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## PREVIEW; United States v. Milton: *Application of a Sentencing Enhancement Where a Firearm is Possessed in Connection with a Simple Drug Offense*

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**PREVIEW; United States v. Milton: Application of a  
Sentencing Enhancement Where a Firearm is Possessed in  
Connection with a Simple Drug Offense**

**Lauren Amongero\***

The Ninth Circuit Court of Appeals is scheduled to hear oral argument in this matter on Monday, July 6, 2020, at 1:00 p.m., in the 2nd Floor Courtroom of the Pioneer Courthouse in Portland, Oregon. Anthony R. Gallagher will likely appear on behalf of the Appellant. Kurt G. Alme will likely appear on behalf of the Appellee.

**I. INTRODUCTION**

United States Sentencing Guidelines (USSG) § 2K2.1(b)(6)(B) states “[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense . . . increase by 4 levels.”<sup>1</sup> The United States District Court of the District of Montana in Billings found that the enhancement applied in this case.<sup>2</sup>

The question presented here is whether the district court properly applied the four-level sentence enhancement under USSG § 2K2.1(b)(6)(B) where the defendant possessed a firearm in connection with a drug offense.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

On August 15, 2018, Chad Milton was arrested and subsequently charged by indictment with one-count of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1) (2018).<sup>3</sup> While parked at a gas station, an officer observed Milton in a car “digging” underneath the driver’s side dash.<sup>4</sup> Officers initiated a traffic stop after a license plate search revealed that the plate did not match the car.<sup>5</sup> During the stop, officers noticed a digital scale in the center console and believed Milton was under the influence of drugs because he had “sunken eyes, a slight build, and marks on his arms.”<sup>6</sup> Milton signed a consent form authorizing officers to search the car.<sup>7</sup> Officers discovered loose rounds of .40 caliber ammunition in a bag and a loaded .40 caliber magazine on the driver’s side floorboard.<sup>8</sup> Milton was then pat-searched for weapons and officers found a small case containing .3 grams of methamphetamine, .4 grams of heroin, five

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<sup>1</sup> U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(6)(B) (U.S. SENTENCING COMM’N 2018).

<sup>2</sup> Brief of Defendant–Appellant, *United States v. Milton*, 2019 WL 5491644 at \*2–5 (D. Mont. Oct. 17, 2019) (No. 19-30139).

<sup>3</sup> *Id.* at \*1-4.

<sup>4</sup> Answering Brief of the United States, *United States v. Milton*, 2019 WL 7494592 at \*4 (D. Mont. Dec. 20, 2019) (No. 19-30139).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*5-6.

<sup>7</sup> Brief of Defendant–Appellant, *supra* note 2, at \*5.

<sup>8</sup> *Id.*

Hydromorphone pills, spoons containing residue, and multiple syringes on his person.<sup>9</sup> Officers continued to search the car and located an unloaded .40 caliber pistol under the driver’s side dash area behind the pedals.<sup>10</sup>

Milton pled guilty to the indictment.<sup>11</sup> At sentencing, the district court determined that a four-level sentencing enhancement applied under USSG § 2K2.1(b)(6)(B) because Milton possessed a firearm in connection with another felony offense—drug possession.<sup>12</sup>

The district court made two factual findings and concluded that the enhancement applied because (1) the firearm and the drugs were “easily accessible” to Milton; and (2) possession of the firearm in public and in the car emboldened Milton’s drug possession.<sup>13</sup> The district court reasoned that the magazine and the firearm were accessible and could have been loaded “in a relatively short period of time.”<sup>14</sup> The court also noted that the officers observed Milton digging under the dash, which indicates he was aware of the firearm’s presence.<sup>15</sup>

The district court sentenced Milton to thirty-seven months imprisonment followed by three years of supervised release.<sup>16</sup> Milton objected to the sentencing enhancement and filed a timely appeal.<sup>17</sup>

### III. SUMMARY OF ARGUMENTS

#### A. Appellant Chad Milton

Appellant argues that the district court incorrectly applied the four-level enhancement under USSG § 2K2.1(b)(6)(B) because he did not possess the firearm “in connection with” the drug possession.<sup>18</sup>

Appellant notes that in 2006 the United States Sentencing Commission added Application Note 14(A), which states that § 2K2.1(b)(6)(B) applies “if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense.”<sup>19</sup> Thus, Appellant contends that for an underlying offense of simple possession, the district court must find that the firearm *facilitated* the drug offense in order to apply the enhancement.<sup>20</sup>

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<sup>9</sup> Answering Brief of the United States, *supra* note 4, at \*6.

<sup>10</sup> *Id.* at \*7.

<sup>11</sup> Brief of Defendant–Appellant, *supra* note 2, at \*3.

<sup>12</sup> Answering Brief of the United States, *supra* note 4, at \*8.

<sup>13</sup> *Id.* at \*1–2.

<sup>14</sup> *Id.* at \*9.

<sup>15</sup> *Id.*

<sup>16</sup> Brief of Defendant–Appellant, *supra* note 2, at \*3.

<sup>17</sup> *Id.* at \*3–6.

<sup>18</sup> *Id.* at \*6.

<sup>19</sup> *Id.* at \*7; U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(6)(B) Application nn. 14(A) (U.S. SENTENCING COMM’N 2018).

<sup>20</sup> Brief of Defendant–Appellant, *supra* note 2, at \*7 (emphasis added); *United States v. Blankenship*, 552 F.3d 703, 705–06 (8th Cir. 2009) (reversing the district court’s sentencing

Appellant contends that accessibility of the firearm is a determinative factor in whether the firearm facilitated the drug offense.<sup>21</sup> He distinguishes his situation from *United States v. Routon*,<sup>22</sup> where this Court interpreted the “in connection with” language of § 2K2.1(b)(6)(B).<sup>23</sup> There, the defendant always kept a firearm accessible between the driver and front passenger’s seat when he drove the car he stole; therefore, the Ninth Circuit held that his illegal conduct was emboldened by the firearm.<sup>24</sup> Appellant argues that these facts are distinguishable from *Routon*, because, here, the firearm was not accessible.<sup>25</sup> He argues the firearm was not observable inside the car, the ammunition was not discovered until after the officers searched the car, and the unloaded firearm remained undiscovered until a more extensive search was conducted.<sup>26</sup> Appellant cites *United States v. Pinex*,<sup>27</sup> an unpublished opinion where this Court held that a firearm locked in a suitcase in the trunk of a car, along with drugs, did not support a finding that the firearm emboldened the drug possession.<sup>28</sup>

Appellant concludes that proximity of the firearm and drugs alone cannot justify the enhancement without a finding that the firearm was accessible during, or emboldened, the drug offense.<sup>29</sup> In summary, Appellant maintains that the firearm did not embolden the drug possession, because he only possessed user amounts of drugs and the firearm was unusable and inaccessible.<sup>30</sup>

#### B. Appellee *United States of America*

Appellee argues that the enhancement was properly applied based on two key factual findings: (1) the firearm and the drugs were both easily accessible; and (2) the possession of the firearm in public and in the car emboldened the drug possession offense.<sup>31</sup>

Appellee first argues that it is clear that the firearm was accessible to Milton because he was seen digging under the dash, where the firearm was located, and the drugs were found on his person.<sup>32</sup> Appellee contends that Milton most likely noticed the officer at the gas station and hid the

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enhancement because there were no findings that the loaded firearm found in the car facilitated the user amount of drugs possessed).

<sup>21</sup> Brief of Defendant–Appellant, *supra* note 2, at \*11.

<sup>22</sup> 25 F.3d 815 (9th Cir. 1994).

<sup>23</sup> *Id.* at 817.

<sup>24</sup> *Id.* at 816–19.

<sup>25</sup> Brief of Defendant–Appellant, *supra* note 2, at \*11.

<sup>26</sup> *Id.*

<sup>27</sup> 720 Fed. App’x 345, 348 (9th Cir. 2017).

<sup>28</sup> *Id.* at 348.

<sup>29</sup> Brief of Defendant–Appellant, *supra* note 2, at \*12.

<sup>30</sup> *Id.* at \*11–12.

<sup>31</sup> Answering Brief of the United States, *United States v. Milton*, 2019 WL 7494592 at \*19 (D. Mont. Dec. 20, 2019) (No. 19-30139).

<sup>32</sup> *Id.* at \*14.

firearm.<sup>33</sup> Appellee argues that, as in *Routon*, the firearm was in the driver's seat area and was therefore accessible.<sup>34</sup>

Appellee also argues that possession of the firearm in public and in the vehicle emboldened Milton's drug offense.<sup>35</sup> Appellee asserts four ways that the firearm emboldened the drug possession: (1) during the stop, Milton appeared to be under the influence of drugs; (2) Milton may have felt less safe possessing the drugs in public without the firearm; (3) the scale, spoons, and syringes could be evidence that Milton was sharing the drugs with others; and (4) the five Hydromorphone pills have a high street value that may have also led Milton to carry the firearm.<sup>36</sup>

Last, Appellee argues that the enhancement should apply because Milton possessed more than a residue amount of drugs.<sup>37</sup> Appellee notes that courts have stated that the "inference that a firearm is for protection of drugs is allowable when the amount of drugs is more than residue."<sup>38</sup>

#### IV. ANALYSIS

The Ninth Circuit must determine whether the district court abused its discretion in applying the enhancement.<sup>39</sup> To answer whether the firearm was used "in connection with" (whether it facilitated or had the potential to facilitate) the drug possession, the Court must decide whether the firearm was accessible or emboldened the offense.

Both parties agree that Application Note 14(A) clarified that in cases of simple possession, a district court may apply the sentencing enhancement under § 2K2.1(b)(6)(B), but only if the court makes a factual finding that the firearm facilitated the drug offense.<sup>40</sup> Here, the parties disagree whether the firearm facilitated Milton's drug offense. Conversely, Application Note 14(B) states that the sentencing enhancement is warranted when firearms and drugs are found in the same location in drug trafficking offenses.<sup>41</sup> Therefore, when the underlying offense is simple drug possession, spatial proximity between the firearm and the drugs alone does not warrant the enhancement; rather, there must also be a finding of facilitation.<sup>42</sup>

In determining the outcome of this case, the Ninth Circuit will look to the precedent established in *Routon* and *Pinex*. In *Pinex*, this Court held the firearm was not accessible, noting that the defendant would have

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<sup>33</sup> *Id.* at \*15.

<sup>34</sup> *Id.* at \*15–16; *United States v. Routon*, 25 F.3d 815, 819 (9th Cir. 1994).

<sup>35</sup> Answering Brief of the United States, *supra* note 4, at \*16.

<sup>36</sup> *Id.* at \*17–18.

<sup>37</sup> *Id.* at \*18.

<sup>38</sup> *Id.* at \*13.

<sup>39</sup> Brief of Defendant–Appellant, *United States v. Milton*, 2019 WL 5491644 at \*6 (D. Mont. Oct. 17, 2019) (No. 19-30139).

<sup>40</sup> *Id.*; Answering Brief of the United States, *supra* note 4, at \*11–12.

<sup>41</sup> *United States v. Blankenship*, 552 F.3d 703, 705 (8th Cir. 2009); U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(6)(B) Application nn. 14(B) (U.S. SENTENCING COMM'N 2018).

<sup>42</sup> *Blankenship*, 552 F.3d at 705.

to make a “significant effort” to access the firearm locked in a suitcase in the trunk of the car.<sup>43</sup> Whereas, in *Routon*, this Court determined the firearm was accessible because it was found in the front of the car where the defendant could easily reach it while driving.<sup>44</sup>

Appellant maintains that it is clear he did not want the weapon accessible because he made an effort “to hide and render [the weapon] useless.”<sup>45</sup> However, the district court noted that given the proximity of the firearm and ammunition, and their accessibility to Milton, it would not have taken “anytime at all” to load the firearm.<sup>46</sup> Since proximity alone is not conclusive, the Ninth Circuit will have to determine whether the fact that Milton was seen digging under the dash where the firearm was found, and could have accessed and loaded the firearm in a relatively short period of time, supports the conclusion that it was accessible, or whether the fact that he had unloaded and hid the firearm supports his argument that he intended to render the firearm inaccessible.

The Court should also address whether possession of a firearm in public and in a car alone emboldens a drug offense and allows a district court to apply the enhancement. Relying on *United States v. Swanson*,<sup>47</sup> the district court here determined that the firearm facilitated Milton’s drug offense because he possessed the firearm in public and in a car, which can “dangerously embolden” an offender in many ways.<sup>48</sup> Yet, if a simple drug possession is automatically emboldened when the defendant also possesses a firearm in public, the accessibility determination is inconsequential.

## V. CONCLUSION

The Ninth Circuit will likely find that the district court did not abuse its discretion and will likely affirm the court’s application of USSG § 2K2.1(b)(6)(B), because the firearm was accessible to Milton, the officers observed Milton digging under the front dash where the firearm was found, and possession of the firearm in public and in the car emboldened the offense. However, there are additional questions that the Court should address to aid in proper application of the enhancement. For example, since proximity alone is not enough to find facilitation, what additional facts show that a firearm is accessible or has an emboldening effect? Would a loaded gun in the front seat of a car, but locked in a lock box, be considered accessible or embolden a drug offense?<sup>49</sup> Is the fact

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<sup>43</sup> *United States v. Pinex*, 720 Fed. App’x 345, 348 (9th Cir. 2017).

<sup>44</sup> *United States v. Routon*, 25 F.3d 815, 816 (9th Cir. 1994).

<sup>45</sup> Brief of Defendant–Appellant, *supra* note 2, at \*12.

<sup>46</sup> Answering Brief of the United States, *United States v. Milton*, 2019 WL 7494592 at \*14–15 (D. Mont. Dec. 20, 2019) (No. 19–30139).

<sup>47</sup> 610 F.3d 1005, 1008 (8th Cir. 2010) (quoting *United States v. Smith*, 535 F.3d 883, 886 (8th Cir. 2008)).

<sup>48</sup> Answering Brief of the United States, *supra* note 4, at \*16.

<sup>49</sup> See e.g. *United States v. Walker*, 900 F.3d 995, 997–97 (8th Cir. 2018) (holding that the district court’s application of the enhancement was improper because the defendant possessed a user quantity of drugs, the shotgun was locked in the trunk of the vehicle, and no facts were presented to show that the shotgun was accessible); compared to *United States v. Fuentes Torres*, 529 F.3d 825,

that a defendant possesses a firearm in public and in a car dispositive of an emboldening effect? Regardless of the Court's decision, this case presents an opportunity for the Court to clarify how accessibility is to be construed in this analysis and whether possessing a firearm in public with drugs unequivocally emboldens the drug offense.

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825–27 (8th Cir. 2008) (holding that possession of a handgun and ammunition in the center console of a car and two grams of powder cocaine emboldened the drug offense).