

NO. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

BRIAN L. POSLEY, JR.

Petitioner

vs.

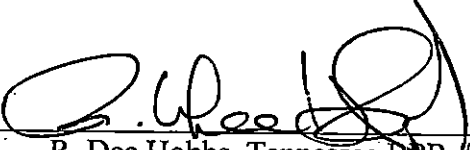
UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

BELL & HOBBS

By: 

R. Dee Hobbs, Tennessee BPR #10482
Appointed Counsel for Brian L. Posley, Jr.
P.O. Box 11308
Chattanooga, TN 37401
Email: bell.hobbslaw@gmail.com
(423) 266-6461/ Fax 756-8521

QUESTION PRESENTED FOR REVIEW

Whether the four-level sentencing enhancement provision in USSG § 2K2.1(b)(6) should be applied in cases where ammunition only is found, although bullets alone cannot facilitate another felony offense as a firearm can, and despite the directions of set forth in the comments to this Guidelines provision.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

Brian L. Posley, Jr., Petitioner

United States of America, Respondent

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	ii
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
INDEX TO APPENDICES.....	iii
TABLE OF AUTHORITIES.....	iv
PRAYER.....	1
OPINION BELOW.....	2
JURISDICTION.....	3
STATUTES, ORDINANCES AND REGULATIONS INVOLVED.....	4
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE PETITION.....	7

Review is necessary because the Sixth and Eleventh Circuit have issued binding decisions that possession of ammunition alone is sufficient to trigger application of the four-level enhancement provided under USSG § 2K2.1(b)(6), regardless of whether the ammunition alone had the potential of facilitating an underlying crime. This is an important question of federal law that has not been, but should be, settled by this Court.

CONCLUSION.....	18
-----------------	----

INDEX TO APPENDICES

DECISION OF SIXTH CIRCUIT COURT OF APPEALS.....	20
---	----

TABLE OF AUTHORITIES

Cases

<i>James v. United States</i> , 217 Fed. Appx. 431 (6th Cir. 2007).....	13
<i>Smith v. United States</i> , 508 U.S. 2123 (1993).....	7, 15
<i>United States v. Bullock</i> , 526 F.3d 312 (6th Cir. 2008).....	14
<i>United States v. Burns</i> , 498 F.3d 578 (6th Cir. 2007).....	13, 16
<i>United States v. Chappell</i> , 334 Fed.Appx. 970 (11th Cir. 2009).....	11
<i>United States v. Clay</i> , 346 F.3d 173 (6th Cir. 2003).....	13
<i>United States v. Coleman</i> , 627 F.3d 205 (2010).....	passim
<i>United States v. Davis</i> , 372 Fed. Appx. 628 (6th Cir. 2010).....	10
<i>United States v. Ennenga</i> , 263 F.3d 499 (6th Cir. 2001).....	14, 15
<i>United States v. Fuentes-Torres</i> , 529 F.3d 825 (8th Cir. 2008).....	8
<i>United States v. Hardin</i> , 248 F.3d 489 (6th Cir. 2001).....	10, 13, 14
<i>United States v. Henry</i> , 878 F.2d 937 (6th Cir. 1989).....	13
<i>United States v. Moore</i> , 239 F. Appx. 137 (6th Cir. 2007).....	10
<i>United States v. Posley</i> , No. 16-6856, 2017 WL 3867818 (6th Cir. September 5, 2017)	passim
<i>United States v. Regans</i> , 125 F.3d 685, 686 (8 th Cir. 1997), cert. denied 523 U.S. 1065 (1998).....	8
<i>United States v. Rhind</i> , 289 F.3d 690 (11th 2002).....	9
<i>United States v. Richardson</i> , 510 F.3d 622 (6th Cir. 2007).....	13
<i>United States v. Rogers</i> , 333 Fed. Appx. 975 (6th Cir. 2009).....	13

<i>United States v. Smith</i> , 480 F.3d 1277 (11th Cir. 2007).....	9
<i>United States v. White</i> , 144 Fed. Appx. 486 (6th Cir. 2009).....	13
<i>United States v. Willis</i> , 283 Fed. Appx. 368 (6th Cir. 2008).....	
<i>United States v. Young</i> , 115 F.3d 844m 838 (11th Cir. 1997)	9

Statutes

18 U.S.C. § 924(c)(1)	8
18 U.S.C. § 924(e)	9
28 U.S.C. § 1254(1).....	3
Title 18 U.S.C. § 922(g)	5

Rules

USSG §2K2.1	passim
USSG § 2K2.1(b)(5).....	7,9
USSG § 2K2.1(b)(6).....	passim
USSG § 2K2.1(b)(6)(B).....	9,10
USSG § 4B1.4(b)(3)(A).....	9

Other

U.S. Sentencing Guidelines Manual, Supplement to Appendix C, 170-77 (2010)(Amendment 691).....	7,9
--	-----

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian L. Posley, Jr., respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Sixth Circuit is attached as Appendix A to this Petition and is styled *United States v. Posley*, No. 16-6856, 2017 WL 3867818 (6th Cir. September 5, 2017).

JURISDICTION

On September 5, 2017, the Court of Appeals for the Sixth Circuit entered its ruling affirming the district court. *United States v. Posley*, No. 16-6856, 2017 WL 3867818 (6th Cir. September 5, 2017). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND REGULATIONS INVOLVED

(1) USSG § 2K2.1(b)(6):

If the defendant used or possessed any firearm or ammunition in connection with another felony offense...increase by 4 levels.

(2) USSG §2K2.1 Cmt. N. 14:

“In Connection With”.--

(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.

(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 (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.--

“Another felony offense”, for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

STATEMENT OF THE CASE

On February 25, 2016, fugitive officers of the Chattanooga Police Department arrived at 4622 Paw Trail in Chattanooga, Tennessee in search of Brian L. Posley, Jr., who had active state warrants for a probation violation and failure to appear. After confirming that Mr. Posley was present, the officers demanded that he come outside the residence. He followed their commands without incident.

A search incident to the arrest on the outstanding warrants took place, during which a bag containing 9 millimeter bullets and 2.6 grams of powder cocaine was found in the left front pocket of Mr. Posley's jeans. The sum of \$700 in cash was also found on Mr. Posley. A subsequent search of the residence resulted in the discovery in the bathroom of 40.5 grams of marijuana and 2.3 grams of crack cocaine. Further, the arrest report created after the arrest references Mr. Posley's involvement in gang activity. No firearm was identified or recovered, however.

On April 26, 2016, a federal grand jury in the Eastern District of Tennessee returned an indictment charging Mr. Posley with one count of being a felon in possession of ammunition in violation of Title 18 U.S.C. § 922(g). Mr. Posley entered a guilty plea to the one count pursuant to a written plea agreement. The plea agreement contains no reference to any other crime being coupled with or facilitated by Mr. Posley's unlawful possession of ammunition.

A Presentence Investigative Report ("PSR") was prepared by the United States Probation office utilizing the 2015 edition of the Federal Sentencing Guidelines Manual. According to the PSR, Mr. Posley's base offense level was established at 20 under United States Sentencing Guideline (USSG) § 2K2.1.

This base offense level, however, was enhanced by four levels under USSG § 2K2.1(b)(6)(B) because it was determined that Mr. Posley committed the offense in connection to a felony drug trafficking offense, possession of drugs for resale. This conclusion was made after the plea agreement was offered and after Mr. Posley's change of plea hearing. This determination was the first reference in the record to the ammunition being held in order to facilitate another felony. Mr. Posley's adjusted offense level under the PSR thus became 24.

Mr. Posley filed objections to the PSR on November 16, 2016, taking issue with the four level enhancement applied under USSG § 2K2.1(b)(6)(B). Soon afterward, the PSR was amended to reference *United States v. Coleman*, 627 F.3d 205 (2010). The Addendum concluded that *Coleman*: "...[P]rovides a basis for a plain language reading of the Special Offense Characteristic. The facts of *Coleman* are similar to Posley in that the defendant possessed ammunition in relation to a drug trafficking offense and the appellate court upheld the application of the four-level upward adjustment."

The sentencing hearing followed on December 16, 2016. Mr. Posley again stated the basis for his objection to the four level enhancement. After taking a recess, the trial court asked how Mr. Posley, despite a sporadic work history, was in possession of \$700 in cash unless he was engaged in drug trafficking as was now being claimed by the government. Despite reservations about the nature of the felony that purportedly was facilitated by Mr. Posley's possession of ammunition, the lower court determined that *Coleman* governs this case, stating in pertinent part as follows:

The defendant had the ammunition and drugs on his person, and I don't think there's a reason ... to distinguish between cases where all the drugs are in the house versus some of the drugs are in the house, as defense counsel suggested I should....I am going to overrule the objection. I don't think this is an overwhelmingly strong case that's been put on by the government, but I do think the government has met its burden. Given the defendant's work

history, the existence the cash, the existence of the various types of drugs, and the amounts, I do believe the enhancement should be applied.

REASONS FOR GRANTING THE PETITION

This Petition addresses the issue of whether ammunition alone facilitates, or has the potential to facilitate, another felony offense in the total absence of a firearm. Well before this case arose, the Sentencing Commission amended USSG § 2K2.1(b)(6) to address a split in the circuits with respect to the interpretation of the phrase “in connection with” when applying an enhancement in cases where a firearm was used “in connection with” burglary and drug offenses.

In light of the reasoning of this Court in *Smith v. United States*, 508 U.S. 2123 (1993), the Commission renumbered USSG § 2K2.1(b)(5) to USSG § 2K2.1(b)(6) and added Application Note 14, stating that its provisions applied where a firearm facilitated or had the potential to facilitate another felony offense or another offense, respectively. See U.S. Sentencing Guidelines Manual, Supplement to Appendix C, 170-77 (2010) (Amendment 691). Application Note 14(B), a part of the Amendment, clearly indicates that the four level enhancement applies only in cases in which a firearm is found in close proximity to drugs or drug paraphernalia or materials. In light of the fact that the 2006 amendments to Section 2K2.1 (b)(6) serve to clarify that the enhancement should only be applied where a firearm facilitates or has the potential of facilitating a drug crime, the enhancement should not be applied in a case where only ammunition is present that has no potential of facilitating any crime. The decision of the lower courts in this case only perpetuates the type of confusion and misapplication that led the Commission to amend USSG § 2K2.1(b)(6) to begin with.

This important question of federal law has not been addressed by this Court. This issue has arisen at least twice in reported opinions of the Sixth Circuit, including the present matter,

and each such case has drawn a dissent over the question of how ammunition “facilitates” an underlying offense. This issue has broad implications for any defendant who may be subject to the enhancement of §2K2.1 (b)(6) based only on the sole possession of ammunition, regardless of whether that ammunition facilitates or has the potential to facilitate another offense. Meanwhile, the decision of the Sixth Circuit in this case to apply the enhancement to these facts conflicts with relevant decisions of this Court.

A. Background: The split between the circuits which necessitated the Amendment to Section 2k2.1 (b)(6) in 2006.

Prior to adoption of Application Note 14 (A) in 2006, the Guidelines had not provided guidance on the term “in connection with,” which at the time was found in USSG § 2K2.1(b)(5). *United States v. Fuentes-Torres*, 529 F.3d 825, 827 (8th Cir. 2008). In that case, the Eighth Circuit applied this Court’s construction of a comparable statutory term, “in relation to,” as provided in *Smith, supra*. See *United States v. Regans*, 125F.3d 685, 686 (8th Cir. 1997), *cert. denied*, 523 U.S. 1065 (1998).

In *Smith*, this Court interpreted the phrase “in relation to,” as contained in 18 U.S.C. § 924(c)(1), to require that at a minimum a firearm must have some purpose or effect with respect to a drug trafficking crime, and its presence could not be the result of accident or coincidence. *Smith*, 508 U.S. at 238. This Court said, “[T]he gun at least must ‘facilitate, or have the potential of facilitating,’ the drug trafficking offense.” *Id.* In *Regans*, where the defendant had only a small, personal-use amount of drugs and a firearm, the Eighth Circuit nonetheless applied the provisions of then-Section 2K2.1(b)(5), reasoning that “when a firearm is carried during a drug offense, including a possession-for-use offense, the drug felon has the ability to use the weapon in connection with his drug offense.” *Regans*, 125 F.3d at 686.

Meanwhile, at least one other circuit chose not to interpret Section 2K2.1(b)(5) this way. The Eleventh Circuit held that the term “in connection with” in USSG § 2K2.1(b)(5) “should be given its ordinary and natural meaning, and ...expressly rejected a more restrictive interpretation.” *United States v. Smith*, 480 F.3d 1277, 1280 (11th Cir. 2007), *cert. denied*, 522 U.S. 872 (2007) (citing *United States v. Rhind*, 289 F.3d 690, 695 (11th 2002); *United States v. Young*, 115 F.3d 844, 838 (11th Cir. 1997)). In *Young*, the Eleventh Circuit considered the phrase “in connection with” as it appears in USSG § 4B1.4(b)(3)(A), a guideline applicable to “armed career criminals” under 18 U.S.C. § 924(e). The *Young* court interpreted “in connection with” according to its “ordinary and natural meaning” and found that the term should be read “quite expansively.” *Young*, 115 F.3d at 837. The court rejected the “facilitated or potentially facilitated” interpretation adopted by other appellate courts which interpreted the phrase as it appeared in § 2K2.1(b)(5). *Id.* at 838. Although the *Young* holding was limited to the armed-career criminal guideline, in the later *Rhind* decision the Eleventh Circuit relied on *Young* to reject the majority interpretation of § 2K2.1(b)(5). *Rhind*, 289 F.3d at 695.

In response, in 2006 the Sentencing Commission promulgated Amendment 691, which modified USSG § 2K2.1 and its Application Notes. See U.S. Sentencing Guidelines Manual, Supplement to Appendix C, 170-77 (2010) (Amendment 691). The Amendment redesignated § 2K2.1(b)(5) as § 2K2.1(b)(6), *id.*, at 171, Application Note 18, *id.* at 172, and added the new Application Note 14, *id.* at 174-75. Application Note 14 provided in relevant part as follows:

- (A) In General. – Subsections (b)(6) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.
- (B) Application When Other Offense if Burglary or Drug Offense. – Subsections (b)(6) 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) and (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

USSG 2K2.1(b)(6) cmt. n. 14(A), (B).

The Sentencing Commission stated the reason for this amendment as follows:

[T]he amendment addresses a circuit conflict pertaining to the application of [§ 2K2.1(b)(6)]..., specifically with respect to the use of a firearm “in connection with” burglary and drug offenses. The amendment, adopting the language from *Smith v. United States*, 508 U.S. 223 (1993), provides at Application Note 14 that the provisions apply if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense, respectively...In addition, the provisions apply 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. The Commission determined that application of [§ 2K2.1(b)(6)] is warranted in these cases because of the potential that the presence of the firearm has for facilitating another felony offense or another offense.

Id. at 177. The reference by the Sentencing Commission to only a firearm is obvious, as is the omission on any mention of ammunition alone.

B. A plain reading of § 2K2.1(b)(6) and its Application Note 14 (A) reveals that more than mere proximity to drugs is required to show that ammunition is possessed “in connection with” another felony offense.

The Sixth Circuit has determined that “in connection with” under § 2K2.1 has the same meaning as “in relation to” under 18 U.S.C. § 924 (c)(1). *See e.g., United States v. Davis*, 372 Fed. Appx. 628, 629-30 (6th Cir. 2010); *United States v. Moore*, 239 F. Appx. 137, 140 (6th Cir. 2007); *United States v. Hardin*, 248 F.3d 489, 497 (6th Cir. 2001). This Circuit recognizes the minimum requirement that a firearm have some purpose or effect with respect to the drug trafficking crime such that it at least facilitates, or has the potential to facilitate, the drug trafficking offense before the sanction of § 2K2.1(b)(6) is applied. *Hardin*, 248 F.3d at 497-98 (quoting *Smith*, 508 U.S. at 238) (quotations omitted).

The instant case represents the second time that the Sixth Circuit has made an overbroad application of USSG § 2K2.1(b)(6) and of the term “in connection with” the facilitation or the potential of facilitation of drug activity. In *United States v. Coleman*, 627 F.3d 205 (6th Cir. 2010), the majority concluded that for § 2K2.1(b)(6) to apply, possession of ammunition in close proximity to drugs must make drug trafficking easier or less difficult, or have the potential to make drug trafficking easier or less difficult. *Id.* In so ruling, the majority simply restated that the ammunition must have facilitated or had the potential to facilitate an alleged drug trafficking crime. With all due respect, restating the provisions of USSG § 2K2.1(b)(6) and Application Note 14(A) does not include a determination of any nexus between the possession of ammunition alone and unlawful drug activity.

In support of its analysis, the majority in *Coleman* cited the unpublished decision of the Eleventh Circuit in *United States v. Chappell*, 334 Fed.Appx. 970 (11th Cir. 2009) which upheld the application of § 2K2.1(b)(6) where only ammunition was found. *Coleman*, 627 F.3d at 212 (citing *Chappell*, 334 Fed. Appx. at 973). This analysis drew a dissent from Judge Gilman, however, who took issue with any reliance on *Chappell* due to the fact that *Chappell* contained no reasoning at all on the issue in question. *Id.* (quoting *Chappell*, 334 Fed. Appx. at 973 (alterations omitted)). In total, the reasoning of the Eleventh Circuit on the determinative issue was, “The district court was entitled to find that the ammunition had the potential to facilitate Chappell’s felony possession of methamphetamine.” 334 Fed. Appx. at 973. The remainder of the opinion contained no explanation as to why the district court was so empowered.

The *Coleman* dissent stopped short of proclaiming that possession of ammunition only can never facilitate another felony offense; however, the dissent did note the difficulty of ascertaining a plain reading of USSG § 2K2.1(b)(6) that results in applying the enhancement

where only ammunition is found. *Coleman*, 627 F.3d at 216. In its ruling, the majority in *Coleman* failed to explain how its “plain reading” of USSG § 2K2.1(b)(6) did anything more than blindly enforce the four-level enhancement because drugs were found in close proximity to ammunition. The present case, then, provided the Sixth Circuit an opportunity to either roll back a blind application of the enhancement or elaborate on the factors that must exist for the “fortress theory” to apply to possession of ammunition only. Again, with all due respect, it did neither.

Instead, the Sixth Circuit in the present case simply concluded that the trial judge had correctly determined that the mere presence of ammunition in close proximity to drugs facilitated, or had the potential to facilitate, that offense. In so holding, the Sixth Circuit went on to conclude that *Coleman* had been properly followed in determining that a sufficient nexus existed between the drugs and the ammunition for the enhancement to apply. No explanation for the conclusion, however, was set forth.

As was true in *Coleman*, the majority opinion in the present case drew a response, this time in the form of a conditional concurrence from Judge Merritt, who concurred in the opinion only because *Coleman* is “binding precedent.” Judge Merritt went on to state that he is in accord with the dissent of Judge Gilman in *Coleman*. Therefore, at least two judges hearing these cases (which appear to be three in number) have stated that they cannot see how the presence of ammunition, without more, “facilitated” the underlying drug offense.

To this point in time, neither the Sixth Circuit in *Coleman* or in this case, nor the Eleventh Circuit in *Chappell*, has offered a understandable rationale under a plain reading analysis. It is necessary for this Court to now provide guidance on the important factors that

support a finding that ammunition alone facilitates or has the potential to facilitate a felony offense.

C. Mere possession of ammunition does not satisfy the fortress theory.

The so-called “fortress theory” has long been applied by the Sixth Circuit in determining whether a defendant’s possession of a firearm is “in connection with” drug trafficking. *United States v. Richardson*, 510 F.3d 622, 625 (6th Cir. 2007). Under the fortress theory, “if it appears that the firearms found on the premises controlled or owned by a defendant and in his actual constructive possessive are used to protect drugs or otherwise facilitate a drug transaction, then such firearms are used ‘during and in relation to’ a drug trafficking crime.” *Hardin*, 248 F.3d at 500 (quoting *United States v. Henry*, 878 F.2d 937, 944 (6th Cir. 1989)).

Prior to its holding in *Coleman*, the Sixth Circuit had relied upon the fortress theory only in cases involving drug transactions, using firearms to protect a valuable stash of drugs, or having some indication that a firearm was used to keep the defendant safe while using or transporting drugs. *See, e.g. United States v. Rogers*, 333 Fed. Appx. 975, 976-77 (6th Cir. 2009) (unpublished) (enhancement warranted where defendant carried gun to a drug transaction); *United States v. White*, 144 Fed. Appx. 486, 487 (6th Cir. 2009) (unpublished) (defendant apprehended with gun and .3 grams of cocaine in house “often used by others for selling drugs”); *James v. United States*, 217 Fed. Appx. 431, 438 (6th Cir. 2007) (unpublished) (gun found in proximity to 33 grams of marijuana meant for resale); *United States v. Burns*, 498 F.3d 578, 580 (6th Cir. 2007) (“[P]olice found the firearm in close proximity to drugs and drug paraphernalia shortly after conducting a controlled buy at the residence.”); *United States v. Clay*, 346 F.3d 173, 175 (6th Cir. 2003) (defendant apprehended in uninhabited apartment late at night with firearm, \$575 in cash, and 1.6 grams of crack); *Hardin*, 248 F.3d 489, 500 (6th Cir. 2001) (gun located

near a “large stash of cocaine” for sale); *United States v. Ennenga*, 263 F.3d 499, 503-04 (6th Cir. 2001) (defendant “holed up” in basement apartment containing firearms and several dozen marijuana plants and protected by an alarm system). “Put differently, § 2K2.1 applies if the firearm has some emboldening role in [a] defendant’s felonious conduct.” *Ennenga*, 263 F.3d at 503 (internal quotation marks and citation omitted).

Contrary to the stated belief of the Sixth Circuit (as reflected in these cases) that § 2K2.1(b)(6) is designed to increase punishment for those defendants whose unlawful possession of ammunition may be assumed to create in the future a heightened risk of violence, § 2K2.1(b)(6) was intended to enhance the recommended punishment only for those particular defendants whose unlawful firearm possession has actually created a heightened risk of violence. *United States v. Bullock*, 526 F.3d 312, 316-17 (6th Cir. 2008) (citation omitted). “Thus, [this Circuit] ha[s] never found that the [Section] 2K2.1(b)(6) enhancement can be applied simply because there is a theoretical possibility that the firearm may be used to commit a felony at some unspecified future time.” *Id.* at 317. After all, as a general matter there is no presumption created by §2K2.1 that a defendant’s possession was “in connection with” the other felony offense. *United States v. Hardin*, 248 F.3d 489,497 (6th Cir. 2001).

As stated by the dissent in *Coleman*, “Many things could in theory put a person ‘one step closer’ to having a firearm, such as applying for a firearms permit, having a holster, possessing a laser scope, or earning money to be able to purchase a weapon.” *Coleman*, 627 F.3d at 216. In correctly noting that application of the fortress theory requires the actual or constructive possession of a firearm, the dissent further recognized that: “[O]nly *actual possession of a firearm* would potentially ‘facilitate’ drug dealing under this [C]ourt’s ‘fortress theory’ because displaying bullets alone can cause no harm. *Id.* (emphasis in original). It was not shown that

neither Mr. Coleman nor the Petitioner in this case actually, or even constructively, possessed a firearm.

Possession of bullets alone, without more, cannot create a heightened risk of violence such that the enhancement under § 2K2.1(b)(6) would apply. The holdings in both *Coleman* and the present case, however, are necessarily dependent on the assumption that at some unspecified point in the future, the defendant will come to possess a firearm to go with his ammunition. The record in the present case contains no evidence to support this conclusion, however.

Although possession of an unloaded firearm could certainly embolden a defendant in his drug activity, since brandishing an unloaded weapon might actually prevent potential buyers from stealing drugs or harming a defendant, the same is simply not true of the possession of ammunition. The Sixth Circuit has stated that, "In the narcotics business, firearms are as much tools of the trade as are most commonly recognized article of narcotics paraphernalia." *Ybarra v. Illinois*, 444 U.S. 85, 106 (1979) (internal quotations and citations omitted). The same has never been stated as to ammunition, however. In the present case, Mr. Posley's possession of ammunition only had no potential to protect drugs, facilitate sales or embolden him in illegal activity.

In sum, when a court determines whether to apply the fortress theory pursuant to Application Note 14(A), it must be decided whether the illegal instrumentality, in this case ammunition alone, actually facilitated or had the potential to facilitate another offense. As this Court determined in *Smith*, followed by the Sixth Circuit in regard to applying Section 2K2.1(b)(6), "[P]ossession of firearms that is merely coincidental to the underlying felony offense is insufficient to support the application of § 2K2.1." *Ennenga*, 263 F.3d at 503; *see also Smith*, 508 U.S. at 238 ("[T]he firearm must have some purpose or effect with respect to the drug

trafficking crime; its presence or involvement cannot be the result of accident or coincidence.”) In this case, there was nothing to evidence that possession of ammunition alone had no emboldening role in an underlying drug crime. Review by this Court is needed to avoid blurring the distinctions that the amended Guidelines provision was intended to address.

D. Exercise of this Court’s certiorari jurisdiction is warranted in this case.

The amendments made by the Sentencing Commission to clarify the application of § 2K2.1(b)(6) were intended to make distinctions between cases requiring enhancement based on actual use and cases involving incidental possession of a firearm or ammunition. The Sixth Circuit has now upheld application of enhancements in cases where possession of ammunition alone did not facilitate, or potentially facilitate, a drug offense. The net effect of these decisions is to cross lines of distinction that the amendments were intended to address. The result now raises an important question of federal sentencing law that has not been, but should be decided by this Court. There is now the danger of misapplication of the guideline to punish defendants based solely on the proximity of ammunition to drugs.

In *Coleman*, the Sixth Circuit majority determined that the fact finding of the district court was not clearly erroneous. 627 F.3d at 214. The court also found, however, that a plain reading of USSG § 2K2.1(b)(6) and Application Note 14(A), coupled with application of the fortress theory, was legally correct. *Id.* Further, the court relied at least in part in the Eleventh Circuit ruling in *Chappell* in affirming the decision of to enforce the Guidelines enhancement where only ammunition was found. *Id.*

Should the Court grant this Petition, the plain reading analysis of Section 2K2.1(b)(6) made in *Coleman* and in this case is subject to de novo review. *See Burns*, 498 f.3d at 580 (legal conclusions concerning the interpretation and application of the guidelines are reviewed de

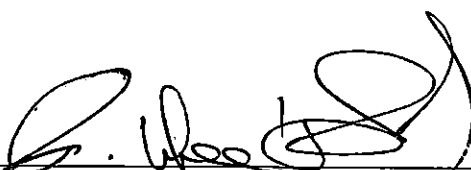
novo). The same holds true on the application of the fortress theory to the facts of this case, which is also a question of law subject to de novo review. *See, e.g., United States v. Willis*, 283 Fed. Appx. 368, 369 (6th Cir. 2008) (unpublished). Accordingly, Mr. Posley respectfully requests this Court to consider the question of whether a plain reading analysis of Section 2K2.1(b)(6) supports its application in this case where only ammunition was found and/or whether the fortress theory was applied correctly to possession of ammunition only.

CONCLUSION

For the foregoing reasons, Petitioner Brian L. Posley, Jr. respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit in this case.

This first day of December, 2017.

BELL & HOBBS

By: 

R. Dee Hobbs, Tennessee BPR #10482
Appointed Counsel for Brian L. Posley, Jr.
P.O. Box 11308
Chattanooga, TN 37401
Email: bell.hobbslaw@gmail.com
(423) 266-6461/ Fax 756-8521

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN L. POSLEY, JR.

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

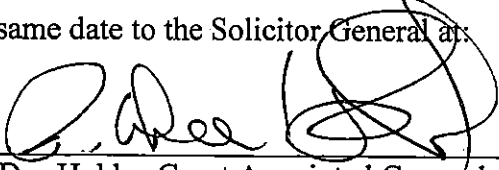
CERTIFICATE OF SERVICE

I, R. Dee Hobbs, do swear or declare under penalty of perjury that on this date, December 1, 2017, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

Noel Francisco
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Christopher D. Poole
United States Attorney's Office
900 Georgia Ave, Chattanooga, TN 37402

With a courtesy copy also e-mailed this same date to the Solicitor General at:
SUPREMECTBRIEFS@USDOJ.GOV



R. Dee Hobbs, Court Appointed Counsel

APPENDIX

Opinion of the Court of Appeals for the Sixth Circuit in *United States v. Posley*, 16-6856 (6th Cir. 2017).

NOT RECOMMENDED FOR PUBLICATION
File Name: 17a0515n.06

No. 16-6856

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Sep 05, 2017
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA.

Plaintiff-Appellee,

v.

BRIAN L. POSLEY, JR.,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF TENNESSEE

BEFORE: MERRITT, MOORE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. Brian Posley pled guilty to being a felon in possession of ammunition and was sentenced to 70 months' imprisonment. Posley now appeals the district court's application of a four-level enhancement to his base offense level for possessing the relevant ammunition "in connection with another felony offense" under USSG §2K2.1(b)(6)(B). Because neither the district court's finding that Posley was engaged in a felony drug-trafficking offense nor its decision that Posley possessed ammunition in connection with that offense was in error, Posley's sentence stands.

On February 25, 2016, officers with the Chattanooga Police Department visited a house to execute an arrest warrant that had been issued for Posley due to his failure to appear in court and his violation of probation. Once there, the officers asked the resident who opened the front door and another occupant to step outside, leaving Posley alone in the house. The officers saw

APPENDIX

Opinion of the Court of Appeals for the Sixth Circuit in *United States v. Posley*, 16-6856 (6th Cir. 2017).

No. 16-6856, *United States v. Posley*

Posley walk in front of a window and instructed him to exit the house. Upon arresting Posley pursuant to the warrant and searching him, the officers found a bag containing four 9mm bullets and cocaine in his front left pocket, as well as \$700 in cash. The officers then searched the house, where they found marijuana and cocaine in the toilet. The toilet was located in a bathroom that corresponded to the location where the officers saw Posley walk across a window just before he exited the house. In total, the officers found 2.3 grams of crack cocaine, 2.6 grams of cocaine, and 40.5 grams of marijuana, and Posley confessed to the officers that the drugs were his.

A grand jury charged Posley with being a felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1), and Posley pled guilty to the offense. A probation officer prepared a presentence investigation report (PSR), which revealed that Posley had charges pending against him in state court for possessing drugs for resale during the February 25, 2016 incident. The PSR also stated that Posley was employed during only four of the thirty months preceding his arrest. The PSR placed Posley's base offense level at 20 and added a four-level enhancement under USSG §2K2.1(b)(6)(B) for Posley's possessing ammunition in connection with a felony drug-trafficking offense. After a three-point reduction for acceptance of responsibility, Posley's total offense level was 21. Combined with a criminal history category of V, the PSR calculated Posley's sentencing range at 70 to 87 months' imprisonment.

Posley's sole objection to the PSR involved the four-level enhancement for possessing ammunition in connection with a felony offense. After hearing arguments at the sentencing hearing, the district court overruled Posley's objection. The court held that "[g]iven the defendant's work history, the existence of the cash, the existence of the various types of drugs, and the amounts," the Government had met its burden of proving that Posley was involved in

No. 16-6856, *United States v. Posley*

drug trafficking. Furthermore, the court relied on our decision in *United States v. Coleman*, 627 F.3d 205 (6th Cir. 2010), to conclude that the close proximity between the ammunition and the drugs rendered Posley's possession of the ammunition "in connection with" the drug trafficking. The district court then sentenced Posley to 70 months' imprisonment. Posley now appeals.

The district court did not err by applying §2K2.1(b)(6)(B)'s four-point enhancement to Posley's base offense level. The enhancement is appropriate when "the defendant used or possessed any firearm or ammunition in connection with another felony offense." USSG §2K2.1(b)(6)(B) (2015). Application note 14(A) further describes that the enhancement applies "if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense." *Id.* comment. (n.14(A)). The district court did not clearly err when it determined that Posley possessed the drugs in his house and on his person for resale—a felony drug-trafficking offense—and correctly determined that the mere presence of ammunition in close proximity to the drugs facilitated, or had the potential to facilitate, that offense.

The Government presented sufficient, reliable facts to prove by a preponderance of the evidence that Posley possessed the drugs found during his arrest for resale. Contrary to Posley's assertion, more than "mere possession of the drugs . . . , coupled with abject speculation that his having \$700 in cash 'must have' come from drug dealing," supports the district court's conclusion. First, the fact that Posley had three types of drugs supports an inference that the drugs were not for personal use. Furthermore, as the district court noted, the sentencing guidelines indicate that 40.5 grams of marijuana would create around 81 cigarettes. USSG §2D1.1, comment. (n.9). Posley objected to this weight calculation, noting that, because the marijuana was found in the toilet, it was weighed down with water. Regardless of whether the

No. 16-6856, *United States v. Posley*

40.5-gram figure was slightly inflated from water weight, however, the district court reasonably concluded that the amount of marijuana in Posley's possession "seem[ed] like quite a bit for [him] to not be distributing." The district court's conclusion that the \$700 in cash in Posley's front pocket likely came from drug sales is also reasonable, given that Posley had barely been employed for the thirty months preceding his arrest. Finally, it was at least probative that, at the time of his sentencing, Posley had been charged in state court for possessing the very drugs at issue for resale. Considering all of these incriminating facts, it was not clear error for the district court to find that Posley held the drugs for resale, which constitutes a felony offense in Tennessee, *see* Tenn. Code Ann. § 39-17-417(a)(4), (g)(1)(2010).

The district court also properly relied on *United States v. Coleman*, 627 F.3d 205 (6th Cir. 2010), to hold that there was a sufficient nexus between the ammunition and the drugs to render §2K2.1(b)(6)(B)'s enhancement applicable. In *Coleman*, officers discovered ammunition and marijuana together in a defendant's residence. 627 F.3d at 208. After the defendant pled guilty to being a felon in possession of ammunition and was sentenced pursuant to §2K2.1(b)(6)(B)'s enhancement, he argued that his possession of ammunition, alone, could not have facilitated his felony drug-trafficking offense. In rejecting the defendant's challenge, we relied on the "fortress theory," under which "a connection is established if it reasonably appears that the firearms found on the premises controlled or owned by a defendant and in [the defendant's] actual or constructive possession, are to be used to protect the drugs or otherwise facilitate a drug transaction." 627 F.3d at 212 (alteration in original) (quoting *United States v. Richardson*, 510 F.3d 622, 626 (6th Cir. 2007)). We applied the fortress theory to ammunition and held that ammunition has the capacity to facilitate a drug-trafficking offense, as required under §2K2.1(b)(6)(B), whenever it is in close proximity to the drugs involved in the offense.

No. 16-6856, *United States v. Posley*

See id. at 212–13. Posley argues that our holding in *Coleman* is wrong, because it contradicts application note 14(B), which provides that the enhancement should apply “in the case of a drug trafficking offense in which a *firearm* is found in close proximity to drugs,” USSG §2K2.1, comment. (n.14(B)) (emphasis added), but does not mention *ammunition* in close proximity to drugs. However, the dissenting opinion in *Coleman* raised this same point, *see* 627 F.3d at 217 (Gilman, J., dissenting), and the majority declined to follow it. Thus, *Coleman*’s holding that ammunition, alone, in close proximity to drugs can facilitate a drug-trafficking offense is binding precedent.

Posley’s attempts to distinguish his case from *Coleman* are unavailing. In *Coleman*, the circumstances leading up to the officers finding ammunition and drugs in the defendant’s house were irrelevant to our holding that the defendant possessed the ammunition “in connection with” a felony drug-trafficking offense. Thus, the different circumstances leading up to Posley’s arrest are not relevant. Furthermore, despite Posley’s argument that the drugs in the toilet were not “in close proximity” to the ammunition in his front pocket, the record supports a reasonable inference that Posley possessed the drugs found in the toilet together with the ammunition immediately before he exited the house. The officers saw Posley pass a window in the bathroom where the majority of the drugs were found before he stepped outside; Posley was likely trying to dispose of the drugs, while he possessed the ammunition, in the officers’ presence. Thus, the district court did not clearly err in finding that all of the drugs—including the cocaine in Posley’s pocket and the marijuana and crack cocaine in the toilet—were in close proximity to the ammunition.

Posley’s reliance on *United States v. Shields*, 664 F.3d 1040 (6th Cir. 2011), is also misplaced. In *Shields*, we held that a district court erred by applying the §2K2.1(b)(6)(B)

No. 16-6856, *United States v. Posley*

enhancement when there was insufficient evidence to prove that the criminal defendant possessed a firearm “in connection with” a felony drug-possession offense. *See* 664 F.3d at 1042. We reasoned that, although the fortress theory can apply to drug possession—as opposed to drug trafficking—it would be easier to prove that a firearm in close proximity to drugs facilitated a drug-trafficking offense than it is to prove that a firearm in close proximity to drugs facilitated drug possession. *See id.* at 1044–45. We went on to hold that, because the defendant possessed a relatively small amount of drugs and asserted that the firearm was for self-protection, there was insufficient evidence to prove that his firearm possession was anything more than coincidental to his drug possession. *See id.* at 1045. Posley argues that those same mitigating factors are present in his case. However, even assuming that Posley’s assertion is true, *Shields* is distinguishable, because the felony underlying Posley’s sentence enhancement is drug trafficking, contrasted with the mere possession in *Shields*. As we recognized in *Shields*, “it is easier to see how a firearm,” and in this case, ammunition, “facilitates drug trafficking transactions, than it is to see how a firearm facilitates the mere possession of controlled substances.” *Id.* at 1046.

Finally, because the district court had sufficient, reliable evidence before it to impose the §2K2.1(b)(6)(B) enhancement, Posley’s sentence did not violate his due process rights.

The judgment of the district court is affirmed.

No. 16-6856, *United States v. Posley*

MERRITT, Circuit Judge, concurring, in which MOORE, J., joins. I concur in this opinion only because the published opinion in *United States v. Coleman*, 627 F.3d 205 (6th Cir. 2010), is binding precedent. I actually agree with Judge Gilman's dissent in that case. Like Judge Gilman, I do not see how the ammunition in this case "facilitated" the underlying offense.