

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Luis R. Figueroa-Gonzalez,
Petitioner,
v.
United States of America,
Respondent

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Staples v. United States*, 511 US 600 (1994), this Court held that in order for the government to prove that a defendant violated Title 26 U.S.C. §5861(d), the government must show that the defendant knew of the features of the firearm that bring it within the purview of the statutory definition of a machine gun. The same requirement applies to the crime of possessing a machinegun, Title 18 U.S.C. 922(o). *Rogers v. United States*, 522 U.S. 252, note 1 (1998). In *Staples* at 615, note 11, the Court explained that “knowledge can be inferred from circumstantial evidence, including any external indications signaling the nature of the weapon”. But the Court has provided no further guidance on what circumstantial evidence is sufficient to convict a defendant and/or, like in this case, to find by a preponderance of the evidence that a supervised release condition was violated.

Lower courts have applied the opinion in *Staples* in different ways. Some circuit courts consider that admissions by a defendant, evidence of use of the automatic firearm, and evidence of possession are enough to prove knowledge. The First Circuit, however, has also ruled that the evidence of a visible “chip” that converts a semi-automatic firearm to a machinegun is generally sufficient to establish knowledge under *Staples*. The question is presented as follows:

Whether the presence of a visible alteration in a seized firearm is sufficient to satisfy the government’s burden to prove that the defendant knew of the features of the firearm that bring it within the purview of the statutory definition of a machine gun?

STATEMENT OF RELATED PROCEEDINGS

United States v. Figueroa-González, 19-652 (DRD). Indictment related to his arrest and for the same reasons as to the supervised release revocation. The case is still pending.

PARTIES TO THE PROCEEDING

Luis R. Figueroa-Gonzalez, petitioner on review, was the movant/appellant below.

The United States of America, respondent on review was the respondent/appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Luis R. Figueroa-González respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit, which denied his direct appeal of judgment imposed by the United States District Court for the District of Puerto Rico.

INTRODUCTION

In *Staples v. United States*, 511 US 600 (1994), this Court held that in order for the Government to prove that a defendant violated Title 26 U.S.C. §5861(d), the Government must show that the defendant knew the features of the firearm that bring it within the purview of the statutory definition of a machine gun. The Court explained that “if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect.” *Id.* at 620.

One result of the Court holding in *Staples* was that a conviction under Title 18 U.S.C. 922(o) for possession of a machine gun also

required the Government to establish the defendant's knowledge that the weapon he possessed was a machine gun. See *Rogers v. United States*, 522 U.S. 252, note 1 (1998).

After the Court decided *Staples*, the First Circuit, as well as other circuit courts, interpreted the holding in *Staples* to require the Government to prove knowledge by sufficient direct or circumstantial evidence, including a defendant's admission of knowledge, evidence of his use of the firearm or his familiarity with the seized firearm. The First Circuit, while initially following this line of reasoning, has now gone further. The First Circuit, in this case, found that the existence of an "immediately visible chip" in a seized firearm, jointly with the prior criminal history of Mr. Figueroa-González and his possession of extended magazines, was sufficient evidence to satisfy the knowledge requirement imposed by this Court in *Staples*.

This relaxation of the knowledge requirement for a conviction under Title 18 U.S.C. 922(o) is very dangerous as it allows the Government to convict gun owners mainly by the physical characteristics of a gun, without any evidence that could allow the trier of facts to infer their specific knowledge as to such characteristic. This

is contrary to both the letter and the spirit of the holding of this Court in *Staples*.

This case provides an excellent opportunity to address the First Circuit’s position, which is contrary to the letter and the spirit of the holding of this Court in *Staples* and provide guidance to all courts as to the evidentiary standard necessary to satisfy the knowledge required for a conviction for possession of a machinegun under federal law.

Petitioner was arrested on October 8, 2019, when Puerto Rico Police Department agents executed a search warrant in his home and seized a series of items, including two pistols, one of which had a chip to convert the same to fully automatic, magazines, and ammunition. (District Court Docket, hereinafter “Ddtk” 74). As a result of his arrest, a motion was filed for violation of supervised release conditions. (Id.).

During the supervised release revocation hearing, the Government presented a single witness to wit: TFA agent Jorge Valentín (hereinafter “Valentin”). (T.R.H. at P. 5, App. 21, included as Appendix B). Valentín was not present during the search and seizure of the firearm, and his first contact in the case was when he participated

in a post-arrest interview of Mr. Figueroa-González after he waived his Miranda rights. (T.R.H. at P. 6-7, App. 22-23).

During the interview, Mr. Figueroa González never admitted to having knowledge that the seized gun had a chip or that it was otherwise modified. His admission reads as follows: “everything that was inside the house was his, and that he was responsible for everything”. (Id. at P 7 L.14-17).

At the revocation hearing, Valentin explained that he saw the gun in controversy after Mr. Figueroa-González arrest and, while not testing it, found a chip device attached to the backplate that converts the same to a machine gun. (Id. L. 19-25). Valentin never testified that Figueroa-González admitted knowing the existence of the chip in the firearm nor using it at any time. Valentin never testified as to how and where the modified gun was found, except that it was found in Figueroa-González' residence.

With this scant record the district court found that Figueroa-González was in violation of his supervised release conditions, sentencing him to 30 months of imprisonment. First Circuit issued judgment confirming the district court ruling holding that the requisite

mens rea for a Title 18 U.S.C. §922(o) opinion may be established by circumstantial evidence, which includes external indication signaling the nature of the weapon, that the A.T.F. agent testified that the chip was immediately visible, that Mr. Figueroa-González possessed extended magazines that fit the firearm and that his criminal history demonstrated a familiarity with guns. (Ap. A).

The First Circuit, however, fails to note that no evidence was presented at the revocation hearing as to Mr. Figueroa-González' handling of the seized firearm nor as to the location in the house where the gun was found. The existence of a chip in the gun does not automatically creates sufficient evidence to infer that Mr. Figueroa-González possessed the necessary *mens rea* as required by this Court precedents. The determination made by the First Circuit is wrong, and the Petition for writ of certiorari should be granted.

JUDGMENT BELOW

The Judgment of the United States Court of Appeals for the First Circuit affirming the conviction and sentence of the Petitioner was handed down on September 14, 2022. The opinion is unpublished and is attached as **Appendix A**. The judgment on revocation was issued by

the District Court for the District of Puerto Rico after the conclusion of the revocation hearing. The transcript of such hearing is attached as Appendix B.

JURISDICTION

Petitioner requests review of the judgment of the United States Court of Appeals for the First Circuit entered on September 14, 2022. Accordingly, the Petition is timely filed within 90 days as required by Rule 13, Rules of the Supreme Court.

This Court has statutory jurisdiction to review the judgment issued by the Court of Appeals for the First Circuit under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This Petition concerns the interpretation of relevant portions of 18 U.S.C. §922(o). The relevant portion of the statute is attached as Appendix C.

STATEMENT OF THE CASE

This Petition seeks review of the holding issued by the United States First Circuit Court of Appeals that rejected Mr. Figueroa-González' request for review of his revocation sentence. The district

court found that he violated his supervised release conditions based on the incorrect determination that the Government had proven that one of the weapons found in Mr. Figueroa-González' possession had been altered to fire as an automatic weapon and that he had the necessary *mens rea* to commit such offense.

A. The Alleged Violation of Supervised Release

On November 6, 2019, the Probation Office filed a Motion Notifying Violations of Supervised Release and Requesting an Arrest Warrant. (Ddtk. 74 App. 12-15). The motion filed by the probation officer, in synthesis, alleged that Mr. Figueroa-González was arrested on October 8, 2019, when the Puerto Rico Police Department (“PRPD” agents executed a search warrant in his home and seized a series of items, including two (2) pistols, one of which had a chip to convert the same to fully automatic, magazines, and ammunition. The motion also explained that on October 8, 2019, a Criminal Complaint was filed that charged Mr. Figueroa-González with possessing a machine gun, in violation of 18 USC 922(o) and being a felon in possession of a firearm in violation of 18 USC 922(g)(1). (Id.).

Proceedings in the parallel new criminal prosecution continued.

On October 16, 2019, a Grand Jury formally charged Mr. Figueroa-González in case 19-652 (D.R.D.) with the same offenses contained in the criminal Complaint filed against him.

B. The Revocation Hearing

Revocation proceedings in this matter were held before any disposition of the Criminal Complaint and subsequent Indictment referenced above. Accordingly, at the time the revocation proceedings were held, Mr. Figueroa-González was presumed innocent of the charges presented against him by the Government.

At the revocation hearing, the Government presented a single witness to wit: TFA Agent Valentín. (T.R.H. at P. 5, App. 21). Valentín, however, did not participate in the search and seizure that took place in Mr. Figueroa-González' apartment. At the revocation hearing, he explained that his first contact in the case was when he participated in a consented interview of Mr. Figueroa-González after he waived his Miranda rights. (T.R.H. at P. 6-7, App. 22-23).

It is undisputed that Valentín did not know where the seized firearms were located in the apartment. Furthermore, it is likewise undisputed that Mr. Figueroa-González never admitted to Valentin any

fact from which the Government or the district court could infer that he knew that one of the seized pistols was modified and converted to fire in fully automatic mode.

Agent Valentín explained that Mr. Figueroa-González provided a post-arrest statement, but such statement was limited to admitting that his house and bedroom were searched by PRPD officers and admitted that “everything that was inside the house was his and that he was responsible for everything”. (Id. at P. 7 L. 14-17).

In fact, the Government failed to provide any testimonial or documentary evidence to support any type of evidentiary burden that Mr. Figueroa-González had actual knowledge that any of the weapons he possessed were modified to fire in fully automatic mode. No testimony as to where or how the firearms were found was provided by Valentín. No evidence as to the location of the firearm was provided either. More importantly, Mr. Figueroa-González never admitted his alleged use of the firearms, nor could Valentín provide any circumstantial evidence as to when or where Mr. Figueroa-González used or handled the firearm in a way or form that could allow him to gain the necessary *mens rea* for a conviction for possession of a

machinegun.

The only evidence related to the *mens rea* that Figueroa-González possessed, if any, at the time of his arrest was that one of the firearms was a Glock 21 .45 caliber black gun that had a chip device attached to the backplate that converts the same to a machine gun. (Id. L. 19-25, App. 23).

Notwithstanding the evident lack of evidence to establish that Mr. Figueroa-González had the necessary *mens rea* to be found responsible for a supervised release violation involving the possession of a fully automatic firearm, the district court plowed ahead and revoked Mr. Figueroa-González' supervision imposing an additional term of 30 months of imprisonment based on such violation.

The direct result of the district court's finding that Mr. Figueroa-González had the requisite *mean rea* of possessing a fully automatic firearm to justify his revocation under the charged conduct was an automatic and significant increase of his revocation exposure.

Note No. 4 to USSG § 7B1.1 defines firearm or destructive device of a type described in 26 U.S.C. §5845(a) to include a shotgun, certain types of rifles, a machinegun; a silencer of a firearm; a destructive device; and certain large-bore weapons. Note No. 5 to USSG § 7B1.1,

however, clarifies that “where the defendant is under supervision in connection with a felony conviction or has a prior felony conviction, possession of a firearm (other than a firearm described in 26 U.S.C. § 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. § 922(g) prohibits a convicted felon from possessing a firearm”. (Parenthesis in original).

The difference is important as the Revocation Table in the USSG § 7B1.4 provides incremental punishment for Grade A Violations, particularly when, as here, the defendant was on supervised release as a result of a prior sentence for a Class A felony. While Grade A violations for a Criminal History I defendant like Mr. Figueroa-González commence at 12-18 and increase to 24-30 months of imprisonment, if a prior Class A felony was committed, a Grade B violation, assuming a Criminal History of I, only provides for an advisory range of 4-10 months of imprisonment. Accordingly, the determination by the district court that Mr. Figueroa-González possessed an automatic firearm in violation of supervised release conditions increased his potential sentencing range from 4-10 to 24-30 months of imprisonment. He was sentenced to 30 months by the

district court.

C. Mr. Figueroa-González appeals.

Mr. Figueroa-González explained to the appeals court how the incorrect factual determination as to the existence of evidence to support the necessary *mens rea* finding required the vacation of the revocation judgment and remand for resentencing. The First Circuit Court of Appeals, however, summarily denied Mr. Figueroa-González' request for relief without discussing how the finding of the requisite *mens rea* could be harmonized with the bare-bones evidentiary presentation made by the Government at the revocation hearing.

Furthermore, the First Circuit Court of Appeals rejected Mr. Figueroa-González' by holding that the Government had presented sufficient circumstantial evidence to prove the requisite mean rea because the chip that converts the semi-automatic firearm to automatic was immediately visible, as Mr. Figueroa-González "possessed extended magazines that fit the firearm and his criminal history demonstrated a familiarity with guns." (See: Opinion at Appendix A to this Petition).

The determination by the district court is troubling. While Valentin did testify as to the chip in the firearm, he did not testify as to

how any of the extended magazines fitted the automatic firearm.

Furthermore, the record at the hearing has no evidence as to how Mr. Figueroa-González familiarity with guns impacted the charged offense. In any case, this Court can note that Mr. Figueroa-González' prior conviction had no relationship with automatic weapons and are very old offenses.

The other problem that is immediately apparent from the opinion issued by the First Circuit Court, in this case, is that it failed to follow this Court and its own precedents that require much more to satisfy the *mens rea* requirement that is one of the elements of a violation of 18 U.S.C. §922(o).

REASONS FOR GRANTING THE WRIT

This Petition presents the opportunity for the Court to correct the evident errors committed by the First Circuit examination and provide guidance to lower courts on an important and recurring question regarding the proper evidentiary requirements for a finding of conviction for a violation of 18 U.S.C. §922(o).

I. The First Circuit is misapplying this Court's precedents

While the First Circuit Court has recognized that “[t]o establish a violation of 922(o), the government must prove that 1) the defendant possessed or transferred a machinegun 2) with knowledge that the weapon had the characteristic to bring it within the statutory definition of a machine gun.” *United States v. Tanco Baez*, 942 F.3d 7, 26 (1st. Cir. 2019) quoting *United States v. Olofson*, 563 F.3d 652, 659 (7th Cir. 2009), its decision, in this case, runs counter to this Court’s precedents.

The judgment issued in this case waters down the *mens rea* requirement by allowing knowledge to be established by the simple fact that the firearm has a chip that is externally visible with no meaningful additional evidence to support the knowledge finding.

While footnote 11 in *Staples* does recognize that “knowledge can be inferred from circumstantial evidence, including any external indications signaling the nature of the weapon” *Staples* was never intended to be a simplification of the Government’s burden at trial.

The First Circuit, however, here construes the footnote in *Staples* as allowing the Government to prove *mens rea* irrespective of the defendant’s actual knowledge or lack thereof, mainly based on the external indications of the seized firearm. In the First Circuit’s view, if

the seized firearm has a chip and the chip is readily visible, then the Government has proven its burden to establish *mens rea*.¹

Put another way, if the First Circuit's determination, in this case, is upheld, once a gun is found to have a visible modification that converts the same to fully automatic, the defendant is assumed to have knowledge of such modification irrespective of whether he handled the gun, fired the gun or used it in any other way. The judgment in this case thus is not only a clear deviation from prior precedents issued by the First Circuit but in direct contradiction of this Court's precedents.

For example, in *United States v. Nieves-Castano*, 480 F.3d 597 (1st. Cir. 2007), the circuit court vacated a conviction related to an AK-47 machinegun that had alterations made which were externally visible because the gun owner was a lay person who even after looking at the weapon will not necessarily know that the rifle had been modified. Likewise, in *United States v. Tanco*, supra, the First Circuit confirmed a

¹ As has been discussed before, the other reasons mentioned by the First Circuit for upholding the district court's finding and revocation are not supported by the evidence in the case.

conviction based on the fact that co-conspirators heard the machine gun being fired.

Relevant to this inquiry is the First Circuit opinion in *United States v. Laureano-Pérez*, 797 F.3d 45 (1st. Cir. 2015), a case the circuit court called a “close call” the modified firearms were found in a bag, but no evidence was presented that he opened the bag or was told what the bag contained. The First Circuit confirmed the jury verdict explaining that Cummings had stored weapons and drugs for co-conspirators before, that he was close to one of the leaders of the conspiracy, and, more importantly, that he was seen firing automatic firearms that belonged to the criminal organization.

In *United States v. Torres-Pérez*, 22 F.4th 28 (1st Cir. 2021), the First Circuit went to great lengths to explain that in addition to the existence of a chip in a modified firearm, a jury could convict only because there were additional facts that supported a finding of knowledge. In *Torres-Pérez*, the prior knowledge could have been inferred by the jury as Mr. Torres was seen with the machinegun in his waistband and when he threw the gun into the truck’s open driver’s side window. *Id.* at 33.

Here no such facts were available to the trier of fact. Nonetheless, the First Circuit simply assumes knowledge, without any evidence, that Mr. Figueroa-González handled the seized firearm because the gun had a visible chip.

This Petition provides the opportunity for this High Court to curb the misapplication of its precedent in *Staples* that has occurred in this case while at the same time giving guidance to Courts as to the proper application of the *mens rea* requirement of proof in revocation and trial related to 922(o) cases.

II. The Question Presented is Important and Frequently Recurring.

This Honorable Court should grant review as to this important issue that will recur frequently. Lower courts have grappled with the type and quality of the circumstantial evidence that is sufficient to establish *mens rea* when direct evidence of knowledge is lacking in a machine gun possession case.

While lower courts have generally agreed that evidence of use of the seized firearm, prior possession, and similar evidence is sufficient to allow a trier of fact to infer knowledge, the First Circuit interpretation

of *Staples* to allow the mere existence of external indications as sufficient to satisfy the *mens rea* requirement will lead to different outcomes in factually similar cases.

Accordingly, all courts will benefit from a more explicit explanation of the quality and quantity of evidence that is required to establish the *means rea* requirement.

III. This Case is an Ideal Vehicle for Addressing the Question

This case is an ideal vehicle to provide guidance and for the Court to address the question presented herein. The question is clearly presented on direct review. It was a properly preserved issue included by Petitioner in his appeal. There can be no plausible claim that the error was harmless as both the United States never presented such defense before and as the legal error committed by both lower courts severely impacted the advisory sentencing range that was used by the district court to sentence Mr. Figueroa-González.

CONCLUSION

For the reasons expressed above, this Court should grant this Petition for Certiorari and provide the relief herein requested.

Respectfully submitted,

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Counsel of Record for Petitioner Figueroa-González

Date: December 12, 2022

CERTIFICATE OF SERVICE

I, Raúl S. Mariani Franco, certify that on December 12, 2022, copies of the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI were served to each party to the above proceeding, or to that party's counsel, and on every other person required to be served, pursuant to Supreme Court Rules 29.3 and 29.4, by depositing an envelope containing the above documents in the United States mail, properly addressed to them with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

In Aspen, Colorado, today December 12, 2022.

S/Raúl S. Mariani Franco
RAUL S. MARIANI FRANCO

CERTIFICATION OF WORD COUNT AND FONT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 3373 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 2022.

S/Raul S. Mariani Franco
RAUL S. MARIANI FRANCO

APPENDIX A

United States Court of Appeals For the First Circuit

No. 21-1812

UNITED STATES,

Appellee,

v.

LUIS R. FIGUEROA-GONZALEZ,

Defendant - Appellant.

Before

Lynch, Kayatta and Gelpí,
Circuit Judges.

JUDGMENT

Entered: September 14, 2022

Defendant-Appellant Luis R. Figueroa-Gonzalez ("Defendant") appeals the 30-month prison term he received upon revocation of his term of supervised release. He challenges the district court's finding that he possessed a machine gun and its resulting classification of his violation as Grade A. The government has moved for summary disposition of this appeal. Defendant has not responded. We review preserved claims challenging a revocation sentence for abuse of discretion and forfeited claims for plain error. See United States v. Tanco-Pizarro, 892 F.3d 472, 478-79 (1st Cir. 2018). After careful examination of the government's motion, Defendant's opening brief, and the relevant portions of the record, we grant the government's motion.

Defendant argues first that Federal Rule of Evidence 701 required the district court to exclude a lay opinion offered by an agent from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") about the function of the chip attached to the firearm in question. District courts may, however, consider evidence that is inadmissible under the Federal Rules of Evidence in revocation proceedings as long as the evidence is reliable, see United States v. Colón-Maldonado, 953 F.3d 1, 3 (1st Cir. 2020), and Defendant makes no express argument that the agent's opinion was unreliable, see United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed

argumentation, are deemed waived."). Even if this argument were not waived, it would still fail. The agent's opinion, which was based on his firsthand perception of the firearm and his twenty-two years of law enforcement experience, was sufficiently reliable for the district court to consider.

Defendant also challenges what he views as two factual misstatements made by the district court while explaining its finding that the firearm was a machine gun. He did not object to these alleged misstatements below, so our review is for plain error. Because he makes no effort to satisfy the four prongs of the plain-error standard, he has waived these arguments. See United States v. Rodríguez-Torres, 939 F.3d 16, 40 (1st Cir. 2019). In any event, Defendant has failed to show that the purported misstatements affected his substantial rights. See United States v. Merced-García, 24 F.4th 76, 80 (1st Cir. 2022) (explaining that the defendant bears the burden of showing prejudice on plain-error review). Whether the ATF agent was present for the search of Defendant's residence had no bearing on the reliability of the agent's testimony about the function of the chip attached to the firearm. And given that testimony, we are not convinced that any error in stating that the agent had reported a positive result from the ATF's testing for automatic firing was key to the court's finding by a preponderance of the evidence that the firearm met the statutory definition of a machine gun. See 26 U.S.C. § 5845(b) (defining "machinegun" to include weapons "designed to shoot" automatically); see also United States v. Smith, 500 F.3d 27, 31 (1st Cir. 2007) ("[T]he standard of proof in a supervised release revocation hearing is a preponderance standard . . .").

Finally, Defendant argues that the government failed to prove that he knew that the firearm could or was designed to fire automatically. See United States v. Torres-Pérez, 22 F.4th 28, 32 (1st Cir. 2021) (describing elements for possession of a machine gun in violation of 18 U.S.C. § 922(o)). Even assuming, in Defendant's favor, that the government did have to prove that knowledge, the district court did not clearly err in inferring that Defendant understood the automatic nature of the firearm. See id. ("The requisite mens rea may be established by circumstantial evidence,' which includes 'external indications signaling the nature of the weapon.'" (quoting United States v. Nieves-Castaño, 480 F.3d 597, 601 (1st Cir. 2007))). After all, the ATF agent testified that the chip was "immediately visible," Defendant possessed extended magazines that fit the firearm, and his criminal history demonstrated a familiarity with guns.

Accordingly, the government's motion for summary disposition is granted, and the judgment of the district court is affirmed. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:

Carmen Milagros Marquez-Marin
Thomas F. Klumper
Mariana E. Bauza Almonte
Maria L. Montanez-Concepcion
Luis R. Figueroa-Gonzalez
Raul S. Mariani-Franco

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

v. Plaintiff,

Docket No. 02-261

LUIS FIGUEROA GONZALEZ,

San Juan, Puerto Rico

September 13, 2021

Defendant.

HEARING

BEFORE THE HONORABLE JUDGE AIDA M. DELGADO COLON,

UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Government: Mr. Vance Eaton, AUSA

For the Defendant: Mr. Raul Mariani, AFPD

Proceedings recorded by stenography. Transcript produced by CAT.

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1 San Juan, Puerto Rico

2 September 13, 2021

3 At or about 10:31 AM

4 * * *

5 COURTROOM DEPUTY: Criminal case no. 2-261, *United*
6 *States of America v. Luis Figueroa Gonzalez*, set for
7 revocation of supervised release. Present are AUSA Richard
8 Vance Eaton on behalf of the government, and defense attorney
9 Raul Mariani on behalf of the defendant.

10 (Defendant is present and being assisted by the court
11 interpreter.)

12 THE COURT: Good morning.

13 MR. MARIANI: Good morning, Your Honor.

14 MR. EATON: Good morning, Your Honor.

15 THE COURT: Are we ready to proceed?

16 MR. EATON: The government's ready, Your Honor.

17 MR. MARIANI: Yes, Your Honor.

18 THE COURT: Okay. So in this particular case, the
19 case has been called for final revocation. And the case
20 reflects that originally this defendant was sentenced on
21 September 30th of the year 2005 to 120 months and three years
22 of supervised release. Original charges before the Court
23 being those of using and discharging a weapon in relation to a
24 crime of violence, regarding the intimidation and interference
25 with an officer at the U.S. Marshal Service while on official

1 duties.

2 Defendant was sentenced. He was released on
3 supervised release in the year 2011. At the time, he had a
4 state detention warrant, a detainer, and he was transferred to
5 the state correctional system where he was to serve a sentence
6 on charges of state murder, robbery, the use and carrying of a
7 weapon without a license, and the use of an automatic weapon.
8 He pled guilty, was sentenced to 30 years in the murder
9 charge, 14 in the robbery, and five -- and five in the weapons
10 counts.

11 It appears that he was released on state parole on
12 February 5th of 2019, and, as the record goes, he has been
13 arrested and charged once again in Federal Court in 19-652, a
14 case before Judge Dominguez, for the possession of a machine
15 gun and possession of controlled substances, as reported by
16 the probation officer in the motion filed on November the 6th
17 of 2019.

18 So being that the summary of the allegations for
19 revocation in support filed by the probation officer, I ask
20 defense counsel whether the defendant is admitting or
21 challenging the allegations?

22 MR. MARIANI: Your Honor, as the defendant has a
23 pending criminal case for the underlying conduct, he is in no
24 position to admit the charges.

25 THE COURT: The government has the evidence to

1 || present?

2 MR. EATON: Yes, Your Honor.

5 MR. EATON: Thank you, Your Honor. I call Jorge
6 Valentin.

7 THE COURT: Please go to the witness stand. You will
8 be placed under oath.

9 COURTROOM DEPUTY: Please raise your right hand.

10 Do you solemnly swear that the testimony you are
11 about to give in the case now before the Court will be the
12 truth, the whole truth, and nothing but the truth, so help you
13 God?

14 THE WITNESS: I do.

15 THE COURT: You may be seated.

16 MR. EATON: If it pleases the Court, Your Honor.

17 THE COURT: You may proceed.

18 JORGE VALENTIN,

19 called as a witness by the government, having been sworn,
20 testified as follows:

21 DIRECT EXAMINATION

22 BY MR. EATON:

23 Q. Agent Valentin, would you please tell the Court where you
24 work and what you do?

25 A. I'm an ATF task force officer, and I have been a TFO for

1 || over two years.

2 Q. And so were you a TFO back in October 2019?

3 A. Yes, I was.

4 COURT REPORTER: I'm sorry. October 20 --

5 MR. EATON: '19.

6 | BY MR. EATON:

7 Q. And how did you first get involved with Mr. Figueroa
8 Gonzalez?

9 A. I was with the case agent, Special Agent Idaris Torres,
10 when she was interviewing Luis Fiqueroa Gonzalez.

11 Q. So where did the interview of the defendant take place?

12 A. At the ATF office in San Juan.

13 Q. And so going to that interview, was that your first
14 contact with Mr. Figueroa?

15 A. Yes.

16 Q. At the beginning of that interview, did you or Agent
17 Torres provide a Miranda warning to Mr. Figueiroa?

18 A Yes

19 Q. And how did that go?

20 A. He said that he wasn't going to sign any documents, but
21 that he has been through this process many times, so that he
22 knew what his rights were.

23 Q. And so were those -- how were those rights presented to
24 him? In what format?

25 A. In our written format.

1 Q. Did he say to you and to Agent Torres that he wished to
2 speak?

3 A. Yes.

4 Q. So what did he tell you had happened that morning?

5 A. He stated that he was sleeping in his bedroom -- that's
6 the first bedroom to the right when you enter the house -- and
7 he was sleeping there with a woman. He heard the Puerto Rico
8 Police Bureau agents were inside the house, so he woke up, and
9 he confronted the police officers.

10 Q. Did he know why they were there?

11 A. They told him that they had a search warrant for the
12 residence.

13 Q. And what did he say happened next at his house?

14 A. He told the PRPD agents that the woman had nothing to do
15 with what was inside the house, and he stated that everything
16 that was inside the house was his, and that he was responsible
17 for everything.

18 Q. So what was inside the house, according to Mr. Figueroa?

19 A. Two firearms.

20 Q. Do you remember what kind of firearms they were?

21 A. Yes.

22 Q. Could you just tell the Court, please?

23 A. Okay. There was a Glock 21, .45 caliber, black gun with
24 a chip device attached to the back plate that converts the
25 firearm to a machine gun, which means that it can --

1 MR. MARIANI: I have an objection, Your Honor. That
2 is an opinion.

3 THE COURT: Overruled.

4 MR. MARIANI: Your Honor --

5 THE COURT: Counsel, you can cover the basis for
6 that.

7 MR. EATON: Certainly.

8 BY MR. EATON:

9 Q. So let's stop there. We'll get into a description of the
10 gun in a minute.

11 A. Okay.

12 Q. So just generally, though, how many guns were seized?

13 A. Two guns.

14 Q. And what about ammunition?

15 A. There was ammunition, and there was magazines.

16 Q. What kind of magazines?

17 MR. MARIANI: Lack of foundation, Your Honor.

18 THE COURT: Overruled.

19 BY MR. EATON:

20 Q. Did you get a chance to view this evidence?

21 A. Yes.

22 Q. You saw the guns?

23 A. Yes.

24 Q. You saw the magazines?

25 A. Yes.

1 Q. Okay. What kind of magazines were they?

2 A. They were magazines, .45 caliber. There were extended
3 magazines, and there were also AR-type pistol magazines.

4 Q. So were these magazines that would then fit in those two
5 guns that were seized?

6 A. Yes.

7 MR. EATON: Your Honor, if I may approach with what
8 has been marked for identification as Government's One through
9 Seven? Defense counsel has seen these.

10 MR. MARIANI: There is no objection, Your Honor, that
11 those be marked.

12 THE COURT: Very well.

13 BY MR. EATON:

14 Q. And, Agent, if you would please just show the Court each
15 of those photos, starting with number one, and tell her Honor
16 what they are, please?

17 A. This is the serial number of the Glock 21, .45 caliber
18 gun.

19 Q. Would you refer that reference, that -- that's
20 Government's One?

21 A. Yes.

22 Q. Okay. What's Government's Two show?

23 A. This is Government Two. This is the chip that was
24 attached to the back plate of the .45 caliber Glock.

25 MR. MARIANI: I have an objection as to that opinion,

1 Your Honor. He's not qualified.

2 MR. EATON: I can lay additional foundation, Your
3 Honor.

4 THE COURT: I'm sorry?

5 MR. EATON: I can lay additional foundation about
6 that, Your Honor.

7 THE COURT: Go ahead.

8 BY MR. EATON:

9 Q. Agent Valentin, you are an ATF agent, right?

10 A. Yes.

11 Q. And what are some duties of yours? What areas of crime
12 does the ATF deal with?

13 MR. MARIANI: Your Honor, I have an objection. This
14 witness has never before been announced as an expert witness,
15 nor a summary --

16 THE COURT: And he's not testifying as an expert
17 witness. He's testifying based on training and knowledge, and
18 he may testify as to a caliber for a weapon.

19 Go ahead.

20 BY MR. EATON:

21 Q. So what kind of things does the ATF investigate?

22 A. We investigate mainly firearm violations.

23 Q. Sir, do you have experience investigating guns?

24 A. Yes. And I'm also a Puerto Rico Police Bureau agent for
25 over 20 years.

1 Q. And in your 20 years of experience as a Puerto Rico
2 Police agent, and as well as your experience with the ATF,
3 have you had occasion to look into guns like this?

4 A. Many times.

5 Q. And in your training and experience, you mentioned
6 something called -- that you called a chip. What is that?
7 Can you tell the Court what that is?

8 A. That's a device that is used to convert a regular handgun
9 into a machine gun. Meaning that it can shoot more than one
10 round with the pull of a trigger.

11 Q. And you've seen that before?

12 A. Yes. Many times.

13 Q. Have you even -- fired weapons that have those in
14 training?

15 A. No, I haven't fired them.

16 Q. Have you seen them fired?

17 A. Yes.

18 Q. And you see that chip device on this gun?

19 A. Yes.

20 Q. Okay. I'd like to go ahead with -- do you remember which
21 exhibit we are on, please, sir?

22 A. Excuse me?

23 Q. What number are we on?

24 A. We're going to number Three now.

25 Q. Okay. Could you please tell the Court what you see in

1 Government's Exhibit Three?

2 A. Government Exhibit Three, this is the chip device that's
3 attached to the back plate of the machine gun.

4 Q. Okay. And what's in Government's Four?

5 A. In Government Four, we can see an AR-type gun, pistol.

6 Q. Okay. And that looks like a rifle to me. Why'd you call
7 it a pistol?

8 A. Because it is not designed to be shot from the shoulder.

9 Q. Okay. And please tell the Court what's in Government's
10 Five. That was Four, right?

11 A. Yes.

12 Q. Okay. What's in number Five?

13 A. Government Five, we can see the Glock, model 21, .45
14 caliber machine gun with a chip device attached to the back
15 plate.

16 Q. And what is in Government's Six?

17 A. In Government Six, there is all the evidence that was
18 seized during the search warrant.

19 Q. And you got a chance to review that evidence?

20 A. Yes.

21 Q. When did you do that?

22 A. I saw this evidence today at the ATF office.

23 Q. So it's still stored there?

24 A. Yes, it is.

25 Q. What's in Government's Seven?

1 A. Government Seven, we can see the AR-type pistol.

2 MR. EATON: Your Honor, I'd offer One through Seven
3 into evidence. I believe defense counsel said he had no
4 objection, but I wanted to make it clear that I am offering
5 those as exhibits, Your Honor.

6 THE COURT: Well, you have alluded to them as
7 exhibits, and he has testified as to contents displaying the
8 pictures, so they're admitted.

9 (At 10:44 AM, Government Exhibits One through Seven
10 admitted into evidence.)

11 BY MR. EATON:

12 Q. Okay. So, Agent Valentin, in interviewing Mr. Figueroa,
13 did he say if there was anyone else in the house?

14 A. Yes.

15 Q. Who did he say was also in the house with him?

16 A. He said that there was a woman that was sleeping with him
17 in the house, in his bedroom.

18 Q. And who is she?

19 A. He said that she's a woman that occasionally sleeps with
20 him there, but she's not always in the house.

21 Q. And did he make any comments about whether the guns and
22 ammunition in the house might have belonged to her?

23 A. No. He said that everything was his, that he was
24 responsible for everything.

25 Q. Are you aware if Mr. Figueroa has a criminal history?

1 || And we heard the Court talk about it.

2 | A. Yes.

3 Q. Does he have convictions for felonies?

4 MR. MARIANI: Lack of personal knowledge, Your Honor.

7 | BY MR. EATON:

8 Q. Have you had a chance to look at Mr. Figueroa's state or
9 federal convictions?

10 A. Yes.

11 Q. And in reviewing those, can you say that Mr. Figueroa has
12 felony convictions?

13 A. Yes.

14 MR. MARIANI: Your Honor, I have an objection. The
15 Court is aware of that. I don't see the relevance for the
16 agent to testify about hearsay evidence that he saw maybe
17 today.

20 THE COURT: Very well. Go ahead.

21 BY MR. EATON:

22 Q. I think you said yes, he does?

23 A. Yes.

24 Q. Okay. In your training and experience, is the Glock
25 pistol or any firearm, for that matter, manufactured in Puerto

1 || Rico?

2 A. No. There are no manufacturers of firearms or
3 ammunitions in Puerto Rico.

4 Q. And if you could go back to the government exhibit that
5 showed the modification, please.

6 || Okay. What number is that?

7 A. Number Two.

8 Q. Okay. Looking at Government Exhibit Two, as well as
9 thinking on your review of this physical evidence and looking
10 at it, is the modification to this gun immediately visible?

11 A. Yes, it is.

12 Q. And so, Agent Valentin, were there any -- when
13 Mr. Figueroa said that the guns and ammo were his, at any
14 point did he stray from that statement, did he give any doubt
15 about that, or was he very clear in saying that those guns
16 belonged to him?

17 A. He stated that clearly.

18 Q. Where did he get them?

19 A. He said that he bought them, but he didn't tell from the
20 person that he bought them.

21 Q. Okay.

22 MR. EATON: I have no further questions, Your
23 Honor.

24 THE COURT: Cross?

25 || CROSS-EXAMINATION

1 || BY MR. MARIANI:

2 Q. Good morning, Mr. Valentin.

3 A. Good morning.

4 Q. So the fact is that before today you had not seen the
5 evidence in this case?

6 A. Yes, I have seen the evidence before.

7 Q. Didn't you just state that you saw the evidence shown to
8 you in Exhibit No. Seven today?

9 A. Because I saw the evidence again today.

10 Q. Okay. The fact is that you never fired the firearm that
11 is depicted in Exhibit No. Two, the one with the -- what you
12 say is a chip, you have never fired that firearm?

13 A. No.

14 Q. You never fired any of the firearms?

15 A. Of the seized firearms?

16 || Q. Yes.

17 A. No.

18 Q. Okay. You have never been qualified as a firearms
19 expert, have you?

20 A. No.

21 MR. MARIANI: I have no further questions, Your
22 Honor.

23 THE COURT: Mr. Valentin, are you an agent within
24 the case?

25 THE WITNESS: I am the co-case agent. The case

1 agent is Idaris Torres.

2 THE INTERPRETER: I'm sorry. The what agent?

3 THE WITNESS: The co-case agent.

4 THE COURT: Okay. And do you know if the weapon has
5 been tested as part of the case that is pending before the
6 Court?

7 THE WITNESS: Yes.

8 THE COURT: By whom was it tested?

9 THE WITNESS: It was tested at the ATF lab by the
10 personnel that works there.

11 THE COURT: And what were the results?

12 MR. MARIANI: Your Honor, I have an objection as to
13 that as to violation of confrontation rights.

14 THE COURT: You can cross if you want.

15 MR. MARIANI: He didn't do the test, Your Honor.

16 THE COURT: I'm sorry?

17 MR. MARIANI: The agent did not perform the test.

18 THE COURT: He doesn't have to.

19 Have you seen the report?

20 THE WITNESS: Yes.

21 MR. MARIANI: I still have my objection, Your Honor,
22 noted for the record.

23 THE COURT: The objection is, but the test here is
24 preponderance. It's not beyond a reasonable doubt, which
25 would be the test in the case before Judge Dominguez. And,

1 actually, still the Rules of Evidence, you know that they
2 barely apply in these type of hearings.

3 Of course confrontation rights are allowed, and all
4 they need to establish is preponderance of the evidence and
5 reliability of the evidence that is before the Court. So I
6 understand the substance of your objections in the case before
7 Judge Dominguez, and if this were to be offered in a case
8 before trial, but not in a revocation hearing.

9 Any other question from the government? Any
10 redirect?

11 MR. EATON: No, Your Honor.

12 THE COURT: Sir, you are excused.

13 I'm sorry. Do you have any other questions for him,
14 Mr. Mariani?

15 MR. MARIANI: No, Your Honor, I don't.

16 THE COURT: You are excused.

17 (At 10:51 AM, witness excused.)

18 THE COURT: Okay. This defendant stands charged in
19 19-652 with the offense of possessing a machine gun and
20 possession of controlled substances. I note --

21 Can I see Exhibit Seven? Thank you.

22 And although Exhibit -- it's actually Exhibit Six,
23 which is the table depicting all the items that were seized.
24 I can see there, on the upper right corner, white or -- like
25 envelopes, but I have heard no testimony here concerning

1 drugs. Only that this is what was seized. But, still, I did
2 hear testimony concerning the seizure by agents of the
3 pistols, of the large or extended magazines, and the
4 ammunition that this defendant admitted to possess and
5 admitted that it was his property.

6 The standard applicable at this type of hearing is
7 preponderance of the evidence, not the standard of beyond a
8 reasonable doubt. He stands charged in 19-652 with the
9 possession of a machine gun, and this agent has testified too
10 that he was a co-agent in the case, that he was present at the
11 time that the weapons were seized. He has identified each one
12 of the items, ammunitions, extended magazines, and the chip
13 that converted the pistol, the Glock pistol into an automatic
14 weapon. He also testified as to having knowledge of the
15 report, and that the weapon has been tested by the ATF
16 laboratory, resulting positive; and that the defendant
17 admitted and confessed to the possession of the same.

18 Based on that, I find that there is a basis to
19 revoke. I'm making no finding concerning the possession of
20 controlled substances, as to which I heard no testimony
21 specifically.

22 I am returning the exhibits to my courtroom deputy.
23 Thank you.

24 So this will constitute conduct that amounts to the
25 possession of a machine gun, which also, I must state, there

1 was testimony concerning the fact that is well known, that
2 actually will suffice even judicial notice, that there are no
3 weapons or ammunitions manufactured in Puerto Rico. So --

4 MR. MARIANI: Your Honor --

5 THE COURT: -- based on the evidence and the
6 determinations of the Court, Mr. Mariani, there is a
7 determination made that there's a basis to revoke. I will
8 hear from you as to allocution if there's information that you
9 would like to offer.

10 MR. MARIANI: Your Honor, before we go into the
11 sentencing phase, in reconsideration, Your Honor, one of the
12 elements of the machine gun offense, 922(o), is knowledge and
13 intent. It's specific knowledge, mens rea, requisite.
14 There's not even a scintilla of evidence regarding the mens
15 rea requirement in this case. So even though there may be
16 sufficient evidence to revoke on the felon in possession
17 charge, because of the evidence that was presented by the
18 government, I -- in reconsideration, Your Honor, we ask
19 that -- a finding that there was not sufficient evidence to
20 revoke on a machine gun count in this case.

21 And that's a -- that will make a difference, Your
22 Honor, in our view, as to sentencing. And that's what we are
23 arguing, that there's not sufficient evidence to revoke on a
24 machine gun count.

25 And the case, Your Honor, I think I have it here,

1 it's *United States v. Tanco Baez*, 942 F.3d 7 --

2 THE COURT: Nine what?

3 MR. MARIANI: 942 F.3d 7, at page 26, quoting *Staples*
4 *v. United States*, 511 U.S. 600. While the evidence --
5 knowledge may be established by circumstantial evidence,
6 *Staples* says that there has to be evidence -- obviously, a
7 criminal trial, beyond a reasonable doubt. Here would be via
8 preponderance of the evidence, that the defendant knew that
9 the seized gun had the characteristics to bring it within the
10 statutory definition of a machine gun.

11 MR. EATON: May I, Your Honor?

12 THE COURT: Yes.

13 MR. EATON: Counsel is definitely right that *Staples*
14 requires knowledge. I think the language -- I don't have that
15 case in front of me, but the language that he just read from,
16 it was precisely what came to mind to me, which is that the
17 knowledge is actually not knowledge that the gun fires
18 automatically. The knowledge is that it has the
19 characteristics which bring it within the definition of a
20 machine gun under the statute.

21 So, Your Honor, the way I read that, and the way I
22 believe the First Circuit reads that as well, is that when
23 there is a visible modification to a weapon, that you can see
24 by looking at it, that modification, being the thing that
25 brings the weapon within the definition of a machine gun, that

1 that in and of itself can be the knowledge.

2 I would also point out, Your Honor, as Your Honor had
3 already mentioned, the evidence -- the standard here is
4 preponderance of the evidence. And, finally, I point out that
5 of course he couldn't have any weapons whatsoever, both as a
6 felon and as a condition of his probation, Your Honor.

7 THE COURT: Actually, I think that the testimony here
8 established that the chip was clearly visible. It's something
9 that is not a part of the manufacturing. It is put there.
10 And the defendant made admissions concerning the fact that all
11 the evidence that was found was there, consistent with the
12 weapon's capabilities, also the fact that extended magazines
13 were available to fit the weapon. The findings remain as
14 originally made.

15 So I will hear from you.

16 MR. MARIANI: Yes, Your Honor.

17 The Court has before it defendant, who has basically
18 all his young life been in prison. The PSR report in this
19 case, Your Honor, that dates back to the year 2005 or -- if
20 I'm not mistaken, basically contains the circumstances of a
21 very young individual who had no prior criminal history, who
22 commits two offenses -- well, string of offenses, including an
23 offense here in Federal Court. He was using drugs. He was
24 basically dependant since the age of 15, as per the report at
25 page seven, and he had limited scholarship. He didn't work.

1 || And for those mistakes, Your Honor, he was sentenced to a
2 || significant state sentence and a consecutive ten-year sentence
3 || in this case.

4 Upon release, Your Honor -- Your Honor has new
5 violations which are pending before Judge Dominguez, and those
6 the Court is aware, and I'm not going to dwell long on those,
7 because those are the claims in the revocation motion. What
8 the Court doesn't have in the motion is the other side of the
9 story, which is my client's attempt to try to engage himself,
10 after so long a period of time being imprisoned, in some type
11 of gainful legal employment for the first time in his life.

12 The probation officer is surely aware that
13 Mr. Figueroa, upon release from state prison, was able to
14 obtain employment. He was working in the Housing Department.
15 He was working 8:00 to 5:00 every day.

16 The sad story was that Mr. Figueroa had no place to
17 live, except with his mother, where he moved in in the housing
18 project. And immediately, upon the other persons -- other
19 people who were involved in illegal conduct in that housing
20 project learning that he had moved in with his mother, they
21 went to question him. He was a threat to them.

22 He had two alternatives, Your Honor. He had three,
23 in fact. He could have left. He didn't have any place to
24 live, but he could have tried to move someplace else. He
25 could have gone to the police, but he had been in prison for

1 so long, what he could do. Or he could try to protect
2 himself, and violate the law in doing so, and that's what he
3 wrongly chose. He chose to get some firearms, to protect
4 himself, and now he's here.

5 So, Your Honor has the case. The facts of the case
6 are, basically, in the Indictment of -- filed before Judge
7 Dominguez, they don't involve any violence; they don't involve
8 any violations as to drug trafficking; they don't involve any
9 allegations as to this defendant being involved in the drug
10 trafficking operation that could or could have not been going
11 on in that housing project.

12 He had firearms, a whole bunch of firearms, and of
13 course he's now subject to revocation. He's subject to a
14 subsequent sentence if found guilty in case 19-652, if I'm not
15 mistaken, before Judge Dominguez.

16 So what's a fair sentence, Your Honor? We requested
17 --- the Court denied, and we understand, and we are not
18 waiving our request that we did previously as to
19 reconsideration, because we understand that it is correct, and
20 I would refer to the Court, just to protect my client's
21 appellate right, Your Honor, what we suggest is the correct
22 guideline, which the Court of course has denied. And if the
23 Court would only have found on revocation for felon in
24 possession, Your Honor, we would have submitted that this was
25 a grade B violation.

1 He has a Criminal History I, as the same Criminal
2 History as the original offense should apply, and that would
3 have given an advisory guideline range of four to ten months.
4 As the Court -- and we would have requested the Court a
5 sentence within that guideline range, a -- sufficient but not
6 greater than necessary to satisfy any sentencing purposes.

7 However, Your Honor, and, again, without waiving our
8 prior objection, assuming -- well, not assuming. Now that the
9 Court has found a revocation for a machine gun, and given that
10 Mr. Figueroa's prior offense is a class A felony, with a grade
11 A violation, then the guideline sentencing range is increased,
12 from 24 to 30 months.

13 Your Honor, we submit that the imposition of a
14 sentence of 24 months in this case, that will most probably
15 run consecutively to whatever Judge Dominguez would have to
16 decide, is going to impose for the machine gun and for the
17 firearm, is sufficient and not greater than necessary to
18 satisfy any sentencing purposes in this case, particularly,
19 Your Honor, given the fact that he would have additional
20 imprisonment because of the machine gun and the felon in
21 possession.

22 And I cannot give an estimate of what Judge Dominguez
23 is going to impose to him. That's -- he's the judge, and he
24 can impose a varied, different type of sentence for this
25 defendant. And that will depend whether there will be some

1 plea negotiations or whether the case goes to trial. But what
2 I can say now, Your Honor, is that given the amount of time
3 this defendant has been involved basically in prison, the lack
4 of any violent conduct upon release, the circumstances of the
5 offense, which include what I have proffered here today, 24
6 months, Your Honor, in addition to additional supervised
7 release, both in this case and in Judge Dominguez' case, would
8 probably put this defendant for let's say two, three, four,
9 five years of additional imprisonment.

10 I cannot anticipate, nor can tell the Court what's
11 going to happen in the future, but at least today, from our
12 position, Your Honor, given that the higher guideline range
13 has been applied in this case, given the Court's determination
14 as to a machine gun, by revocation of -- a machine gun
15 violation that caused the revocation, we will submit, Your
16 Honor, that 24 months is sufficient, and that will be our
17 request.

18 THE COURT: Actually, under Section 7B1.2, which is
19 the one that you are alluding, a grade A violation is any
20 violation that constitutes a federal, state, or local offense
21 punishable by a term of imprisonment exceeding one year, which
22 is even the crime of simple possession of a weapon, or the one
23 that is charged of possession of a machine gun, is also -- and
24 it says, or is a crime of violence, is a controlled substances
25 offense, or involves the possession of a firearm or

1 destructive device of a type described in Title 26, Section
2 5845(a), or (b), any other federal, state, or local offense
3 punishable by a term of imprisonment exceeding 20 years.

4 And then, although there's a notation that implicates
5 that the supervision in connection with the felony conviction
6 -- or has a prior felony conviction of possession of a weapon
7 other than a machine gun, is generally a grade B violation.

8 However, under the guideline calculation, one of the key
9 factors is whether the defendant was on supervised release as
10 a result of a sentence for a class A felony, and, in this
11 particular case, he was.

12 And then right now -- I think that the guideline will
13 remain the same. So in terms of what would be applicable in
14 Judge Dominguez' case, exactly, that would be a different
15 situation and a different standard of evidence. And of course
16 the evaluation would be different.

17 Even under the guidelines here, it includes the
18 description of the different types of ammunition -- weapons
19 that will qualify, and if you look at the exhibits presented
20 by the government, and the type of weapons that were
21 possessed, and the clear fact that the chip is clearly
22 identifiable -- and also alludes to the possession of regular
23 weapons concerning the size or length of the barrel, and this
24 defendant even had a pistol that, as stated here by the
25 government, looked like a rifle, but didn't meet the

1 definition of a rifle, which is a weapon that is also -- is a
2 pistol that is also modified with a larger barrel that he also
3 possessed. As to the controlled substances, I have not
4 determined probable cause, so I will not be considering that.

5 So would the defendant like to make any statements
6 that I should consider before imposing sentence?

7 THE DEFENDANT: This problem, the only thing that
8 brought for me was for me to lose my freedom again, and losing
9 my daughter. I have lost my life. I've been in jail since I
10 was young, and I've just lost the only thing that I was about
11 to bring into the world that had my own blood.

12 THE COURT: What do you mean that you just lost her?

13 THE DEFENDANT: She passed away.

14 MR. MARIANI: His daughter passed way when he was
15 arrested. His wife was in a very late stage pregnancy, and
16 she had a miscarriage while he was --

17 THE DEFENDANT: Two days before the child was to be
18 born.

19 THE COURT: I'm really sorry. Sad to hear.

20 MR. MARIANI: And, Your Honor, he basically -- I
21 didn't say this before, but obviously he has been under
22 psychological counseling because of that. He suffers
23 depression, because he finds himself to be the responsible
24 person for the tragic end result of his wife's pregnancy.

25 THE COURT: Very well. I will hear from the

1 government.

2 MR. EATON: Your Honor, I would in no way suggest
3 that the defendant faced an easy road when he got out of
4 prison. It had to have been a hard one. But the fact remains
5 that those decisions he made when he was young are going to
6 keep impacting him and the way he's treated by the criminal
7 justice system.

8 So within less than a year of getting out following
9 those convictions so long ago for second degree murder in the
10 state, for -- federally for an incident in which he shot at an
11 U.S. Marshal, you know, within a year of getting out, there he
12 is again with guns, with a fully automatic gun, with high
13 capacity magazines, and with lots of ammunition. So of course
14 society, and us, and police, and everyone's going to view him
15 as someone with this potential for violent acts.

16 And, no, there was no violence in the revocation
17 facts, there's no violence alleged in the pending case; but
18 there is great potential for violence in his possession of
19 those weapons. So not taking anything away from the
20 mitigation that's been presented, when -- let me also point
21 out, Your Honor, there was sort of a strange procedural
22 history back then, at the time of his convictions, in which he
23 was first sentenced federally in January of 2003. Well, at
24 that time, the state murder charge, and carjacking, and those
25 other gun charges, and so forth, those were not yet

1 convictions. They then became convictions. He was convicted
2 of those in August of 2003. So later that year --

3 THE COURT: In October. The murder charge came in
4 October.

5 MR. EATON: Yes, Your Honor. I'm sorry. Right. The
6 conviction itself in October --

7 THE COURT: The other ones, the robbery and the two
8 weapons charged, occurred August the 7th of 2003.

9 MR. EATON: Thank you, Your Honor. I apologize. But
10 the point being that, at the time of the PSR done back then,
11 he was a Criminal History Category I, because those were not
12 yet convictions. He was later resentenced in 2005. The PSR
13 remained the same. So he has -- and our knowledge is that the
14 rules say that the original Criminal History Category is the
15 applicable one for purposes of the revocation. However, he's
16 in a way kind of benefited from the fact that those
17 convictions were not final yet between the time of the first
18 sentencing and the second sentencing when they became final.

19 So, you know, I think that given the gravity of his
20 record, the quickness with which he did turn back to criminal
21 acts while on probation after getting out, the sort of low
22 calculation of his criminal history, Your Honor, I do think
23 that these things call for a variance above the guidelines,
24 above the applicable guidelines. And I think -- I would ask
25 the Court to consider a sentence that is actually closer to

1 the statutory maximum for these violations, Your Honor.

2 MR. MARIANI: Your Honor, if I may respond to that
3 very briefly?

4 THE COURT: Go ahead.

5 MR. MARIANI: As to -- even if the Court were to
6 accept the government's suggestion and do a variance, I would
7 ask the Court to consider the guidelines. I know there's a
8 statutory maximum. It's five years. But even assuming that
9 the state cases were to be included as a criminal history,
10 which they should not, because of the provision of the
11 guidelines, then this defendant would be a Criminal History
12 III. That's a 30 months to 37 months sentence. And the
13 government, while asking the Court to go closer to the
14 statutory maximum, doesn't state how close, but that would be
15 double, even a departure or a variance to a Criminal History
16 III. So in our position, Your Honor --

17 THE COURT: Here the statutory maximum is three
18 years, which is 36 months.

19 MR. MARIANI: Well, I thought that it was five
20 years.

21 THE COURT: The problem is I think you keep thinking
22 of the offense of possessing a machine gun, but he's here for
23 the revocation.

24 MR. MARIANI: Okay.

25 THE COURT: So the guidelines for the possession of a

1 machine gun in Judge Dominguez' case probably will be higher.
2 I don't know. I have not worked those. But here, upon
3 revocation, the statutory maximum to which he's exposed is 36
4 months.

5 MR. MARIANI: Very well. Then I stand corrected,
6 Your Honor. And more than that, 24 or even 30 months should
7 be sufficient in this case. That would be our request, again,
8 24 months, Your Honor.

9 THE COURT: Very well. Having heard both parties in
10 the case, the Court finds that Mr. Luis Figueroa Gonzalez
11 violated the conditions of his supervised release by
12 committing a new criminal offense, which is the possession of
13 a machine gun as alluded in the motion filed by the probation
14 officer on November the 6th of 2019, as charged in the
15 Indictment, 19-652, and as per the testimony of Agent Valentin
16 here in court. Therefore, the supervised release term imposed
17 on September the 30th of 2005 is hereby revoked.

18 Upon imposing sentence, the Court will consider the
19 advisory Sentencing Guidelines, Chapter Seven policy
20 statements regarding revocation of supervised release.
21 Pursuant to Section 7B1.1(a)(1), a grade A violation has been
22 determined since the conduct constitutes the offense of
23 possession of a machine gun, as cited under Title 26, Section
24 5845(a).

25 Based on a Criminal History Category of I, and a

1 grade A violation, the guideline imprisonment range in this
2 case is from 24 to 30 months, pursuant to Section 7B1.4(a).

3 I think that the record that this defendant has we
4 have already made reference to, and what was the original
5 nature of the charges for which he was sentenced here
6 originally, which was the using and discharging of a weapon in
7 relation to a crime of violence, which is the assault on a
8 U.S. Marshal member. And for that, he was sentenced. He
9 received an amended judgment on November the 30th of 2005.

10 While he was originally charged in the federal case,
11 after he had already been charged in 2002, for robbery, murder
12 in the first degree, use and carrying of weapons without a
13 license, and use of an automatic weapon as well, for those
14 charges, he was sentenced after his federal sentence in August
15 and October of the year 2003. He was released on parole on
16 February the 5th of 2019, and now he stands with new federal
17 charges a short period of time after being placed on parole,
18 and supervised release, that began at that point in time as
19 well.

20 I don't think that we need to go and expand much on
21 the potential for danger and capacity for causing lethal harm
22 that there is in machine guns. The Circuit requires that
23 there be a connection between the defendant, his record, and
24 the use of that weapon, and the damage it does in society. In
25 this particular case, we have that those were the type of

1 weapons that this defendant had way back in 2003 when he was
2 convicted. Then it so happens he got similar charges at the
3 state level in the year 2003 for which he was convicted in
4 2003, also automatic weapons. And now the violation here
5 relates to the possession of automatic weapons as well, for
6 which he had large capacity magazines and a significant number
7 of ammunitions within his control and possession.

8 His propensity for violence, well, he has a first
9 degree -- a murder conviction actually, let me not qualify
10 that. A murder conviction at state level for which he was
11 sentenced to 30 years, which as well goes along with
12 Sentencing Commission findings reflecting a high rate of
13 recidivism and the propensity for violence of those that are
14 convicted for weapon offenses.

15 I don't know if recent personal factors, which are
16 really sad facts that have transpired in the life of
17 Mr. Figueroa, will make him change his course of action. I
18 hope that he has decided to amend his past wrongdoings and to
19 change, but I think that the record is clear that the
20 propensity or risks of recidivism are there, the propensity
21 for violence as well.

22 The clear fact that on three different occasions he
23 continues to go back to the use and possession of a machine
24 gun, and the potential to cause serious bodily injury that
25 this defendant has in the sense of not only the weapons that

1 he possessed but actions he has engaged in, and the fact that
2 this offense or new criminal conduct came just eight months
3 after commencing his supervised release at federal level and
4 his state parole through the Puerto Rico Department of
5 Corrections, and considering all sentencing factors, it is the
6 judgment of the Court that Mr. Luis Roberto Figueroa Gonzalez
7 be committed to the custody of the Bureau of Prisons for a
8 term of imprisonment of 30 months, with no further supervision
9 to follow. The sentence is to be consecutive to the state
10 sentence.

11 Mr. Figueroa Gonzalez is informed of his right to
12 appeal from the sentence imposed within 14 days of judgment
13 being entered. And Attorney Mariani is requested, until
14 relieved by the Court of Appeals, if that ever happens, to
15 continue with the representation of Mr. Figueroa.

16 Anything else?

17 MR. EATON: Nothing for the government, Your Honor.

18 MR. MARIANI: Nothing, Your Honor, but I assume this
19 would have -- I'm just looking at the local charges, and the
20 sentence. For the record, the sentence was September 10,
21 2003, in the local case. I have copies here.

22 THE COURT: September 10.

23 MR. MARIANI: Ten, yeah. And there's another one,
24 Your Honor, for August 7, 2003. There are ones for August 7,
25 and then there are sentence --

1 THE COURT: There must be three for August 7 of 2003,
2 because at state level, every count is like a separate
3 judgment.

4 MR. MARIANI: Yes. Exactly. But they are sentences
5 imposed by Honorable Carmen Mayra Medina on August 7. And
6 then there's a sentence imposed by Honorable Judge Lourdes
7 Vazquez Carina September 10, 2003.

8 THE COURT: That's for 30 years.

9 MR. MARIANI: Exactly.

10 THE COURT: Okay.

11 MR. MARIANI: And even though there are violations of
12 firearms, there's no violation for automatic weapons in any of
13 these charges, Your Honor, to the best of my --

14 THE COURT: Can I see it?

15 MR. MARIANI: Sure.

16 THE COURT: Because I'm quoting from the probation
17 officer's statements -- actually, Counsel has presented the
18 arguments making reference to documents that remain in the
19 Spanish language, and I must say that I have reviewed them as
20 well in the Spanish language in as much no translation is
21 available.

22 I will be ordering the translation. But I will say
23 this. As to -- and I know that when I refer to the murder, I
24 say let me not make any qualification, but it was a murder
25 case with a 30 year sentence that, actually, though the

1 original charge was for first degree, he pled after a plea
2 agreement to a second degree. But the sentence was 30 years,
3 as correctly cited.

4 As to the weapon cases, the state complaint refers to
5 long weapons, (Remarks in Spanish.) I haven't found, though
6 I'm reading, basically scanning through this, reference to
7 automatic weapons, in which case the Court stands corrected as
8 to the state charges that originally alluded, as per the
9 probation officer's assessment that it was a charge for --
10 involving automatic weapon. By the same token, one of those
11 charges, which is the one that alludes to that the defendant
12 possessed two weapons, one of them a long weapon, alludes
13 basically to the robbery offense, which is more a description
14 of a carjacking. But of course for carjacking, the state
15 court will not have jurisdiction. So it's alluded as a
16 robbery. That is correctly stated. But, still, my
17 determination to revoke is based on -- more so based on the
18 actual charges.

19 I just placed a stick-on to cross-reference to see
20 which case. I'm returning the document to counsel.

21 It's based on the actual charges, and the trajectory
22 of this defendant that I have alluded to with state court is
23 in reference to support, one, the short term in which he has
24 returned to committing offenses, the recidivism, and the
25 nature of the offenses, which are drug-related weapons. As to

1 both times in Federal Court, it is clear that the defendant
2 has been in possession of automatic weapons, the first time
3 and this second time around.

4 As to what is alluded to or defined in state court as
5 a long weapon, I don't know. There's no description within
6 the Indictment. And here, at this time, with the weapon that
7 was seized, what we see as a long weapon, that the prosecutor
8 characterized that looks like a rifle, and that the agent, ATF
9 agent identified that it's still a pistol, is certainly a
10 weapon that looks like a rifle, but in as much it doesn't meet
11 the definition that it's carried or fired from the shoulder,
12 it's considered a pistol. So that's the same fashion in which
13 it has been considered.

14 Can the courtroom deputy assist me in returning this
15 to counsel? Thank you.

16 Actually, Counsel, make sure that a copy is left so
17 that the translation can be made and made part of the record.
18 Can we make copies?

19 MR. MARIANI: May I ask -- the Court is asking the
20 defense to secure services of translation?

21 THE COURT: No. I am ordering it right now.

22 MR. MARIANI: Okay.

23 THE COURT: And it's just to preserve the record,
24 because within my findings I have already clarified, I am not
25 making this -- the term that -- the decision to revoke, nor

1 the sentence imposed is based or premised on the state
2 charges. He already served for that.

3 Anything else aside from that? Any request for
4 designation, I imagine you will leave that for Judge
5 Dominguez, who will have a controlling sentence if there is a
6 plea or something happens in that case. Other than that, if
7 you have anything, I will hear from you.

10 THE COURT: Very well. Then the defendant, and
11 counsel, the parties are excused, and I'll be ready for the
12 next case.

13 MR. MARIANI: Your Honor, if I may, just a
14 housekeeping matter regarding my client. Given that the
15 hearing ended at this time, we will ask if it's possible for
16 the Marshals to give him lunch, because if he gets back, there
17 will be no food for him in Bayamon is what he represents to
18 me.

22 MR. MARIANI: Okay.

23 (Proceedings concluded.)

24 * * *

* * *

1 U.S. DISTRICT COURT)
2 DISTRICT OF PUERTO RICO)

3

4 I certify that this transcript consisting of 40 pages is
5 a true and accurate transcription to the best of my ability of
6 the proceedings in this case before the Honorable United
7 States District Court Judge Aida M. Delgado Colon on September
8 13, 2021.

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13 S/ Amy Walker

14 Amy Walker, CSR 3799

15 Official Court Reporter

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APPENDIX C

Relevant Portions of 18 U.S.C. §922(o)

(o)

(1)

Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.