NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2018

LEWIS TEMPLETON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Service to:
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January 2, 2019

NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2018

LEWIS TEMPLETON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

QUESTION PRESENTED FOR REVIEW

Whether the Tenth Circuit correctly concluded that Mr. Templeton had waived his argument that the evidence was insufficient to support increasing Mr. Templeton's base offense level by four levels pursuant to U.S.S.G. § 2K2.1(b)(6)(B) because there was no spatial connection between the firearms and the marijuana sale where Mr. Templeton's counsel plainly objected that there was no evidence to support the enhancement.

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PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Donald Morrison, Assistant Federal Public Defender, declare under penalty of perjury that I am counsel for Petitioner, **LEWIS TEMPLETON**, and I personally mailed the Petition for a Writ of Certiorari to this Court by depositing the original and ten copies in an envelope addressed to the Clerk of this Court, sealed the envelope, and sent it by United States Postal Service, postage prepaid, at approximately 4 p.m. on January 2, 2019.

/s/Donald Morrison
Attorney for Petitioner

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

Petitioner **LEWIS TEMPLETON** respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review the opinion of *United States v. Templeton*, — Fed.Appx. —, 2018 WL 1750547 (10th Cir. October 3, 2018).

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Templeton*, — Fed.Appx. —, 2018 WL 4776150 (10th Cir. October 3, 2018), is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

The Tenth Circuit's decision was filed October 3, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the Courts of Appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Pursuant to Supreme Court Rules 13.1, 13.3, 13.4, and 30, and 28 U.S.C. § 2101(c), this Petition is timely if filed on or before January 2, 2019.

APPLICABLE CONSTITUTIONAL, STATUTORY AND GUIDELINES PROVISIONS

The Question Presented above pertains to the following provisions:

I. 18 U.S.C. § 922(g)(1) provides:

> It shall be unlawful for any person–
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition

which has been shipped or transported in interstate or foreign commerce.

II. U.S.S.G. § 2K2.1 provides in pertinent part:

(a) Base Offense Level (Apply the Greatest):

***

(4) 20, if–

. . . (B) the (i) offense involved a ... (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense[.]

***

(b) Specific Offense Characteristics

***

(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.

STATEMENT OF THE CASE AND THE FACTS

Mr. Templeton pled guilty to an Information charging him with one count of being a felon in possession of two firearms, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Information dated September 26, 2016, Vol. I, docket number 19; Judgment in a Criminal Case dated May 25, 2017, Vol. I, docket number 34, at 1. The

United States Probation Office then prepared a Presentence Investigation Report (PSR)3. It summarized the offense conduct, based on investigative reports prepared by Bureau of Alcohol, Tobacco, Firearms and Explosives, as follows. PSR at 3, ¶ 5. On November 2, 2015, a confidential informant (CI) told agents with the Lea County, New Mexico, Drug Task Force that defendant-appellant Lewis Templeton was selling marijuana at his residence in Eunice, New Mexico. *Id*., ¶ 6. At their direction, the CI made a controlled purchase of marijuana from Mr. Templeton that day. *Id*. The next day, the agents obtained and executed a search warrant for Mr. Templeton's residence. *Id*., ¶ 7. They found two rifles between the mattress and box springs of Mr. Templeton's bed, a loaded semiautomatic .22 caliber with a sawed-off barrel and another semiautomatic .22 caliber with a loaded magazine in a soft gun case. *Id*., ¶ 8. They also found on top of the dresser in the bedroom a tin container with three baggies in it that contained a total of 1.8 grams of methamphetamine, after Mr. Templeton told them it was there. *Id*., ¶ 7. Further investigation disclosed that Mr. Templeton has several felony convictions. *Id*. at 4, ¶ 9.

Based on that account of the relevant conduct, and applying U.S.S.G. § 2K2.1, the PSR set the base offense level at 20 because one of the firearms was a sawed off rifle. PSR at 4, ¶ 15. It added four levels pursuant to § 2K2.1(b)(6)(B) because of the methamphetamine found in the bedroom. *Id*. at 4-5, ¶ 16. It deducted three levels for

Mr. Templeton's acceptance of responsibility. *Id*., ¶¶ 22, 23. The resulting total offense level was 21. *Id*., ¶ 24. The PSR assessed four criminal history points, placing Mr. Templeton in Criminal History Category III. *Id*. at 8, ¶¶ 34-37. The resulting advisory guidelines term of imprisonment was 46 to 57 months. *Id*. at 18, ¶ 82.

Mr. Templeton filed objections to the PSR. Defendant's Objection to Presentence Report and Sentencing Memorandum dated January 6, 2014, Vol. I, docket number 27. As relevant to this appeal, he objected to the four-level enhancement under § 2K2.1(b)(6)(B), alleging that his girlfriend, not him, possessed "a substance believed to be methamphetamine," Objection at 1, and that the substance was not in fact methamphetamine. *Id*. at 2. The government responded that application of § 2K2.1(b)(6)(B) was appropriate because three baggies containing methamphetamine were found in a tin container on top of the dresser in the bedroom, and the firearms were found between the mattress and box springs of the bed in the same room. "This factual scenario seems to squarely fit within § 2K2.1(b)(6)(B) and hence the 4 level increase should apply. The method of packaging clearly indicates that the methamphetamine was meant for distribution." Government's Response to Defendant's Objection to Presentence Report and Sentencing Memorandum dated January 13, 2017, Vol. I, docket number 28 at 2.

The Probation Office agreed with the government, because Mr. Templeton told the agents that three baggies containing methamphetamine would be found inside a tin container in his bedroom, the substances in the baggies field tested positive for methamphetamine, the rifles were in the same bedroom, and Mr. Templeton has a prior history of distributing drugs, including methamphetamine. "Due to the defendant's history of distributing drugs, including methamphetamine, it is reasonable to conclude he possessed the methamphetamine with intent to distribute it, especially due to the manner in which it was packaged. The close proximity of the rifles had the potential to facilitate his drug trafficking activities, as the defendant knew the rifles were located in the same bedroom." Addendum to the Presentence Report dated January 13, 2017, Vol. II, docket number 29 at 1-2.

At the sentencing hearing held on May 22, 2017, the court first took up Mr. Templeton's objection to the § 2K2.1(b)(6)(B) enhancement. The court initially stated that it intended to apply the enhancement. Tr. at 3.[1] However, after listening to arguments by counsel for Mr. Templeton and the government, *id*. at 3-5, the court reversed its position, stating, "I'm not going to add the four levels." *Id*. at 5. Counsel for the government then offered an alternative basis for applying the enhancement,

[1]"Tr." refers to the Transcript of the Sentencing Hearing, which was included in Volume III of the Record on Appeal.

that being the sale of marijuana to the CI the day before the search warrant was executed. *Id*. at 5-6.

The court stated that it agreed with counsel. *Id*. at 6. Counsel for Mr. Templeton then objected, and the following exchange took place between counsel and the court:

> MR. MORRISON: I would object, your Honor. And certainly he wasn't charged with possession with intent to distribute marijuana. He wasn't charged with any sale of marijuana. No marijuana was recovered here. So the connection suggesting that a marijuana sale from the day before is tenuous when the issue here is, we objected to the issue of the government saying it's a controlled substance, and that being meth, and we're saying it's not. I was very clear. They could just get a lab report. It's not --it's not that hard to do, Judge. That would have clarified this issue completely
> THE COURT: Yeah. But wrong. So I'm going to (indiscernible)
> MR. MORRISON: Note my objection, Judge.
> THE COURT: (indiscernible)
> MR. MORRISON: Thank you.

Id. at 6-7.

The court then took up the issue of what sentence to impose. Counsel for the government stated that the sentencing range was 46 to 57 months, and requested the court to impose a term of imprisonment of 46 months. *Id*. at 7-8. Counsel for Mr. Templeton summarized his client's background, renewed his request that the court

not impose the four-level enhancement, which would result in a sentencing range of 30 to 37 months, and reminded the court that he had requested a sentence of 30 months. *Id*. at 9-11. Mr. Templeton also addressed the court. *Id*. at 11-12. The court then sentenced Mr. Templeton to a term of imprisonment of 46 months, followed by a term of supervised release of two years, and imposed a special assessment of $100.

Mr. Templeton appealed. Notice of Appeal, dated June 5, 2017, Vol. I, Docket No. 42. The Tenth Circuit Court of Appeals affirmed his conviction. *United States v. Templeton*, — Fed. Appx. —, 2018 WL 4776150 (10th Cir. Nov. 3, 2018).

The Tenth Circuit refused to consider Mr. Templeton's arguments on the merits, on the grounds that he failed to raise an objection to the sentencing enhancement in the district court based on the physical proximity of the firearms to the marijuana sale, but rather had only objected to lack of evidence of temporal proximity. *Id.* at *3. Accordingly, the Court concluded that he waived his right to raise the issue on appeal. *Id.*

REQUEST FOR WRIT OF CERTIORARI

I. This Court should grant the petition to clarify that a defendant who plainly objects to the application of a sentencing enhancement based on a completely unforeseen argument at the sentencing hearing does not waive the right to argue that the evidence was insufficient to support the enhancement.

This case raises the issue of whether a defendant intentionally relinquishes a known right to raise an argument when the government, without warning, raises a completely new argument for imposing an enhancement at the sentencing hearing, and the defendant objects that the evidence is insufficient and, indeed, the evidence is insufficient.

"[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *Kontrick v. Ryan,* 540 U.S. 443, 458, n. 13, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). Mr. Templeton argued that there was insufficient evidence to support the enhancement. The Tenth Circuit should have reached the merits of his claim.

U.S.S.G. § 2K2.1(b)(6)(B) instructs that if the 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," then

the base level for the offense should be increased by 4 levels, and if that results in an offense level of less than 18, then increase the offense level to 18. "The application note to § 2K2.1 defines in connection with to mean that "the firearm ... facilitated, or had the potential of facilitating, another felony offense[.]" USSG § 2K2.1 cmt. n. 14(A). If Defendant had been guilty of a drug-trafficking offense, the enhancement would apply if a firearm had been found "in close proximity to drugs," *id*. cmt. n. 14(B), "because the presence of the firearm has the potential of facilitating another felony offense." *Id*." *United States v. Justice*, 679 F.3d 1251, 1254-55 (10th Cir. 2012).

Here, both the parties and the PSR proceeded on the assumption that the "drug trafficking offense" involved in application of § 2K2.1(b)(6)(B) and Application Note 14(B) was possession with intent to distribute the methamphetamine in the tin contained on top of the dresser in the same bedroom where the firearms were found between the mattress and the box springs of the bed. The court originally expressed its intent to impose the enhancement on that basis. Tr. at 1-3. But after listening to Mr. Templeton's counsel vigorously argue against the enhancement, *id*. at 3, 4-5, the court changed its mind and stated, "I'm not going to add the four levels." *Id*. at 5. The government responded that the enhancement was appropriate based on Mr. Templeton's sale of marijuana to a confidential informant at his residence the day

before execution of the search warrant that revealed the firearms. *Id*. at 5-6. The court agreed with that position. *Id*. at 6. Counsel for Mr. Templeton objected to this entirely new theory. After noting that Mr. Templeton had not been charged with any marijuana-related offense, and that no marijuana had been recovered during the execution of the search warrant, counsel stated, "*So the connection suggesting that a marijuana sale from the day before is tenuous* when the issue here is, we objected to the issue of the government saying it's a controlled substance, and that being meth, and we're saying it's not." *Id.* (emphasis added).

The government has the burden of proving by a preponderance of the evidence any findings necessary to support a sentence enhancement. *United States v. Gambino-Zavala*, 539 F.3d 1221,1228 (10th Cir. 2008) (citing *United States v. Tindall*, 519 F.3d 1057, 1063 (10th Cir. 2008)). As applied to § 2K2.1(b)(6)(B) and in the context of this case, the government had to prove that the firearms found in the bed "were used or possessed ... in connection with another felony offense." *Id*. The district court applied the enhancement based on the felony offense of selling marijuana to a confidential informant at Mr. Templeton's residence the day before execution of the search warrant. Mr. Templeton did not dispute that he made the sale, nor did he dispute that this constituted a felony offense. But that is not the end of the inquiry. According to Application Note 14(B) to § 2K2.1, when the other felony offense triggering

application of § 2K2.1(b)(6)(B) is a drug trafficking offense, the firearm must be found in close proximity to the drugs. "[I]n the case of a drug trafficking offense in which a firearm is found *in close proximity* to drugs, drug-manufacturing materials, or drug paraphernalia[,] application of subsection[] (b)(6)(B) ... is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively." Application Note 14(B)(ii) (internal alterations and emphasis added). This means that the government bore the burden of proving that the firearms found in the bed in the bedroom were in "close proximity" to the location of the marijuana sale.

There is no evidence in the record sufficient to support such a finding. The PSR states only, "On November 2, 2015, a confidential informant (CI) advised agents with the Lea County Drug Task Force that Lewis Templeton was selling marijuana from his residence. The agents then had the CI purchase an unknown amount of marijuana from Templeton using contingency funds." PSR at3, ¶ 6. Even assuming that it would be reasonable to infer from that account that the sale to the CI occurred at Mr. Templeton's residence, there is no evidence as to precisely where at the residence the sale occurred.

The record does not contain any description of the residence itself, beyond the fact that it has at least one bedroom. Thus, the sale of "an unknown amount of

marijuana" may have occurred somewhere inside the residence, or outside the residence, such as on a porch or in a yard, or in a vehicle driven to the residence by the CI. Since no marijuana was found during the execution of the search warrant, the marijuana Mr. Templeton sold the previous day cannot be tied to any particular place at the residence, even by inference.

Application of the § 2K2.1(b)(6)(B) enhancement has been affirmed where firearms and drugs are found in a residence. In *United States v. Gambino-Zavala*, 539 F.3d 1221 (10th Cir. 2008), officers responded to calls that shots were being fired in an apartment. *Id*. at 1224. They went to the apartment and were let in by the defendant. *Id*. They did a cursory search of the apartment for potential victims and located a shotgun and ammunition in the closet of the apartment's only bedroom. *Id*. at 1224, 1229. The defendant admitted he was an illegal alien, and the officers confirmed that he had two outstanding misdemeanor warrants, so they arrested him. *Id*. at 1224. The officers then conducted a more thorough search, and found two more firearms, one under the bed in the only bedroom of the apartment and the other in a closet in the living room, *id*. at 1229, and 253.4 grams of heroin. *Id*. The heroin was found in a cabinet in the kitchen. *Id*. at 1230.

The defendant pled guilty to possessing the shotgun and ammunition found during the initial search. *Id*. at 1224-25. As relevant here, the district court imposed

a four-level enhancement pursuant to § 2K2.1(b)(6)(B), rejecting his challenge to the sufficiency of the evidence supporting it. *Id*. at 1228. This court affirmed imposition of the enhancement, *id*. at 1230, because "the court reasonably concluded a sufficient nexus exist[ed] between the shotgun and the drugs to justify the enhancement. '[W]e have *generally* held that if the weapon facilitated or had the potential to facilitate the underlying felony, then enhancement ... is appropriate.' *Id. United States v. Brown*, 314 F.3d 1216, 1222 (10th Cir. 2003). Here, the shotgun had the potential to facilitate illegal drug transactions by helping Gambino-Zavala protect himself and his drug supply. The district court therefore did not err in applying the § 2K2.1(b)(6) enhancement." *Id*. (emphasis added).

The sparse record in this case stands in stark contrast to the record in *Gambino-Zavala*, in which three firearms and a sizeable amount of heroin were all found in a one bedroom apartment. Those facts easily support the conclusion that the firearms and heroin were in close proximity to each other, and the firearms therefore had the potential to facilitate drug dealing. *See United States v. Alcantar*, 733 F.3d 143, 147 (5th Cir. 2013) (presence of drug paraphernalia, drug manufacturing materials, and a dismantled but easily and quickly assembled firearm in the same bedroom satisfied the "close proximity" requirement in Application Note 14(b)(ii)).

In contrast, *United States v. Clinton*, 825 F.3d 809 (7th Cir. 2017), is much more in line with the facts of this case, and convincingly explains why those facts are insufficient to support the application of § 2K2.1(b)(6)(B). The case began with a domestic violence call to the police. *Id* .at 810. The victim told the officers who responded to the call that the defendant sold cocaine and had a firearm in the residence. *Id*. She told them that he kept the firearm in the bedroom closet, but she had taken it and hid it under a pile of clothes in the dining room to keep him from using it. *Id.* The officers searched the residence with her consent and found a pistol under the pile of clothes. *Id.* They also found a plate under the living room couch that had cocaine base, a razor blade, a box of baggies, and a digital scale on it. *Id*. The defendant ultimately pled guilty to felon in possession of a firearm. *Id*. The PSR recommended application of § 2K2.1(b)(6)(B) based on the drug offense, which the district court did in calculating the total offense level. *Id*. at 811. The Seventh Circuit reversed that ruling, holding that the court's findings were insufficient to support the enhancement. *Id*. at 815. The court specifically focused on the "close proximity" requirement for the enhancement to apply when the other offense is a drug offense. "If a firearm is found in close proximity to the drugs or its paraphernalia, the conclusion that the firearm is connected to that drug activity is a reasonable one in

light of the common use for that purpose." *Id*. at 812. The court went on to explain the importance of the "close proximity" requirement:

> But that Application Note should not be interpreted to ordain such a connection whenever a defendant involved in drug distribution also is in possession of a firearm. The term "close proximity" must not be read out of the Application Note. It is the close proximity that allows the court to find such a connection without any further evidence—the proximity alone provides the evidence that the two are connected. If that "close proximity" is lacking, then the connection may still be established, but it must be determined through evidence of such a connection.

Id. The court then observed that the district court had essentially made no findings of fact that would support application of the enhancement absent evidence of close proximity of the pistol to the defendant's drug-related activities. *Id*. at 813.

The bottom line was that the record contained "little support" for the enhancement. *Id*. at 814. The court went on to make clear that its holding was based on the evidence before it, and its assessment of that evidence.

> We do not hold that the enhancement is inapplicable as a matter of law, but the fact findings in this record do not support the enhancement. The district court identified only the generalized need for protection by those engaged in drug offenses. But that would apply whenever a person who sold drugs also possessed a firearm in the residence. It would transform the "close proximity" test of Application Note 14 to a broad-based rebuttable presumption that the enhancement applied whenever a firearm was possessed and a drug offense was also alleged

> regardless of the location of the firearm and its proximity to the drugs. The Sentencing Commission could have imposed an enhancement if any weapon was possessed without requiring that it be possessed in connection with the offense, but it chose not to do so. *See United States v. Carillo-Ayala*, 713 F.3d 82, 89–90 (11th Cir. 2013)(comparing the provision in § 2D1.1(b)(1) requiring only that a weapon was possessed with the requirement under § 5C1.2(a)(2) that the firearm was possessed in connection with the offense). Because the court's findings are insufficient to support application of the four-level enhancement, that determination is vacated and the case must be remanded for resentencing.

Id. at 814-15.

In this case, the only "finding" explicitly made by the court in applying the § 2K2.1(b)(6)(B) enhancement was that it agreed with the government's alternative theory that a single sale of marijuana to a confidential informant somewhere at Mr. Templeton's residence justified the conclusion that he possessed the firearms concealed in his bed "in connection with" that sale. But, just as in *Clinton*, that cannot suffice to justify the enhancement. There is nothing in those facts that show that the firearms were in "close proximity" to that sale, nor anything else in the record that would support a finding that the firearms concealed in the bed facilitated, or had the potential to facilitate, that single sale of an unknown amount of marijuana.

Defense counsel's objection plainly raised the issue of the sufficiency of the evident to support the enhancement. The Tenth Circuit should have addressed the argument made on appeal.

CONCLUSION

Accordingly, Defendant-Petitioner Templeton requests that this Court grant *certiorari* in this case, vacate the Tenth Circuit's decision, and remand for reconsideration.

Respectfully submitted,

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