

No. 08-2481

**In The United States Court of Appeals
for the First Circuit**

UNITED STATES OF AMERICA,
Appellee,

v.

KELMIT OQUENDO-RIVERA,
Defendant - Appellant.

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

BRIEF FOR THE APPELLANT

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*In San Juan, Puerto Rico
March 30th, 2009*

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TO THE HONORABLE COURT:

COMES NOW the defendant-appellant Kelmit Oquendo-Rivera (hereinafter “Mr. Oquendo”), through the undersigned attorney, and very respectfully states, alleges and prays as follows:

I. APPELLATE JURISDICTION

This case originated from the prosecution of an alleged violation by Mr. Oquendo to the conditions of supervised release imposed by the district court on him at sentencing. The district court exercised jurisdiction pursuant to 28 U.S.C. § 3231,

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18 U.S.C. § 3583(e) and under its inherent authority to enforce Judgments in criminal cases.

This Honorable Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291. The defendant-appellant seeks to appeal from the Judgment of the district court issued on September 29, 2008, and entered on the docket on September 30, 2008, imposing a 60-month term of imprisonment after revoking Mr. Oquendo's supervised release term. (Addendum "Add." pp. 1-2.) Mr. Oquendo timely moved the district court for reconsideration on October 14, 2008. (D.E. # 94; Appendix ("App.") at pp. 22-28.) The district court declined to reconsider on October 29, 2008. (D.E. # 95.) Mr. Oquendo filed a timely notice of appeal on October 29, 2008. (D.E. # 96; App. at p. 29-30.)

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- A. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REVOKING MR. OQUENDO'S SUPERVISED RELEASE TERM WHERE THE DISTRICT CLEARLY ERRED IN FINDING BY A PREPONDERANCE OF THE EVIDENCE THAT MR. OQUENDO INCURRED IN NEW CRIMINAL CONDUCT.**

- B. WHETHER THE SENTENCE IMPOSED ON MR. OQUENDO UPON REVOCATION IS BOTH PROCEDURALLY AND SUBSTANTIVELY**

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**REASONABLE WHERE THE DISTRICT COURT
IMPOSED THE STATUTORY MAXIMUM IN THE
FACE OF CLEAR MITIGATING FACTORS.**

III. STATEMENT OF THE CASE

A. Nature of the Case

Mr. Oquendo's is one of those unfortunate cases where a person finds him or herself in the wrong place at the wrong time. After Mr. Oquendo pled guilty back in the year 2000 to charges of narcotics distribution, the district court sentenced him to serve 78 months in prison and a supervised release term of 5 years. (Amended Judgment, D.E # 60.)¹ Mr. Oquendo began serving his term of supervised release on October 22, 2004 after he was released from prison.

Almost three and a half years later, during which he showed exemplary compliance, Mr. Oquendo was charged by her supervising probation officer with having violated several of his conditions of release. (App. at pp. 18-21.) The motion notifying the district court of the violations alerted that the Puerto Rico Police had been involved in a shootout in the municipality of Yauco, Puerto Rico, while they

¹The original judgment issued on September 20, 2000, stated that the sentence was 87 months even though the oral sentence imposed had been 78 months imprisonment. Mr. Oquendo moved *pro se* for an amendment of the judgment on December 17, 2001. (D.E. # 58.) The district court granted the motion on January 15, 2002. (D.E. # 59.) Hence the amended judgment.

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executed a search warrant. Mr. Oquendo was identified as one of the shooters and an allegation was made that Mr. Oquendo had specifically fired a weapon at one of the police officers.

Local charges were brought against Mr. Oquendo for, among other things, attempted murder and weapons law violations. While some of the charges were still pending at the local level², the district court convened a final revocation-of-supervised-release hearing. At said hearing, the district court heard the testimonies of several Puerto Rico Police officers, including officer Rashid Feliciano's, the officer at whom Mr. Oquendo allegedly fired shots. The district court also heard the testimony of Mr. Oquendo.

Many contradictions were pointed out during the police officers' testimonies. The only police officer that testified seeing Mr. Oquendo with a firearm was the same officer that shot and wounded Mr. Oquendo. The testimonies of four other police officers present during the same intervention cast serious doubts on the veracity of the version offered by officer Feliciano. Yet, the district court chose to believe officer Feliciano and revoked Mr. Oquendo's supervised release term. In doing so, it is respectfully submitted that the district court abused its discretion and made

²All local charges have been dismissed against Mr. Oquendo at this time.

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clearly erroneous findings of fact. Similarly, the district court abused its discretion in sentencing Mr. Oquendo to the statutory maximum term without giving due consideration to mitigating evidence under § 3553(a) and without giving a sufficient explanation.

For the reasons set forth below, the judgment of the district court should be reversed and Mr. Oquendo's sentence on revocation vacated.

B. Course of Proceedings and Disposition in the Court Below

Mr. Oquendo was indicted on February 23, 2000, along with another co-defendant on charges of narcotics distribution. (D.E # 4.) After reaching an agreement with the government in exchange for his plea of guilty, Mr. Oquendo was sentenced by the district court to a term of 87 months imprisonment, subsequently amended to 78 months. (D.E. ## 38, 39, 47 and 60.) The district court also imposed a supervised release term of 5 years on Mr. Oquendo. (*Id.*)

Mr. Oquendo began serving his supervised release term upon his release from confinement on October 22, 2004. The record reflects that Mr. Oquendo served his supervised release term without eventuality for over three and a half years until February 25, 2008, when his supervising probation officer filed a motion notifying several alleged violations to his supervised release conditions and moving the district

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court for an order to show cause why his supervision should not be revoked. (D.E. # 65; App. pp. 18-21.) In what is pertinent to this appeal, the general allegation is that the probation officer was notified on February 21, 2008, that Mr. Oquendo had been arrested at the Municipality of Yauco, Puerto Rico, for his alleged involvement in a shoot out. The shooting supposedly ensued while members of the Puerto Rico Police attempted to execute a search warrant in a residence at “El Cerro” sector of the aforementioned municipality.

The motion notifying violations specifically states that Mr. Oquendo shot at a police officer during the incident. At the time, the local authorities were in the process of filing charges against Mr. Oquendo. Charges were eventually brought for attempted murder and weapons law violations in the Commonwealth of Puerto Rico courts.

While the charges were pending at the local level, and after several continuances, the district court convened a final revocation hearing on September 29, 2008. (D.E. # 91.) At said hearing, the government presented the testimonies of agents Jose Brasero, Rashid Feliciano and Hector Castillo of the Puerto Rico Police. (*Id.*) Mr. Oquendo’s defense counsel called to the stand agents David Colon and Juan Tirado also of the Puerto Rico Police. (*Id.*) Mr. Oquendo also testified. (*Id.*)

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Once all the evidence was submitted and after hearing argument from defense counsel, the district court found that Mr. Oquendo had violated his conditions of supervised release by “committing a very serious crime”, *i.e.* shooting at a police officer with a gun, which was a grade A violation. (Transcript of Revocation Hearing, D.E. # 101 at 82; Appendix “App.” at p. 112.) The district court sentenced Mr. Oquendo to the statutory maximum term for a grade A violation, five years. (*Id.*; *see also* Judgment on Revocation, D.E. # 93; Add. at pp. 1-2.) This Judgment on Revocation was issued by the district court on September 29, 2008, and entered into the docket the following day, September 30, 2008. (*Id.*)

Mr. Oquendo unsuccessfully moved the district court for reconsideration. (D.E. ## 94 and 95.) A timely notice of appeal was then filed by Mr. Oquendo on October 29, 2008. (D.E. # 96; App. at pp. 29-30.)

IV. STATEMENT OF FACTS

After Mr. Oquendo was released from prison, he continued working on his own rehabilitation while on supervision. His goal was to become a productive member of society. And for three and half years, he seemed to have excelled at such task. For instance, Mr. Oquendo began his own car detailing business, for which he had received a municipal permit and his business was registered at the Puerto Rico

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Treasury for purposes of collecting the sales tax mandated by law. Mr. Oquendo was also studying. He had enrolled in May of 2007 in the Electric Technical School and was taking courses in refrigeration.

On February 21, 2008, Mr. Oquendo attended class in the morning. (Transcript of Revocation Hearing, App. at p. 87.) Classes began at 7:30 a.m. and ended at 12:00 noon. (*Id.*) Immediately after he left school, he went to his wife's³ house where he stayed for a while. (*Id.*) Mr. Oquendo then accompanied his wife to visit her sister. (*Id.* at 87-88.) They arrived at the sister's house at approximately 1:30 p.m. (*Id.* at 88.) Once there, Mr. Oquendo received a phone call from Bebe. (*Id.*) Bebe, as Mr. Oquendo explained, Mrs. Oquendo's cousin's wife. (*Id.*) Bebe was calling to receive a quote from Mr. Oquendo regarding his car detailing services. (*Id.*)

Mr. Oquendo met Bebe at his sister-in-law's house. (*Id.* at 89.) He checked the car and provided the quote. (*Id.*) During this time, Bebe also told Mr. Oquendo that he had a cousin who had recently purchased a van and that he (Bebe's cousin) was also interested in getting a quote to retain Mr. Oquendo's services. (*Id.*) Mr. Oquendo then agreed to accompany Bebe to meet the latter's cousin. (*Id.*)

³The person to whom Mr. Oquendo refers to as his wife is in reality his consensual or common law partner, the mother of Mr. Oquendo's daughter.

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Bebe and Mr. Oquendo arrived at a nearby two-story house. (*Id.* at p. 90.) They went upstairs to talk to Bebe's cousin. (*Id.*) As Mr. Oquendo walked inside the house behind Bebe, he saw that there were drugs inside the residence. (*Id.* at p. 91.) Mr. Oquendo then decided not to go in and to remain at the doorway of the house. (*Id.*) Mr. Oquendo became afraid of the situation since he was on federal supervision. (*Id.*) He was there for about two to three minutes and at all times looking down at the street. (*Id.*) Mr. Oquendo also told Bebe to hurry. (*Id.*)

All of the sudden, while standing at the doorway and balcony of the residence, Mr. Oquendo sees three individuals all dressed in civilian clothes running towards the house holding firearms. (*Id.* at 92.) Mr. Oquendo did not know who these individuals were. (*Id.*) He certainly did not know that they were police officers. (*Id.* at p. 97.) Afraid for his life, Mr. Oquendo began to run towards the back of the house. (*Id.*) Mr. Oquendo ran in the direction of a small alley that exists in between the residence where he was at and the next door house. (*Id.* at pp. 92-93.) Right away, the three individuals, who Mr. Oquendo later realized were police officers, began firing their weapons at him. (*Id.* at pp. 93-94.) He kept running and looking for a place to hide. (*Id.* at p. 93.) Mr. Oquendo then jumped the fence dividing the two houses and once he landed on the other side, he was hit in the leg by a bullet. (*Id.* at pp. 93-95.) Mr.

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Oquendo fell to the ground immediately following the impact and was unable to walk. He felt that his “leg was hanging” and the only thing holding it was the skin. (*Id.* at p. 95.)

Mr. Oquendo dragged himself seeking cover until he was able to arrive at a small stairway in the next door house. (*Id.*) He was bleeding and in a great deal of pain. In that position, Mr. Oquendo was able to observe a uniformed police officer who had arrived at the scene. (*Id.* at p. 96.) He screamed out at the police officer and told him that he was hurt, that he was wounded. (*Id.*) Mr. Oquendo was then approached by the police officer that he was screaming out to, later identified as officer Castillo. (*Id.* at p. 97.) Officer Castillo placed Mr. Oquendo under arrest and told him to remain silent. (*Id.*) Officer Castillo also searched Mr. Oquendo. He found his wallet and cell phones. (*Id.*)

The next officer to arrive where Mr. Oquendo was laying was officer Rashid Feliciano. (*Id.* at p. 98.) Officer Feliciano simply began to kick Mr. Oquendo. (*Id.*) Moreover, officer Feliciano asked his colleague Castillo whether he had searched Mr. Oquendo to which Castillo replied that he had. (*Id.*) Notwithstanding, officer

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Feliciano introduced his hand inside Mr. Oquendo's pocket retrieving a small bag.⁴ (*Id.*) Mr. Oquendo immediately denied that such an item was his. (*Id.*) Officer Feliciano just said "shut up." (*Id.*) Following this exchange, Mr. Oquendo was taken to the hospital. (*Id.*) He was carried out on a stretcher. (*Id.*)

At the hospital, Mr. Oquendo was approached by a police officer who showed him everything that was seized from his person including the small bag. (*Id.* at pp. 98-99.) Mr. Oquendo reiterated that the bag did not belong to him. (*Id.* at 99.) The police officer then asked Mr. Oquendo what do you want me to say that you were using or that I found you at the drug point selling it? (*Id.*) The charge would be more serious if the latter. (*Id.*) Mr. Oquendo then reluctantly replied that he rather had the officer say that he was using. (*Id.*) Mr. Oquendo was then transported to the Medical Center. (*Id.*) He underwent surgery to repair his broken leg. Rods and screws have been inserted inside his leg. At the time of the revocation hearing, almost nine months later, Mr. Oquendo still needed crutches to walk.

Unfortunately, the above-stated version of the events was not the one believed by the district court. The district court found credible the testimony of officer Rashid

⁴The contents of the small bag allegedly found inside Mr. Oquendo's pocket subsequently filed-tested positive to cocaine.

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Feliciano, the officer who shot and wounded Mr. Oquendo. Officer Feliciano testified on direct that on February 21, 2008, he was part of the team that was going to execute a search warrant in a house located at “El Cerro” in Yauco, Puerto Rico. (Transcript, App. at p. 55.) There were three police cars involved in the assignment. Officer Feliciano was ridding in the second vehicle. (*Id.*) His instructions, as he testified, were to go inside the house. (*Id.*)

Officer Feliciano further testified that he stepped out of his car and went up the stairs in front of the residence to be searched. (*Id.*) All of the sudden, officer Feliciano heard a shot from the right side of the place where he was at. (*Id.*) Immediately thereafter, he heard another shot coming from a window. (*Id.*) He could only see the silhouette of a person through the window. (*Id.*)

When this second shot was fired, officer Feliciano identified himself as a police officer and ordered the person to come out of the residence. (*Id.*) The person allegedly came out of a window, jumped on a small edge protruding from the house and ran left. (*Id.*) The person also aimed and shot his gun towards him while running. (*Id.* at pp. 55-56.) Officer Feliciano then dropped the sledge hammer that he was going to use to break the door of the residence open, aimed his weapon and fired at the individual. (*Id.* at p. 56.) Officer Feliciano continued to hear shots all around him,

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so he threw himself to the ground looking for cover. (*Id.*) In doing so, he lost sight of the individual that had fired at him until the neighbors alerted that there was a person at the house next door. (*Id.*) Said individual was hiding, had been wounded and was bleeding. (*Id.*)

The wounded individual was arrested by officer Hector Castillo. (*Id.*) Officer Felciano identified the individual that shot at him in court as defendant-appellant Mr. Oquendo. (*Id.*)

On cross-examination, officer Feliciano admitted several important points. He stated in response to questions from Mr. Oquendo's counsel that he parked his vehicle in front of the residence. (*Id.* at p. 59.) His instructions were to be the first one in and to break open the door with a sledge hammer. (*Id.* at p. 57.) Officer Feliciano exited his vehicle sledge hammer in hand since he was about to enter the premises. (*Id.* at p. 59.) While he was approximately **nine feet** away from the house, he heard the first shot. (*Id.*) The individual that shot at him came out of a window and was holding a revolver. (*Id.* at pp. 59-60.) The person fired the revolver with his left hand. (*Id.* at p. 60.) Officer Feliciano shot the individual three times at the same time the individual allegedly fired at him also three times. (*Id.*) Officer Feliciano admitted that he was aware at the time that he had shot Mr. Oquendo in the leg. (*Id.*)

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According to officer Felciano, Mr. Oquendo did not fall to the ground or even touch his leg. (*Id.* at pp. 60-61.) On the contrary, he continued running and was even able to jump a fence. (*Id.* at p. 61.) Officer Felciano saw that Mr. Oquendo apparently hesitated for a second when the bullet hit him, but began running again. (*Id.*) Since officer Felciano continued hearing shots, he took cover until the shots stopped. (*Id.*) Immediately thereafter, he went looking for Mr. Oquendo. (*Id.* at p. 62.) He followed the same path that he had seen Mr. Oquendo follow. (*Id.*) He even jumped the same fence. (*Id.*) No blood was seen by officer Felciano on the fence or on the other side of the fence. (*Id.*) He saw blood on the stairwell leading up to where Mr. Oquendo was hiding. (*Id.*)

Importantly, officer Felciano admits that no revolver was recovered from the scene. (*Id.* at p. 63.) No police officer was harmed during the shooting; no police vehicle was hit either. (*Id.*) Officer Felciano admits that he has fired at many people before this incident because he has done three tours to Iraq. (*Id.* at p. 64.) Finally, officer Felciano candidly admitted on cross-examination that had Mr. Oquendo not possessed a weapon, he would not have been able to fire at him. (*Id.* at p. 65.) He testified that he needed to wait to be fired upon first. (*Id.*)

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The district court found officer Feliciano's version to be credible despite of the many inconsistencies that existed within his testimony and with respect to the testimonies of his fellow officers present at the scene. As it will be shown below, in doing so, the district court erred.

V. STANDARD OF REVIEW

This Honorable Court reviews a district court's decision to revoke supervised release on its finding of a violation for abuse of discretion. *United States v. Whalen*, 82 F.3d 528, 532 (1st Cir. 1996)(citing *United States v. Morin*, 889 F.2d 328, 331 (1st Cir. 1989)). On the other hand, findings of fact by the district court in determining whether a supervised release violation occurred are reviewed for clear error. *Id.*

Revocation sentences are also reviewed by this Honorable Court for abuse of discretion. *United States v. McInnis*, 429 F.3d 1, 4 (1st Cir. 2005).

VI. SUMMARY OF ARGUMENT

The district court committed clear error in crediting the version of facts given by officer Rashid Feliciano over that of Mr. Oquendo. Mr. Oquendo's version is the only one that comports with the other circumstantial evidence presented in the case and at the revocation hearing. Officer Feliciano's, on the other hand, is an embellished version of the facts intended only to cover his own wrongdoing. Officer

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Feliciano shot and wounded an unarmed individual, which, under most circumstances, would be a violation of an individual's Fourth Amendment rights. Then, he conveniently accommodates his testimony to one that would justify his firing upon Mr. Oquendo. The problem with officer Feliciano's version is that it does not make sense in light of other evidence presented at the hearing and particularly in view of the testimonies of his fellow officers.

With respect to sentencing, the district court abused its discretion in sentencing Mr. Oquendo to the statutory maximum without giving complete consideration to all of the factors set forth in section 3553(a) of Title 18, United States Code. The district court did not even mention the factors. Similarly, the district court failed to provide a reasoned explanation for his chosen sentence in light of mitigating evidence and in view of other alternatives. For the reasons more fully set forth below, the judgment of the district court should be vacated.

VII. ARGUMENT

A. The District Court Abused its Discretion in Revoking Mr. Oquendo's Supervised Release Term.

As stated above, this case is the best example of an individual finding himself in the wrong place at the wrong time. But it is also about much more than that. It is

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about the rampant corruption that exists within the Puerto Rico Police that has prompted the return of many indictments against Puerto Rico Police officers for depravation of civil rights.⁵ Yet, the district court in the present case decided to give credibility to the completely and utterly incredible testimony of the only police officer that allegedly saw Mr. Oquendo in possession of a firearm; the same officer that shot and seriously wounded Mr. Oquendo. The same officer that has gone to three tours at the Iraq war and admits having fired at many people before.

Mr. Oquendo was doing things right during his supervision. He was studying, had started his own business and was complying with all of his conditions of supervised release. In fact, he had done so for over three and a half years. On February 21, 2008, Mr. Oquendo was attempting to give a quote to a potential client of his car detailing business. He never imagined that on that day he would receive a serious injury to his leg by the hands of a police officer. Moreover, he never imagined, after more than three years of living a completely law-abiding life, that he would be sent back to jail.

⁵Moreover, at least three of Puerto Rico Police officers that participated in the arrest of Mr. Oquendo, are currently under investigation for the alleged beating of a youngster in Yauco, Puerto Rico which resulted in the death of the youngster. As far as Mr. Oquendo knows, no charges have been brought yet, but the Puerto Rico Special Bureau of Investigations is involved in the case. Among the investigated police officers are David Colon-Martinez, Jaime Rodriguez-Vega and Eric Vega-Nazario.

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Mr. Oquendo saw armed individuals in civilian clothes running towards the house where he was at. His reaction—a reasonable one—was to run not knowing who these persons were. Mr. Oquendo, unarmed, tried to run in the direction of the adjacent houses. He jumped a fence to hide from what he perceived was a threat against his life. Once he landed on the other side of the fence, he was fired upon and hit in the leg. He immediately fell to the ground. He was bleeding profusely and in a great deal of pain. Realizing what was happening, Mr. Oquendo dragged himself to the next door house to hide. As soon as he saw a uniformed police officer, he asked for help. He was in turn arrested and a bag of cocaine planted in his pocket by the same police officer that shot him. The same police officer that admitted he would not have had justification to fire upon an unarmed individual unless fired upon first. The same officer that stood to be charged administratively or even criminally unless he places Mr. Oquendo with a firearm in his hand and shooting at him.

Mr. Oquendo's version is further confirmed by the fact that he had in his possession many car keys as testified by one of the officers. These car keys are the keys to the cars that Mr. Oquendo was working on as part of his detailing business. Additionally, this Honorable Court should be concerned about the allegation that a bag of cocaine was planted on Mr. Oquendo's person. As admitted by Mr.

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Oquendo's probation officer, Mr. Oquendo never tested positive to controlled substances during the three and a half years that he was on supervision. It defies credulity that he would possess a bag of cocaine in his pocket not being a drug user. The more reasonable explanation is that it was planted so that the police officers could argue a connection with the house to be searched.

The district court chose to believe officer Feliciano, without so much as commenting on the testimonies of the other police officers. Officer Feliciano said that he was **nine feet** from the residence when he heard the first shot. That he was the first one out and that he could only see a silhouette. Shortly thereafter, he saw whom he claims is Mr. Oquendo, exiting through a window. Mr. Oquendo allegedly had a revolver and fired at the officer with his left hand as he ran in direction to the back of the house. The officer then fired at Mr. Oquendo hitting him on the leg. But Mr. Oquendo did not fall; he continued running and was even able to jump a fence. Mr. Oquendo was arrested some time after by another police officer while he screamed for help. He was allegedly found in possession of a baggie of cocaine.

This version, which the district court credited, is unbelievable. First, no

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revolver was ever recovered. Second, Mr. Oquendo is right handed.⁶ Yet, the officer claims that Mr. Oquendo shot with his left hand. Moreover, there was no blood near the fence that Mr. Oquendo supposedly jumped while wounded. And the version of officer Feliciano is contradicted in many respects by the testimonies of his fellow officers present at the scene. These testimonies are discussed *seriatim*.

1. Officer Brasero

Officer Brasero testified that on February 21, 2008, he started service at 6:30a.m. at the Yauco headquarters. (Transcript, App. at p. 36.) He was part of the team of people assigned to execute a search warrant at sector El Cerro in Yauco. (*Id.*) The search warrant had been investigated by fellow officer David Colon and issued by a Puerto Rico Judge. (*Id.*)

At around 7:30 a.m., a fellow agent dropped off officer Brasero and officer David Colon near the area to begin surveillance on the house that was to be searched. (*Id.*) Officer Brasero testified that it was not until after midday that they saw people arriving at the house, including Mr. Oquendo. (*Id.*) The officers decided to enter the house at around 2:00p.m. (*Id.*)

⁶At the revocation hearing, the defense demonstrated to the district court that Mr. Oquendo is right handed by having Mr. Oquendo draw on the black board, which he did with his right hand, and by signing his name with both his right hand and his left hand. (Transcript, App. at pp. 92-95.)

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Officer Brasero testified that as the several Puerto Rico police cars arrived at the scene, a shoot out ensued. (*Id.* at p. 37.) Officer Brasero looked for cover immediately behind a vehicle that was parked across from the residence. (*Id.*) He saw an individual coming out of a side door in front of the house. (*Id.*) His fellow agents were also yelling that there was another individual coming out of a lateral or side window of the house to be searched. (*Id.*) However, officer Brasero was not able to see the latter. (*Id.*) He did see his fellow officer Feliciano firing shots at the person. (*Id.*)

When the shoot out ended, officer Brasero and officer David Colon went into the house. (*Id.*) Inside there were five out of the seven individuals that he had seen earlier entering the house during his surveillance. (*Id.*) Drugs and a pistol were recovered from the residence. (*Id.* at p. 38.) The five individuals inside the house were arrested. (*Id.*) Officer Brasero heard that his fellow officers had also arrested Mr. Oquendo at the next door house and that he had been taken to the Hospital by officer Castillo. (*Id.*) Officer Brasero seized the drugs and the firearm inside the house. (*Id.*) The drugs eventually field tested to cocaine base. (*Id.*)

On cross examination, officer Brasero testified that during the surveillance, he saw six people enter the house. (*Id.* at p. 4.) He was the one who gave the call to

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enter. (*Id.* at p. 40.) Officer Brasero also testified that Mr. Oquendo had arrived to the house between 20 minutes to half an hour before the call to enter the house was given. (*Id.* at p. 41.) However, he admitted that he had previously testified that he gave the call to enter the house at approximately two o'clock and that at that same time is that he sees Mr. Oquendo arrive. (*Id.* at pp. 41-42.)

Officer Brasero did not see Mr. Oquendo with a firearm or doing anything illegal. (*Id.* at p. 42.) He also asseverated, answering questions from defense counsel, that he had initially taken video of the surveillance but the battery went dead before any of the subjects were seen arriving at the house. (*Id.* at p. 43.) Further, when the call to enter was given, all of the officers arrived together. (*Id.*) They did not run, they were "brisk walking." (*Id.*) The testimony of officer Brasero was that **the first shot was heard before he or any of his fellow officers stepped out of the patrol cars.** (*Id.* at pp. 43-44.) He did not see who fired that first shot or where it came from. (*Id.* at p. 44.) It was only officer Bracero heard the first shot and took cover, that he saw Agent Rashid Feliciano hit his vehicle. Only after he heard the first shot and after he took cover, only then officer Brasero saw agent Rashid Feliciano exit his vehicle. (*Id.*) It is then that officer Brasero also looks and sees agent Feliciano firing at or toward the left side of the house. (*Id.*) Officer Brasero did not see anybody

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shooting at officer Feliciano. (*Id.* at p. 45.)

In addition, officer Brasero testified on cross-examination that no patrol cars were hit by bullets, that no revolver was ever found, and that no casings were found inside the house. (*Id.* at p. 46.) Importantly, officer Brasero testified that he saw an individual exiting through the front door of the house while the shooting was taking place; a door that was towards the right hand side if one stands in front of the house. (*Id.* at p. 47.) That individual fled the scene, according to officer Brasero, when the shooting began. (*Id.* at pp. 47-48.)

Officer Brasero was presented with the video that he took which showed the house at issue. He was also asked to identify the door through which the individual he saw exited, the direction the individual went while fleeing and where the officer himself was at. (*Id.* at pp. 49-51.) Officer Brasero was also asked to identify the place he saw officer Feliciano firing his weapon in relation to the house. (*Id.* at p. 51-52.)

The testimony of officer Brasero ended once again reaffirming that no revolver was ever recovered from the scene. Many agents participated in the intervention. Homicide agents even arrived after the incident. (*Id.* at p. 52.) Yet, the revolver allegedly in the hands of Mr. Oquendo was not found.

As this Honorable Court can see, this testimony is in direct contradiction with

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the testimony of officer Feliciano. According to Feliciano, the first shot was allegedly fired when he was nine feet from the door he was supposed to break open as the first agent in. Yet, officer Brasero testified that the first shot was fired when none of the agents had yet stepped out of their vehicles. Officer Brasero also testified about an individual who exited the front door of the residence, the same front door that officer Feliciano was nine feet away from when he first heard a shot. He testified about a silhouette, he never mentioned an individual coming out of the door which presumably he would have had to face. Officer Brasero saw officer Feliciano firing, but he did not see anyone firing at officer Feliciano. Once again, no revolvers recovered, no officers wounded, no police cars hit.

2. *Officer Castillo*

Hector Castillo, of the Puerto Rico Police, was also called as a witness for the government. (Transcript, App. p. 66.) On direct-examination he testified that on February 21, 2008, he heard a 1050 code from agent Brasero. (*Id.*) In the message that officer Castillo received, officer Brasero alerted that there was an individual who fled the area holding a firearm. (*Id.* at p. 68.) A description of what the individual was wearing was also provided by way of message. (*Id.*) Officer Castillo was nearby so he testified that it took him about a minute to get to El Cerro. (*Id.*)

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As officer Castillo arrived, he got out of his car and saw officer David Colon. (*Id.*) Officer Castillo was accompanied by fellow officer Lopez who stayed in the car. (*Id.*) The testimony continued that officer Colon told officer Castillo that the individual that fled had gone to an orange and white house. (*Id.*) Officer Castillo then proceeded to go to the area that had been described to him. (*Id.* at p. 69.) He jumped a fence and went upstairs to a second floor. (*Id.*) Officer Castillo was able to see blood in the area of the stairwell. (*Id.*) As he went up, he could hear some screaming. (*Id.*) He identified himself as a police officer and asked the screaming person whether he was armed. (*Id.*) He finally saw an individual, later identified as Mr. Oquendo, lying on the floor next to some washing machines. (*Id.*) Mr. Oquendo was bleeding and asked for an ambulance. (*Id.* at p. 70.) Officer Castillo asked for an ambulance over the radio and then approached Mr. Oquendo. (*Id.*) Officer Castillo asked Mr. Oquendo whether he was armed to which Mr. Oquendo replied in the negative. (*Id.*)

While Mr. Oquendo continued to ask officer Castillo for help, officer Feliciano arrived. (*Id.*) According to officer Castillo, officer Feliciano told him that Mr. Oquendo had been the person that fired at officer Feliciano. (*Id.*) Officer Castillo placed Mr. Oquendo under arrest. (*Id.*) In the process of searching Mr. Oquendo,

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officer Castillo allegedly found money, two cellular phones and keys to different cars. (*Id.*) A bag containing what it was later determined to be cocaine was also apparently found by officer Castillo on Mr. Oquendo's person. (*Id.* at p. 71.)

Officer Castillo accompanied Mr. Oquendo to the hospital. (*Id.*) At the hospital, he left Mr. Oquendo with a fellow officer and then went on to the police station to hand over the money, property and drugs seized from Mr. Oquendo. (*Id.*) Since officer Castillo was not feeling well, he left that day, he returned the following day to follow up on the field test to the baggie found in Mr. Oquendo's possession. (*Id.* at p. 72.) The field test conducted by a fellow officer yielded positive to cocaine. (*Id.*)

On cross-examination, officer Castillo admitted that Mr. Oquendo was hurt when he saw him for the first time, that Mr. Oquendo was screaming for help and that in the condition he was found, he could not jump a fence. (*Id.* at pp. 74-75.) Officer Castillo also testified that Mr. Oquendo was not armed and that a caliber .38 revolver was not found in the premises of the arrest. (*Id.* at pp. 75-76.)

Aside from the fact that no revolver was ever found, Officer Castillo's testimony contradicts that of Officer Feliciano insofar as the latter testified that even after having been hit by a bullet in the leg, Mr. Oquendo was able to continue running

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and jump a fence. In the condition that Mr. Oquendo was, unable to walk to the point that he had to be taken out on a stretcher, he could not have done the things that officer Feliciano allegedly observed Mr. Oquendo doing. This is yet another example of the inconsistencies in the testimony that the district court ultimately credited.

In addition, the bag allegedly found in Mr. Oquendo's possession field tested positive to powder cocaine. As the Court can gather from officer Brasero's testimony, all the narcotics found in the house subject to the search tested positive to cocaine base. If the intent of the officers was to somehow connect Mr. Oquendo to the drug house, they failed to do it. They planted the wrong substance. This is yet another inconsistency to take into consideration.

3. *Officer Colon*

Officer David Colon was called to testify by the defense of Mr. Oquendo. (Transcript, App. p. 78.) On direct examination, he testified that he was the officer who conducted surveillance during which some observations were made and later used to obtain the search warrant. (*Id.* at p. 79.) During his surveillance, officer Colon never saw Mr. Oquendo. (*Id.* at p. 80.)

On the day of the execution of the search warrant, officer Colon similarly did not see Mr. Oquendo exit the house. (*Id.*) The first time he saw Mr. Oquendo was

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when he was being brought down on a stretcher to the ambulance. (*Id.*)

This testimony confirms Mr. Oquendo's version. Mr. Oquendo had never been to the house that was to be the subject of the execution of a search warrant. February 21, 2008, was the first time he visited said house. And an explanation for being there has already been given and is uncontroverted. Additionally, it calls into question officer Castillo's testimony that it was officer Colon who directed him to the place where Mr. Oquendo was found. Up until the point of Mr. Oquendo being carried out on a stretcher, officer Colon had not seen Mr. Oquendo at all.

4. Officer Tirado

Officer Tirado was also called by the defense. (Transcript, App. at p. 81.) He testified that on February 21, 2008, he was part of the backup team for the execution of the search warrant at issue in this case. (*Id.* at p. 82.) He was in the first patrol car of the convoy of cars going up to the house for the execution of the search warrant. (*Id.*) As officer Tirado drove past the house, he looked up towards the house and saw an individual standing in the balcony of the residence. (*Id.* at pp. 82-83.)

While officer Tirado continued driving, a person fired at him. (*Id.* at p. 83.) Once he heard the shot, and as he looked for cover, he crashed his vehicle. (*Id.*) Officer Tirado then exited his vehicle and looked for cover. (*Id.* at p. 84.) At that

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time, he did not see anybody around the premises of the house. (*Id.*) Officer Tirado also testified that he saw an individual trying to exit through the main entrance door of the residence. (*Id.*) The person had a black revolver in his hand and officer Tirado asked him to stop after identifying himself as a police officer. (*Id.*) In fact, officer Tirado testified that this person was the same one who fired at him from the balcony as he arrived to the house. (*Id.* At p. 85.)

The individual seen by officer Tirado was able to exit the house and ran towards the back part of the house. (*Id.*) Officer Tirado again asked him to stop. (*Id.*) The individual fired his revolver towards the ground but in the direction of officer Tirado. (*Id.*) Officer Tirado fired back. (*Id.*) The individual jumped a fence and officer Tirado lost sight of him. (*Id.*) That individual, officer Tirado testified, was not Mr. Oquendo and was never arrested. (*Id.*)

This testimony, if believed, is similarly in contradiction with officer Feliciano's testimony. Officer Feliciano could not have been nine feet from the door when the first shot was heard. Officer Tirado testified that he was driving the first car in the convoy when the first shot was fired. This is consistent with officer Brasero's version that the first shot was fired before any of his fellow officers stepped out of their cars. Moreover, both officer Tirado and Brasero testified that they saw an individual come

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out of the front entrance door. This individual had a revolver and shot at officer Tirado. This individual was allegedly in the balcony of the residence and then exited the house through the front door. Had officer Feliciano really being in front of the house nine feet away with the sledge hammer, he would have faced this individual head on.

5. *To Sum Up*

Mr. Oquendo cannot stress enough his main point of contention. The question that remains unanswered in this case: where is the gun that Mr. Oquendo allegedly possessed? It was never found, and without any testimony before it as to where the gun went, the district court made the unreasonable inference that the gun could have been hidden anywhere when the most reasonable explanation is that no gun ever existed. The only officer that saw such a gun is officer Feliciano, the same officer the fired at an unarmed individual. Conveniently, he testifies that it was a revolver because a revolver does not expel bullet casings. Regarding this, another point is interesting. No casings were ever found in the house or in the surroundings of the house. Thus, there is no evidence that the officers were in fact shot at. Unless they want to conveniently say that all of the guns possessed and fired by the “bad guys” were revolvers. This Court is reminded that the only firearm seized from the house

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was a pistol and that fortunately none of the officers were wounded or their squad cars hit.

Mr. Oquendo was never tested forensically to confirm that he had in fact fired a gun. The reason, we suspect, is that the officers knew such test would yield negative results. What about videos? The officers originally began to take a video of the surveillance and intervention. But the video camera ran out of batteries before the call to enter the house was given.

Moreover, Mr. Oquendo's suffered a shattered tibia, which required many surgical procedures, the insertion of rods and screws in his leg. He lost sensation and feeling in his left leg and can barely move his left foot as of today. Yet, the district court made a finding that adrenaline was responsible for Mr. Oquendo's super human ability to run and even jump fences after receiving a gunshot wound that shattered his tibia.

We then come to the outrageous claim that Mr. Oquendo possessed drugs. As if shooting Mr. Oquendo without justification wasn't enough, officer Feliciano then plants a bag of cocaine in his pocket. This Honorable Court knows, like the district court knew, that Mr. Oquendo is not a drug user. It makes no sense that he would have a baggie of cocaine in his person. This also goes to the credibility of the police

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officers in this case, including officer Feliciano.

Mr. Oquendo currently finds himself in a very difficult situation. His testimony was not credited by the district court. He can almost understand that in the normal case, the testimony of a convicted felon who is trying to avoid further incarceration, is looked at with suspicion for it can be considered self-serving. However, what Mr. Oquendo hopes to accomplish in this appeal is to attempt to show that the testimonies of the police officers are the ones that cannot be credited and should be looked at suspiciously. Officer Feliciano's testimony particularly, which is the one that the district court focused on. His testimony is suspicious at best, and completely contradicted by other objective and extrinsic evidence and by common sense. Mr. Oquendo is mindful that prevailing under an abuse of discretion/clearly erroneous standard is difficult if not impossible. But in this particular case an injustice has occurred.

Mr. Oquendo is similarly mindful that the credibility determinations of a trial court are given special deference given the lower court's ability to see witnesses face-to-face, their demeanor and inflections. *See United States v. Henderson*, 463 F.3d 27, 32 (1st Cir. 2006). As this Court has held, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

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United States v. Marrero-Rivera, 124 F.3d 342, 347 (1st Cir. 1997). But as this Court has also recognized, quoting the Supreme Court:

[F]actors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Henderson, 463 F.3d at 32 (quoting *Anderson v. City of Bessemer*, 460 U.S. 564, 575 (1985)). A factual finding will only be overturned by this Court if after reviewing all of the evidence this Court has a "definite and firm conviction that a mistake has been committed." *United States v. Ivery*, 427 F.3d 69, 72 (1st Cir. 2005); *see also United States v. Forbes*, 181 F.3d 1 (1st Cir. 1999)(declining to approve of district court findings where the district court did not explain why it chose to believe a police officer's improbable testimony that was called into question by extrinsic evidence.)

Mr. Oquendo submits that the present is one of those cases where the findings of the district court, even if based on credibility, should be disregarded. As discussed above, there are many instances of objective evidence contradicting officer Feliciano's testimony. His story is so improbable that a reasonable fact finder would

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not have credit it. Simply put, in this case the district court committed clear error in accepting the version of officer Feliciano. In doing so, the district court abused its discretion in revoking Mr. Oquendo's supervised release term. The judgment of the district court should accordingly be vacated.

B. The District Court Erred in Sentencing Mr. Oquendo to the Maximum Statutory Term of Imprisonment upon Revocation.

The district court sentenced Mr. Oquendo to the maximum statutory term of imprisonment for a Class A violation: five years. *See* 18 U.S.C. § 3583(e). Mr. Oquendo does not deny that five years was the maximum since his offense of conviction was itself a Class A felony. *See United States v. McInnis*, 429 F.3d at 4 . The sentence was, however, unreasonable. Section 3583(e) states that the imposition of sentence following revocation must be done after considering the factors set forth in 18 U.S.C. § 3553(a). The district court did not consider—did not even mention the factors. There is nothing in the record reflecting a reasoned analysis of the different options and factors as they applied to Mr. Oquendo. The district court limited itself to state the following for the record:

So I am making a finding that, indeed, this defendant violated a particular term and condition, which is committing a very serious crime. It's a grade A violation,

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which under advisory guidelines has a range of 27 to 33 months, and under Statute has a five year Statute – maximum term of imprisonment.

I intend to imprison Mr. Oquendo for five years, without additional supervision. That's the disposition the Court is making at this time.

(Transcript, App. at p. 112.)

Mr. Oquendo's defense tried to introduce evidence of his employment, studying records etc. The district court responded with "I believe you." (Transcript, App. at pp. 109-110.) Mr. Oquendo, as confirmed by the probation officer, had never tested positive to drugs during his supervision. But the main point that the defense tried to impress on the district court was the fact that the present case was not by a long shot a straightforward case. The district court disagreed. (*Id.* at p. 110.)

It is respectfully submitted that the district court had other alternatives than the maximum statutory term, specifically in light of Mr. Oquendo's compliance with his supervised release conditions prior to this case. The district court had the advisory guidelines available. And the failure of the district court to balance the factors in § 3553(a)–or even mention them–has resulted in a sentence that is both procedurally and substantively unreasonable. For this reason as well, the judgment of district court should be vacated and the case remanded for further proceedings.

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VIII. CONCLUSION

In view of all of the above, it is respectfully submitted that the district court abused its discretion in revoking Mr. Oquendo's supervised release term. The district court committed clear error by giving credence to the unreliable, unbelievable and implausible testimony of officer Rashid Feliciano. His testimony was improbable within itself and in light of objective extrinsic evidence including the testimonies of his fellow police officers.

The district court similarly erred in sentencing Mr. Oquendo to the maximum statutory term of imprisonment. The lower court did not balance the factors found in section 3553(a) as they apply to Mr. Oquendo something that the district court was required to do by statute. The result was an unreasonably high sentence in a case that is far from clear. The judgment of the district court should accordingly be vacated.

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RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 30th day of March , 2009.

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United States Court of Appeals

FOR THE FIRST CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

No. **08-2481**

UNITED STATES OF AMERICA,
Appellee,

v.

KELMIT OQUENDO-RIVERA,
Defendant-Appellant.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I have served two copies of this brief with its corresponding appendix by hand-delivering it to the following attorneys for the government:

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In San Juan, Puerto Rico, this 30th day of March, 2009.

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No. 08-2481

**In The United States Court of Appeals
for the First Circuit**

UNITED STATES OF AMERICA,
Appellee

v.

KELMIT OQUENDO-RIVERA
Defendant - Appellant

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

ADDENDUM TO THE BRIEF FOR THE APPELLANT

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*In San Juan, Puerto Rico
March 30, 2009*

*Attorneys for Defendant-Appellant
Kelmit Oquendo-Rivera*

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JUDGMENT ON REVOCATION 1-2

UNITED STATES DISTRICT COURT

JUDICIAL

District of

PUERTO RICO

UNITED STATES OF AMERICA

V.

JUDGMENT IN A CRIMINAL CASE

(For Revocation of Probation or Supervised Release)

KELMIT OQUENDO-RIVERA

Case Number: 3:00-CR-0033-02 (JAF)

USM Number: 19288-069

MAX PEREZ-BOURET, AFD

Defendant's Attorney

THE DEFENDANT:

admitted guilt to violation of condition(s) _____ of the term of supervision.

was found in violation of condition(s) Standard Condition #1 after denial of guilt.

The defendant is adjudicated guilty of these violations:

<u>Violation Number</u>	<u>Nature of Violation</u>	<u>Violation Ended</u>
Standard Condition #1	The defendant shall not commit any crimes, 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.	02-25-2008

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

The defendant has not violated condition(s) _____ and is discharged as to such violation(s) condition.

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.

September 29, 2008

Date of Imposition of Judgment

s/José A. Fusté

Signature of Judge

José A. Fusté, Chief United States District Judge

Name and Title of Judge

September 29, 2008

Date

AO 245D (Rev. 12/03 Judgment in a Criminal Case for Revocations
Sheet 2— Imprisonment

Judgment — Page 2 of 2

DEFENDANT: KELMIT OQUENDO-RIVERA
CASE NUMBER: 3:00 CR.0033-02 (JAF)

IMPRISONMENT

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

Imprisonment for a term of sixty (60) months.

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

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