IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

KASEEM ALEXANDER,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Issue 1: Whether the appellate court erred in affirming the District Court's abuse of discretion in overruling petitioner's objection to the Presentence Investigation Report which argued that appellant's offense level be reduced to a Level 6 pursuant to U.S.S.G. §2K2.1(b)(2), the sporting use exception, where appellant's only offense conduct was limited to target shooting at a public gun range with firearms rented from the gun range.

ISSUE 2: Whether the appellate court erred in affirming the District Courts abuse of discretion in denying appellant's motion for a downward sentencing variance under 18 U.S.C. § 3553(a) where appellant's only offense conduct involved target shooting at a public gun range.

- Prefix-

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The Petitioner, KASEEM ALEXANDER, respectfully prays that a writ of certiorari issue to review the judgment-order of the United States Court of Appeals for the Eleventh Circuit entered on September 10, 2020, Case No. 20-10436; Southern District of Florida Case Number 19-cr-60146-JIC.

TABLE OF CONTENTS

TABLE OF CONTENTS	4
TABLE OF CITATIONS	5
OPINION BELOW	6
JURISDICTION	6
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	6
STATEMENT OF THE CASE	7
COURSE OF PROCEEDINGS	7
STATEMENT OF FACTS	9
REASONS FOR GRANTING THE WRIT	20
CONCLUSION	39

TABLE OF CITATIONS

Cases

United States v. Barrington, 648 F.3d 1178, 1204 (11th Cir. 2011) 34

United States v. Bossinger, 12 F.3d 28, 29 (3d Cir.1993) 22

United States v. Caldwell, 431 F.3d 795, 799 (11th Cir. 2005) 32

United States v. Clay, 483 F.3d 739, 743 (11th Cir. 2007) 34

United States v. Collins, 313 F.3d 1251, 1257 (10th Cir.2002) 22

United States v. Crisp, 454 F.3d 1285, 1292 (11th Cir. 2006) 34

United States v. Denis, 297 F.3d 25, 32 (1st Cir.2002) 22

Gall v. United States, 552 U.S. 38, 47 (2007) 38

U.S. v. Hanson, 534 F.3d 1315 (10th Cir. 2008) 12

United States v. Irey, 612 F.3d 1160, 1189 (11th Cir. 2010) 38

United States v. Lewitzke, 176 F.3d 1022, 1028 (7th Cir.1999) 22

United States v. Rothenberg, 610 F.3d 621, 624 (11th Cir. 2010) 33

United States v. Rosales-Bruno, 789 F.3d 1249, 1261, 1263–64 (11th Cir. 2015) 34

United States v. Shell, 972 F.2d 548 (5th Cir. 1992) 29

Statutes and Rules

Title 18 U.S.C. 922(g) 7

18 U.S.C. § 3553(a) 15

Title 28, United States Code Section 1254(1) 6

U.S.S.G. 2K2.1(b)(2) 12

OPINION BELOW

On September 10, 2020, the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's convictions and sentence, Case No. 20-10436. A copy of the opinion-order is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was the Defendant in the District Court and will be referred to by name or as the petitioner. The

respondent, the Untied States of America will be referred to as the government. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The petitioner is incarcerated and is serving his sentence in the Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court Below

On May 30, 2019 the grand jury returned an indictment against defendant alleging a single violation of Title 18 U.S.C. 922(g) generally referred to a being a felon and being in possession of a firearm within the Southern District of Florida (in this case renting and using firearms on one occasion at Broward County, Florida public gun range). [D.E. 1]. On July 12, 2019, petitioner made his initial appearance in the Southern District of Florida and counsel was appointed. [D.E. 8]. On July 22, 2019 petitioner was arraigned and entered his not guilty plea with bail being set in the amount of a $100,000.00 personal surety bail to be cosigned by relatives. On July

26, 2019 the bail was posted and petitioner was released shortly thereafter. On September 5, 2019 a superseding indictment was filed which, without altering the charge or number of counts, rephrased the language of count one to reflect recent judicial changes regarding the scienter requirement as to the element of knowledge of the basis of disqualification to possess a firearm. [D.E. 15]. On September 17, 2019 petitioner was arraigned on the superseding indictment and re-entered his not guilty plea. [D.E. 18]. On September 25, 2019, petitioner appeared before the district court and changed his plea to guilty to count one and charged in the superseding indictment. [D.E. 19]. At that hearing the court received, reviewed and accepted the case factual proffer statement and factual basis for the guilty plea which was filed with the court, also on September 25, 2019. [D.E. 20]. On November 22, 2019, the Presentence Investigation Report was filed with the court and served upon the parties. [D.E. 24]. On December 11, 2019 petitioner filed his objection to the Presentence Investigation Report and his written Motion for Downward Variance. [D.E. 25]. On January 23, 2020 petitioner filed his certificate of program completion and graduation dated January 21, 2020 from The Focus Forward Project completed in New York City, appellant’s home, and

letters of support from persons with knowledge of defendant's character in aid of sentencing. [D.E. 29]. On January 29, 2020 petitioner appeared before the district court for sentencing where the district court considered and rejected petitioner's objections to the Presentence Investigation Report and Motion For Downward Variance and sentenced petitioner to a term of 24 months in the Bureau of Prisons followed by 36 months of supervised release and the $100.00 special assessment. [D.E. 32 and 33]. On February 1, 2020 petitioner filed his notice of appeal and this appeal ensued. [D.E. 35].

Statement of the Facts

The facts and factual basis on appeal arise from the record of the filed transcripts of the change of plea [D.E. 42] and sentencing [D.E. 45] proceedings as well as the factual proffer filed in support of appellant's guilty plea [D.E. 20] and the Presentence Investigation Report [D.E. 24] filed in the district court. The evidence of petitioner's offense was as follows: During his change of plea hearing, petitioner affirmatively agreed that the facts contained in his two-page factual proffer document filed were all true and correct [D.E. 42-10-11]. The factual proffer document signed by petitioner, his counsel

and the government included the following facts: "On April 23, 2018, the defendant, along with three other individuals, went to Big Al's Pawn & Gun Shop located at 3300 W. Hallandale Beach Blvd. in Pembroke Park, FL. The group rented five (5) firearms and several rounds of ammunition. Glock manufactured three (3) of the firearms. One of the firearms was an M & P 9mm pistol, and the last firearm was a Kass Vector short-barreled rifle. The defendant created a video of himself inside the gun range and posted it on social media. The defendant held several of the firearms and loaded them with ammunition. The defendant also tried several of the firearms. The defendant indicated he was at Big Al's during the video. Law enforcement personnel confirmed the defendant flew from New York, NY to Fort Lauderdale, FL aboard JetBlue airlines on April 20, 2018. Law enforcement personnel also secured the waiver form completed by the defendant on April 23, 2018 as well as the receipt showing the type of firearm s and amount of ammunition rented by the defendant. All of the firearms and all of the ammunition were manufactured outside the State of Florida and had, therefore, moved in interstate and foreign commerce prior to the defendant possessing them on April 23, 2018. The defendant knew that, prior to April 23, 2018, he had been convicted of a crime

punishable by a term of imprisonment exceeding one year. All of the events constituting this offense occurred in Pembroke Park, Broward County, Southern District of Florida" [D.E. 20-1-2].

The case facts reflected in the Presentence Investigation Report reiterated and supplemented the written factual basis case facts as follows: "On April 23, 2018, Kaseem Alexander and three other individuals went to Big Al's Pawn and Gun Shop, located at 3300 West Halladale Beach Boulevard in Pembroke Park, Florida. The group rented five firearms and purchased several rounds of ammunition. Three of the firearms were manufactured by Glock, one was an M&P 9mm pistol, and the last was a Kass Vector short-barreled rifle. Alexander created a video of himself inside the gun range and posted it on social media; he indicated he was at Big Al's during the video. Alexander held several of the firearms and loaded them with ammunition, and he also fired several of the firearms. Law enforcement personnel confirmed Alexander flew from John F. Kennedy International Airport in Queens, New York, to Fort Lauderdale/Hollywood International Airport in Fort Lauderdale, Florida, aboard JetBlue airlines on April 20, 2018. Law enforcement personnel also secured the waiver form Alexander completed on April 23, 2018, as well as the

receipt that reflects the types of firearms and the amount of ammunition Alexander obtained. All the firearms and ammunition were manufactured outside the State of Florida and had moved in interstate and foreign commerce prior to Alexander possessing them on April 23, 2018. Alexander knew that prior to April 23, 2018, he was convicted of a crime punishable by a term of imprisonment exceeding one year" [D.E. 24-1].

Additionally petitioner signed and submitted his written statement in support of Adjustment for Acceptance of Responsibility: "The defendant provided the following written statement, dated October 15, 2019, wherein he admitted his involvement in the offense: My name is Kaseem Alexander. I fully accept responsibility for my actions as charged in my Indictment to which I have pled guilty. I apologize to the government, my family and the Court. I am sorry that I committed the crime to which I have pled guilty not that I was arrested, prosecuted and convicted. I have made a commitment to lead a law abiding life hereafter and rehabilitate myself for the future of myself, my family and my community. /s/ Kaseem Alexander" [D.E. 24-5]. In the Presentence Investigation Report appellant's base offense level was computed as follows: Page 5, Paragraph 10: "Base Offense Level: The guideline for a violation of

18 U.S.C. § 922(g)(1) is § 2K2.1. Because the defendant was a prohibited person at the time the defendant committed the instant offense, the base offense level is 14." [D.E. 24-5]. The Presentence Investigation Report increased petitioner's guideline offense level computation by +2 levels due to the number (five) of firearms possessed at Big Al's as follows: "Specific Offense Characteristics: Because the offense involved at least three but less than eight firearms, the offense level is increased by two levels, § 2K2.1(b)(1)(A). +2" [D.E. 24-5]. The resultant adjusted offense level reported was a Level 16 [D.E. 24-5]. The Presentence Investigation Report awarded a -3 level adjustment for acceptance of responsibility by appellant [D.E. 24-6] yielding a total offense level of Level 13 [D.E. 24-6; Paragraph No. 19].

The Presentence Investigation Report computed +2 criminal history points for petitioner's conviction of criminal possession of a weapon and attempted criminal possession of a weapon in the state of New York [D.E. 24-6; Paragraph 22].

An additional +3 criminal history points were computed for petitioner's conviction of criminal possession of a weapon in the state of New York [D.E. 24-8; Paragraph 23].

The Presentence Investigation Report computed +3 criminal history points for petitioner's conviction of criminal possession of a weapon and attempted criminal possession of a weapon in the state of New York [D.E. 24-6; Paragraph 21], resulting in a total of eight (8) criminal history points yielding a criminal history category of IV [D.E. 24-8; Paragraph 24].

Based upon the forgoing the Presentence Investigation Report computations at sentencing appellant faced a statutory imprisonment range of: "Statutory Provisions: The maximum term of imprisonment is 10 years, 18 U.S.C. § 924(a)(2)" [D.E. 24-14; Paragraph 61]; and a guideline imprisonment range of: "Guideline Provisions: Based upon a total offense level of 13 and a criminal history category of IV, the guideline imprisonment range is 24 to 30 months" [D.E. 24-14; Paragraph 62].

Petitioner filed an objection to the Presentence Investigation Report as follows: "Paragraph 11 should include the U.S.S.G. 2K2.1(b)(2) adjustment as "if the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise use such firearms or ammunition, decrease the offense level

determined above to level 6"; the quoted language of the guideline. Defendant's possession of the firearms and ammunition at Big Al's shooting range was for the limited sporting purpose of target shooting at the gun range which is a federally licensed facility as required by the Bureau of Alcohol, Tobacco and Firearms. No firearms or ammunition were either brought to or taken away from the range. The range was open for business during the entire event. The range was supervised by range staff employees during the event. No crime was committed at the range. Under the facts of this case the sporting purpose reduction applies. Defendant's base offense level is determined under subsection (a)(6) (prohibited person level 14); and is such not subject to the exclusion provision covering subsections (a)(1)-(5). Application of this specific offense characteristic would affect the guideline computation as quoted above the offense level "computed above" would be reduced to level 6. The remaining guideline computations would be adjusted accordingly" [D.E. 25-1-2]. In addition, petitioner requested the court to grant a downward sentencing variance from the total offense level guideline range of 24-30 months described above based upon the target shooting adjustment in the event that the court determined that the U.S.S.G.

2K2.1(b)(2) guideline adjustment (limited possession for only target shooting) was not applicable based upon an application of the 18 U.S.C. § 3553(a) sentencing factors to be considered in addition to the statutory and guideline minimum and maximum sentences available to the district court. The government did not file a written response to the objection.

At sentencing in support of his guideline objection and motion for downward sentencing variance, petitioner took the oath and testified as follows:

By Mr. Wallace:

Q. Mr. Alexander, on April the 23rd of 2018, did you travel to Ft. Lauderdale, Florida?

A. Yes.

Q. Was that to celebrate your brother's birthday?

A. Yes.

Q. Why did you go to Big Al's gun range at 300 Hallandale that day?

A. My Little brother's birthday, in which he had just turned 19 and we just went to have a little fun.

Q. Was it for purposes of recreation?

A. Yes.

Q. Did you have any other purpose to go there other than recreation?

A. No.

Q. On April 23rd, 2018, did you possess any other firearms or ammunition other than the recreation you've just described?

A. No.

The Defense Attorney: No further questions, your Honor.

The Court: Cross?

By Mr. Brown:

Q. How did you get to South Florida, Mr. Alexander?

A. Plane.

Q. Clearly, you couldn't bring a firearm with you.

A. No.

Q. And specifically because you are – and specifically, are you a three or four time convicted felon?

A. Two?

Q. Two?

A. Mm-hmm.

Q. Both of them involving weapons?

A. Yes.

Q. So, you knew that on April 23rd of 2018 when you got to South Florida, that you were not allowed to possess a firearm or ammunition at any time?

A. Yes.

Q. You did know that?

A. Yes.

Q. As you went to Big Al's, you knew that?

A. Yes.

Q. And at Big Al's, you possessed both the firearm and ammunition, correct?

A. Yes.

Mr. Brown: All right. I have no further questions [D.E. 45-6-8].

Additionally, petitioner offered into evidence a blank firearm transaction report form executed when a customer purchases a firearm from Big Al's to emphasize the factual and legal point that no criminal history inquiry occurs when a firearm is rented and ammunition is purchased by customers at the gun range.

Finally, in the Presentence Investigation Report, the United States Probation Office noted that "the Defense counsel provided the probation officer with case law that addresses the reduction pursuant to § 2K2.1(b)(2). The premise of this argument is that the defendant's possession of the firearms and ammunition was for nothing more than target shooting and was thus for a sporting purpose. As such, he should receive the sporting exception reduction. Although there is no Eleventh Circuit case law on point, counsel provided the case of *U.S. v. Hanson*, 534 F.3d 1315

(10th Cir. 2008) as persuasive authority. The probation officer maintains that the sporting exception reduction is not appropriate; however, the Court may consider this basis as grounds for a variance" [D.E.24-16; Paragraph 74].

At sentencing, the essential case facts concerning petitioner's offense conduct giving rise to the issues on appeal (the single event rental and use of the firearms at Big Al's gun range) were not in dispute. All case facts were admitted by petitioner in the written factual basis, the Presentence Investigation Report interview, his acceptance of responsibility statement and his testimony at hearing in open court. It was undisputed that petitioner knew that he was a convicted felon based upon his prior New York felony case adjudications and because of this fact could not lawfully possess a firearm; that petitioner admitted to possession of firearms at Big Al's gun range as described in his testimony and possessed no other firearms or ammunition at any time. Petitioner submits that the undisputed case facts here supported a factual basis for the requested downward guideline adjustment under U.S.S.G. §2K2.1(b)(2) (the exception for sporting purpose) and or the 18 U.S.C. § 3553(a) requested downward variance sentence both of which were denied at sentencing where the district court imposed a sentence of 24 months.

REASONS FOR GRANTING THE WRIT

Issue 1: Whether the appellate court erred in affirming the District Court's abuse of discretion in overruling petitioner's objection to the Presentence Investigation Report which argued that appellant's offense level be reduced to a Level 6 pursuant to U.S.S.G. §2K2.1(b)(2), the sporting use exception, where appellant's only offense conduct was limited to target shooting at a public gun range with firearms rented from the gun range.

Petitioner objected to the Presentence Investigation Report as follows: Paragraph 11 should includes the U.S.S.G. 2K2.1(b)(2) adjustment as "if the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise use such firearms or ammunition, decrease the offense level determined above to level 6"; the quoted language of the guideline.

Petitioner's possession of the firearms and ammunition at Big Al's shooting range was for the limited sporting purpose of target shooting at the gun range which is a

federally licensed facility as required by the Bureau of Alcohol, Tobacco and Firearms. No firearms or ammunition were either brought to or taken away from the range. The range was open for business during the entire event. The range was supervised by range staff employees during the event. No crime was committed at the range. Under the facts of this case the sporting purpose reduction applies.

Petitioner's base offense level is determined under subsection (a)(6) (prohibited person level 14); and is such not subject to the exclusion provision covering subsections (a)(1)-(5).

Application of this specific offense characteristic would affect the guideline computation as quoted above the offense level "computed above" would be changed to level 6. The remaining guideline computations would be adjusted accordingly.

In *United States v. Hanson*, 534 F.3d 1315 (10th Cir. 2008) the court held in a nearly identical case on the target shooting issue held that: "We reject the government's argument that the sporting exception could not apply to Mr. Hanson as a matter of law, because his admitted purpose does not fall within the scope of a "lawful sporting purpose" under § 2K2.1(b)(2). A "sporting" purpose is an intent to engage in sport, "something that is

a source of pleasant diversion; a pleasing or amusing pastime or activity; recreation." *Webster's Third New International Dictionary* (1976). "Plinking" casual recreational shooting, often at cans and other items found lying around is a form of target shooting, and many people engage in target shooting for amusement and recreation. That plinking is casual, rather than organized or competitive, does not disqualify it as "sporting." We and several other circuits have assumed that target shooting, organized or unorganized, is a sporting purpose under the Guidelines." Citing: *United States v. Collins,* 313 F.3d 1251, 1257 (10th Cir.2002); *United States v. Lewitzke,* 176 F.3d 1022, 1028 (7th Cir.1999); *United States v. Bossinger,* 12 F.3d 28, 29 (3d Cir.1993) (holding, specifically, that "plinking" is a sport); *see also United States v. Denis,* 297 F.3d 25, 32 (1st Cir.2002).

Petitioner submits that using a firearm in a licensed gun range is the company of other enthusiasts represents an even greater sporting purpose than the unorganized target practice cited above requiring application of the (b)(2) adjustment" [D.E. 25-1-3].

The principal case cited and relied upon by appellant is *United States v. Hanson*, 534 F.3d 1315 (10th Cir. 2008) wherein the court held that firearm possession for target

shooting supported the downward adjustment for target shooting allowed under § 2K2.1(b)(2) which states "If the defendant ... possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6." The analysis is further refined by the guideline notes which read as follows: Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. U.S.S.G. § 2K2.1, cmt. n. 6.

The Hanson court rejected the government's argument that the sporting exception could not apply to Mr. Hanson as a matter of law, because his admitted purpose does not fall within the scope of a "lawful sporting purpose" under U.S.S.G. § 2K2.1(b)(2). The court determined that a "sporting" purpose is an intent to engage in sport,

"something that is a source of pleasant diversion; a pleasing or amusing pastime or activity; recreation." *Webster's Third New International Dictionary* (1976). "Plinking" casual recreational shooting, often at cans and other items found lying around is a form of target shooting, and many people engage in target shooting for amusement and recreation. That plinking is casual, rather than organized or competitive, does not disqualify it as "sporting." We and several other circuits have assumed that target shooting, organized or unorganized, is a sporting purpose under the Guidelines. *Id* at 1317.

The Hanson court cited numerous decisions of fellow circuit courts interpreting U.S.S.G. § 2K2.1(b)(2) in support of this rejection holding. In *United States v. Collins*, 313 F.3d 1251, 1257 (10th Cir.2002) conclude that the district court failed to properly examine surrounding circumstances in determining whether the purpose behind Collins's possession was solely a lawful, sporting one, as is required by the Sentencing Guidelines, and vacated Collins's sentence and remanded the case for resentencing. The facts in Collins were as follows. Collins took his automobile to a repair shop in Blanding, Utah to have some repair work done. Finding himself without the means to pay

for the repairs, Collins left his hunting rifle, a Winchester Model 700, 30-06, as security for payment. Three days later, Collins returned, paid the remaining $200 he owed on the car, and retrieved his rifle. On December 4, 2000, Collins returned to the repair shop for additional repairs and once again used his rifle as collateral for the balance of the debt owed. The rifle was eventually taken from the shop by FBI agents and Collins was arrested. Apart from the two instances in which Collins used the gun as collateral, there is no evidence to suggest that Collins's purpose in possessing the gun was anything other than a lawful sporting one. He had a hunting permit from the Ute tribe and had been hunting with the weapon before. There was no evidence of any unlawful use. The court concluded that the district court was incorrect to find that application of § 2K2.1(b)(2) was precluded by two instances of lawful, non-sporting use. The court instructed that on remand the district court be directed to look to "surrounding circumstances" to determine whether the purpose of Collins's possession was solely a lawful sporting one and whether any use was unlawful. Collins's sentence is vacated. *Id* at 1319. Appellant’s case facts are much less serious that those in Collins. Petitioner never owned or possessed any

firearms, nor, engaged in any financial transactions or was never in any position to use a firearm as collateral for repairs. Petitioner's limited possession clearly implicates and supports U.S.S.G. § 2K2.1(b)(2) guideline adjustment.

As further support the Hanson further cites the decision in *United States v. Lewitzke,* 176 F.3d 1022 (7th Cir.1999) where two witnesses testified as to target shooting that regularly took place in Lewitzke's backyard the court determined this activity supported a factual basis for the section U.S.S.G. § 2K2.1(b)(2) adjustment. The court there affirmed the judgment based upon the inference that the concealment of the firearms suggested some unlawful use other than target shooting which the court found to be included within the safe harbor of the sporting use exception. *Id* at 1028.

Also relied upon in *Hanson* was *United States v. Bossinger,* 12 F.3d 28 (3d Cir.1993). At his sentencing hearing, Bossinger that he used the four guns for nothing other than "plinking," which he defined as shooting at cans, bottles, and the like in trash dumps or as they were floating by in a river. In response, the government urged the court to conclude that Bossinger did not possess the firearms solely for plinking and argued that, in any event,

plinking was not a sport within the meaning of U.S.S.G. Sec. 2K2.1(b) (2). The district court held that Bossinger was not entitled to a reduction in base offense level because, as a matter of law, guns possessed for plinking are not possessed for lawful sporting purposes. Sport with firearms, the judge concluded, connotes some form of competition, either between marksmen in target shooting competition or between men and beasts in hunting. Informal, noncompetitive recreation did not, in the district court's view, constitute sport under U.S.S.G. Sec. 2K2.1(b) (2). Bossinger argued on appeal that the district court misinterpreted this Guideline section and the appellate court agreed holding that in common parlance, "sport" connotes recreation--something that is a source of pleasant diversion. See, e.g., 2 Oxford English Dictionary 2979 (compact ed. 1986) ("Pleasant pastime; entertainment or amusement; recreation; diversion"); Webster's Dictionary 2206 (3d ed. 1971) ("something that is a source of pleasant diversion; a pleasing or amusing pastime or activity; recreation"). The appellate court held that "a firearm possessed "solely for lawful sporting purposes" is, accordingly, understood to mean a firearm possessed solely for lawful recreational use. We find nothing in the text or legislative history of U.S.S.G. Sec. 2K2.1(b) (2) that

would justify a more restricted reading. In particular, we find no authority, legal or lexicographical, for the proposition that sport necessarily implies competition. We hold only that plinking is sport. On remand, the district court will have to determine whether Bossinger has established by a preponderance of the evidence that he possessed the firearms solely for lawful plinking." *Id* at 29. Again the undisputed offense conduct of petitioner entailed a much more formal, structured environment for target shooting; the rental and use of a firearm within a public gun range.

The Hanson court further cited as authority the decision in *United States v. Denis,* 297 F.3d 25 (1st Cir.2002). At the sentencing hearing Denis testified that he was an avid hunter and had purchased the rifle because it was suitable for both hunting and target shooting. He pointed out that a modification had been made to the rifle's magazine so that it would hold no more than five rounds of ammunition, as required by Maine hunting law. Moreover, the rifle was equipped with a telescopic sight calibrated to a distance appropriate for hunting and target shooting. Denis testified that he had used the rifle regularly for such purposes until 1996, when the rifle was damaged in a hunting accident. The court held

under § 2K2.1(b)(2), it was not enough that Denis had purchased the rifle for hunting and target shooting, or that in previous years had hunted frequently, but rather, Dennis bore the burden of proving that he used the rifle exclusively for lawful sporting purposes. *Id* at 32. Petitioner's testimony and all other case facts and evidence definitively establish that his use the rental firearm was for the temporary, limited lawful sporting purpose of recreational target shooting at the public gun range justifying the U.S.S.G. § 2K2.1(b)(2) downward guideline adjustment.

Other circuits have addressed the U.S.S.G. § 2K2.1(b)(2) downward adjustment as applied to the consideration of the surrounding circumstances concerning firearm possession. In *United States v. Shell*, 972 F.2d 548 (5th Cir. 1992) the Fifth Circuit articulated the necessity for examination of the surrounding circumstance and for the determination of whether possession triggered the U.S.S.G. § 2K2.1(b)(2) downward adjustment. The court held that "lawful recreation or collection must the be sole intended uses." Id at 553. Any defendant, including petitioner, who possess a firearm for sporting uses or collection still violates 18 U.S.C. 922(g) which prohibits a convicted felon from the possession of a firearm.

However, as argued before the district court at sentencing, the Sentencing Commission allows a reduction in guideline penalty level for certain limited types of possession which is exactly what the case evidence, facts and testimony supported in the district court and the instant appeal. Petitioner clearly violated the law by temporarily possessing the firearms at Big Al's gun range, for which he expressly admitted in his guilty plea before the district court, however he was also clearly entitled to the reduced guideline penalty provisions of U.S.S.G. Sec. 2K2.1(b) (2). Petitioner did not own the firearms or ammunition. It was factually undisputed that the firearms were owned by the gun range and were never possessed at any other time than during the limited event at the gun range on April 23, 2018. There was no allegation or suggestion of any use other than the recreational activity described by appellant and observed by the agents in the online video capture of the event. There was no allegation of self-defense or any other means of firearm use outside the target shooting at the gun range, thus, petitioner's firearm possession was solely for the recreational, sporting use implicating U.S.S.G. 2K2.1(b) (2) and the downward guideline adjustment to Offense Level 6.

The government argued at sentencing in opposition to the U.S.S.G. 2K2.1(b) (2) adjustment request the following: "There are no lawful sporting purposes when you're a convicted felon" [D.E. 24-25]. The government's interpretation of the guideline and the commentary notes, as argued, would render the sporting and collection exception language of U.S.S.G. Sec. 2K2.1(b) (2) a nullity under the law. This argument is explicitly trumped by the *Hanson* decision cited above which held: "We agree with the defendant that it would be improper for a district judge to infer a nonsporting purpose from the bare fact of a defendant's criminal involvement. Every application of U.S.S.G. § 2K2.1(b)(2) involves a person involved in crime of some sort, and if that fact alone were sufficient to outweigh other evidence, such as the defendant's testimony, no defendant could ever prove entitlement to the exception." *United States v. Hanson*, 534 F.3d 1315, 1318 (10th Cir. 2008).

Petitioner freely and honestly admitted to the district court that he broke the law by possessing the firearms at the gun range on April 23, 2018. The undisputed sentencing record established that the firearm possession was limited to the rental of firearms for a matter of hours within a single day and only at the

public, licensed gun range for recreational target practice and nothing more. There were no facts involving any concealment of firearms, drug use, self-defense or other non-sporting use of the firearms. The governments suggestion at sentencing that there are no lawful sporting uses when you are a convicted felon was a misstatement of the law as applied to appellants case facts.

The facts in petitioner's case present a much less culpable and less serious offense of firearm possession which under the limited case facts set forth above justify a reduction in the guideline sentencing range accordingly.

The appellate court's decision fails to identify any specific other non-sporting purpose of petitioner's offense conduct. "The facts Alexander admitted when he pled guilty and did not dispute in the PSI—that he created a video of himself inside the gun range, indicated in the video that he was at Big Al's gun range, and posted the video on social media—support a finding that he had an additional purpose and, thus, was not eligible for the sporting-purpose reduction. *United States v. Caldwell*, 431 F.3d 795, 799 (11th Cir. 2005). Given those undisputed facts, we are not left with a definite and firm conviction that the district court erred by concluding that the sporting-purpose reduction did not apply." *United States v.*

Rothenberg, 610 F.3d 621, 624 (11th Cir. 2010). Appendix; Page 4. Posting on the internet is not an recognized purpose of a firearm at all. The video merely memorializes the sporting purpose which was the actual purpose stated in the opinion. This reasoning is a departure from other recognized uses: sale of the firearm and self-defense, for example and absent other evidence misses the mark as to the guideline application.

Most respectfully, the appellate court erred in refusing to reverse the district court's refusal to apply the U.S.S.G. § 2K2.1(b)(2) guideline adjustment and reduce petitioner's guidelines to a level 6.

ISSUE 2: Whether the appellate court erred in affirming the District Courts abuse of discretion in denying appellant's motion for a downward sentencing variance under 18 U.S.C. § 3553(a) where appellant's only offense conduct involved target shooting at a public gun range.

The district court is required impose a sentence sufficient, but not greater than necessary, to comply with the factors listed in § 3553(a), including the nature and circumstances of the offense and the history and characteristics of the defendant; the need to promote respect for the law and protect the public from the defendant's future criminal conduct; and the sentencing

guideline range. 18 U.S.C. § 3553(a). The district court abuses its discretion if it, for example, (1) fails to consider relevant factors that were due significant weight, (2) gives an improper or irrelevant factor significant weight, or (3) commits a clear error of judgment by balancing the proper factors unreasonably. *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc). The district court's unjustified reliance on a single § 3553(a) factor may also result in an unreasonable sentence. *United States v. Crisp*, 454 F.3d 1285, 1292 (11th Cir. 2006). The weight given to any specific factor is committed to the sound discretion of the district court. *United States v. Clay*, 483 F.3d 739, 743 (11th Cir. 2007). The district court possesses broad leeway in deciding how much weight to give a defendant's criminal history. *United States v. Rosales-Bruno*, 789 F.3d 1249, 1261, 1263–64 (11th Cir. 2015). Further while the district court must consider the § 3553(a) factors, it need not state on the record that it has considered each one of the factors or discuss each of them. *United States v. Barrington*, 648 F.3d 1178, 1204 (11th Cir. 2011).

The facts in petitioner's case present a less culpable offense of firearm possession by a felon which warranted a downward variance sentence from the

recommended guideline range of 24-30 months. Petitioner pled guilty to the offense and fully and completely accepted responsibility for his actions. 18 U.S.C. § 3553(a), which requires this Court to impose a sentence that is "sufficient, but not greater than necessary to achieve the goals of sentencing." Mitigating factors that this Court should take into consideration under § 3553(a) include: (1) the unduly harsh result of the application of the criminal history guidelines, (2) the assistance offered and rendered by the Defendant has assisted the Court and the justice system in the efficient facilitation of justice, (3) the Defendant's age, and (4) a more lenient sentence is sufficient to deter future criminal conduct. These factors all combine to establish that the sentence of 24 months within the guideline range of 24-30 months imprisonment is well beyond what is necessary to achieve the goals of sentencing under § 3553(a)(2). In the Presentence Investigation Report, paragraph 74 , the United States Probation Officer concluded that the sporting purpose guideline adjustment U.S.S.G. § 2K2.1(b)(2), argued above, and submitted that the court may in lieu of applying the U.S.S.G. § 2K2.1(b)(2) guideline consider a downward variance based upon the specific facts of the case. Petitioner respectfully requests that in the event the

court does not determine that the sporting purpose guideline adjustment applies that the court order a downward variance. The district court has been charged by Congress to impose a sentence which, in its judgment, is sufficient but not greater than necessary to meet the goals of sentencing. Because the Guidelines are no longer mandatory, the sentences which the district court may consider include, on the low end, the 0 months and on the high end the statutory maximum penalty. There are two major purposes of deterrence. The first is to ensure that the sentence imposed sufficiently deters the appellant from similar conduct in the future. The second is deterring others from becoming involved in a similar crime in the future. Petitioner's early decision to plead guilty and acceptance of responsibility knowing the certainty of a prison sentence presents direct evidence of specific deterrence. Following any prison sentence, it is unlikely that appellant will ever engage in future criminal activity. Petitioner confessed his guilt and pleaded guilty in open court fully accepted responsibility for his actions and is serving the sentence imposed.

The recommendation of the United States Probation Officer in Paragraph 74 of the Presentence Investigation Report was entitled to certain deference. Petitioner

reincorporates by reference the arguments presented in Issue 1 above as a supplemental factual basis and legal basis for a downward variance sentence. It is difficult to imagine a less culpable fact pattern of unlawful firearm possession by a convicted felon than the facts presented on this appeal, a one-time, hours rental and use of firearms at a public gun range. Petitioner, while fully accepting responsibility for his offense, submits that renting and using a firearm for a few hours at a gun range under the supervision of the establishment staff represents the most minimal level of offense conduct to support punishment, and thus, would require a sentence commensurate to that required by U.S.S.G. § 2K2.1(b)(2) at the reduced guideline level of 6, especially as wherein here, appellant was cooperative, did not obstruct justice and accepted responsibility. Petitioner submits that a sentence commensurate with offense level 6 would maintain certainty of punishment, maintain respect for the law, send an appropriate message to the community while imposing a mitigated punishment for the offender reflecting the specific offense factual characteristics. Further, while on bail petitioner attended and graduated from the Focus Forward Project on January 21, 2020. This program provides an educational curriculum focused on reentry into society

of by defendants facing incarceration, wherein petitioner was commended for his outstanding participation in the program and his remorse for his offense conduct. [D.E.29-1; Appendix 2]. Petitioner submits a sentence commensurate with the adjusted Offense Level 6 as provided for in U.S.S.G. § 2K2.1(b)(2) is sufficient but not greater than necessary to accomplish all of the statutory purposes of 18 U.S.C. § 3553(a). *Gall v. United States*, 552 U.S. 38, 47 (2007) and 18 U.S.C. § 3553(a).

The appellate court, in denying relief on direct appeal found that the district court did not abuse its discretion "by sentencing Alexander to 24 months' imprisonment. It had wide discretion to weigh the § 3553(a) factors, and, given Alexander's previous firearm offense convictions, it did not make a clear error in judgment by giving more weight to the need to promote respect for gun laws over other sentencing factors." Appendix Page 5. The court relied upon *United States v. Irey*, 612 F.3d 1160, 1189-90 (11th Cir. 2010). Petitioner's United States Probation Officer conceded that a downward variance sentence was appropriate in this case due to the mitigation built into the case facts, possession of a firearm in a public, licensed, supervised gun range and no other criminal conduct. To sentence petitioner to the same

guideline sentence that an offender carrying a firearm either in public a vehicle or home or during the commission of a crime, ignores the mitigated factual basis of limited firearm possession in a gun range.

Petitioner submits that the appellate court committed reversible error in affirming the district court's refusal to impose a downward variance sentence commensurate with offense level 6 under the facts of this case.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED this 8th day of December, 2020.

/s/ A. Wallace

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APPENDIX "A"