**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 94-20824

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JORGE LUIS DIAZ-MUÑOZ,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Texas
(CR-H94-117-1)

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November 15, 1995

Before KING, SMITH, and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Jorge Luis Diaz-Muñoz appeals the imposition of a consecutive rather than concurrent sentence. Finding no error, we affirm.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Diaz-Muñoz has been arrested and deported from the United States seven times. His re-entry after his most recent deportation came to the attention of Immigration and Naturalization Service officials when they discovered that he was serving a state sentence in Texas for a theft conviction. Diaz-Muñoz pleaded guilty to unlawfully re-entering the United States after having been deported, a violation of 8 U.S.C. § 1326.

At sentencing, Diaz-Muñoz asked that the sentence for this latest federal violation run concurrently with his state sentence, pursuant to U.S.S.G. § 5G1.3(c) and the accompanying commentary.[1] The district court considered both a concurrent and a consecutive sentence, but ultimately chose to impose a consecutive sentence citing Diaz-Muñoz's criminal history and the likelihood that he would engage in future criminal conduct.

II.

We review the district court's interpretation of the guidelines de novo but its application of the guidelines to the facts for clear error. United States v. Gaitan, 954 F.2d 1005, 1008 (5th Cir. 1992). District courts must consider and follow § 5G1.3(c), a policy statement regarding the calculation of a sentence for multiple offenses. United States v. Hernandez, 64 F.3d 179, 183 (5th Cir. 1995). It applies, as in this case, where neither subsection (a) nor subsection (b) applies. Id. at 181-82;

[1] The 1993 version of the guidelines applies to this case.

see United States v. Torrez, 40 F.3d 84, 86 & n.1 (5th Cir. 1994). As we recently stated, "[s]ection 5G1.3(c) expressly contemplates the imposition of a consecutive sentence." Torrez, 40 F.3d at 87.

A district court must also consider the methodology set out in note 3 of the commentary to § 5G1.3, which applies to subsection (c) cases. Hernandez, 64 F.3d at 183. This methodology also expressly contemplates imposition of a consecutive sentence. See U.S.S.G. § 5G1.3 comment. (n.3).

The language of the commentary is permissive, not mandatory. Hernandez, 64 F.3d at 183 & n.5; Torrez, 40 F.3d at 87. Once the court has considered the suggested methodology, it may decline to apply it. Hernandez, 64 F.3d at 183; Torrez, 40 F.3d at 87. If the court chooses not to follow the methodology, it must either explain why the calculated sentence would be impracticable or state reasons for using an alternative method. Hernandez, 64 F.3d at 183.

## III.

The district court considered the methodology suggested in the commentary to § 5G1.3. Although it did not explicitly cite that section or its commentary, it considered both a concurrent and a consecutive sentence in an attempt to fashion an appropriately incremental punishment. The court then chose to impose a consecutive sentence on two grounds: (1) the defendant's past criminal conduct (characterizing his criminal history category as under-representing the seriousness of his past conduct) and (2) the

likelihood that he would engage in future criminal conduct.

After such consideration and explanation, the court was within its discretion to impose a consecutive sentence upon Diaz-Muñoz. See Hernandez, 64 F.3d at 182-83 & n.5; Torrez, 40 F.3d at 87. Accordingly, we AFFIRM.