IN THE
SUPREME COURT OF THE UNITED STATES

MASNIK SAINMELUS,
Petitioner,

vs. Number

UNITED STATES OF AMERICA
Respondent.
_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the petitioner, MASNIK SAINMELUS, by and through undersigned counsel and pursuant to Sup. Ct. R.39, and moves this Honorable Court for leave to file the attached Petition for Certiorari in the Supreme Court of the United States without costs and to proceed in forma pauperis.

In the lower courts, the Petitioner was formally adjudicated unable to afford counsel and undersigned counsel was appointed for him under 18 U.S.C. Section 3006(a) of the Criminal Justice Act; accordingly, the Petitioner has not attached an affidavit of insolvency.

Respectfully Submitted,

s/Gregory A. Samms
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail upon The Solicitor General, United States Department of Justice, Washington, D.C. 20530 and upon all counsel of record, this 25th day of September, 2019.

s/Gregory A. Samms

Gregory A. Samms, Esq
Florida Bar No. 438863

IN THE
SUPREME COURT OF THE UNITED STATES

MASNIK SAINMELUS,
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UNITED STATES OF AMERICA
Respondent.
_____/

PETITION FOR A WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS
IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT

DECLARATION VERIFYING TIMELY FILING

Petitioner, MASNIK SAINMELUS, through undersigned counsel, and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the Petition for Writ of Certiorari filed in the above-styled matter was placed in the U.S. mail in a prepaid first-class envelope, addressed to the Clerk of the Supreme Court of the United States, on the 25th day of September, 2019.

GREGORY A. SAMMS, ESQ.
Attorney for the Petitioner

By: s/Gregory A.Samms

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September 25, 2019

IN THE
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MASNIK SAINMELUS,
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IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS
IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT

MASNIK SAINMELUS respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Eleventh Judicial Circuit rendered and entered in Case No. 18-14707 of that Honorable Court as a mandate on September 4, 2019, which affirmed the judgement and sentence of the United States District Court for the Southern District of Florida.

QUESTIONS PRESENTED

1. Whether The District Court Erred When The Court Increased The Appellant's Guideline Range Four Levels By Finding That The Offense Involved Between 8 and 24 firearms under U.S.S.G 2K2.1(b)(1)(B).
2. Whether The District Court Erred When The Court Increased The Appellant's Guideline Range Four Levels By Finding That The Offense Involved Between 8 and 24 firearms under U.S.S.G 2K2.1(b)(1)(B).

LIST OF PARTIES

The parties in this proceeding or persons who have an interest in the outcome of this case are as follows:

1. Bloom, Hon. Beth
2. Brown, Bruce
3. Fajardo Orshan, Ariana
4. Greenberg, Benjamin G.
5. Lawrence, Samuel

6. Mulvihill, Thomas

7. Sainmelus, Masnik

8. Samms, Gregory A.

9. Seltzer, Hon. Barry S.

10. Smachetti, Emily M.

11.Snow, Hon. Lurana S.

12. Jason Wu

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REFERENCE TO THE OPINION BELOW

The trail court issued no written opinions in this matter. The Eleventh Circuit Court of Appeals did issue a written, unpublished opinion which, along with the judgement of the trial court, is included in the appendix to this petition.

STATEMENT OF JURISDICTION

This court has jurisdiction under 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

The Petitioner was the defendant in the district court, and will be referred to by name or as the Petitioner. The respondent, United States of America, will be referred to as the government. The record will be noted by reference to the document and page number of the Record on Appeal as prescribed by the rules of this Court. The petitioner is incarcerated.

The Appellant is a well know rapper who plies his trade on YouTube with numerous videos. [D.E. 54, p. 11]. The particular genre that the Appellant performs in is called "trap videos." [D.E. 54, pp 7-11]. These videos are the creation of African American urban youth whose lyrics describe the social reality of their existence. [D.E. 54, p. 7]. The Appellant is signed to a record label called Sniper Gang. [D.E. 34, ¶¶ 54, 68]. This label puts out a number of videos with artists other than the Appellant. [D.E. 34, ¶ 68].

In the Spring of 2017, members of the Bureau of Alcohol Tobacco and Firearms, the Broward Sheriff's Office and the Drug Enforcement Agency began monitoring the social media accounts of individuals they believed were committing criminal acts who referred to themselves as "Sniper Gang." [D.E. 34, ¶ 7]. The monitoring of these social media accounts led to arrests for federal offenses that were committed by these individuals that law enforcement suspected to be members of "Sniper Gang." Law

enforcement in an undercover capacity purchased heroin, cocaine and firearms from several individuals over a six-month period. Namely, Jovante Telfort, Scoth Vilburn, and Mondlin Seppe, who sold guns to undercover operatives and were charged with various felony offenses under case number 17-60308-CR-DIMITROULEAS. [D.E. 34, ¶ 8]. None of these undercover operations revealed any involvement of the Appellant in the aforementioned gun and drug sales. [D.E. 34, ¶ 18].

On September 27, 2017, a suspected Sniper Gang member named Willie Ryan posted several photos on his Instagram account depicting himself and another individual, Emmanuel Francois, sitting on a bed covered with various firearms. On the bed between Ryan and Francois was a silencer and at least five pistols of various make, model and caliber for a total of seven firearms plus a silencer. [D.E. 34, ¶ 9].

On the same date that Willie Ryan posted the Instagram picture of himself and Emmanuel Francois sitting on a bed of guns, the Appellant was engaged in a video shoot with his cameraman Leroy James. [D.E. 52 p. 11]. Leroy James became familiar with the Appellant in middle school. [D.E. 52 p. 7]. He followed the Appellant's burgeoning rap career and approached the Appellant about being his cameraman for future videos and the Appellant agreed. The trap videos that Mr. James filmed for the Appellant contained the standard trap video components of; the artist having gold teeth; gun waiving; money and

women. [D.E. 52 p. 7]. These trap videos are in many instances instantaneous. [D.E. 52 p. 7-8].

Mr. James described to the court how these videos occur when he testified at the sentencing hearing about the filming of the video "I Was." Mr. James and the Appellant were in Orlando where the Appellant was doing a performance at a club. [D.E. 52 p. 8]. After the performance the Appellant decided that they should shoot a video. [D.E. 52 p. 8]. The Appellant invited people in the club telling them if they wanted to be in the video to come back to their hotel room. [D.E. 52 p. 8]. Once at the hotel room unknown males gave their personal guns to the women present to hold during the filming of the video. [D.E. 52 p. 8]. During the filming of the video the girls waived the guns around and used them as props to enhance the trap video. [D.E. 52 p. 8]. The guns were not owned by the women in the video and after the shoot was over the guns were returned to the owners. [D.E. 52 p. 9]. The Appellant also used a gun during the video but that gun was also given to him by one of the males in attendance. After the video was finished the Appellant returned the gun to its owner. [D.E. 52 p. 9]. The Appellant did not have his own gun. [D.E. 52 p. 10]. The "I Was" video was spontaneous and took about twenty to thirty minutes to make. [D.E. 52 p. 8].

On September 27, 2017, the Appellant and Leroy James shot the "No Reason" video. Mr. James and the Appellant were hanging out when someone came to them and

suggested a spot where they could shoot a video. [D.E. 52 p. 12]. The first location was outdoors and people started showing up that wanted to be in the video. [D.E. 52 p. 12]. Someone then suggested to them that there was another spot that they could go to. [D.E. 52 p. 12]. The location was a home in Golden Acres. When they arrived, there were guns laid out on a bed in one of the rooms in the home. Neither the Appellant nor Mr. James placed any of those guns on the bed. [D.E. 52 p. 13]. This video shoot was advertised on social media so a lot of people were present prior to the arrival of the Appellant. [D.E. 52 p.13]. There were a lot of guys in the house with guns walking around. [D.E. 52 p. 14]. These armed men were saying "let's shoot right here." That was how the shoot was produced in the bedroom. [D.E. 52 p. 14].

The Appellant sat on the bed and the video shoot took place with the Appellant sitting next to a number of guns one of which was the gun in the indictment, which was a, a Primary Weapons .300 Blackout caliber rifle. [D.E. 52 p. 14; D.E. 34 , ¶ 10]. The rifle had a silencer attached to the barrel, namely an AR-15 Advanced Armament Corp. silencer. [D.E. 34 , ¶ 10]. After the shoot was over numerous individuals asked to take pictures with the Appellant and he obliged. [D.E. 52, p.14]. The Appellant was asked to take a picture with the rifle containing the silencer. [D.E. 52, p.15]. The Appellant held the rifle with the silencer attached for the picture and then placed it back on the bed. [D.E. 52, p.14-16]. The Appellant posted on his social media account the photo of himself holding the Blackout caliber rifle with the AR-15 attached silencer. [D.E. 34, ¶

10]. That photo was the offending photo that was seen by law enforcement. [D.E. 34, ¶ 10]. The Appellant did not bring his own gun to the video shoot and did not leave the video shoot with a gun. [D.E. 52, p.15]. He did not procure any of the guns that were on the bed. The guns were simply props in the video shoot. [D.E. 52, p.14-16]. One of the photos on the social media account depicted the Appellant sitting on the bed next to the Blackout rifle and the AR 15 silencer along with other firearms. [D.E. 34, ¶ 10]. This portion of the video is depicted in the first portion of the "No Reason" video. [D.E. 47]. The Appellant is rapping while sitting on the bed next to the weapons. [D.E. 47].

These social media photos led to additional investigation by authorities who located the home in Pompano Beach where the video was taken. [D.E. 34 ¶ 11]. The exact room where the "No Reason" video was shot and where the photos of the Appellant were taken, was photographed and documented by law enforcement. The Blackout rifle and the AR 15 silencer were taken from a civilian victim of a strong-armed robbery on September 10, 2017. [D.E. 34 ¶ 11]. The victim of that robbery was able to identify four of his stolen firearms from photos of the "No Reason" video shoot. [D.E. 34 ¶ 13]. These weapons were recovered from suspected Sniper Gang members through undercover buys or through arrests and home searches. [D.E. 34 ¶ 12-13]. However, none of the weapons were recovered from the Appellant. [D.E. 34 ¶ 12-13].

The Appellant was arrested on June 13, 2018 and subsequently charged with a one count indictment alleging Possession of a firearm not registered in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. § 5861(d). [D.E. 34 p. 2]. On August 30, 2018 the Appellant pled guilty to the sole count of the indictment and executed a written plea agreement where the government agreed to recommend a two to three level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. [D.E. 34 ¶ 1-3].

Subsequently, the Appellant appeared before the District Court for sentencing on November 6, 2018. [D.E 41]. The probation department filed an initial PSI on October 4, 2018. [D.E. 34]. In the initial PSI the probation department held the Appellant responsible for 8 firearms. [D.E. 34 ¶ 18]. This calculation was based on the fact that during the video shoot of "No Reason" the Appellant was filmed and photographed sitting next to 8 firearms that were on the bed while he was rapping [D.E. 34, ¶ 18]. Because the silencer was attached to the AR15 rifle, the probation department counted the silencer as a separate firearm and held the Appellant responsible for nine firearms. [D.E. 34, ¶ 18]. The import of the number of firearms was to increase the Appellant's offense level by four levels. [D.E. 34, ¶ 24]. The probation department did acknowledge that there was no evidence connecting the Appellant to the theft of the firearms or silencer. [D.E. 34, ¶ 18].

The probation department calculated the base offense level for a violation of 26 U.S.C. § 5861(d) using the guideline found at § 2K2.1 for firearm offenses. That section states that unlawful possession of a firearm that is described in 26 U.S.C. § 5845(a) where the defendant was a prohibited person at the time, he committed the instant offense, has a base offense level of 20, pursuant to U.S.S.G. § 2K2.1(a)(4)(B). [D.E. 34, ¶ 23].

The defense filed an objection to the probation's department base calculation challenging the department's assessment that the Appellant is a prohibited person within the meaning of § 2K2.1(a)(4)(B) because of prior felony convictions that the department deemed qualified the Appellant to be a prohibited person. [D.E. 36]. The probation department responded by filing an Addendum where the department conceded that the Appellant' s priors could not be used as predicate offenses. [D.E. 37-1]. However, the Addendum put forth a new argument that the defendant was a prohibited person because of his past drug use. The defense filed a notice of supplemental authority that established the government had to prove the Appellant was an unlawful user at the time of the offense. [D.E. 40].

The court heard arguments on the defense objections and overruled them. The Court found that the Appellant was a prohibited person for his admitted drug use and was also responsible for 9 firearms as indicated in the PSI. [D.E. 54, p. 56].

The court then calculated that the Appellant's adjusted offense level. With the four-level enhancement for the number of firearms, the finding that he was a prohibited person and a two-level increase because the gun was stolen, the Appellant's adjusted offense level was 26. The Appellant then received a three-level reduction for acceptance of responsibility resulting in a total offense level of 23. The Appellant was determined to have a criminal history category of III which corresponded to an advisory guideline range of 57 to 71 months. [D.E. 54, p. 65].

After hearing arguments on the 3553 factors, the Court sentenced the Appellant to 36 months. [D.E 54, p. 71].

On May 24, 2016 the appellant timely filed his Notice of Appeal. (D.E. 48).

ARGUMENT

A. The Court erred when it found that the Appellant was subject to a four-level increase because the court determined that the Appellant was responsible for nine firearms under 2K2.1(b)(1)(B).

It is clear from the facts in this case that the District Court was dealing with a very unique situation. Here, the appellant did not have any claim to ownership of the guns that were attributed to him under 2K2.1(b)(1)(B). He simply showed up to a home for the

purpose of a video shoot. The evidence shows that he did not place the guns there, nor did he direct anyone to place the guns there. He did not touch all the guns. The evidence shows that he picked up one of the guns on the bed to take a picture and then replaced it after the photo was taken. Under these circumstances the question becomes what level of possession is necessary to be held responsible for gun possession under 2K2.1(b)(1)(B).

Possession of a firearm may be either actual or constructive. *United States v. Iglesias,* 915 F.2d 1524, 1528 (11th Cir. 1990). Constructive possession of a firearm exists when a defendant does not have actual possession but instead knowingly has the power or right, and intention to exercise dominion and control over the firearm. A defendant's presence in the vicinity of a firearm or mere association with another who possesses that gun is insufficient; however, at the same time, "[t]he firearm need not be on or near the defendant's person in order to amount to knowing possession." *United States v. Wright*, 392 F.3d 1269, 1273 (11th Cir. 2004) (citing *United States v. Winchester*, 916 F.2d 601, 603-04 (11th Cir. 1990)) (holding that a firearm found behind his couch when the defendant was not home was sufficient for a conviction under 18 U.S.C. § 922(g)). As long as the Government proves, through either direct or circumstantial evidence that the defendant (1) was aware or knew of the firearm's presence and (2) had the ability and intent to later exercise dominion and control over that firearm, the defendant's constructive possession of that firearm is shown. *United States v. Perez*, 661 F.3d 568, 587 (11th Cir. 2011).

Section 922(g)(1) requires that a defendant have been in knowing possession of a firearm. *18 U.S.C. § 922(g)(1); United States v. Beckles*, 565 F.3d 832, 841 (11th Cir. 2009). Possession may be either actual or constructive. *Perez,* at, 576. However, a defendant's "mere association" with a person actually possessing the firearm at issue is insufficient, by itself, to establish constructive possession under § 922(g). *Id.*; *United States v. Andrews*, 564 F. App'x 977, 980 (11th Cir. 2014).

"[A] defendant's mere presence in the area of [an object] or awareness of its location is not sufficient to establish possession." *United States v. Jones*, 314 F. App'x 261, 266 (11th Cir. 2009)

The guidelines in it's application notes defines when firearms are to be counted under 2K2.1. Application note 5 states that: For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer. *2K2.1 n.5*

In this very unique case, the defendant a rap artist, went to a home to shoot a video. As part of that genre, the presence of guns as props is a common and almost universal occurrence. When he arrived at the home for the video shoot a number of guns were on the bed. The defendant did not place them there. He had no knowledge of the

ownership of any of the guns. He had no idea if the guns were legal or not. He simply was going to shoot his video and leave. [D.E. 54, pp. 14-17]. The probation office is basing their enhancement solely on a photo depicting the number of guns on the bed. [D.E. 34, ¶ 10]. There is no evidence in the government's possession that he had any control over these weapons outside of them being props in a video. He didn't take any of the guns after the video shoot because none of them were his. [D.E. 54, pp. 14-17]. There was never any intent on the part of the defendant to use the weapons for any nefarious purpose. To attach every weapon sitting on the bed in a photo shoot to the defendant is an improper expansion of the guidelines.

If the language of *Application note 3* is followed to the letter, it can clearly be said that the Appellant only sought to obtain one gun. He only picked up one gun off the bed. He did not seek to obtain any other firearms. Thus, he only unlawfully possessed one firearm and he never sought to distribute any of the firearms. Since that one firearm had a silencer attached, which is counted as a separate firearm, Application note 3 of 2K1.1 clearly indicates that only 2 firearms should be counted.[1]

B.<u>The Court Erred When It Found That The Appellant Was A Prohibited Person Under U.S.S.G 2K2.1(a)(4)(b) By Finding That Because The Appellant Admitted To</u>

[1] The firearm in question had a silencer attached. Therefore, if the silencer is to be counted as a separate gun then the Appellant is responsible for two guns. Since the enhancements under 2K1.1(B)(4) begins at 3 firearms the Appellant in either case would not receive an increase in his guidelines score.

Using Drugs In the Past His Base Offense Level Should Be Increased By Two Levels.

In order to calculate the Appellant's base offense level, the probation department correctly used the 2016 Federal Sentencing Guidelines Manuel as the crime was committed on September 27, 2017. The guideline that is applicable for a violation of 26 U.S.C. § 5861(d) is found at § 2K2.1(a)(4)(B). That section provides that if the Appellant was a "prohibited person at the time the defendant committed the instant offense;" then his base offense level is 20. The defense objected to the Appellant being categorized as a "prohibited person" initially based on the fact that the Appellant had two previous felony state pleas where adjudication was withheld. Under recent Florida Supreme Court case law withholds of adjudication are not counted as convictions.[2] The court agreed and the government conceded that the prior state withhold of adjudications could not be the predicate for finding that the defendant was a "prohibited person" as defined in 2K2.1. [D.E. p.55].

However, the probation department subsequently argued the Appellant was a prohibited person because he had admitted to drug use in his past. [3] Application Note 3

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[2] See Clarke v. United States, 184 So.3d 1107, 1108 (Fla. 2016), where the Florida Supreme Court ruled that "a guilty plea for a felony for which adjudication was withheld does not qualify as a 'conviction.'"

[3] In the probation department's addendum to the PSI the department stated: In further review of 18 U.S.C. § 922(g), pursuant to 18 U.S.C. § 922(g)(3), it is unlawful for any person who is an unlawful user of or addicted to any controlled substance, to be in possession of a firearm. As reflected in the defendant's criminal history at

of U.S.S.G. 2K2.1 defines a "prohibited person" for purposes of 2K2.1(a)(4)(B) as "any person described in 18 U.S.C. § 922(g) or § 922(n)." *U.S.S.G. 2K2.1 application n.3.* Under 18 U.S.C. § 922(g), "It shall be unlawful for any person … (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" to possess firearms. *18 U.S.C. § 922(g).* When you refer to the Controlled Substances Act for the definition of "addicted to a controlled substance" the Act gives a definitive description of what the term addict means. The statute does not define the phrases "unlawful user of … any controlled substance" or "addicted to any controlled substance." The Act does give a definition for the term addict. 21 U.S.C. 802(1) states: The term "addict" means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction. *21 U.S.C. 802(1).*

The testimony at the sentencing hearing revealed that the Appellant frequently used marijuana. [D.E. 54, p. 53; D.E. 34 ¶ 59]. Further that he used MDMA from 2010 to 2014; Ecstasy from 2014 to June 2018 and during the same time Xanax to help him fall asleep. Although these admissions show drug use, they clearly don't meet the definition

---

paragraphs 35, 36, 37, and 38, the defendant has been arrested for drug possession offenses, pled no contest, and adjudication was withheld. He was placed in a drug court program twice. The defendant further admitted using marijuana during at least one arrest. As reflected in paragraphs 59 through 61, the defendant admitted a substantial history of drug abuse. [D.E. 37-1 p.3].

of addict that is contained in 21 U.S.C. 802(1). The Appellant's drug use was personal. His marijuana use and Xanax use were to help the Appellant deal with sleep issues. The MDMA was discontinued in 2014 approximately four years before the Appellant was arrested for this offense. Although these admissions show that the Appellant was using drugs, he falls far short of the definition that the statue requires to be termed an addict. There was no evidence that the Appellant's drug was so substantial as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction. The Appellant was a functioning music artist making a number of videos. He was preforming in rap concerts and had a functioning relationship with his wife. He certainly was not at the point where he could be determined to be an addict within the meaning of 21 U.S.C. 802(1).

The next question is whether the Appellant qualifies as an unlawful user as the term is used in 18 U.S.C. § 922(g). An individual's status as a prohibited person is measured "at the time the defendant committed the instant offense." U.S.S.G. § 2K2.1(a)(4)(B). While a court may use evidence of a defendant's unlawful use of drugs while on bond to infer he was a user at the time he possessed a firearm, such evidence is not necessary. The government need only show the defendant was an unlawful user of drugs or addicted to drugs at the time he committed the offense. In other words, the

government must show a defendant's drug use was contemporaneous with his firearm possession. *United States v. Bennett*, 329 F.3d 769, 776-77 (10th Cir. 2003). As stated in *United States v. Edmonds*, 348 F.3d 950 (11th Cir. 2003), to be an "unlawful user of" marijuana a defendant's use must be "ongoing and contemporaneous with the commission of the offense." *Edmonds* at 953.

The testimony from the hearing showed that on the day the Appellant was arrested he was not under the influence of any marijuana or any other substances. [D.E. 54, p.17]. Leroy James testified that he knows how to recognize when someone is high and he stated under oath that the defendant was not. [D.E. 54, p.17]. This shows that in spite of general statements that the Appellant gave for his PSI interview that he in fact was not using drugs contemporaneously with the offense. This is important because the offense itself only took a few seconds to pick up the weapon for a photo and place it back on the bed. This wasn't a conspiracy where the Appellant was engaged in criminal conduct over a period of months. This was a singular offense that occurred on one day at a specific time when the defendant was not a "drug user." Under the standard of both *Bennett* and *Edwards* supra, the Appellant is not a prohibited person under 2K2.1 and as such his initial offense level should have been 18 rather than the 20 he received for being a prohibited person.

REASONS FOR GRANTING THE WRIT

The Appellant was never in possession of nine firearms but actually picked up one firearm at a video shoot. This Court needs to add clarification to the nature of constructive possession. It should not apply to circumstances where the firearm was used simply as a prop by an unsuspecting person. The government failed to prove at the sentencing hearing that the Appellant unlawfully sought to obtain, unlawfully possess, or unlawfully distribute nine firearms. Thus, the Court erroneously increased his guidelines four levels.

The Appellant was erroneously found to be a prohibited person Under U.S.S.G 2K2.1(a)(4)(b). By doing so the District Court and the Circuit Court did not follow Eleventh Circuit precedent that requires that the government must show a defendant's drug use was contemporaneous with his firearm possession. Unless this Court grants certiorari courts across the nation will wrongly enhanced defendants who may have used drugs in the past but not contemporaneous with the offense.

CONCLUSION

For the reasons stated here the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted
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Florida Bar No. 438863

BY: s/Gregory A. Samms

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was served via U.S. Mail upon the Solicitor General of the United States, U.S. Department of Justice, Washington D.C. 20530 and upon all counsel of record this 25th day of September, 2019.

BY:s/Gregory A. Samms

GREGORY A. SAMMS, ESQ.
Florida Bar No. 438863

APPENDIX

Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14707
Non-Argument Calendar

D.C. Docket No. 0:18-cr-60131-BB-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MASNIK SAINMELUS,
a.k.a., John Wicks,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(September 4, 2019)

Before WILSON, EDMONDSON, and HULL, Circuit Judges.

PER CURIAM:

Masnik Sainmelus appeals his 36-month sentence after pleading guilty to possessing a firearm not registered in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. § 5861(d). First, he argues that the district court erroneously applied a two-level enhancement because he was a person prohibited from possessing firearms under U.S.S.G. § 2K2.1(a)(4)(B), based on its finding that he regularly used drugs at the time of his offense. Second, he argues that the district court's finding that his offense involved eight or more firearms, leading to a four-level enhancement under U.S.S.G. § 2K2.1(b)(1)(B), was clearly erroneous.

I.

We review the district court's factual findings for clear error and its application of the Guidelines *de novo*. *United States v. Newman*, 614 F.3d 1232, 1235 (11th Cir. 2010). A factual finding cannot be clearly erroneous when the factfinder is choosing between two permissible views of the evidence. *United States v. Saingerard*, 621 F.3d 1341, 1343 (11th Cir. 2010). The sentencing court may make factual findings based on undisputed statements in the presentence

investigation report ("PSI"). *United States v. Hamilton*, 715 F.3d 328, 339 (11th Cir. 2013). When the government seeks to apply a sentencing enhancement over a defendant's factual objection, it has the burden of proving the facts by a preponderance of the evidence. *United States v. Washington*, 714 F.3d 1358, 1361 (11th Cir. 2013). In the context of a prohibited-person finding under U.S.S.G. § 2K2.1, the government must present "reliable and specific" evidence that the defendant was an unlawful user of a drug. *United States v. Bernardine*, 73 F.3d 1078, 1081 (11th Cir. 1996).

Section 2K2.1 of the Guidelines, which addresses firearm offenses, assigns a base offense level of 20 if, *inter alia*, the defendant "was a prohibited person at the time the defendant committed the instant offense." U.S.S.G. § 2K2.1(a)(4)(B). A "prohibited person" is "any person described in 18 U.S.C. § 922(g)," *id.*, comment. (n.3)., which prohibits individuals who are "unlawful user[s] of or addicted to any controlled substance" from carrying firearms, 18 U.S.C. § 922(g)(3).

To be an "unlawful user" for sentencing purposes, the "defendant's use must be ongoing and contemporaneous with the commission of the offense." *United States v. Edmonds*, 348 F.3d 950, 953 (11th Cir. 2003) (quotation omitted). Under this standard, the government need not show that the defendant was under the influence of a controlled substance at the time of his arrest, but only that he qualified as an unlawful user "during the same time period as the firearm

possession." *Id.* In *Edmonds*, we concluded that the defendant's admitted history of drug use and positive test for marijuana two months after his arrest, along with testimony that the defendant was rolling a marijuana cigarette at the time of the arrest, was sufficient to prove that the defendant was an unlawful user. *See id.*

Here, the district court did not err in applying a two-level enhancement for being a person prohibited from possessing firearms: the record, including defendant's admitted facts in the PSI, supported that Sainmelus was an "unlawful user" of marijuana and ecstasy, contemporaneous with his unlawful possession of the unregistered firearms.

II.

If an offense for unlawful receipt, possession, or transportation of firearms or ammunition involved 8 to 24 firearms, the offense level is increased by 4 levels. U.S.S.G. § 2K2.1(b)(1)(B). For purposes of calculating the number of firearms in this section, the court can only count "those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed." *Id.*, comment. (n.5).

"Possession of a firearm may be either actual or constructive." *United States v. Perez*, 661 F.3d 568, 576 (11th Cir. 2011). "Constructive possession of a

firearm exists when a defendant does not have actual possession but instead knowingly has the power or right, and intention to exercise dominion and control over the firearm." *Id.* A defendant's presence in the vicinity of a firearm or association with another who possesses that firearm is insufficient; alternatively, the firearm need not be on or near the defendant's person to amount to knowing possession. *Id.* To demonstrate constructive possession, the government must show that "the defendant (1) was aware or knew of the firearm's presence and (2) had the ability and intent to later exercise dominion and control over that firearm." *Id.* In *Perez*, we concluded that the evidence was sufficient to establish Perez's constructive possession of firearms placed in his car to be transported to a fictional cocaine stash house he and his co-conspirators intended to rob. *Id.* at 578.

Here, the district court properly applied a 4-level enhancement for Sainmelus's offense involving between 8 and 24 firearms because photograph evidence showed Sainmelus within arm's reach of at least 8 firearms, plus a silencer, and also tended to show that he intended to exercise dominion or control over all of them. Accordingly, we affirm Sainmelus's sentence.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT

Southern District of Florida
Fort Lauderdale Division

UNITED STATES OF AMERICA
v.
MASNIK SAINMELUS

JUDGMENT IN A CRIMINAL CASE

Case Number: **18-60131-CR-BLOOM-001**
USM Number: **18746-104**

Counsel For Defendant: **GREGORY SAMMS**
Counsel For The United States: **BRUCE BROWN**
Court Reporter: **Yvette Hernandez**

The defendant pleaded guilty to count(s) 1.

The defendant is adjudicated guilty of these offenses:

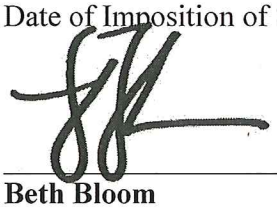
TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
26 USC § 5861 (d)	Possession of a firearm not registered in the National Firearms	09/27/2017	1

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

All remaining counts are dismissed on the motion of the government.

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.

Date of Imposition of Sentence: **11/6/2018**



Beth Bloom
United States District Judge

Date: 11/6/2018

DEFENDANT: **MASNIK SAINMELUS**
CASE NUMBER: **18-60131-CR-BLOOM-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **36 MONTHS AS TO COUNT 1.**

The court makes the following recommendations to the Bureau of Prisons: that the Defendant be designated to a South Florida facility. Also, that the Defendant be considered to participate in the 500 hour RDAP program administered by the BOP.

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **MASNIK SAINMELUS**
CASE NUMBER: **18-60131-CR-BLOOM-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **2 years as to count 1.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **MASNIK SAINMELUS**
CASE NUMBER: **18-60131-CR-BLOOM-001**

SPECIAL CONDITIONS OF SUPERVISION

Association Restriction - The defendant is prohibited from associating with his co-conspirators in the Related Cases while on supervised release.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: **MASNIK SAINMELUS**
CASE NUMBER: **18-60131-CR-BLOOM-001**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED

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

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **MASNIK SAINMELUS**
CASE NUMBER: **18-60131-CR-BLOOM-001**

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of $100 due immediately.

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

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

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

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

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Government shall file a preliminary order of forfeiture within 3 days.

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

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 18-60131-CR-BLOOM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MASNIK SAINMELUS,

Defendant.
_____/

DEFENDANTS' OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

COMES NOW the defendant, Masnik Sainmelus, by and through undersigned counsel and respectfully files his Objections To The Pre-sentence Investigation Report, dated October 4, 2018 and as grounds therefore would state:

I. Factual Objections.

A. **Objection to ¶s 4,5,6 and 8**: In ¶s 4,5, 6 and 8, the PSI discusses what other individuals did that have nothing to do with this case criminal activities. These other individuals sold guns and drugs and were arrested and or convicted in their own cases. These crimes have nothing to do with the defendant and the allegations in this case. There are no gun or drug sales that were done by the defendant and the government and the probation

office continue to try and link the defendant to these other individuals because they claim to be members of Sniper Gang. For purposes of this defendant "Sniper Gang" is the record label that he performs for. If other individuals commit crime and claim that they are members of Sniper Gang, that doesn't reflect on the defendant's activities which revolve solely around music production. The defense strenuously objects to the inclusion of these individuals as part of this PSI. There is literally no criminal connection to these individuals. The defendant picked up a gun during a video shoot and left it after the shoot was over. These other individuals did active crimes, not the passive activity that the defendant committed.

B. **Objection to ¶ 10**: In ¶ 10 the paragraph points to the fact that in one of the photographs depicting Sainmelus holding a firearm, there is a Mossberg 500 model shotgun in his hand. The defense objects to any inference that Sainmelus knew that the Mossberg was stolen. This objection is related to the allegations in ¶ 12 below.

C. **Objection to ¶ 12**: In ¶ 12 it is alleged that the Mossberg was the subject of an undercover purchase and was also previously reported stolen form a carjacking in Pompano Beach. Sainmelus was not involved with the theft of these weapons and did not bring them to the video shoot. He has no knowledge of who stole these weapons and the defense objects to any intimation that Sainmelus had any criminal involvement with these weapons. He simply held them for photographs at a video shoot.

II. Substantive Objections.

A. Objection to ¶ 23 Base Offense Level.

Under USSG 2K2.1(a)(4)(b) the probation department calculates the defendant's base offense level at 20 because the department finds the defendant to be a prohibited person because he has a prior felony plea for delivery of cocaine as indicated in ¶ 14 of the PSI and for possession of hydromophone in ¶ 15. However, those pleas were facilitated by his participation in the Broward County Drug Court and those pleas both had adjudication withheld. The defense objects to this basis to be considered as a prohibited person based on the Florida Supreme Court decision in *Clarke v. United States.* In 2015 Eleventh Circuit certified to the Florida Supreme Court the question of whether a guilty plea with adjudication withheld is a "conviction" under Florida law. *United States v. Clarke*, 780 F.3d 1131, 1132 (11th Cir. 2015). The Florida Supreme Court responded by ruling that "a guilty plea for a felony for which adjudication was withheld does not qualify as a 'conviction.'" *Clarke v. United States*, 184 So. 3d 1107, 1108 (Fla. 2016). See *United States v. Williams*, 668 F. App'x 859 (11th Cir. 2016).

Although the Clarke case did not address specifically whether the same reasoning applies to USSG 2K2.1(a)(4)(b), the reasoning of not allowing the benefit of having adjudication withheld to eviscerate in the context of Federal sentencing still applies.

B. Objection to ¶ 24 Specific Offense Characteristics.

The defense objects to the four-level increase to the guidelines that attaches if the defendant's offense involved between 8 and 24 firearms under 2K2.1(b)(1)(B).

The government bears the burden of proving the applicability of Guidelines provisions that enhance a defendant's offense level. *United States v. Cataldo*, 171 F.3d 1316, 1321 (11th Cir. 1999). Where the defendant challenges the factual basis for his sentence, the government must prove the disputed fact by a preponderance of the evidence with "reliable and specific evidence." Id. (citation and internal quotation marks omitted). "This burden requires that the trier of fact to believe that the existence of a fact is more probable than its nonexistence." *United States v. Almedina*, 686 F.3d 1312, 1315 (11th Cir.)

A defendant's possession of a firearm may be actual or constructive. *United States v. Perez*, 661 F.3d 568, 576 (11th Cir. 2011). "Constructive possession of a firearm exists when a defendant does not have actual possession but instead knowingly has the power or right, and intention to exercise dominion and control over the firearm." *Id.* A defendant's presence near a firearm or mere association with someone else who possesses a firearm is insufficient to prove constructive possession. *Id.* When determining how many firearms were involved in an offense, the district court should include all "firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed." Id. § 2K2.1, cmt. n.5. To prove actual possession of the firearms, the Government

must demonstrate that the defendant "exercised direct physical control over them." *United States v. Hagman*, 740 F.3d 1044 at 1048 (5th Cir. 2014). To prove constructive possession, the Government must show that the defendant exercised ownership, dominion, or control over the firearms or the premises in which they were discovered. *United States v. Sealy*, 661 F. App'x 278, 281 (5th Cir. 2016)

A defendant's possession of firearms may be actual or constructive, sole or joint." *United States v. Vega*, 720 F.3d 1002, 1003 (8th Cir. 2013). Constructive possession "requires both knowledge that the contraband is present and dominion over the premises where the contraband is located." *United States v. Ways*, 832 F.3d 887, 897 (8th Cir. 2016). The defendant concedes that he had knowledge of the firearms in the bedroom for the video shoot once he entered the residence. However, the defendant did not have dominion over the residence and thus was not in constructive possession of those firearms. It is true that a defendant's "mere presence" in or "mere connection" to a residence where contraband is located is not sufficient to establish that he constructively possessed that contraband. *Id.* at 897-98.

In this very unique case, the defendant a rap artist, went to a home to shoot a video. As part of that genre, the presence of guns as props is a common and almost universal occurrence. When he arrived at the home for the video shoot a number of guns were on the bed. The defendant did not place them there. He had no knowledge of the ownership of any of the guns. He had no idea if the guns were legal or not. He simply was going to shoot his video and leave. The

probation office is basing their enhancement solely on a photo depicting the number of guns on the bed. There is no evidence in the government's possession that he had any control over these weapons outside of them being props in a video. He didn't take any of the guns after the video shoot because none of them were his. There was never any intent on the part of the defendant to use the weapons for any nefarious purpose. To attach every weapon sitting on the bed in a photo shoot to the defendant is an improper expansion of the guidelines.

C. Objection to ¶ 29 Adjusted Offense Level.

In ¶ 29 the probation department calculates the offense level at 29. However, based on the aforementioned defense objections, the adjusted offense level should be 20 rather than 26. The calculation begins at a base offense level of 18 for the defendant not being a prohibited person. No increase under ¶ 24 for the number of firearms. A two-level increase because the gun was stolen for an adjusted offense level of 20.

D. Objection to ¶ 33 Total Offenses Level.

Based on the aforementioned objections, the total offense level should be 17 after the three-level decrease for acceptance of responsibility.

E. Objection to ¶ 80 Guideline Provisions.

The Probation Department's guideline calculations are a total offense level of 23 and a Criminal History Category of III for a guideline imprisonment range of 57 -71 months. Based on the aforementioned objections the defense finds that the defendant has a total offense level of 17 and agrees that the Criminal History Category is III for a **total offense level of 30-37 months**.

WHEREFORE, the defense respectfully requests that the defense objections to the guideline calculations are accepted by the Court and that the court find that the guidelines are a total offense level of 30-37 months.

I HEREBY CERTIFY that a true and accurate copy of the foregoing Motion has been provided to U.S. Attorney Bruce Brown, 500 Broward Boulevard, 7th Floor, Fort Lauderdale, Florida 33394, through the auspices of CM/ECF on October 17, 2018.

Respectfully Submitted,

s/ Gregory A. Samms

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