

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Bobby Dale Simmons,

Petitioner,

v.

United States of America,

Respondent.

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

**APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI**

UNITED STATES DISTRICT COURT

Western District of Oklahoma

UNITED STATES OF AMERICA)	JUDGMENT IN A CRIMINAL CASE
v.)	
)	
Bobby Dale Simmons)	Case Number: 5:22-CR-00255-001-G
)	USM Number: 34984-510
)	<u>Traci L Rhone & Julia C Summers</u>
)	Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 of the one-count Indictment filed on June 21, 2022

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 922(g)(1)	Felon in Possession of Firearms	May 14, 2022	1
18 U.S.C. § 924(a)(2)			

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 5, 2024
Date of Imposition of Judgment


CHARLES B. GOODWIN
United States District Judge

April 22, 2024
Date Signed

DEFENDANT: Bobby Dale Simmons
CASE NUMBER: 5:22-CR-00255-001-G

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
NINETY-SIX (96) MONTHS.

The court makes the following recommendations to the Bureau of Prisons:

It is recommended the defendant participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program at a rate determined by Bureau of Prisons staff in accordance with the program.

If eligible, it is recommended the defendant participate in the Residential Drug Abuse Program while incarcerated.

If eligible, it is recommended the defendant be designated to FMC Fort Worth, TX or FCI El Reno, OK.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

By 2 p.m. on _____
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 3 — Supervised Release

Judgment—Page 3 of 7

DEFENDANT: Bobby Dale Simmons
CASE NUMBER: 5:22-CR-00255-001-G

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: TWO (2) YEARS.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
 You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Bobby Dale Simmons
CASE NUMBER: 5:22-CR-00255-001-G

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. Stricken.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's
Signature

Date

DEFENDANT: Bobby Dale Simmons
CASE NUMBER: 5:22-CR-00255-001-G

SPECIAL CONDITIONS OF SUPERVISION

The defendant must submit to a search of his person, property, electronic devices or any automobile under his control to be conducted in a reasonable manner and at a reasonable time, for the purpose of determining possession, or evidence of possession, of firearms, controlled substances, drug paraphernalia, or drug trafficking, at the direction of the probation officer upon reasonable suspicion. Further, the defendant must inform any residents that the premises may be subject to a search.

The defendant shall participate in a program of substance abuse aftercare at the direction of the probation officer to include urine, breath, or sweat patch testing, and outpatient treatment. The defendant shall totally abstain from the use of alcohol and other intoxicants both during and after completion of any treatment program. The defendant shall not frequent bars, clubs, or other establishments where alcohol is the main business. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

The defendant shall participate in a program of mental health aftercare at the direction of the probation officer. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Judgment — Page 6 of 7

DEFENDANT: Bobby Dale Simmons
CASE NUMBER: 5:22-CR-00255-001-G

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
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TOTALS \$ _____ \$ _____

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Bobby Dale Simmons
CASE NUMBER: 5:22-CR-00255-001-G

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 100.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:
 If restitution is not paid immediately, the defendant shall make payments of 10% of the defendant's quarterly earnings during the term of imprisonment.

After release from confinement, if restitution is not paid immediately, the defendant shall make payments of the greater of \$ _____ per month or 10% of defendant's gross monthly income, as directed by the probation officer. Payments are to commence not later than 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the United States Court Clerk for the Western District of Oklahoma, 200 N.W. 4th Street, Room 1210, Oklahoma City, Oklahoma 73102.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number

Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:
 All right, title, and interest in the assets listed in the Preliminary Order of Forfeiture dated September 7, 2023 (doc. no. 58).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

2025 WL 2374700

Only the Westlaw citation is currently available.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Bobby Dale SIMMONS, Defendant - Appellant.

No. 24-6077

|

FILED August 15, 2025

(D.C. No. 5:22-CR-00255-G-1) (W.D. Oklahoma)

Attorneys and Law Firms

David Raymond Nichols, Jr., Office of the United States Attorney, Oklahoma City, OK, for Plaintiff - Appellee.

[Josh Lee](#), [Leah Deborah Yaffe](#), Public Defenders, Office of the Federal Public Defender, Denver, CO, for Defendant - Appellant.

Before [TYMKOVICH](#), [PHILLIPS](#), and [MORITZ](#), Circuit Judges.

ORDER AND JUDGMENT *

***1** Bobby Dale Simmons pleaded guilty to unlawful firearm possession and was sentenced in district court. In determining Simmons' Sentencing Guidelines imprisonment range, the district court applied a four-level enhancement to his offense level pursuant to [U.S.S.G. § 2K2.1\(b\)\(6\)\(B\)](#) because it found Simmons possessed the firearm in connection with another felony offense. On appeal, Simmons argues that the enhancement was improperly applied because there was no coincident felony offense.

We **AFFIRM**. Simmons fails to show the district court plainly erred in applying the enhancement because his prior state drug convictions, listed in the adopted Final Presentence Report, elevate his drug possession charge from a misdemeanor to a felony pursuant to [21 U.S.C. § 844](#).

I. Background

A. Factual Background

Oklahoma City Police Department responded to a reported disturbance at a hotel. They observed Simmons exit the hotel carrying a black case that they suspected held a handgun. He placed the case in his vehicle as OCPD officers tried to detain him. While taking Simmons into custody, the officers saw a revolver on the driver's side floorboard in plain sight. A search of the vehicle uncovered three firearms, ammunition, and small quantities of various drugs. The drugs included: (1) 4.41 grams total package weight of methamphetamine; (2) 2.40 grams total package weight of marijuana; (3) approximately 14.32 grams total package weight of a light brown powdery substance (not tested due to possibility of [fentanyl](#)); (4) five [fentanyl](#) patches; and (5) 19 small blue pills marked "M30" identified on pill identifier as [Oxycodone](#) and one unknown pink pill in the shape of an "X." Also found in the vehicle were numerous items consistent with drug distribution, including scales, glass pipes, torches, and small plastic baggies. OCPD officers identified Simmons as a convicted felon.

Simmons was arrested and charged in the Western District of Oklahoma for one count of unlawfully possessing firearms under [18 U.S.C. § 922\(g\)](#). He pleaded guilty to the single-count indictment without a plea agreement.

While on bond, however, Simmons was again arrested in relation to a shoplifting investigation. During his arrest, officers found drugs in his pocket. The drugs included: (1) two [suboxone](#) pills; (2) 0.8 grams of psilocybin; (3) 8.1 grams of methamphetamine; (4) 2.7 grams of cocaine; and (5) 8.2 grams of marijuana. A search of his car revealed a semi-automatic firearm and ammunition, as well as a pipe, digital scales, and brass knuckles.

B. Simmons' Final PSR and Sentencing Proceeding

Simmons' Final PSR included a four-level enhancement under [U.S.S.G. § 2K2.1\(b\)\(6\)\(B\)](#) for possessing a firearm in connection with another felony offense. Specifically, the relevant paragraph read: "As detailed in the offense conduct, the defendant possessed a firearm *in connection with the felony offense of possession of controlled dangerous substance* including methamphetamine and fentanyl; therefore, pursuant to [U.S.S.G. § 2K2.1\(b\)\(6\)\(B\)](#), a four-level increase is warranted." Vol. III, 35 (emphasis added) (Paragraph 24(a)). No objections were made to this sentencing enhancement before or at the sentencing proceeding.

*2 At sentencing, the district court began by resolving the remaining objections to the Final PSR. Again, none pertained to the four-level enhancement. The court then calculated Simmons' Guidelines imprisonment range. But it did not make additional, explicit findings as to the enhancement apart from its general adoption of the Final PSR. See Vol. III, 142–43. In fact, the court did not specify the exact felony offense, nor did it cite any state or federal statute in applying the enhancement. Simmons' Guidelines imprisonment range was calculated to be 120 to 150 months based on his total offense level of 27 and his criminal history score of 12 (criminal history category of V).¹ A statutory maximum of 10 years applied, however, and thus Simmons' Guidelines imprisonment recommendation was capped at 120 months.

Relying on the [18 U.S.C. § 3553\(a\)](#) factors, the court subsequently presented an individualized assessment of Simmons' history and characteristics and the instant offense to impose an appropriate sentence. Ultimately, the district court varied downward and sentenced Simmons to 96 months of imprisonment and two years of supervised release. The court expressed concern about Simmons' criminal history and drug possession, but recognized his education, military service, completion of a mental intervention program, and the fact that he had no criminal convictions in the five years leading up to the instant offense.

II. Discussion

Simmons appeals his sentence. He argues the felony offense requirement was not satisfied for the sentencing enhancement because: (1) the Final PSR referred to Oklahoma's simple possession statute, a misdemeanor, in its reasoning for the enhancement; and (2) his drug possession offense could not have been elevated from a misdemeanor to a felony under [21 U.S.C. § 844](#) because the categorical approach plainly applies to the statute.

A. Standard of Review

Simmons concedes that the four-level enhancement was not challenged below and thus plain error review applies. We find plain error only when there is: "(1) error, (2) that is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity, or public reputation of judicial proceedings." [United States v. Romero](#), 491 F.3d 1173, 1178 (10th Cir. 2007) (citation omitted). Failure to satisfy even one of the requirements is fatal to Simmons' claim.

B. No Plain Error: 21 U.S.C. § 844

We see no error in the district court's application of the sentencing enhancement, much less a plain one. The adopted Final PSR included Simmons' prior drug-related misdemeanors, which enhance his instant drug possession from a misdemeanor to a felony under 21 U.S.C. § 844. We do not agree with Simmons that the categorical approach plainly applies to the federal statute.

Under federal law, simple possession of drugs—though generally a misdemeanor under Oklahoma and federal statute—becomes a felony offense when committed after a prior drug conviction that is final under state law. *See 21 U.S.C. § 844(a)*. The statute provides:

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both, *except that if he commits such offense after a prior conviction under this subchapter or subchapter II, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final*, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years

*3 *Id.* (emphases added).

To begin, Simmons argues we cannot rely on 21 U.S.C. § 844 because the district court considered only Oklahoma's simple possession statute in applying the enhancement. Specifically, Simmons underscores that Paragraph 24(a) of the Final PSR used the term *controlled dangerous substance*, a term that he claims can only refer to the state statute.² Aplt. Br. 8–9 (citing OKLA. STAT. ANN. tit. 63, § 2-101 to § 2-1101). But the Final PSR did not cite or limit its analysis of the enhancement to only Oklahoma's simple possession statute in justifying the enhancement, nor did it use the term, "simple." In other words, the text of the Final PSR does not require nor restrict us from relying on only one, or even a specific, authority. Rather, we read Paragraph 24(a) to explain that Simmons' possession of *controlled dangerous substances* under Oklahoma law is to be heightened from a misdemeanor to a felony under § 844 due to Simmons' prior drug-related criminal history. To assume the Final PSR was *only* referring to the Oklahoma statute, and that it is mutually exclusive with any reliance or application of the federal statute, is too rigid of an interpretation that is unsupported by the record.³

We find 21 U.S.C. § 844 supports Simmons' enhancement. While it is true that Simmons was found possessing allegedly small quantities of drugs that amount only to misdemeanor quantities, Simmons' prior, final state drug convictions convert his misdemeanor offense to a felony. Simmons' long rap sheet includes numerous state drug-related offenses, which were explicitly listed in the Final PSR, unobjected to, and adopted by the court. *See FED. R. CRIM. P. 32(i)(3)* (a sentencing court "may accept any undisputed portion of the presentence report as a finding of fact[.]"); *United States v. Hooks*, 551 F.3d 1205, 1217 (10th Cir. 2009) ("If a defendant fails to specifically object to a fact in the PSR, the fact is deemed admitted by the defendant and the government need not produce additional evidence in support of the admitted fact." (citation omitted)). The Final PSR stated, for example:

- *4 • In 2014, Simmons pleaded guilty and was sentenced to 12 years, suspended, with supervised probation for possession of a controlled dangerous substance with intent to distribute (1.65 grams of meth) in Oklahoma state court.
- In 2016, Simmons pleaded guilty and was admitted to mental health court for possession of a controlled dangerous substance (6.4 grams of meth) in Oklahoma state court.

Vol. III, 9–16.

Simmons counters that it was *plainly* erroneous to not apply the categorical approach in determining whether a prior drug conviction constitutes a "drug, narcotic, or chemical offense" under 21 U.S.C. § 844.⁴ Aplt. Br. 13. He argues that the state

statutes under which he was previously convicted are *plainly* overbroad and do not categorically match the federal definition to elevate his misdemeanor to a § 844 felony.

“An error is plain ‘when it is contrary to well-settled law.’” *United States v. Thornton*, 846 F.3d 1110, 1118 (10th Cir. 2017) (quoting *United States v. Ruiz-Gea*, 340 F.3d 1181, 1187 (10th Cir. 2003)). And “[f]or that inquiry[,] we look to whether the Supreme Court or the Tenth Circuit has addressed the issue.” *Id.* (quoting *Ruiz-Gea*, 340 F.3d at 1187).

Here, even if there was an error, it does not surpass the “plain” prong because it is not clearly established that the categorical approach applies to § 844. First, Simmons notes there is no caselaw directly on point and instead leans on cases in which the categorical approach was applied to allegedly analogous statutes.⁵ But those cases did not address the federal statute before us. Second, an unpublished decision in this Circuit declined to hold that the district court should have applied the categorical approach to determine whether a defendant’s Missouri drug offense was a “prior [drug] conviction” under 21 U.S.C. § 844(a). *United States v. Shaw*, No. 22-3251, 2023 WL 3335596, at *2 (10th Cir. May 10, 2023).⁶ We clarified in *Shaw* that “§ 844(a) does not require the prior offense to be a violation of [the Federal Controlled Substance] Act. It simply refers to ‘any drug, narcotic, or chemical offense chargeable under the law of any State.’” *Id.* at *4. And tellingly, we found that “[a]lthough the categorical approach applies to serious drug offenses under the ACCA, it does not pertain to § 844(a).” *Id.* Simmons’ arguments analogizing § 844 to seemingly parallel statutes is thus unconvincing and, even if the district court erred, it was not plain error given a persuasive circuit case on the matter.

***5** Accordingly, we find the district court did not plainly err in applying the four-level sentencing enhancement to Simmons.⁷

III. Conclusion

It is a party’s responsibility to timely seek clarification of a defendant’s sentence, and to timely object or challenge sentencing adjustments or related facts in the Final PSR. Even though we agree that the district court could have more thoroughly explained its reasoning, application of the sentencing enhancement did not amount to plain error.

Thus, for the foregoing reasons, we affirm.⁸

MORITZ, Circuit Judge, dissenting.

The majority concludes that Simmons qualifies for a four-level enhancement under *United States Sentencing Guidelines* § 2K2.1(b)(6)(B) because he possessed a firearm in connection with a felony. Specifically, the majority concludes that Simmons committed federal felony drug possession, violating 21 U.S.C. § 844. But there’s a problem with that view: the district court never specified which felony justifies the enhancement. The district court adopted the presentence investigation report (PSR) in full without directly addressing the enhancement. And the PSR—the only place in the record that discusses the enhancement—never mentions § 844.

***6** The PSR recommended that Simmons receive a four-level enhancement for possessing “a firearm in connection with the felony offense of possession of controlled dangerous substance[s] including methamphetamine and fentanyl.” R. vol. 2, 35. The majority reads this sentence “to explain that Simmons’[s] possession of controlled dangerous substances under Oklahoma law is to be heightened from a misdemeanor to a felony under § 844 due to Simmons’[s] prior drug-related criminal history.” Maj. Op. 6 (cleaned up). That’s not a reading of the PSR—that’s conjuring a felony from thin air.

I would remand this case for the district court to explain which felony it used to apply the enhancement. The majority’s use of § 844 makes a remand all the more necessary because the one hint that the PSR *does* provide does not point to § 844. The parties agree that the PSR’s use of the phrase “the felony offense of possession of controlled dangerous substance[s]” references

Oklahoma law. Indeed, Oklahoma's drug laws appear in its "Uniformed Controlled Dangerous Substances Act." Okla. Stat. tit. 63, ch. 2. And there's a fatal flaw with invoking Oklahoma's drug laws as the predicate felony for the enhancement: drug possession is a misdemeanor under Oklahoma law, not a felony. [Okla. Stat. tit. 63 § 2-402\(A\)\(1\)](#) ("It shall be unlawful for any person knowingly or intentionally to possess a controlled dangerous substance."); *id.* [§ 2-402\(B\)\(1\)](#) ("Any person who violates this section is guilty of a misdemeanor punishable by confinement for not more than one ... year.").

So if the district court invoked Oklahoma's drug-possession law to justify the enhancement—and the signs suggest that it did—then the district court erred. Such an error would be plain, too, given the plain language of the Oklahoma statute and the Guidelines' definition of a felony offense under [§ 2K2.1\(b\)\(6\)\(B\)](#). *See United States v. Arellanes-Portillo*, 34 F.4th 1132, 1140 (10th Cir. 2022) ("Error may be plain based on the text of statutes or Guidelines."). Erroneously applying [§ 2K2.1\(b\)\(6\)](#) also satisfies the third and fourth prongs of plain-error review because the four-level enhancement increased Simmons's Guidelines range from 84 to 105 months to 120 months, [U.S.S.G. ch. 5 pt. A](#) (sentencing table), causing obvious prejudice that requires reversal, *United States v. Sabilion-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014) ("[A]n obvious misapplication of the sentencing guidelines will usually satisfy the third and fourth elements of the plain[-]error test."); *id.* ("[W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?"').

Perhaps the district court erred. Perhaps the district court meant to invoke [§ 844](#). But rather than read the PSR to say something it doesn't, I would remand this case. I respectfully dissent.

All Citations

Not Reported in Fed. Rptr., 2025 WL 2374700

Footnotes

- * This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with [Fed. R. App. P. 32.1](#) and [10th Cir. R. 32.1](#).
- 1 Without the four-level enhancement, Simmons' offense level would have been 23. The Guidelines range for an offense level of 23 and a criminal history category of V is imprisonment of 84 to 105 months.
- 2 [OKLA. STAT. ANN. tit. 63, § 2-101](#) (" 'Controlled dangerous substance' means a drug, substance or immediate precursor in Schedules I through V of the Uniform Controlled Dangerous Substances Act or any drug, substance or immediate precursor listed either temporarily or permanently as a federally controlled substance."). [21 U.S.C. § 844](#) similarly uses the term, *controlled substance*. [21 U.S.C. § 802\(6\)](#) ("The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.").
- 3 Simmons argues that the government "implicitly asks for affirmance on alternative grounds" by relying on [§ 844](#). *Aplt. Reply 10*. He maintains that the government waived this argument because it did not "brief the appropriate standard of review." *Id.* at 5–6, 10. But for the reasons explained, we disagree that reliance on the federal statute is an *alternative* argument.
- 4 "[W]hen the language of the enhancement confines the court's inquiry to the terms of the statute of conviction, courts employ the categorical approach, looking not to the particular facts of the prior conviction but to the terms of the underlying statute." *United States v. Martinez-Hernandez*, 422 F.3d 1084, 1086 (10th Cir. 2005) (cleaned up).

5 *See, e.g.*, [United States v. Cantu](#), 964 F.3d 924, 926 (10th Cir. 2020) (applying the categorical approach to “determine whether a state [Oklahoma] conviction was for a serious drug offense” under the Armed Career Criminal Act); [United States v. Herrera-Roldan](#), 414 F.3d 1238, 1241 (10th Cir. 2005) (applying a categorical approach to a Texas statute based on Guidelines text).

6 Unpublished cases are not binding precedent, but we consider them for their persuasive value. *See* [FED. R. APP. P. 32.1](#); [10th Cir. R. 32.1](#).

7 Based on the district court's findings, it is doubtful Simmons could demonstrate the alleged errors prejudiced him. [United States v. Gonzalez-Huerta](#), 403 F.3d 727, 733 (10th Cir. 2005) (“To meet this burden, the appellant must show ‘a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.’ ” (citation omitted)); [United States v. Mendoza](#), 543 F.3d 1186, 1194 (10th Cir. 2008) (“The party that failed to raise the issue below bears the burden of establishing this probability.” (citation omitted)). In sentencing Simmons, the court recognized that he possessed, on two occasions, “paraphernalia used in the consumption and the sale of illegal drugs[,]” including pipes, scales, torches, small plastic baggies. Vol. III, 31–32; Vol. II, 5–7 (Final PSR). Relatedly, the Guidelines provide that “the enhancement applies ‘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’ ”, [United States v. Tobanche](#), 643 F. App'x 781, 783 (10th Cir. 2016) (emphasis added) (unpublished), because “the presence of the firearm has the potential of facilitating another felony offense.” [U.S.S.G. § 2K2.1\(b\)\(6\)\(B\)](#) cmt. 14(B)(ii). Ultimately, we do not reach the question of whether there is a reasonable probability the sentencing enhancement would have been applied to Simmons regardless of the alleged errors based on the adopted facts suggesting he intended to distribute drugs—even so, Simmons cannot satisfy the second prong of the plain error standard.

8 Simmons argued in his appellate brief, for preservation purposes only, that his conviction must be vacated because [18 U.S.C. § 922\(g\)\(1\)](#) is plainly unconstitutional, both on its face and as applied to him. While his appeal was pending, we clarified in [Vincent v. Bondi](#) that [§ 922\(g\)\(1\)](#) is constitutional under the Second Amendment “without drawing constitutional distinctions based on the type of felony involved.” [127 F.4th 1263, 1266 \(10th Cir. 2025\)](#) (citations omitted). Simmons therefore cannot demonstrate plain error as to his preserved argument.

Supreme Court of the United States

Office of the Clerk

Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

November 5, 2025

Clerk
United States Court of Appeals for the Tenth
Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

Re: Bobby Dale Simmons
v. United States
Application No. 25A517
(Your No. 24-6077)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on November 5, 2025, extended the time to and including December 15, 2025.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by


Pipa Fisher
Case Analyst

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Ms. Leah D. Yaffe
Office of the Federal Public Defender
633 17th Street, Suite 1000
Denver, CO 80202

Mr. D. John Sauer
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Clerk
United States Court of Appeals for the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257
