
NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

2023-2024 TERM

SHAUNTAVUS BERKLIN

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

I.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF BERKLIN'S OBJECTION TO THE NUMBER OF GUNS BERKLIN WAS HELD ACCOUNTABLE FOR.

II.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT ENHANCING BERKLIN'S ADJUSTED OFFENSE LEVEL BY TWO LEVELS PURSUANT TO USSG §2K2.1(B)(1)(A).

III.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING BERKLIN'S SENTENCE WHERE BERKLIN'S SENTENCE WAS UNREASONABLE IN LIGHT OF THE STATUTORY SENTENCING FACTORS LISTED IN 18 U.S.C. §3553(A)-(F) AND PRINCIPLES APPLIED BY THE ADVISORY FEDERAL

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The Petitioner, SHAUNTAVUS BERKLIN, (hereinafter “BERKLIN”), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceedings on December 20, 2023.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered an unpublished opinion affirming the District Court's Sentence, *United States of America v. Shauntavus Berklin*, on December 20, 2023. *Appendix 1*.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals affirming the Judgment of the United States District Court was entered on December 20, 203. The Eleventh Circuit Court of Appeals entered its Order Denying BERKLIN'S Petition for Rehearing and Petition for Rehearing *En Banc* on February 14, 2024. *Appendix 2*. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254 and Rule 10.1, Rules of the Supreme Court. This Petition for Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

The Fifth Amendment to the Constitution provides, in relevant part that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person ... be deprived of life, liberty, or property, without due process of law...."

UNITED STATES CONSTITUTION, AMENDMENT VI

The Sixth Amendment to the Constitution provides in relevant part that: “In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.”

STATEMENT OF THE CASE

1. Course of Proceedings

On June 16, 2021, a federal grand jury issued a three (3) count indictment against SHAUNTAVUS BERKLIN, charging him with being a convicted felon and knowingly possessing a firearm in violation of 18 U.S.C. §922(g)(1) and 18 U.S.C. §924(a)(2) (Count I); knowingly and intentionally distributing a controlled substance in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §841(b)(1)(C) (Counts II and III), together with a forfeiture count. (Case No.: 2:21-cr-00048-JLB-NPM)

On October 20, 2021, a federal grand jury issued a one (1) count indictment against SHAUNTAVUS BERKLIN, charging him with being a convicted felon and knowingly possessing a firearm in violation of 18 U.S.C. §922(g)(1) and 18 U.S.C. §924(a)(2), together with a forfeiture count. (Case No.: 2:21-cr-00104-TPB-KCD-1).

On June 28, 2022, BERKLIN pled guilty to Counts I, II and III to wit: with being a convicted felon and knowingly possessing a firearm in violation of 18 U.S.C. §922(g)(1) and 18 U.S.C. §924(a)(2) and knowingly and intentionally distributing a controlled substance in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §841(b)(1)(C) and to forfeit any and all assets and property or portions thereof, subject to forfeiture, pursuant to 18 U.S.C. §924(d) and 28 U.S.C. §2461(c). (Case No.: 2:21-cr-00048-JLB-NPM)

On June 28, 2022, BERKLIN pled guilty to Count I, knowingly possessing a firearm in violation of 18 U.S.C. §922(g)(1) and 18 U.S.C. §924(a)(2) and to forfeit any and all assets and property or portions thereof, subject to forfeiture, pursuant to 18 U.S.C. §924(d) and 28 U.S.C. §2461(c) (Case No.: 2:21:-dcr-00104-TPB-KCD-1).

On October 25, 2022, a sentencing hearing was held. The District Court sentenced BERKLIN to three (3) years of supervised release as to Counts II and III; pay a \$400.00 special assessment fee and 120 months for Count 1; 180 months for Count 2 and 180 months for Count three all to run concurrently and to run concurrent with the sentence entered in 2:21-cr-104-TPB-KCD.¹

BERKLIN filed his Notice of Appeal on November 9, 2022 as to both cases.

¹ Which came out to be 120 months for Counts I in both cases and 180 months for Counts II and III in Case No.: 21-cr-48.

This Court issued its opinion affirming BERKLIN'S sentence on December 20, 2023. BERKIN'S Petition for Rehearing and Petition for Rehearing *En Banc* was denied on February 14, 2024.

2. Statement of the Facts.

a. The Offense Conduct.

On January 30, 2021, at approximately 12:29 a.m., Fort Myers Police Department (FMPD) detectives observed a vehicle driven by BERKLIN flee at a high rate of speed and run through a red light at an intersection. When detectives attempted to conduct a traffic stop of the vehicle, BERKLIN increased his speed and fled from law enforcement through a residential neighborhood before eventually crashing the vehicle into a tree, in a roadway median. (PSI: 28)

When detectives arrived at the scene of the crash, BERKLIN and a passenger, later identified as Christopher Fletcher, had already fled the area on foot. A search of the vehicle revealed a loaded Glock GMBH, Model 17GEN5, 9-millimeter firearm, bearing Serial No.: BNMF461, with a 17 round magazine capacity, and two cell phones located on the driver's seat floorboard, a Florida driver's license issued to BERKLIN located in a compartment under the vehicle's radio, and paperwork addressed to BERKLIN in the glovebox. Detectives also located a black beanie hat and a pair of eyeglasses on the ground next to the driver's side door of the vehicle. The hat and glasses were consistent with those

which law enforcement had observed BERKLIN wearing earlier that day and on other occasions in which they had contact with him. A loaded Taurus, semi-automatic firearm, bearing Serial No.: TCN93575, was located on the front passenger seat. A baggie containing a usable quantity of marijuana (1.6 grams), a usable quantity of crack cocaine (0.5 grams), as well as 18 small baggies, packaged for distribution, containing a total of 10.5 grams of fentanyl, were located in the center console. Additionally, a baggie containing a useable quantity of MDMA/ecstasy (0.2 grams) was located in the driver's side door handle. (PSI: 29)

The FDLE compared a sample of DNA taken from the Glock firearm located on the driver's seat floorboard to a buccal swab taken from BERKLIN. The FDLE analyst concluded the DNA sample from the Glock firearm was a mixture of at least four individual's DNA and that the mixture was 700 billion times more likely to have originated from BERKLIN and three unrelated individuals than that of four unrelated individuals. (PSI: 30)

BERKLIN was determined by the detectives to be a convicted felon. The State of Florida, Office of Executive Clemency, advised BERKLIN did not have his civil rights restored to own, possess, or use firearms after having been convicted of a felony. (PSI: 31).

In April 2021, BERKLIN was identified by a DEA confidential informant (CI) as a known narcotics dealer in Fort Myers. Based upon the CI's information, the DEA began an investigation which included surveillance efforts and controlled purchases of fentanyl. The DEA arranged for the CI to be utilized to purchase fentanyl from BERKLIN. (PSI: 33).

Each controlled purchase was completed with prerecorded investigative funds and recorded audio and video. At the conclusion of each transaction, BERKLIN was identified as the person with whom the CI had completed each transaction. (PSI: 34)

For the first purchase on April 9, 2021, the CI placed a recorded phone call to BERKLIN and arranged to meet at Edison Mall in Fort Myers to purchase seven grams of fentanyl for \$600 of United States currency. The DEA subsequently tested the substance and found the substance to be 6.86 grams fentanyl. (PSI: 35).

For the second purchase on April 23, 2021, the CI placed a recorded phone call to BERKLIN and arranged to meet at Publix in Fort Myers to purchase one-half ounce of fentanyl for \$1,200 of United States currency. The DEA subsequently tested the substance and found the substance to be 13.89 grams fentanyl. (PSI: 36).

b. Facts Pertaining to BERKLIN'S Sentence.

Probation grouped BERKLIN'S charges as follows: Count Group 1: Possession of a Firearm by a Convicted Felon (Count 1: 2:21-cr-104- TPB-KCD). Possession of a Firearm by a Convicted Felon (Count 1: 2:21-cr-48-TPB- NPM). Distributing a Controlled Substance (Fentanyl) (Counts 2 and 3: 2:21-cr-48- TPB- NPM)

Probation set BERKLIN'S Base Offense level at 22. The guideline for a violation of 18 U.S.C. §922(g)(1) is U.S.S.G. §2K2.1. That section provides that if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense, then the base offense level is 22. Pursuant to USSG §2K2.1, comment. (n.10), for purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). Pursuant to USSG §2K2.1, comment. (n.2), for purposes of subsection (a)(1), (a)(3), and (a)(4), a “semiautomatic firearm that is capable of accepting a large capacity magazine” means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more

than 15 round of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm.(PSI: 46)

In Docket No.: 2:21-cr-104-TPB-KCD, the offense involved one extended Glock magazine with a 31 round magazine capacity. In Docket No.: 2:21-cr-48-TPB- NPM, the offense involved a Glock firearm with a 17 round magazine capacity. The defendant committed the instant offenses on October 16, 2020, after being convicted on November 16, 2010, of Aggravated Assault with Firearm, a crime of violence, Lee County Circuit Court, Fort Myers, Florida, Docket No.: 10-CF-17320.

Probation gave BERKLIN a two-level increase pursuant to U.S.S.G. §2K2.1(b)(1)(A) finding the offense involved three to seven firearms, increase by 2 levels. In Docket No.: 2:21- cr-104-TPB-KCD, the offense involved one Taurus firearm and one Glock firearm. In Docket No.: 2:21-cr-48-TPB-NPM, the offense involved one Taurus firearm and one Glock firearm, for a total of four firearms. (PSI:47)

Probation gave BERKLIN a 4 level increase pursuant to U.S.S.G. §2K2.1(b)(6)(B), finding BERKLIN used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. In Docket

No.: 2:21- cr-104-TPB-KCD, BERKLIN possessed a loaded Glock, Model 19, 9-millimeter firearm, bearing Serial No.: PFY450, six rounds of S&B ammunition, six rounds of Blazer ammunition, and one round of F.C. ammunition. BERKLIN also possessed a firearm and ammunition while facilitating or potentially facilitating, the further felony of Robbery-Possessing Firearm and, in Docket No.: 2:21-cr-48- TPB-NPM, and further felony of Possession with Intent to Distribute Fentanyl. (PSI: 48)

Probation gave BERKLIN a 2-level increase pursuant to U.S.S.G. §3C1.2 finding BERKLIN recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, increase by two levels. In Docket No.: 2:21-cr-48-TPB-NPM, BERKLIN increased his vehicle speed and fled from FMPD detectives, ran through a red light at an intersection, and crashed his vehicle into a tree in a roadway median in a residential neighborhood. (PSI:51) Accordingly, the probation officer set BERKLIN'S' Adjusted Offense Level at 30. (PSI: 52) BERKLIN was given a 3 level decrease pursuant to U.S.S.G. §3E1.1(a) and U.S.S.G. §3E1.1(b) making his Total Offense Level 27. (PSI: 54-56)

The probation office found that BERKLIN had a total offense level of 27 and a criminal history category of III. As such, the guideline imprisonment range was 87 to 108 months. (PSI:110)

c. BERKLIN'S Sentencing Hearing

BERKLIN'S sentencing hearing was held on October 25, 2022. (DE:83) The sentencing hearing was for his two pending cases to wit: 2:21-cr-104 and 2:21-cr-48 and were heard together. (DE:83).

BERKLIN'S Counsel advised the District Court that “[w]e have no objection to any of the factual recitations within the PSR. We do have an objection at Page 11, to Paragraph 47 of Document 70 that was filed on October 17, 2022 by Probation.” (DE:83:4).

BERKLIN'S Trial Counsel advised the District Court of the objection: “Paragraph 47 at Page 11 of Document 70. It's the PSR that was filed on 10/17 of '22. The PSR that incorporates both PSRs. Your Honor, Probation has taken the position under 2K2.1(b)(1)(A) the offense involves three to seven firearms increased by two levels. Mr. Berklin pled to two separate firearms. The issue is, is that his specific two firearms were also located with other firearms that were not specifically his, but because there were other firearms in existence located either with or near to the other firearms, probation has seen fit to give him the two-level enhancement under 2K2.1(b)(1)(A). I would note an objection to that. Mr. Berklin pled to two separate firearms in this case and not to a total of four firearms in this case. . . I would also argue it's essentially double counting. And it's certainly inequitable to enhance Mr. Berklin two levels when he in fact has already pled guilty to two separate cases

and the government has not had to prepare these cases for trial, etc. There was a lot of DNA evidence in this case that the government did not have to go through that whole process either. So we would note our objection as to paragraph 47 at page 11 of the PSR document number 70.” (DE:83:5-6).

The District Court overruled the objection and found that BERKLIN’S guidelines situation is “Level 27, Criminal History Category III.” And that the guidelines would be 87 to 108 months. (DE:83:8). The District Court then confirms that the maximum for this case is ten years for the gun charge in Count 1 and the maximum sentences available for the two drug buys was twenty years for each one. (DE:83:12). The District further confirms that BERKLIN’S maximum sentence for both cases is 60 years and the total guidelines for both cases is 87 to 108 months. (DE:83:13).

The District Court concludes that “[e]ighty-seven to 107, which translates to, . . . nine years. So two different crimes totaled up. Maximum exposure is 60 years; guidelines say between seven and nine years. Okay. So that’s where we are. In light of all of this, what sentence is the government recommend?” (DE:83:13).

The government testified that “the United States has two plea agreements in this case. Or in these cases. Pursuant to those plea agreements, we’re recommending a sentence within the guideline range, specifically at the high end of the guideline range which is 108 months as it relates to the term of imprisonment.(DE:13)

BERKLIN'S Counsel argued that "Mr. Berklin has pled to two separate cases. The government has not had to prepare for trial. They've not had to go through the effort in the work of our challenge to the DNA. And not having to have spent the money on that as well. And I think it's important for the Court to look at what Mr. Berklin has pled to in this particular case. He's pled to possession for two separate firearms. That's it."(DE:83:14). As such, BERKLIN asked for 87 months or 7.25 years. (DE:83:14).

BERKLIN'S Counsel then argued that BERKLIN has "had a history since he was a young kid, problems in school. He was in ESE classes. He was a poor student. Because of that he dropped out of school because school—just wasn't doing well in school. He's asked that he be placed in a facility where he can obtain his GED and/or his CDL License. . . So he would like something that he can take with him once he gets out, that he can be gainfully employed and use that to earn money. And that's where he's at, at this point. I think if you look at his prior history, he's had a tough time personally. He's had drug and alcohol issues as well. And we're also asking that the Court recommend to the Bureau of Prisons that he be able to participate in the RDAP program." (DE:83:15).

The District Court held that "I've reviewed the sentencing guidelines, all of the submissions that have been made here, and pursuant to Title 18 U.S. Code Section 3551 and 3553, it's my judgment that the defendant, Mr. Berklin, will be

committed to custody of the Bureaus of Prisons for a term which I Will announce momentarily." (DE:83:18). The District Court held that "I do want to give him credit for accepting responsibility and not going to trial. Now, the first case, Case Number 20-194 (sic)[21-104] . . . that's a one-count indictment. . . So in case number 104, the sentence is ten years, in case number 48 Count 1 the sentence is ten years, and then Counts 2 and 3 the sentence is 15 years, but that's all to run concurrently. So to be clear the total sentence is 15 years." (DE:74:22-25).

BERKLIN'S Trial Counsel objected: "I've noted my objections but I would object to the Court varying upward from the 120 months sentence from the guidelines sentence of 87 to 108 months, I think the plea was a guideline sentence plea that was worked out and negotiated with counsel for the government. Mr. Berklin is a Level 27 Criminal History Category III, which scores 87 to 108 months, and we believe that pursuant to 3553 factors, that a sentence within the guidelines is sufficient and appropriate for Mr. Berklin based upon his prior criminal history, and that's what's reflected within the presentence investigation report, it's what probation believes is appropriate, and it's what I believe is appropriate; and even the government believed that the sentence of 108 months would be appropriate. At the high end of the guidelines. And departing to 15 years, based upon what was negotiated with the government and based upon his prior criminal history is excessive and we believe should not happen at this state so we would object."

(DE:74:25). Said objection was noted but the District Court did not reduce the sentence.

A. The Eleventh Circuit Erred in Affirming The District Court’s Denial of BERKLIN’S Objection To The Number Of Guns BERKLIN Was Held Accountable For.

The affirming of the District Court’s denial of BERKLIN’S objection to the Number of Guns BERKLIN was accountable for was in error.

B. The Eleventh Circuit Erred In Affirming The District Court Enhancing BERKLIN’S Adjusted Offense Level by Two pursuant to USSG §2K2.1(b)(1)(A).

Based on BERKLIN’S arguments and caselaw, the District Court enhancing BERKLIN’S sentence by two levels amounted to double counting and therefore BERKLIN’S Petition for Writ of Certiorari must be granted.

C. RODRIGUEZ’ Sentence Should not Have been Affirmed by the Eleventh Circuit where RODRIGUEZ’ Sentence was Not Substantively Reasonable Considering 18 U.S.C. §3553(A)-(F).

A sentence will be found to be “substantively reasonable” if when considering the totality of the circumstances, the purposes of 18 U.S.C. §3553(a) are met by the District Court. *United States v. Pugh*, 515 F.3d at 1191.

BERKLIN'S sentence was unreasonable in light of the sentencing factors listed in 18 U.S.C. §3553(a)-(f) and the totality of the circumstances; more particularly, the fact that BERKLIN took immediate acceptance of responsibility and the abusive childhood he was a victim of. Moreover, the sentence was not minimally sufficient or “appropriate” as the District Court alluded to, but greater than necessary to comply with the purposes of sentencing under 18 U.S.C. §3553(a). In reviewing the totality of the circumstance, BERKLIN'S sentence was far too severe.

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF TO THE NUMBER OF GUNS BERKLIN WAS HELD ACCOUNTABLE FOR.

At his sentencing hearing, BERKLIN'S Trial Counsel advised the District Court of the objection: “Paragraph 47 at Page 11 of Document 70. It's the PSR that was filed on 10/17 of '22. The PSR that incorporates both PSRs. Your Honor, Probation has taken the position under 2K2.1(b)(1)(A) the offense involves three to seven firearms increased by two levels. Mr. Berklin pled to two separate firearms. The issue is, is that his specific two firearms were also located with other firearms that were not specifically his, but because there were other firearms in existence

located either with or near to the other firearms, probation has seen fit to give him the two level enhancement under 2K2.1(b)(1)(A). I would note an objection to that. Mr. Berklin pled to two separate firearms in this case and not to a total of four firearms in this case. . . I would also argue it's essentially double counting. And it's certainly inequitable to enhance Mr. Berklin two levels when he in fact has already pled guilty to two separate cases and the government has not had to prepare these cases for trial, etc. There was a lot of DNA evidence in this case that the government did not have to go through that whole process either. So we would note our objection as to paragraph 47 at page 11 of the PSR document number 70." (DE:83:5-6).

In the case at hand, BERKLIN was held accountable for four (4) guns. (PSI:47). Because of this BERKLIN received a 2 level enhancement pursuant to U.S.S.G. §2K2.1(b)(1)(A). (PSI:47). BERKLIN should have only been held accountable for only two guns as that is what he pled to. (DE:44).

In reviewing the plea agreement entered into by BERKLIN and the government, it is clear that when law enforcement executed the search warrant of the hotel where BERKLIN and another defendant were staying, that law enforcement only found two guns, to wit: a Glock Model 19 9mm firearm and another firearm hidden in the mattress. (DE:44:15). As such, there were only two weapons and not four as probation alleges in the PSR. Therefore, based upon the

plea agreement and the facts, BERKLIN only had two weapons in connection with the charges filed in Case No.: 2:21-cr-104-TPB-MRM.

U.S.S.G. §2K2.1(b)(1)(A) provides that “if the offense involved three to seven firearms, increase by 2 levels.” In reviewing the indictment, the plea agreement and the what was recovered from the hotel it is clear that there were only two guns to wit a Taurus firearm and one Glock firearm in this “offense”. What probation did was combine two offenses which were separated in time, in victims and in facts. As such, there was no factual basis to combine the two offenses into one, which is what probation did. “Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event.” *Wooden v. United States*, 142 S.Ct. 1063, 1071 (2022).

The home invasion which led to BERKLIN’S arrest occurred on or about October 16, 2020. (PSI:12)(DE:1). Although not charged with the home invasion, BERKLIN was charged with possession of a weapon by a convicted felon.

The second offense, which probation is including in order to show that there were four guns occurred on or about January 30, 2021 and that was a high speed chase, distribution of a controlled substance and possession of a weapon by a convicted felon. Although both offenses included the charge of possession of a

weapon by a convicted felon, the offenses were not committed close in time had different victims and different fact patterns. As such, there is no legal basis for the two offenses to be considered “one offense”. Accordingly, the fact that the District Court surmised that BERKLIN was in possession of more than two guns that same was affirmed by the Eleventh Circuit, BERKLIN’S request for Certiorari review by this Honorable Court must be granted in order to avoid another miscarriage of justice.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT ENHANCING BERKLIN’S ADJUSTED OFFENSE LEVEL BY TWO LEVELS.

For sentencing purposes, possession of a firearm involves a factual finding. *United States v. Stallings*, 463 F.3d 1218, 1220 (11th Cir.2006). “When a defendant challenges one of the factual bases of his sentence as set forth in the [PSI], the Government has the burden of establishing the disputed fact by a preponderance of the evidence.” *United States v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir.1995). Similarly, our precedent authorizes a district court to consider relevant conduct in fashioning a defendant's sentence so long as that conduct has been proven by a preponderance of the evidence. *United States v. Saavedra*, 148 F.3d 1311, 1314

(11th Cir.1998). A preponderance of the evidence standard “requires 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.) “[T]he district court's factual findings for purposes of sentencing may be based on, among other things, evidence heard during trial, undisputed statements in the [presentence investigation report], or evidence presented during the sentencing hearing.” *United States v. Louis*, 559 F.3d 1220, 1224 (11th Cir.2009) We review the application of the Guidelines' relevant conduct provision to the facts for clear error. *United States v. Amedeo*, 370 F.3d 1305, 1313 (11th Cir.2004).

Under the Guidelines, if a pertinent firearm offense involved three to seven firearms, a two-level increase applies. U.S.S.G. §2K2.1(b)(1)(A). Only those firearms that were “unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed” are to be counted under §2K2.1(b)(1). For firearm-related offenses falling under §2K2.1, relevant conduct includes all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction.

The enhancement to BERKLIN'S total offense pursuant to U.S.S.G. §2K2.1(b)(1)(A) was already accounted for in the statutes that BERKLIN was found guilty of violating and therefore the enhancements are “impermissible double counting”. “Impermissible double counting occurs only when one part of the

Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *United States v. Matos-Rodriguez*, 188 F.3d 1300, 1310 (11th Cir. 1999) [quoting, *United States v. Alexander*, 48 F.3d 1477, 1492 (9th Cir. 1995)]; see also, *United States v. Eubanks*, 593 F.3d 645 (7th Cir. 2010). Again, in the case at hand, the enhancement of BERKLIN'S total offense by two (2) levels pursuant to U.S.S.G. §2K2.1(b)(1)(A) is in fact double counting because said element was already taken into account in determining BERKLIN'S base offense level of 22. (PSI:46). Therefore, because said "elements of the crime" were already fully accounted for by application of another part of the guidelines, enhancing BERKLIN'S total offense by two (2) levels pursuant to U.S.S.G. §2K2.1(b)(1)(A) caused double counting.

Vacating said two-level enhancement would have made BERKLIN'S sentence more reasonable and therefore, not greater than necessary. After all, the District Court failed, as did the Eleventh Circuit, to take into account that BERKLIN accepted responsibility and the history of his childhood. As such, since BERKLIN sentence was unreasonable and the Eleventh Circuit affirmed said unreasonable sentence, this Court must grant BERKLIN'S Petition for Writ of Certiorari review in order to avoid another miscarriage of justice.

III.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING BERKLIN'S SENTENCE THAT WAS NOT SUBSTANTIVELY REASONABLE CONSIDERING 18 U.S.C. §3553(A)-(F)

At the sentencing hearing, the government must prove by a preponderance of the evidence any fact to be considered by the District Court, *United States v. Duncan*, 400 F.3d 1297, 1304 (11th Cir.2005), including the applicability of any guideline enhancements, *United States v. Ndiaye*, 434 F.3d 1270, 1300 (11th Cir.2006). “The findings of fact of the sentencing court may be based on evidence heard during trial, facts admitted by a defendant's plea of guilty, undisputed statements in the presentence report, or evidence presented at the sentencing hearing.” *United States v. Saunders*, 318 F.3d 1257, 1271 n. 22 (11th Cir.2003). In reviewing BERKLIN'S sentence for substantive reasonableness, this Court must consider whether the factors of 18 U.S.C. §3553(a) support his sentence based upon the facts of this case. *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007); *see also, United States v. Johnson*, 485 F.3d 1264 (11th Cir. 2007). BERKLIN argues that the District Court abused its discretion when it failed to give proper weight and consideration to the factors enumerated in 18 U.S.C. §3553(a) and instead entered the sentence basing it

on “impermissible factors”. *United States v. Sarras*, 575 F.3d 1191, 1219 (11th Cir. 2009). And that the Eleventh Circuit failed to consider said argument.

Although the District Court may have discretion in deciding the weight of said factors, said discretion is not unbridled and the District Court must assure that a just and reasonable sentence is given. *See, United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006). It is clear that the sentence imposed by the District Court in this case, was both procedurally and substantially unreasonable. Therefore, said sentence should not have been affirmed; but reversed.

Because of the sentence imposed, BERKLIN was denied his right to due process of law and a reasonable sentence pursuant to the dictates of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), *Gall and Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007). BERKLIN’S sentence did not promote the administration of justice nor law. It did not provide just punishment considering the fact that BERKLIN pled guilty and accepted responsibility. Considering the above facts and the sentence that BERKLIN received, the Eleventh Circuit should have vacated the sentence, not affirmed it. *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996); *United States v. Livesay*, 525 F.3d 1081 (11th Cir. 2008). Based on the errors of both the District Court and the Eleventh Circuit, this Court must grant BERKLIN’S Petition for Writ of Certiorari to prevent a further miscarriage of justice. *See also, United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009).

It is quite clear that the strict application of the advisory sentencing guidelines produced a sentence greater than necessary for punishment under Section 3553(a) for BERKLIN. The statutory factors set forth in Section 3553(a) weigh strongly in favor of a sentence outside of and below the advisory sentencing guidelines. Case law is clear that where circumstances warrant, a District Court can impose sentences that vary downward significantly from the advisory guidelines range and the Appellate Court will affirm such sentences as reasonable. *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007); *see also, United States v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010).

Because of the above, the sentence imposed by the District Court should have been reversed by the Eleventh Circuit as there was a “definite and firm conviction that the District Court committed a clear error of judgment in weighing the §3553(a) factors”. *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). Accordingly, the Eleventh Circuit should have reversed the sentence and because it did not, BERKLIN’S Petition for Writ of Certiorari must be granted.

In considering all of BERKLIN’S arguments, it is clear that BERKLIN has met his burden of demonstrating that the sentence imposed by the District Court was substantially unreasonable and that the sentence should have been vacated. *United States v. Thomas*, 446 F.3d 1348 (11th Cir. 2006); *see also, United States v. Saac*,

632 F.3d 1203 (11th Cir. 2011). Because BERKLIN'S sentence was affirmed by the Eleventh Circuit, his Petition for Writ of Certiorari must be granted.

CONCLUSION

The Eleventh Circuit is required to vacate a sentence 'if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the §3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.' " *United States v. Shaw*, 560 F.3d 1230 (11th Cir. 2009); *See also, United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009).

In the case at hand, reviewing the totality of circumstances, it is obvious that the District Court committed a clear error of judgment when determining BERKLIN'S sentence and because the Eleventh Circuit failed to vacate said sentence. BERKLIN'S Petition for Writ of Certiorari must be granted.

After all, the upholding of his sentence seriously affects the fairness, integrity and public reputation of the judicial proceedings. *See generally, United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). For all of these reasons and in the interest of justice, the Petitioner, SHAUNTAVUS BERKLIN, prays that this Court will issue a Writ of Certiorari and reconsider the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of May, 2024, to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

By *David J. Joffe*
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