# United States Court of Appeals for the Fifth Circuit

No. 23-10144
Summary Calendar

United States Court of Appeals
Fifth Circuit
**FILED**
November 6, 2023
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee*,

*versus*

GUY MENA,

*Defendant—Appellant*.

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

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

PER CURIAM:[*]

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

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

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

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

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

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

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

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