NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

MATTHEW WADE HOWARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

QUESTION PRESENTED

Whether the Tenth Circuit and other circuits have broadened the application of U.S.S.G. § 2K2.1(b)(6)(B) beyond the plain language of the guideline's text and commentary?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Sentencing Guidelines

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Matthew Wade Howard, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on June 12, 2018.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Howard*, 726 F. App'x 720 (10th Cir. June 12, 2018), is found in the Appendix at 1.

JURISDICTION

The United States District Court for the District of Wyoming had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on June 12, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL GUIDELINE PROVISIONS INVOLVED

U.S.S.G. § 2K2.1(b)(6)(B)

> If the defendant . . . 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. . . .

. . .

COMMENTARY [to U.S.S.G. § 2K2.1]

Application Notes:

. . .

14. Application of Subsections (b)(6)(B) and (c)(1).

(A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

(B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

STATEMENT OF THE CASE

Matthew Howard stole four firearms from his parents, with whom he had been living for a period of time during which he was struggling through the throes of methamphetamine addiction and trying to get his life back on track. (Vol. 2 at 10, 23; *id.* at 32-33, 35, 41, 43-44.)[1] Local law enforcement investigating the theft discovered one of the stolen firearms in Mr. Howard's truck, as well as an unrelated shotgun with a barrel less than 18 inches in length. (*Id.* at 10-11.) Thereafter, Mr. Howard provided statements indicating that he had taken the four firearms from his parents and had sold three of them. (*Id.* at 11; *see also id.* at 3.)

Mr. Howard initially was charged in state court with two counts related to the firearms theft, but those charges were dismissed in lieu of a federal indictment. He eventually pleaded guilty to three federal firearms-related offenses.[2] (Vol. 1 at 7-8; Vol. 2 at 31.)

---

[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

[2] These three convictions were: possession of a firearm by a person subject to a domestic violence protection order, in violation of 18 U.S.C. § 922(g)(8); possession of stolen firearms, in violation of § 922(j); and possession of an unregistered firearm (the shotgun with the shortened barrel), in violation of 26 U.S.C. §§ 5841, 5845(a), 5861(d) and 5871.

Mr. Howard's Presentence Investigation Report ("PSR") calculated a guidelines range of 87 to 108 months based on a total offense level of 27 and a criminal history category of III. (*Id.* at 25-26, 29, 38.) This included a four-level enhancement under § 2K2.1(b)(6)(B), which provides a four-level enhancement if the defendant possessed or used a firearm "in connection with another felony offense." The PSR asserted that the enhancement applied because he had "possessed the firearms in connection with the felony offense of Larceny, in that four of the firearms identified in the Indictment were reported as stolen [and he later confessed to stealing the firearms]." (Vol. 2 at 25-26.)[3] The PSR provided no further analysis, and defense counsel did not object to application of the enhancement. (Vol. 2 at 47; Vol. 3 at 25.)

The district court adopted the PSR, but varied downward to a sentence of 54 months, explaining that Mr. Howard's criminal conduct occurred only recently, over a short period of time, and that it was driven primarily by his addiction. (*Id.* at 50-51.)

On appeal, Mr. Howard challenged his sentence as substantively unreasonable; he also preserved for further review the legal question of whether firearms are possessed "in connection with another felony offense" within the meaning of § 2K2.1(b)(6)(B) when that other felony offense is theft and the firearms are simply

[3] Following 2013 statutory amendments, there does not appear to be a crime called "Larceny" in Wyoming anymore. The PSR likely was referring to the renamed and revised "Theft" statute. *See* Wyo. St. § 6-3-402; *see also* Vol. 2 at 31 (noting that Mr. Howard had been charged initially in state court with, *inter alia*, "theft").

the items that were taken. He acknowledged, however, that this argument was foreclosed by binding circuit precedent.

The Tenth Circuit affirmed Mr. Howard's sentence. It further indicated that because Mr. Howard's challenge to § 2K2.1(b)(6)(B) was foreclosed by circuit precedent, any error would not have been obvious and so Mr. Howard could not prevail under plain error review. Appendix at 1-2. This petition follows.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit and other circuits have broadened the application of U.S.S.G. § 2K2.1(b)(6)(B) beyond the plain language of the guideline and its accompanying commentary, and this Court's intervention is necessary to correct the erroneous interpretation.

Section 2K2.1(b)(6)(B) of the Sentencing Guidelines applies a four-level enhancement if the defendant possessed or used a firearm "in connection with another felony offense." Here, Mr. Howard's PSR (which the district court adopted) applied the enhancement because he possessed the firearms stolen from his parents in connection with the felony offense of theft. But the plain language of the guideline's application notes does not support application of the enhancement when a defendant merely steals firearms.

The application notes provide, in pertinent part, that the enhancement applies if the firearm "facilitated or had the potential of facilitating" the felony offense. *Id.* cmt. 14(A). The notes go on to specify two crimes in which possessing a firearm necessarily facilitates the felony offense—burglary and drug trafficking. *Id.* cmt.

14(B). As pertinent here, note 14(B) explains that the enhancement applies "in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary." *Id.* cmt. 14(B). This is so, the note explains, because in such cases "the presence of the firearm has the potential of facilitating another felony offense." *Id.*

Thus, the application notes make clear that a felony *theft* offense is not "facilitated" within the meaning of cmt. n. 14(A) merely because a firearm is taken during that offense. Were that the case, it would be equally true of burglary—and there would be no need, therefore, for application note 14(B) to explicitly say that § 2K2.1(b)(6)(B) applies to burglary when that offense involves only the "find[ing] and tak[ing] a firearm." Put another way, the presence of application note 14(B) is proof positive that note 14(A) does not apply to *theft* just because a firearm is stolen.

Moreover, the plain terms of the note 14(B) discusses "these cases," i.e., burglary and drug trafficking. This is unsurprising given that the note was enacted by the Commission as part of amendments addressing a circuit conflict "specifically with respect to the use of a firearm 'in connection with' burglary and drug offenses." U.S.S.G. App. C, amend. 691 (effective Nov. 1, 2006) ("Reason for Amendment"). And the Commission's specific and narrow carve-out makes some intuitive sense given the risks associated with burglaries. *See generally James v. United States*, 550 U.S.

192, 203 (2007), *overruled by Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) ("The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate.").

The Tenth Circuit, however, previously had adopted a far broader reading of § 2K2.1(b)(6)(B). Specifically, in *United States v. Marrufo*, the circuit court considered the application of § 2K2.1(b)(6)(B) where the target felony was tampering with evidence. 661 F.3d 1204, 1207 (10th Cir. 2011). The evidence that had been tampered with was a firearm, which the defendant had hidden. *Id.* This Court held that the firearm was possessed in connection with felony tampering under application note 14(A) because "to facilitate" means "to make easier," and "[p]ossessing physical evidence makes it easier to tamper with it." *Id.* at 1207-08. Thus, even if the defendant could have committed the target offense without possessing a firearm (and, indeed, he did commit a second count of tampering by changing his clothes to avoid recognition after committing a crime), the fact that *it was a firearm* that he both possessed and feloniously tampered with brought the offense within the orbit of § 2K2.1(b)(6)(B). *Id.*

Because the *Marrufo* court's reasoning was ultimately indistinguishable and necessarily encompassed the simple theft offense at issue here (i.e., the act of stealing

a firearm is, under *Marrufo*, made easier by possessing that firearm), Mr. Howard could not prevail on that challenge in the court of appeals. The problem with the analysis in *Marrufo*, however, is that, as discussed above, it ignores the plain meaning of the guideline as described by *both* application notes 14(A) *and* 14(B); and the plain terms of note 14(B) limit the enhancements' automatic application to the two named offenses (burglary and drug trafficking).

Of course, because Mr. Howard did not object in the district court, his claim is confined to plain error review. *See* Fed. R. Crim. P. 52(b) (providing for correction of a "plain" error). This Court has explained that to prevail under the plain error standard, a defendant must show: (1) error, (2) that is plain, and (3) that affected his substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). If the error meets these conditions, the reviewing court then may exercise its discretion to correct the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citation and internal quotation marks omitted). For two reasons, Mr. Howard can make the required showing, and, accordingly, the standard of review is not a reason to deny review in this case.

First, the plainness test laid out in *Olano* is a model of simplicity: "'Plain' is synonymous with 'clear' or, equivalently, 'obvious.'" *Id.* at 734. This Court similarly defined "plainness" in *Puckett v. United States*, explaining that the error must be "clear or obvious, rather than subject to reasonable dispute." 556 U.S. 129, 135 (2009).

Here, by its plain and clear language, note 14(B) is limited to the named offenses of burglary and drug trafficking offenses—it does not include simple theft. Therefore, the enhancement cannot be applied merely when, as here, a firearm is the object of a felony offense—more must be shown to demonstrate that the firearm "facilitated" that other felony. Because that showing was lacking here, § 2K2.1(b)(6)(B) was erroneously applied to Mr. Howard, and plainly so.

Second, the remaining steps of plain error review also present no hurdle for Mr. Howard. As this Court has explained, when, as here, a defendant shows that the first two prongs of plain error review are met by the application of an incorrect, and higher, guideline range, that is enough for relief in most cases because that error also satisfies the remaining prongs of plain error review. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345-47 (2016) (holding that application of an incorrect, higher, guideline range will, in "the ordinary case," indeed, "[i]n most cases," also satisfy plain error review's third prong); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907-08 (2018) (same as to fourth prong when first three are satisfied).

Nor does the fact that at least two other circuits have, in published decisions, adopted positions similar to the Tenth Circuit in *Marrufo* counsel against this Court's review. *See, e.g.*, *United States v. Pazour*, 609 F.3d 950, 954 (8th Cir. 2010) (concluding that a firearm can facilitate a theft when the firearm is the object stolen); *United States v. Wise*, 556 F.3d 629, 632 (7th Cir. 2009) (concluding that the presence of a firearm

recklessly endangered children); *but see United States v. Larrimore*, 593 F. App'x 168, 176 (4th Cir. 2014) (unpublished) (Diaz, J. dissenting) (rejecting argument that a firearm is necessarily possessed in connection with another felony when the firearm is merely the object of the crime, i.e., the fruit of a theft crime).

For one thing, neither *Marrufo* nor the other circuits' cases considered the interrelation between the guideline text and commentary at issue here, let alone the implications of the express carve-out of burglary offenses in note 14(B). *Cf. Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

For another, this Court has not hesitated to reverse the interpretations of the circuit courts where, as here, the plain text of the provision at issue compels a contrary result. *Cf. Honeycutt v. United States*, 137 S. Ct. 1626, 1631-33 & nn. 1-2 (2017) (concluding that joint and several liability does not apply to forfeiture under 21 U.S.C. § 853 based on plain text of statute, even though majority of circuits that had considered the issue had reached contrary result).

Finally, that the Sentencing Commission theoretically could address this issue by amending the guideline or commentary does not counsel in favor of denial of certiorari under the circumstances of this case. This is so because the application notes in question have been part of the guidelines for over a decade, and cases like

Marrufo have persisted for over half that time without any amendment or clarification from the Commission. This Court's review is necessary to bring the courts of appeals' reading of this important guideline provision into accordance with its plain language, and to correct the erroneous application of the guideline in this case, as Mr. Howard would be unlikely to benefit from any future amendment that the Commission might ultimately adopt.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ John C. Arceci
JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

September 10, 2018