

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GUY MENA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

/s/ Kevin Joel Page

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Appendix A Opinion of Fifth Circuit, CA No. 23-10144,
United States v. Guy Mena, 2023 WL 7314349 (5th Cir. Nov. 6, 2023)
(unpublished).

Appendix B Judgment and Sentence of the United States District Court
for the Northern District of Texas, entered December 1, 2022.
United States v. Guy Mena, Dist. Court 4:21-CR-342-1.

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10144
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

November 6, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GUY MENA,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CR-342-1

Before ELROD, OLDHAM, and WILSON, *Circuit Judges.*

PER CURIAM:*

Guy Mena appeals his guilty-plea conviction for transferring a machinegun without obtaining authorization or paying the requisite tax in violation of the National Firearms Act. *See* 26 U.S.C. § 5861(e). Mena contends that § 5861(e) is unconstitutional as applied to him because machineguns are protected by the Second Amendment and the regulatory

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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requirements of § 5861(e) are inconsistent with the nation’s historical tradition of firearm regulation. *See New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2129-30 (2022). Citing *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016), in which we held that machineguns are not protected by the Second Amendment, the Government moves for summary affirmance. Mena agrees that his constitutional challenge to § 5861(e) is foreclosed by *Hollis*, and he seeks only to preserve the issue for future review.

Summary affirmance is proper where, among other instances, “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Although Mena’s challenge to his conviction fails, and additional briefing is not required, the resolution of this appeal requires more analysis than appropriate for summary affirmance.

Because Mena did not object to the constitutionality of § 5861(e) in the district court, we review for plain error. *See United States v. Snarr*, 704 F.3d 368, 382 (5th Cir. 2013). To demonstrate plain error, Mena must, relevantly, identify (1) a forfeited error (2) that is clear or obvious, rather than subject to reasonable dispute. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

In *Hollis*, we held that machineguns are not protected by the Second Amendment because they are not “in common use.” *Hollis*, 827 F.3d at 447-51 (citing *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)). Mena proffers statistics to show that machine gun ownership is more prevalent than when *Hollis* was decided, but we ordinarily do not consider evidence presented for the first time on appeal. *See Theriot v. Par. of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999). In any event, his assertions are insufficient to demonstrate clear or obvious error in light of our analysis in *Hollis*.

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Mena nevertheless argues that *Bruen* requires a different result. However, Mena's argument would require extending *Bruen*'s analysis to a new factual context. Thus, he has not shown that § 5861(e) is clearly or obviously unconstitutional under *Bruen*. See *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009); accord *Wallace v. Mississippi*, 43 F.4th 482, 500 (5th Cir. 2022).

The judgment is AFFIRMED. The Government's motion for summary affirmance and alternative motion for an extension of time are DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Numbers: 4:21-CR-342-Y(1) &
1:22-CR-008-Y (1)

GUY MENA

M. Levi Thomas, assistant U.S. attorney
Michael A. Lehmann, attorney for the defendant

On December 21, 2021, the defendant, Guy Mena, entered a plea of guilty to count one of the one-count information in case no. 4:21-CR-342-Y (1), and on July 19, 2022, to count two of the three-count indictment in case no. 1:22-CR-008-Y (1). Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE CONCLUDED</u>	<u>COUNT</u>
26 U.S.C. § 5861(e), 5871, and 18 U.S.C. § 2	Transfer of a Firearm in Violation of the National Firearms Act	November 18, 2021	1 in case no. 4:21-CR-342-Y (1)
21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(viii)	Possession with Intent to Distribute Five Grams or More of Methamphetamine (Actual)	September 23, 2021	2 in case no. 1:22-CR-008-Y (1)


The defendant is sentenced as provided in pages two through three of this judgment. The sentence is imposed under Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission under Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 for count one of the one-count information in case no. 4:21-CR-342-Y (1) and \$100.00 for count two of the three-count indictment in case no. 1:22-CR-008-Y (1) for a total of \$200.00.

Upon motion of the government, count one of the three-count indictment is dismissed, as to this defendant only, in case no. 1:22-CR-008-Y (1).

The defendant shall notify the United States attorney for this district within thirty 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.

Sentence imposed December 1, 2022.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed December 1, 2022.

Defendant: Guy Mena

Case Numbers: 4:21-CR-342-Y(1) & 1:22-CR-008-Y (1)

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IMPRISONMENT

The defendant, Guy Mena, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 120 months on count one of the one-count information in case no. 4:21-CR-342-Y (1) and for a term of 175 months on count two of the three-count indictment in case no. 1:22-CR-008-Y(01). The sentences shall run concurrently with each other, for a total sentence of 175 months. Additionally, these sentences shall run consecutively to any future sentences that may be imposed in case nos. F1931036 and F1931167 in the 265th Judicial District Court, Dallas County, Texas.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years on count one of the one-count information in case no. 4:21-CR-342-Y (1) and a term of 4 years on count two of the three-count indictment in case no. 1:22-CR-008-Y (1), to run concurrently with each other for a total of 4 years.

The defendant, while on supervised release, shall comply with the standard conditions recommended by the U. S. Sentencing Commission at §5D1.3(c) of the United States Sentencing Commission Guidelines Manual, and shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the probation officer, as authorized by the Justice for All Act of 2004;

report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Federal Bureau of Prisons;

refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court; and

participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

Defendant: Guy Mena

Case Numbers: 4:21-CR-342-Y(1) & 1:22-CR-008-Y (1)

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FORFEITURE

Under 26 U.S.C. § 5872(a) and 28 U.S.C. § 2461(c), Defendant's interest in the following property is condemned and forfeited to the United States: a 9mm, MPS style rifle with a defaced manufacturer, model, and serial number.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States marshal

BY _____
deputy marshal