

No.

IN THE SUPREME COURT OF THE UNITED STATES

STEVE EARL PERRY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Under § 2K2.1(b)(6) of the United States Sentencing Guidelines, four offense levels are added to the guideline calculation if the defendant used or possessed any firearm or ammunition in connection with another felony offense (an offense other than unlawful possession of the firearm). An application note instructs that the adjustment applies when a firearm facilitated, or had the potential of facilitating, the other felony offense. Under Tenth Circuit precedent, which was used to affirm the Petitioner's sentence, § 2K2.1(b)(6)'s criteria are met if the firearm emboldened the defendant to commit the other felony offense; furthermore, emboldenment can be inferred from possession of a firearm while committing the felony.

Question presented: does the Tenth Circuit's reliance on emboldenment to infer that a firearm was possessed in connection with another felony necessarily satisfy the requirement for an offense level increase under USSG § 2K2.1(b)(6)?

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PREVIOUS OPINIONS AND ORDERS

In *United States v. Perry*, No. 17-7036, 2018 U.S. App. LEXIS 7913 (10th Cir. Mar. 29, 2018) (unpublished), the United States Court of Appeals for the Tenth Circuit issued an Order and Judgment denying a direct appeal wherein Steve Perry, Jr., the Petitioner herein, was the Appellant/Defendant. *See* Attachment 1 (attached hereto). This Petition seeks issuance of a writ of certiorari to the Tenth Circuit Court of Appeals in regard to its decision.

Said Order and Judgment affirmed a Judgment in a Criminal Case filed in the United States District Court for the Eastern District of Oklahoma, in *United States v. Steve Perry, Jr.*, Case No. CR-16-95-RAW. *See* Attachment 2 (attached hereto).

JURISDICTION

The Tenth Circuit reviewed the Judgment in a Criminal Case under the authority of 28 U.S.C. §1291. On March 29, 2018, the Tenth Circuit filed the Order and Judgment now presented for review. Attachment 1 (attached hereto). Neither party filed a request for rehearing.

Jurisdiction for a writ of certiorari lies in this Court pursuant to 28 U.S.C. §1254(1), applicable to cases in the courts of appeals, which permits a writ of certiorari to be “granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.” Mr. Perry was the Appellant in the case now submitted for review.

APPLICABLE LEGAL PROVISIONS

United States Sentencing Guidelines, § 2K2.1(b)(6):

If the defendant--

* * *

(B) 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. If the resulting offense level is less than level **18**, increase to level **18**.

United States Sentencing Guidelines, §2K2.1, Commentary, App. N. 14(A) and (B):

(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.

Okla. Stat. tit. 21, § 540A.A and B:

A. Any operator of a motor vehicle who has received a visual and audible signal, a red light and a siren from a peace officer driving a motor vehicle showing the same to be an official police, sheriff, highway patrol or state game ranger vehicle directing the operator to bring the vehicle to a stop and who willfully increases the speed or extinguishes the lights of the vehicle in an attempt to elude such peace officer, or willfully attempts in any other manner to elude the peace officer, or who does elude such peace officer, is guilty of a misdemeanor...

B. Any person who violates the provisions of subsection A of this section in such manner as to endanger any other person shall be deemed guilty of a felony punishable by imprisonment in the State Penitentiary for a term of not less than one (1) year nor more than five (5) years, or by a fine of not less than One Thousand Dollars (\$1,000.00) nor more than Five Thousand Dollars (\$5,000.00), or by both such fine and imprisonment.

STATEMENT OF THE CASE

1. District Court Proceedings

An Indictment filed in the Eastern District of Oklahoma charged Steve Perry with one count of felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). He entered an unconditional guilty plea and was adjudged guilty.

A Presentence Investigation Report ("PSR") relied on the 2016 U.S. Sentencing Guidelines Manual to recommend a criminal history category of V and an offense level of 25. To reach the offense level the PSR began with a base offense level of 24, added four levels for using or possessing the firearm or ammunition in connection with another felony offense, and subtracted three levels for acceptance of responsibility.

At sentencing the court allowed the government to withdraw its motion requesting a "third point" reduction for acceptance of responsibility based on USSG § 3E1.1(b). With that change, the court adopted the PSR and found that the guideline range was 110-137 months (corresponding to offense level 26 and criminal history category V). Mr. Perry was sentenced to serve 110 months in custody, followed by supervised release for three years. He was committed to the U.S. Bureau of Prisons and is in custody now.

A. “Another Felony Offense” Enhancement

In support of the four offense level increase the PSR stated:

Specific Offender Characteristics: Pursuant to USSG §2K2.1(b)(6)(B), if the defendant used or possessed any firearm or ammunition in connection with another felony offense, the level is increased by four. As stated in the Offense Conduct section, the defendant committed the crime of Endangering Others While Eluding/Attempting to Elude Officer (as charged in Okmulgee County District Court case CF-2016-450) while in possession of a firearm.

In a letter addressed to the Probation Officer who prepared the PSR, counsel for Mr. Perry lodged two objections to the four level adjustment. The first objection addressed whether the other offense was a felony, an issue not raised on direct appeal. As for the second objection, the letter stated:

Additionally, there is no evidence that the firearm facilitated the eluding, as the pursuing officer (Snyder) did not know Mr. Perry had a firearm during the pursuit. The officer’s report indicates that he (Snyder) did not discover the firearm until after the pursuit had ended.

Responding in a letter of its own, the government stated that Mr. Perry attempted to elude the officer while carrying a firearm. The letter continued:

Additionally, after the foot pursuit Defendant moved his hand to his waistband area and refused to show his hands despite commands, in an apparent attempt to pull the firearm on the officer, supporting an enhancement under the guidelines. Possession of the firearm had the ability to further this defendant’s felonious flight from authorities and enhancement under the guidelines is appropriate. Defendant’s objective was to get away and any means would justify that end. Enhancement under the guidelines requires that the firearm be possessed “in connection with” the other offense. As such, the government believes the application is appropriate.

At the sentencing hearing each party called one witness. (See Statement of Facts below). After citing the standards in § 2K2.1(b)(6)(B) and Application Note 14(A), the court summarized the testimony and denied the defense objection as follows:

Based on the evidence in this case and the testimony provided today, as well as the video, the defendant possessed a firearm while eluding and attempting to elude an officer. In the process of eluding, the defendant -- and I'm basing this on the testimony of Mr. Williams and Mr. Snyder, as well as the video. Of course the video didn't show the actual pursuit but it was described in the testimony. Mr. Williams specifically testified that he was looking backward during the pursuit, which would mean that he probably -- if there had been a near collision with a white pickup truck, he probably wouldn't have seen it. So he has no testimony to offer on that point. That testimony was offered by Mr. Snyder. The Court finds it credible. The pursuit was perhaps in excess of speeds of 50 miles per hour in a residential neighborhood with possibly other residents in the vicinity. During the foot -- after the foot pursuit, the defendant refused to show his hands despite the officer's commands, and made furtive movements in his waistband area with his hand in what can be reasonably inferred to be an apparent effort to utilize the firearm on the officer. The Court notes that the Glock pistol... was chamber loaded with a laser site activated, which is very concerning. I'm frankly surprised that Mr. Snyder could have such a cordial conversation with the defendant after that encounter.

In any event, the defendant's possession of firearm had the potential of facilitating the defendant's felonious flight from the authorities. The defendant was subsequently charged in Okmulgee County, district court case CF-2016-450 with a felony charge of endangering others while eluding or attempting to elude an officer, which is punishable by imprisonment of not less than one year.

Based on the evidence in this case, the Court finds by a preponderance of the evidence that the four level enhancement for possessing the firearm in connection with another felony offense pursuant to United States Sentencing Guidelines Section 2K2.1(b)(6)(B) is appropriate. Therefore, the defendant's objection is overruled.

B. Statement of Facts

At the sentencing hearing, Jeremiah Williams testified to what happened while he was a passenger in a car that Steve Perry (Petitioner herein) drove while attempting to elude a peace officer. While Mr. Williams was walking from his grandmother's house, his cousin, Mr. Perry, was driving by and gave him a ride. As they traveled across railroad tracks, an oncoming police vehicle passed them and made a U-turn. Mr. Perry turned left and drove a circular route through a neighborhood, travelling up to 50 miles per hour. He stopped on a gravel road, at which time Mr. Williams got out of the car and ran. Mr. Williams ran because he was afraid of the police, and because he had been smoking marijuana. While Mr. Perry was attempting to elude the officer, he did not say anything to Mr. Williams. Mr. Williams was not asked about whether he saw or was aware of a gun.

Michael Snyder described his pursuit of the vehicle that Mr. Perry was driving while Snyder was on patrol as a District Attorney investigator. At 12:30 p.m. Mr. Snyder saw Mr. Perry driving a car containing a passenger who was not wearing a seat belt. Before Mr. Snyder could turn his vehicle around and pursue, Mr. Perry fled. The area was mostly residential with a speed limit of 25, but the suspect vehicle generally traveled 50-60 miles per hour. While Mr. Snyder pursued with his emergency lights and siren activated, Mr. Perry made a turn too fast and almost struck a pickup truck being driven by an elderly man. Mr. Perry drove off the road and onto a gravel area parallel to railroad tracks. Then he stopped the car, exited, and ran into the nearby

woods. He tripped and fell down. Mr. Snyder drew his firearm and told him to put his hands up. Mr. Perry raised his left hand, but reached for his waistband with his right. After hearing Mr. Snyder's repeated commands to raise his hands, Mr. Perry raised his right hand. After he was arrested, a Glock pistol fell to the ground as he stood up. The investigator noted that the gun was chamber loaded and its laser sight was activated. He did not see a firearm before Mr. Perry was handcuffed.

2. Direct Appeal

Mr. Perry timely appealed the Judgment in a Criminal Case (Attachment 2) entered in district court. The Tenth Circuit addressed his claim that the lower court erred by applying a four offense level increase pursuant to § 2K2.1(b)(6)(B).

Identifying the applicable text of § 2K2.1(b)(6)(B), the court observed that enhancement is appropriate where a 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[.]” *Perry*, 2017 U.S. App. LEXIS 25348 at *3 (Attachment 1). This applies if the firearm or ammunition “facilitated, or had the potential of facilitating” another felony offense. *Id.*, quoting § 2K2.1, cmt. n. 14(A).

Next, the Tenth Circuit turned to the district court's ruling that Mr. Perry qualified for the enhancement by possessing a firearm in connection with the Oklahoma felony offense of endangering others while eluding a police officer. *Id.* See

Okla. Stat. tit. 21, §§ 540A.A, 540A.B. Rejecting Mr. Perry's claim that the district court erred in basing the enhancement on possession of the firearm during the foot chase, after vehicular eluding was complete, the court said:

We disagree. Section 2K2.1(b)(6)(B) doesn't require evidence that the firearm actually facilitated the other felony offense; it only requires that the firearm had the potential to facilitate the other felony offense. And although the district court didn't explicitly say that Perry possessed the firearm during the car chase, we "view the evidence and inferences therefrom in the light most favorable to the district court's determination." *Brown*, 314 F.3d at 1222; *see also United States v. McCane*, 573 F.3d 1037, 1040 (10th Cir. 2009) (declaring we "may affirm the district court on any basis supported by the record"). Because Perry possessed the firearm in the woods, we can infer that he possessed the firearm (1) when he ran from his car, and (2) during the car chase. The only alternative is that he found a loaded firearm while running away from Snyder. And if Perry possessed the firearm during the car chase, then the firearm had the potential to facilitate the felony of endangering others while eluding a police officer. *See United States v. Justice*, 679 F.3d 1251, 1255 (10th Cir. 2012) (ruling that "possession of a firearm may facilitate an offense by emboldening the possessor to commit the offense").

2017 U.S. App. LEXIS 25348 at *4-5

The Order and Judgment turned to Mr. Perry's argument that his possession of the firearm in the car could have been coincidental to the eluding offense, which cannot support the enhancement under Tenth Circuit precedent. *Id.* at *5 (citing *United States v. Gomez-Arrellano*, 5 F.3d 464, 466-67 (10th Cir. 1993)). Mr. Perry claimed that since the district court did not make any findings regarding coincidental possession, the appellate court couldn't make those findings in the first instance, which would amount to de novo review. In response the court reiterated the standards

of review--that the evidence and inferences are viewed in the light most favorable to the lower court's determination, and the court could affirm on any basis supported by the record. *Id.* The court concluded:

...the facts of this case allow us to infer that Perry didn't coincidentally possess a loaded firearm while driving away from a police car at upwards of 50 miles per hour in a residential neighborhood. He reached for the loaded firearm—albeit after he exited the car—when he tripped in the woods. This demonstrates his willingness to use the firearm against Snyder to facilitate his escape. We can infer from this that he would have been willing to use the firearm during the car chase if the need and opportunity arose. Therefore, the firearm's presence in the car wasn't coincidental. Rather, it had the potential to facilitate the crime of endangering others while eluding a police officer.

Id. at *5-6.

Unanimously, the deciding panel affirmed the enhancement and sentence.

I.

REASON FOR GRANTING A WRIT

Certiorari is appropriate when “a... United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. R. 10(c). This basis for review is presented here.

Section 2K2.1 of the United States Sentencing Commission Guidelines Manual (“USSG”) instructs courts on how to determine offense levels in cases involving convictions of possession of a firearm or ammunition in federal court. Subsection

2K2.1(b)(6)(B) requires a four offense level increase if the defendant “used or possessed any firearm or ammunition in connection with another felony offense...” Application Note 14(A) relates to § 2K2.1(b)(6)(B)’s term “in connection with”. It states: “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.” Under the Tenth Circuit’s construction of the guideline, the enhancement is inapplicable if the presence of the firearm is merely coincidental with the other felony. *United States v. Walters*, 269 F.3d 1207, 1219 (10th Cir. 2001). Alternately, if possession of the firearm could embolden the defendant to commit the other felony, the Tenth Circuit deems the facilitation standard in Note 14 satisfied. *United States v. Justice*, 679 F.3d 1251, 1255 (10th Cir. 2012). This petition submits that the Tenth Circuit’s emboldenment standard fails to satisfy the level of “connection” and “facilitation” that the Sentencing Guidelines require.

The emboldenment standard in effect applies the enhancement in § 2K2.1(b)(6)(B) to circumstances that are broader than the terms of the guideline and Note 14(A). Reliance on that standard to affirm the enhancement in Mr. Perry’s case failed to correctly calculate and apply the pertinent guideline and commentary, as this Court’s precedents require. *See Gall v. United States*, 552 U.S. 38, 51 (2007) (failure to correctly calculate the Guidelines range is procedural error; a reviewing appellate court must insure that the district court did not commit such error); *Stinson v. United States*, 508 U.S. 36, 38 (1993) (Guidelines commentary that interprets or explains a

guideline, if legally sound, is authoritative). *See also* 18 U.S.C. § 3553(a)(4)(A) (sentencing court must consider the applicable sentencing range in the Sentencing Guidelines). As stated above, Rule 10(c) favors certiorari review if a court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. This criterion is presented by the petition at hand, because *Perry*'s failure to correctly apply the applicable guideline and commentary is a failure to follow the commands in *Gall* and *Stinson*.

Regarding Rule 10(c)'s criterion of an important question of federal law, the four offense level increase in § 2K2.1(b)(6)(B) substantially impacts a Guideline range, exemplified by its increase of Mr. Perry's range from 70-87 months to 100-120 months. In the long-term future district courts subject to Tenth Circuit precedent will use the improper "emboldenment" theory to add years to the sentences of numerous other defendants.

II.

THE EMBOLDENMENT RULE FAILS TO INSURE THAT THE STANDARD IN § 2K2.1(b)(6)(B) IS MET

Subsection 2K2.1(b)(6)(B) applies when the defendant "used or possessed any firearm or ammunition in connection with another felony offense..." As the Tenth Circuit has recognized, the term "in connection with" is analogous to "in relation to" which appears in 18 U.S.C. § 924(c)(1). *See Walters*, 269 F.3d at 1219. Section 924(c)(1), in relevant part, criminalizes possession of a firearm "in furtherance of"

specified crimes that are violent or constitute drug trafficking. In *Smith v. United States*, 508 U.S. 223, 238 (1993), this Court said: “The phrase ‘in relation to’ thus, at a minimum, clarifies that the 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.” *Smith* recognized that “the ‘in relation to’ language ‘allay[s] explicitly the concern that a person could be’ punished under § 924(c)(1) for committing a drug trafficking offense ‘while in possession of a firearm’ even though the firearm’s presence is coincidental or entirely ‘unrelated’ to the crime.” *Id.* at 238 (quoting *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985)). Under the statute, the firearm must at least facilitate or have the potential of facilitating the offense. 508 U.S. at 238 (citation omitted). Adopting the standard in *Smith*, the Tenth Circuit in *Walters* affirmed a Guidelines enhancement for possessing a firearm in connection with another felony because the evidence indicated that the possessed firearm had the “potential to facilitate” the other crime. 269 F.3d at 1219. *Accord United States v. Blount*, 337 F.3d 404 (5th Cir. 2003) (to be possessed in connection with another felony, the weapon must facilitate or have a tendency to facilitate the other offense, and it must have some purpose or effect with respect to the other offense; its presence or involvement cannot be merely accidental or coincidental).

However, in *Walters* the Tenth Circuit began to approve a factor that was unmentioned in § 2K2.1 or *Smith*. *Walters* affirmed the district court’s finding that firearm possession had the potential to facilitate the crime of possessing a stolen

vehicle because it “emboldened” the defendant to continue possession of the truck by driving it with the gun under the seat. 269 F.3d at 1219-20. Subsequently, in *United States v. Clark*, a similar finding was affirmed. 94 F. App’x 769 (10th Cir. 2004) (unpublished), reversed on other ground, *Clark v. United States*, 543 U.S. 1100 (2005). Clark, a previously convicted felon, stole a vehicle in Arkansas and was later arrested in Canada while possessing the vehicle. In a case behind the front seat, officers found a rifle that a witness had seen in the vehicle in Arkansas. While the circumstances established that he transported the firearm throughout his Arkansas-to-Canada drive, there was no direct evidence of anything he did with the weapon while possessing the stolen vehicle. The district court cited *Walters* while ruling that the firearm probably emboldened Clark to maintain possession of the vehicle and continue his “charade” of impersonating a military officer. Without commenting on the emboldenment factor, the Tenth Circuit affirmed. It concluded that the lower court “could reasonably infer from Defendant's possession of an easily accessible, fully loaded rifle at the time of his arrest in Canada that he kept the rifle in a similar location and condition while traveling through the United States.” 94 F. App’x at 774.

After *Walters* and *Clark*, the Tenth Circuit incorporated emboldenment into its legal analysis of § 2K2.1(b)(6)(B) enhancements. In *Justice*, 679 F.3d at 1255, the court agreed with other circuits that “possession of a firearm may facilitate an offense by emboldening the possessor to commit the offense.” (Citing *United States v. Jenkins*, 566 F.3d 160, 162 (4th Cir. 2009); *United States v. Fuentes Torres*, 529 F.3d 825, 827

(8th Cir. 2008); *United States v. Bullock*, 526 F.3d 312, 318 (6th Cir. 2008); *United States v. West*, 643 F.3d 102, 116 (3d Cir. 2011) (“apparently” recognizing emboldenment); and *United States v. Jeffries*, 587 F.3d 690, 695 (5th Cir. 2009) (same)). *Justice* adopted a general rule that “when the defendant is out and about, with drugs on his person and a loaded firearm within easy reach, one can infer that the proximity of the weapon to the drugs is not coincidental and that the firearm ‘facilitated, or had the potential of facilitating,’ the drug offense by emboldening the possessor.” *Justice*, 679 F.3d at 1256. In Mr. Perry’s appeal, *Justice* was cited in support of the court’s conclusion that “if Perry possessed the firearm during the car chase, then the firearm had the potential to facilitate the felony of endangering others while eluding a police officer.” *Perry*, 2018 U.S. App. LEXIS 7913 at *5. In at least one other court of appeals, a finding of emboldenment is sufficient to conclude that facilitation or potential facilitation is substantiated. *See United States v. Routon*, 25 F.3d 815, 819 (9th Cir. 1994) (firearm facilitated or potentially facilitated another offense if it “had some potential emboldening role” in the defendant’s conduct.)

The Tenth Circuit’s doctrinal reliance on emboldenment to confirm § 2K2.1(b)(6)(B)’s applicability fails to insure a showing of what § 2K2.1(b)(6)(B) requires: connection, facilitation, or potential to facilitate. If emboldenment is to serve as a proxy for the sentencing guideline’s terms, it must always encompass at least as much as those terms encompass. It doesn’t. Beginning with the meaning of “embolden”, Merriam-Webster provides the definition “to instill with boldness or

courage”. See www.merriam-webster.com/dictionary/embolden (visited on 5-25-18). “Facilitate” is defined as “to make easier : help bring about”. See www.merriam-webster.com/dictionary/facilitate (visited on 5-25-18). In light of their definitions, the terms “facilitate” and “embolden” are not even roughly equivalent to each other, and “embolden” is not within the definitional sphere of “facilitate”.

Emboldenment also fails to always confirm facilitation or potential facilitation because it can usually be found where the facts show no more than coincidental presence of a firearm. Emboldenment requires no proof of any fact beyond possession of a firearm while committing a crime. It is commonly “inferred” from the mere presence of a firearm during a felony. In other words, when a firearm’s presence is merely coincidental, Tenth Circuit law calls for enhancement. However, Tenth Circuit precedent recognizes the rule, derived from *Smith*, that if a firearm is involved by coincidence, the connection required by § 2K2.1(b)(6)(B) is not established. *Walters*, 269 F.3d at 1219 (citing *Gomez-Arrellano*, 5 F.3d at 466-67). The Tenth Circuit’s emboldenment standard fails to assist judges in discerning whether a firearm’s presence was coincidental or potentially facilitative. Even worse, since coincidental possession of a gun may automatically qualify as emboldenment, the emboldenment doctrine prevents judges from discerning between mere coincidence and connection. This results in determinations that are wrong, and frees the government from its burden to prove enhancements by a preponderance of evidence. See *United States v.*

Orr, 567 F.3d 610, 614 (10th Cir. 2009) (government must prove guideline enhancements by a preponderance of evidence).

Tenth Circuit law sets some limits on the emboldenment doctrine. *Justice* recognized that if a defendant possessed drugs and later obtained a firearm, emboldenment will not apply if the evidence shows that acquisition of the firearm was “unrelated to the drug possession.” 679 F.3d at 1256 (citing *Jeffries*, *supra*). Rejection of emboldenment in such unusual circumstances provides no guidance to courts attempting to distinguish coincidence from connection in typical cases.

The *Justice* court approvingly cited *United States v. Smith*, 535 F.3d 883, 886 (8th Cir. 2008), which held that where the defendant remained at home with his drugs and firearms, emboldenment did not apply. 679 F.3d at 1256. Demarcating where the line was drawn, *Justice* explained that when a defendant is “out and about, with drugs on his person and a loaded firearm within easy reach, one can infer that the proximity of the weapon to the drugs is not coincidental and that the firearm ‘facilitated, or had the potential of facilitating,’ the drug offense by emboldening the possessor.” *Id.* With this language, *Justice* established a rule recognizing that emboldenment is present in every case featuring the described circumstances, with the exception of the circumstances in *Smith*. In *Justice* the appellate court applied the rule while affirming the district court’s finding that a firearm was possessed in connection with the offenses of possession of methamphetamine and possession of a stolen vehicle.

But the Sentencing Guidelines firmly imply that the inference in *Justice* is improper. Note 14(B) instructs courts to apply the enhancement where the other felony is a drug trafficking offense and the firearm is in close proximity to drugs, drug manufacturing materials, or drug paraphernalia. In that situation, the Note explains, “the presence of the firearm has the potential of facilitating another felony offense[.]” Whereas Note 14(A) establishes the standard of facilitation or potential to facilitate, and Note 14(B) identifies circumstances where potential to facilitate can be presumed, both provisions read together imply that in cases that lack the circumstances of Note 14(B), a presumption is inapplicable and the court must require sufficient evidence establishing facilitation or potential to facilitate. *Justice* did not involve a drug trafficking offense, but an inference of potential to facilitate was made nevertheless.

In the decision denying Mr. Perry’s appeal, the emboldenment doctrine was applied in automatic fashion to facts that showed nothing more than coincidental presence of a firearm. The court inferred that Mr. Perry possessed a firearm during the vehicular chase because police found the firearm in his possession shortly after the chase, at the conclusion of a foot pursuit. The court did not cite any fact showing what Mr. Perry did with the firearm during the vehicular chase. Based only on inference from the presence of the firearm, the court concluded that “the firearm had the potential to facilitate the felony of endangering others while eluding a police officer.” *Perry*, 2018 U.S. App. LEXIS 7913 at *5. At this juncture the Tenth Circuit, quoting *Justice*, observed that “possession of a firearm may facilitate an offense by

emboldening the possessor to commit the offense”. *Id.* (citing *Justice*, 679 F.3d at 1255). This applied a Note 14(B)-style presumption that the enhancement applied, albeit Note 14(B) factual circumstances did not exist. Such was a misapplication of the guideline.

That the appellate court based emboldenment on mere coincidental presence of the firearm is further confirmed by considering the offense Mr. Perry was said to be emboldened to commit. Under Oklahoma law, the offense of endangering others while eluding or attempting to elude an officer applies to

Any operator of a motor vehicle who has received a visual and audible signal, a red light and a siren from a peace officer driving a motor vehicle... directing the operator to bring the vehicle to a stop and who willfully increases the speed or extinguishes the lights of the vehicle in an attempt to elude such peace officer, or willfully attempts in any other manner to elude the peace officer, or who does elude such peace officer[.]”

Okla. Stat. tit. 21, § 540A.A. Mr. Perry was convicted of a felony version of this offense, applicable when the offense is violated “in such manner as to endanger any other person[.]” *Id.* at 540A.B.

Mr. Perry’s possession of a firearm during the eluding offense obviously could not potentially facilitate any element. Section 540A’s elements require use of a motor vehicle to elude--eluding on foot or by other means is outside the scope of the statute. Mr. Perry’s firearm did not have anything to do with using a vehicle to elude, which is the gist of eluding. The same conclusion is borne out by the facts. According to the Order and Judgment, after the officer activated his emergency lights, Mr. Perry

continued to drive, traveling as fast as 50 miles per hour, and eventually stopped. *Perry*, 2017 U.S. App. LEXIS 25348 at *1. It is nonsensical to say that possessing a firearm made it easier for Mr. Perry to drive or use a vehicle in an effort to elude a police officer.

It is equally nonsensical to say that possessing a firearm could facilitate Mr. Perry's action of endangering another with a motor vehicle. The felony version of eluding, applicable when eluding occurs in a "manner" that endangers someone, is confined to endangerment that occurs while committing the elements of eluding, and excludes endangerment that occurs in some other manner. It requires driving a vehicle in a manner that endangers someone, an act that logically excludes conduct with a firearm. Looking to the facts, endangerment was supported by the pursuing officer's testimony that Mr. Perry's vehicle nearly struck a truck that was being driven on the road. The facts reveal no conduct with a firearm when the near-collision occurred, and the passive possession of a firearm at that time is irrelevant to the elemental question of whether endangerment with the vehicle occurred. The facts not only fail to support a connection, but also establish the absence of a connection or potential facilitation. Driving a vehicle in defiance of an order to stop the vehicle cannot be committed or completed by possessing a firearm.

Section 2K2.1(b)(6)(B) requires a connection between the firearm and the "other" offense. In light of the preceding discussion, it is obvious that there was no connection in the normal sense of the word. Note 14(A) broadly construes connection

as including facilitation or potential facilitation. Yet the same logic holds: there is no way in which possession of the firearm facilitated or potentially facilitated driving a vehicle in a manner that constituted a violation of § 540(A)--the firearm did not potentially make it easier to drive the vehicle or nearly collide with another drive.

By basing the enhancement on emboldenment, the Order and Judgment used a basis that is not in § 2K2.1(b)(6)(B) or the applicable commentary, neither of which mentions emboldenment or a similar term. The emboldenment standard establishes a threshold lower than that which the Sentencing Commission established, which allows the enhancement to be applied in a presumptive way when connection, facilitation, or potential to facilitate are not factually substantiated. Since it is clear from the terms of § 2K2.1(b)(6)(B) and the commentary that Mr. Perry's firearm possession had no connection with the elements of eluding, affirmance on the basis of emboldenment authorized an enhancement that did not qualify under § 2K2.1(b)(6)(B).

Since the emboldenment doctrine is precedential law in the Tenth Circuit, if it is wrong, then improper enhancements clearly have been imposed in district courts within the Tenth Circuit, and will continue to be imposed until this Court intervenes. One such case is *Clark*, in which facts revealing anything more than coincidental possession during a felony were absent, and the Tenth Circuit inferred emboldenment. 94 F. App'x at 774. As demonstrated by *Clark* and *Perry*, emboldenment is a hollow legal standard that requires nothing but coincidental possession of a gun to pass muster. This misconstrues and misapplies § 2K2.1(b)(6)(B).

CONCLUSION

Certiorari review is appropriate reverse the Order and Judgment and remand to the Tenth Circuit with instructions to reconsider the appeal without the emboldenment doctrine and require real proof by a preponderance of evidence that the standards of § 2K2.1(b)(6)(B) are satisfied.

Respectfully submitted,

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