as they did in this case. That's their decision, not mine.

All right. Can I proceed to sentence?

MR. CONNORS: I thought you had sentenced him, Your Honor.

THE COURT: No, I have not.

THE CLERK: Resentence.

THE COURT: I want to go through the whole matter again.

MR. CONNORS: Okay.

THE COURT: All right.

So, on December 12, 2012, the defendant, Edwin Almonte-Nunez, pled guilty to Counts I, II, and III of the indictment in criminal Case No. 11-384, which charges

violations of aiding and abetting robbery of a personal property of the United States, that is a U.S. passport; use, carry and brandishing a firearm during and in relation to a crime of violence; and possession of a firearm by a prohibited person, that is a convicted felon.

Title 18, U.S. Code, Section 2112(2), 924(c)(1)(A)(ii), 922(g)(1), and 924(a)(2), class C and class A felonies. On June 14, the defendant was sentenced to a term of 150 months of imprisonment as to Count I and III to be served concurrently, and to 84 months in Count II to be served consecutively for 234 months of imprisonment.

THE CLERK: What's the total, Your Honor?

THE COURT: 234.

Three years of supervised release term were imposed for Counts I and III, and five years as to Count II, to be served concurrently.

On November 14, 2014, the case was remanded for resentencing as to Count III as the sentence imposed exceeded the maximum term of imprisonment allowed by statute. At the time of the sentence the Court used the guidelines in effect November 1st, 2002, which remain the same under November 1, 2014, edition and establish a guideline adjustment to provide -- to the provisions under Section 1B1.11(a) as follows: Given the counts involved the same victim and the same act, Count I and III are grouped into a single group,

pursuant to United States Guidelines 3D1.2(a).

Okay. That section provides that offenses involving robbery have a base level of 20. Since there was -- the guideline for violation of Title 18, U.S.C., Section 212 is found at United States Guidelines 2B3.1. That section provides that offenses involving a robbery have a base level of 20. Since there was a permanent bodily injury to the victim, a six level increase is warranted pursuant to United States Guideline 2B3.1(b)(3)(C).

Considering the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from the law enforcement officer, a two-level increase is warranted pursuant to Guideline Section 3C1.2. Because a person, the victim, was physically restrained to facilitate the commission of the offense, a two-level increase was warranted pursuant to United States Guideline 2B3.1(b)(4)(B).

Since the defendant has demonstrated acceptance of responsibility, a three-level decrease is warranted. There are no other applicable Guideline adjustments. Therefore, based on a total offense level of 27 and a Criminal History Category VI, the Guideline Imprisonment Range is from 130 to 165, with a fine range of 12,500 to 250 -- however, there is a maximum statutory term of 120 months -- plus a supervised release term of at least one year, but not more than three

years as to Count III. Therefore, taking into account the totality of the circumstances and considering the plea agreement, it is the judgment of this Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 120 months for Count III, to be served concurrently with the sentence imposed as to Count I, which is 150, but shall run consecutively to 84 months of imprisonment for Count II. The totality remains the same; 234 months. Right?

THE PROBATION OFFICER: Yes.

THE COURT: 234. 234 months.

All right. Now, upon release from confinement, the defendant shall be placed on supervised release for a term of -- no, the supervised release term is -- what is the supervised release term as to all of these counts?

PROBATION OFFICER: Your Honor --

THE COURT: Yes, that's right. It is a supervised release term of at least one, but not more than three years, is that it, for these two offenses?

PROBATION OFFICER: Your Honor, since we're only resentencing for Count III, we're only mentioning in the resentence wording the supervised release as to this count.

THE COURT: No. No, no. But I just issued a brand new sentence. So I have to state what is the term of supervised release. The term of supervised release is --

PROBATION OFFICER: One to three years. And it would be concurrent to five years for Count II.

THE COURT: Okay. So therefore, it is one to three years as to Counts I and III. And how many years for Count II?

THE PROBATION OFFICER: Five years for Count II.

THE COURT: And five years as to Count II.

All right. And these are the conditions. Under the following conditions:

Okay. These are your conditions. The defendant shall not commit another federal, state, or local crime, and shall observe the standard conditions of supervised release recommended by the U.S. Sentencing Commission and adopted by this Court.

The defendant shall not unlawfully possess controlled substances.

The defendant shall refrain from possessing firearms, destructive devices, and other dangerous weapons.

The defendant shall refrain from the unlawful use of controlled substances and shall submit to a drug test within 15 days of release; thereafter, submit to random drug testing, not less than three samples during the supervision period and not to exceed 105 samples per year in accordance with the Drug Aftercare Program Policy of the U.S Probation Office approved by this Court. If any such samples detect substance abuse,

the defendant shall participate in an in-patient or out-patient substance abuse treatment 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 ability to pay or availability of third-party payment.

The defendant shall participate in vocational training and/or job placement program recommended by the U.S. Probation Office.

The defendant shall provide the U.S. Probation Officer access to any financial information upon request.

The defendant shall submit his person, property, house, residence, vehicles, papers, computer, other electronic communication or data storage device or media, and effects, to a search at any time, with or without a warrant, by a United States Probation Officer, and, if necessary, with the assistance of any other law enforcement officer, in the lawful discharge of the supervision functions of the probation officer, with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release.

In consideration of the Supreme Court's ruling in *Riley versus California,* the Court will order that any search

of the defendant's phone, by probation, while defendant is on supervised release be performed only if there is a reasonable articulable suspicion that a specific phone owned or used by the defendant contains evidence of a crime or violation of release condition, was used in furtherance of the crime, or was specifically used during the actual commission of the crime.

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 Title 18, U.S. Code Section 3563(a)(9).

Having considered the defendant's ability to pay, a fine will be considered. He does not have the ability to pay a fine. A special monetary assessment in the amount of $300 is imposed as required by law.

Sir, generally, a defendant can appeal his conviction if the defendant, that is you, believe that your guilty plea was somehow unlawful or involuntary, or if there's other fundamental defect in the proceedings that was not waived by your guilty plea. Generally, as a defendant you also have the statutory right to appeal the sentence under certain circumstances, particularly if you think the sentence is contrary to the law. However, defendant may waive those rights as part of a plea agreement. You have entered into a plea agreement in which you waive your right to appeal

substantive issues regarding the conviction and sentence in this case. Such waivers are also generally enforceable and, as such, a defendant may waive substantive challenge to conviction at sentence. However, if you believe your waiver of the right to appeal your judgment of conviction and sentence is unenforceable, you can present that theory to the Appellate Court.

With few exceptions, any notice of appeal must be filed within 14 days of judgment being entered in your case. If you're unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis. If you so request, the clerk of the court will prepare and file a notice of appeal on your behalf.

Where was he serving and is he -- does he want to go back there?

MR. CONNORS: He's been at Coleman, and I believe he still wants to be there.

THE COURT: Please ask him.

Sir, do you still want to return to Coleman?

THE DEFENDANT: Yes.

THE COURT: Okay. Yes, sir.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. He was provided a $300 assessment before. And the Court grants him up and until he returns to pay the $300 assessment.

Ana, Miss Romero, did the Court provide any special conditions under 3553? That is, drug treatment or psychiatric treatment to this defendant.

Okay. There you go. It is recommended that this defendant be provided while incarcerated the maximum drug treatment of 500 hours and vocational rehabilitation courses if he wishes to take them.

All right. So the sentence is identical, except that the statutory maximum of 120 is changed for Count III.

Anything further?

MR. CONNORS: No. Thank you, Your Honor.

THE COURT: Okay. Sir, good luck.

You may leave.

(WHEREUPON, the proceedings adjourned at 3:20 p.m.)

REPORTER'S CERTIFICATE

I, DONNA J. PRATHER, do hereby certify that the above and foregoing, consisting of the preceding 17 pages, constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 21st day of December, 2015.

S/Donna J. Prather

DONNA J. PRATHER, RPR, CRR, CBC, CCP
Federal Official Court Reporter
150 Carlos Chardon, Room 150
San Juan, PR 00918