
No. _____

SHAWN DURRAH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA

Respondent-Appellee.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

1. To resolve a circuit split, this Court should grant the Writ to determine whether, in applying the dangerous weapon enhancement U.S.S.G. § 2D1.1(b)(1), mere presence of a firearm and a nexus to narcotic activity is sufficient to apply the dangerous weapon enhancement for cases involving distribution of illegal narcotics?

LIST OF PARTIES AND RELATED CASES

1. Mr. Durrah and United States appear in the caption.
2. There are no related cases.

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CITATIONS TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

8th Circuit Court of Appeals – *United States v. Shawn Durrah* – 23-3127

A – Order Denying En Banc Review (July 26, 2024)

B – Judgment (June 5, 2024)

C – Opinion Affirming Judgment (June 5, 2024)

D – Order Appointing Criminal Justice Act Counsel (Sept. 21, 2023)

District Court in the Southern District of Iowa – *United States v. Shawn Durrah*, No. 3:22-CR-24-SMR-SBJ

E – Notice of Appeal (Sept. 20, 2023)

F – Judgment (Sept. 19, 2023)

JURISDICTION

This is an appeal from a combined federal criminal judgment arising in the Southern District of Iowa. On September 19, 2023, Mr. Durrah received a 250 month sentence. Judgment, App. F. On September 20, 2023, Defendant filed a timely notice of appeal. Notice of Appeal, App. E. See Fed. R. App. Proc. 4 (b) (1) (A) (i) (appeals must be filed within 14 days of final judgment). Notice, App. E.

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

The 8th Circuit has jurisdiction over all federal criminal judgments and sentences. See 28 U.S.C. § 1291.

The jurisdiction of this Court is invoked under § 28 U.S.C. §1254(1).

TIMELINESS

The 8th Circuit affirmed the conviction on June 5, 2024. Judgment and Panel Decision; Appx. B and C. On July 26, 2024, the 8th Circuit denying Mr. Durrah's Petition for En Banc Review. Order, Appx. A. This Petition is filed within 90 days of that date. See US Supreme Court Rule 13 (1) ("A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."). The 90th day falls on October 24, 2024.

A document is considered timely filed if it were delivered on "if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing, or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days." Supreme Court Rule 29.2. This document was mailed via United States Postal Service on October 24, 2024, and post marked for delivery on that date. Thus, it is timely filed since it was sent and postmarked on October 24, 2024.

GUIDELINE PROVISIONS INVOLVED

U.S.S.G. § 2D1.1 (b) (1)

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

STATEMENT OF THE CASE

Relevant Course of Proceedings

On September 19, 2023, in the United States District Court for the Southern District of Iowa, the Honorable Stephanie M. Rose sentenced the Defendant-Appellant, Shawn Durrah, to a term of 250 months imprisonment. Appx. F. Mr. Durrah had entered a plea of guilty to two counts: Conspiracy to Distribute 50 or more grams of methamphetamine, in violation of 18 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846; and Distribution of 50 or more grams of methamphetamine. Appx. C.

Mr. Durrah's sentence was imposed after the Court overruled his objections to a two-level enhancement for possession of a firearm during a drug trafficking offense under U.S.S.G. § 2D1.1(b)(1). Appx. C. The Court found the enhancement

proper despite arguments that the government had failed to prove by a preponderance that the firearm was connected to Mr. Durrah's drug trafficking activities. Appx. F.

Mr. Durrah filed a timely notice of appeal on September 20, 2023. The Eighth Circuit affirmed the district court's judgment on June 5, 2024. Appx. C. A petition for rehearing en banc was denied on July 26, 2024. Appx. A.

Facts

The Government called one witness, Emily Rasche, to support this enhancement. She testified that the CI advised that Mr. Durrah possessed a 9MM handgun, which he left in the center console of the vehicle during any drug transaction. Sent. Tr. 9, R. Doc. 62. She also identified several Facebook messages in which Mr. Durrah mentioned selling a gun to a buyer. Sent. Tr. 11, R. Doc. 62. She also identified threats that Mr. Durrah actually made to the informant. Sent. Tr.

On cross-examination, Officer Rasche admitted that the gun referenced in Paragraph 22 was located in the backseat and that Mr. Durrah was the driver of the vehicle. Sent. Tr. 17, R. Doc. 62. Mr. Durrah did not make any admission about the firearm. Sent. Tr. 17, LL 17-25. R. Doc. 62. In reference to the Facebook photos, she was not able to determine the subject who possessed the firearm in the Facebook photos. Sent. Tr. 18, LL 21-25. R. Doc. 62. She also confirmed that she

had no knowledge about simultaneous drug and firearm sales with Mr. Durrah during the Facebook. Sent. Tr. 19, LL 10-18. Later, she said that Mr. Durrah was bragging about selling firearms and methamphetamine. Sent. Tr. 19, LL 22-25, R. Doc. 62. However, she later acknowledged that those messages occurred nearly 8 months part, with the methamphetamine related communication occurring in October of 2020 while the firearm related communication occurred in June of 2021. Sent. Tr. 20, R. Doc. 1-10.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CIRCUIT SPLIT AS TO WHETHER U.S.S.G. § 2D1.1 (b) (1) REQUIRES A NEXUS TO AND MORE THAN MERE PRESENCE DURING DRUG DEALING ACTIVITY TO APPLY THE DANGEROUS WEAPON ENHANCEMENT.

A. Rule 10 (a) and (c)

The Writ should be granted to resolve a circuit split as to whether this guideline contains to resolve a circuit split as the application of the dangerous weapon standard and to also resolve an important question of federal law. See Supreme Court Rule 10 (a) (Writ may be granted if there is circuit split on important federal questions) and (c) on the basis of an important question of federal law.

B. The Guideline and the 8th Circuit's Resolution of the Guideline.

The 8th Circuit adopted in full the District Court's analysis the dangerous weapon enhancement. It stated:

Under U.S.S.G. § 2D1.1(b)(1), the court must apply a two-level enhancement if the government proves "by a preponderance of the evidence that the defendant possessed 'a dangerous weapon (including a firearm)' while violating 21 U.S.C. § 841(b)." *United States v. Savage*, 414 F.3d 964, 966 (8th Cir. 2005), quoting U.S.S.G. § 2D1.1 (b)(1). The weapon must be connected to the criminal activity for the enhancement to apply, but the government "need not show that a defendant used or even touched [the] weapon." *Id.* at 966-67. It is sufficient that the firearm be "readily accessible" during the illegal activities. *Id.* at 967. Although "mere presence" is not sufficient, the enhancement applies "unless it is clearly improbable that the weapon was connected with the offense." *Id.* at 966.

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Applying the standard to Mr. Durrah's case, it adopted the District Court's analysis in full:

With respect to the gun, again, here I think even if we don't rely on anything that's contested that the cooperating informant said, I still think there's a preponderance of the evidence that establishes the gun under, Mr. Cole, as you've acknowledged, the very unfavorable case law that exists in the Eighth Circuit about these matters.

First, in paragraph 22, there's the outlining of this traffic stop that happened in November of 2021 when they-law enforcement seized somewhere between 75 and 100 fentanyl pills. Defendant gives them a false statement during that traffic stop, and they end up finding a firearm in that car that he's driving.

Added to that, you've got this search of Defendant's phone and social media accounts that has all this information about him selling drugs and guns. And that's uncontested in paragraph 25, in particular the messages which Ms. Zaehring highlighted in her sentencing memo, paragraphs 27, subpart (d) through subpart (e).

I find all of that, without the controlled----or the cooperating source's information, is sufficient to establish by a preponderance of the evidence that Defendant possessed a gun in connection with his drug activities, and in particular when you add in then-even if you give limited weight to what the cooperating source said, that just corroborates the other information that isn't contested. So I do find that adjustment applies as well.

Appx. p. 3. The Panel here concluded that "Firearms are tools of the drug trade," and the district court did not err in finding Durrah possessed a dangerous weapon in connection with his drug distribution. *See United States v. Renteria-Saldana*, 755 F.3d 856, 859 (8th Cir. 2014) (holding that a loaded gun at a house with drugs is enough to show a connection between the firearm and the drug trafficking offense, even if the defendant was not home at the time).

C. The 8th Circuit's "Tools of the Trade" Argument is so Broad to be No Standard at All.

Any enhancement that is a true enhancement should be matched with a standard that ensures that it does not apply in every case, no matter how tenuous the firearm is to drug dealing activity. The standard effectively is: drugs plus gun and "voila!" the enhancement applies.

In *United States v. Renteria-Saldana*, 755 F.3d 856 (8th Cir. 2014), the Eighth Circuit held that a loaded gun found in a defendant's home, along with drugs, was sufficient to support the enhancement, even though the defendant was not home at the time. The court stated that "firearms are tools of the drug trade" and that their presence in a location where drug trafficking occurs is enough to

show a connection between the firearm and the drug trafficking offense.

D. The 8th Circuit’s Standard Conflicts with the 9th, and 10th, 11th Circuits.

The 8th Circuit requires a nexus between the firearm and the drug activity and in addition, has made clear that “mere presence” is not enough unless it is clearly improbable that it was associated with the drug dealing activity.

- In Contrast to 8th Circuit, 11th Circuit Standard Allows “Mere Presence” to Support the Enhancement

In contrast to 8th Circuit, the 11th Circuit has held that “mere presence” is enough to support the enhancement. To meet the standard, the 11th Circuit requires the Government to “prove that the firearm was used to facilitate the distribution of drugs for the firearms enhancement to apply; its mere presence during the drug offense is sufficient.” *United States v. Audain*, 254 F.3d 1286, 1289 (11th Cir. 2001). Evidence of “proximity between guns and drugs, without more, is sufficient to meet the government's initial burden under § 2D1.1(b)(1).” *United States v. Carillo-Ayala*, 713 F.3d 82, 91–92 (11th Cir. 2013).

- In Contrast to 8th Circuit, the 9th Circuit Does not Require a Nexus Between Firearm and Drug Activity and Allows “Mere Presence” to Apply the Enhancement

The 9th Circuit does not even require a nexus to the criminal activity. In *United States v. Restrepo (Diego)*, 884 F.2d 1294, 1296 (9th Cir.1989), that “in applying § 2D1.1(b)(1) the court need not find a connection between the firearm

and the offense. If it finds that the defendant possessed the weapon during the commission of the offense, the enhancement is appropriate.” The enhancement may be applied “if the weapon was present” unless it is “clearly improbable that the weapon was connected with the offense.” U.S.S.G. § 2D1.1, Commentary.

- **The 10th Circuit Requires a Nexus and a Temporal and Spatial Relation to the Drugs.**

From a Defendant’s point of view, the 10th Circuit’s standard appears the most relaxed. It also applies if the “the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.” U.S.S.G. § 2D1.1 cmt. app. n.11(A). The government bears the initial burden of proving the enhancement appropriate by a preponderance of the evidence, and can meet that burden by showing “that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant.” *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1185 (10th Cir.2004) (quoting *United States v. Pompey*, 264 F.3d 1176, 1180 (10th Cir.2001)). This nexus “may be established by showing that the weapon was located nearby the general location where drugs or drug paraphernalia are stored or where part of the transaction occurred.” *Id.*

Based upon that standard, the 10th Circuit found that the enhancement did not apply because there was no nexus or physical or temporal proximity to the drugs.

The government acknowledged at sentencing that the gun was delivered

“after the actual controlled purchase [was] completed,” 3 R. 60, and the court found that there was no evidence the gun was carried during the drug transaction, 3 R. 68–69. Yet it appears from the sentencing transcript that the district court believed the gun was “present” for purposes of the enhancement. 3 R. 67. That conclusion might have been based on the court's finding that the gun purchase was discussed during the drug transaction, 3 R. 68, or that the gun was delivered to someone Mr. Castro–Perez knew to be a “drug customer,” 3 R. 69. But neither fact establishes that the gun was physically located near drugs or a drug transaction.

United States v. Castro-Perez, 749 F.3d 1209, 1211 (10th Cir. 2014)

E. Without a tightly and easily identifiable standard, this guideline could substantially infringe upon the right to bear arms.

The 2nd Amendment obviously does not confer a right to use or deploy firearms to facilitate drug offenses, but as a stand alone matter, it does confer an individual right to bear arms. *D.C. v. Heller*, 554 U.S. 570, 595, 128 S. Ct. 2783, 2799, 171 L. Ed. 2d 637 (2008) (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”). To avoid unnecessarily infringing upon Defendant’s right to bear arms, the Court should adopt a standard that is easy to apply and require a demanding nexus to the commission of the crime itself. This Court has never addressed this issue and as a result, the lower courts are applying the standard in an unpredictable way, resulting disparate outcomes by happenstance of geography. This Court should grant the Writ to ensure uniformity on this important issue.

CONCLUSION AND REQUESTED RELIEF

The Court should grant the Writ and order briefing.

RESPECTFULLY SUBMITTED,



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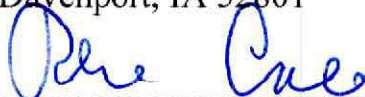
CERTIFICATE OF SERVICE

I, Rockne Cole, counsel for Petitioner, hereby certify that, on October 24, 2024, I mailed an original and 10 copies to the Supreme Court via United States Postal Mail to:

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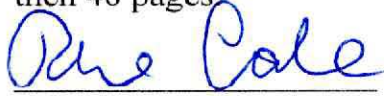
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CERTIFICATE OF WORD COUNT

I, Rockne Cole, certify that the above Petition includes 2572 words and was prepared in 14 Point New Times Roman, in Word and therefore, complies with US Supreme Court Rule 33.1, and it also complies with Rule 33.2 as it contains less than 40 pages



Rockne Cole