

APPENDIX A

UNITED STATES DISTRICT COURT
District of New Mexico

UNITED STATES OF AMERICA

Judgment in a Criminal Case

V.

LEWIS TEMPLETON

Case Number: **2:16CR03859-001JFM**

USM Number: **60013-051**

Defendant's Attorney: **Donald J. Morrison, AFD**

THE DEFENDANT:

- ☒ pleaded guilty to count(s) **Information**.
☐ 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:

<i>Title and Section</i>	<i>Nature of Offense</i>	<i>Offense Ended</i>	<i>Count</i>
18 U.S.C. Sec. 922(g)(1) and 18 U.S.C. Sec. 924(a)(2)	Felon in Possession of a Firearm	11/03/2015	

The defendant is sentenced as provided in pages 2 through 6 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) 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.

5/22/2017

Date of Imposition of Judgment

/s/ J. Frederick Motz

Signature of Judge

Honorable J. Frederick Motz
Senior United States District Judge

Name and Title of Judge

5/25/2017

Date

DEFENDANT: LEWIS TEMPLETON
CASE NUMBER: 2:16CR03859-001JFM

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **46 months.**

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

- ☒ 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 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:
- ☐ before 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

DEFENDANT: LEWIS TEMPLETON
CASE NUMBER: 2:16CR03859-001JFM

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **2 years**.

MANDATORY CONDITIONS OF SUPERVISION

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, as determined by the court.
 - ☐ 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 cooperate in the collection of DNA as directed by statute. *(Check, if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state, local, or tribal sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence prevention. *(Check, if applicable)*
7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. *(check if applicable)*
8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
10. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

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. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: LEWIS TEMPLETON
CASE NUMBER: 2:16CR03859-001JFM

SPECIAL CONDITIONS OF SUPERVISION

You must not use or possess alcohol.

You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair your physical or mental functioning, whether or not intended for human consumption.

You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to pay all, or a portion, of the costs of the program.

You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing may include urine testing, the wearing of a sweat patch, a remote alcohol testing system, an alcohol monitoring technology program, and/or any form of prohibited substance screening or testing. You must not attempt to obstruct or tamper with the testing methods. You may be required to pay all, or a portion, of the costs of the testing.

You must submit to a search of your person, property, residence, vehicle, papers, computers (as defined in 18 U.S.C. 1030(e)(1)), other electronic communications or data storage devices or media, or office under your control. The probation officer may conduct a search under this condition only when reasonable suspicion exists, in a reasonable manner and at a reasonable time, for the purpose of detecting illegal narcotics, drug paraphernalia, alcohol, firearms, and other contraband. You must inform any residents or occupants that the premises may be subject to a search.

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: LEWIS TEMPLETON
CASE NUMBER: 2:16CR03859-001JFM

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments.

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	Assessment	JVTA Assessment*	Fine	Restitution
	\$100.00	\$	\$	\$

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

SCHEDULE OF PAYMENTS

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

Having assessed the defendant's ability to pay, payment of the total fine and other criminal monetary penalties is due as follows:
The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A ☒ In full immediately; or

B ☐ \$ due immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Unless the court has expressly ordered otherwise in the special instruction above, 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 United States Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
LAS CRUCES DIVISION

UNITED STATES OF AMERICA,)	CASE NO: 2:16-CR-03859-JFM
)	
Plaintiff,)	CRIMINAL
)	
vs.)	Las Cruces, New Mexico
)	
LEWIS TEMPLETON,)	Monday, May 22, 2017
)	(2:23 p.m. to 2:42 p.m.)
Defendant.)	

SENTENCING

BEFORE THE HONORABLE J. FREDERICK MOTZ,
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff: DUSTIN SEGOVIA, ESQ.
U.S. Attorney's Office
555 S. Telshor Blvd., Suite 300
Las Cruces, NM 88011

For Defendant: DONALD J. MORRISON, ESQ.
Federal Public Defender
506 S. Main Street, Suite 600
Las Cruces, NM 88001

U.S. Probation Officer: Emma Chacon-Pena

Court Reporter: Recorded; LCR Tortugas

Clerk: Joann O. Standridge

Transcribed by: Exceptional Reporting Services, Inc.
P.O. Box 18668
Corpus Christi, TX 78480-8668
361 949-2988

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 Las Cruces, New Mexico; Monday, May 22, 2017; 2:23 p.m.

2 (Call to Order)

3 **THE CLERK:** For sentencing, Court Calls
4 cr-16-3859-JFM, *Lewis Templeton*.

5 **MR. SEGOVIA:** Dustin Segovia for the United States,
6 your Honor.

7 **MR. MORRISON:** Your Honor, good afternoon. Don
8 Morrison for Mr. Lewis Templeton.

9 **THE COURT:** Now, have you reviewed the Presentence
10 Report with your client?

11 **MR. MORRISON:** Your Honor, I have.

12 **THE COURT:** Are there any factual issues or
13 corrections to be made?

14 **MR. MORRISON:** One moment, your Honor. Let me just
15 double-check something.

16 We filed a sentencing memo with objections, objection
17 objecting to paragraph 16, page 4 and to page 5, under the
18 specific offense characteristics. Apparently he was given a
19 plus-4 in connection with another offense not being possession
20 of narcotics. We objected to that and in fact indicated in our
21 sentencing memo that upon information belief, there were no
22 narcotics. There was nothing.

23 **THE COURT:** Does the government happen to have a
24 position?

25 **MR. SEGOVIA:** Yes, your Honor. The United States

1 filed a response. I think that that enhancement is warranted
2 in this case.

3 **THE COURT:** I haven't read the (indiscernible).

4 **(Long pause)**

5 Okay. Let me hear from you briefly, Mr. Morrison?

6 **MR. MORRISON:** Regarding the plus-4?

7 **THE COURT:** Yes.

8 **MR. MORRISON:** I would argue that there was no drugs,
9 Judge. There's no lab report to suggest that there were drugs.

10 **THE COURT:** (indiscernible) Okay. I'm going to find
11 the four-level enhancement.

12 **MR. MORRISON:** You are? Is that what you said? I
13 didn't --

14 **THE COURT:** I am going to find it.

15 **MR. MORRISON:** There's no proof of any narcotics at
16 all. It's the government's assertion but there's nothing to
17 suggest that. It was a task force, a local state task force, I
18 believe, that recovered something but there is no lab report to
19 ever suggest that there were drugs there. At all. I think
20 that they should come forth with something to suggest that --

21 **THE COURT:** Let me hear from the government.

22 **MR. SEGOVIA:** Your Honor, there weren't any
23 objections to the factual basis. (indiscernible) note
24 paragraph seven it says:

25 "Templeton agreed to speak with an agent and admitted

1 there were three Baggies of methamphetamine in a tin
2 container on top of the dresser in the bedroom."

3 And that's exactly what they found. They found the
4 three Baggies. I think it's notable. I think this came out to
5 about 1.8 grams of methamphetamine. It's not a significant
6 amount but three different Baggies is consistent with
7 trafficking activities. The firearms were located in the same
8 bedroom.

9 And I'd also note that the reason that they were
10 there is that a confidential informant provided information
11 that the defendant was selling marijuana out of his home. They
12 went and did a --

13 **THE COURT:** (indiscernible) understand.

14 **MR. MORRISON:** I'm just so concerned. I mean, the
15 arrest occurred November of 2015. I filed an objection in
16 January of this year. They could have brought in a lab report
17 to say, yeah, that is what it is. I objected to it clearly. I
18 said it wasn't -- in fact, I was very clear in my language that
19 he did not possess meth. That in fact the substance was not a
20 controlled substance upon information belief. I mean, that's
21 what I said. I mean, they could have come in with a lab
22 report.

23 **THE COURT:** But the drug was found.

24 **MR. MORRISON:** What people presumed to be. This is a
25 felon in possession of a firearm case. They presumed it to be

1 drugs. I objected to them ever finding any drugs. And they
2 could have come in with a lab report and said, well,
3 Mr. Morrison's incorrect. This is what we recovered. The
4 substance that actually turned out to be something -- meth -- a
5 controlled substance. That's prohibited. And that wasn't the
6 case here. That's my concern. I mean, I'm saying it wasn't
7 and the government is saying there is.

8 **THE COURT:** Yeah but your client admitted there was.

9 **MR. MORRISON:** But your Honor, he pled guilty but in
10 fact, we never had a hearing to determine any -- if the
11 statement was voluntary, I'm not even going to go there. All I
12 want to say is I objected four months ago. They could have
13 gotten a lab report for that. I said it wasn't, specifically
14 wasn't meth. And he denies making that statement. You know, I
15 -- but I made it clear that it wasn't meth.

16 **THE COURT:** And I -- I think he admitted it.

17 **MR. MORRISON:** But I objected to it. We're not
18 litigating --

19 **THE COURT:** I know but does that matter?

20 **MR. MORRISON:** Mr. Templeton denies making that
21 statement that there was meth in a tin on top of the dresser.

22 **THE COURT:** I'm not going to add the four levels.

23 **MR. SEGOVIA:** Your Honor, I'd like to offer the court
24 a separate and independent basis and that is that the
25 controlled -- a controlled buy was done at his residence for

1 marijuana the day before the search warrant was executed. And
2 then we have this tin of methamphetamine that's found in the
3 bedroom and the firearms that are -- one of them was a sawed-
4 off 22 rifle, a sawed-off (indiscernible) potentially
5 (indiscernible) drug trafficking (indiscernible). They also
6 have a loaded -- a second loaded 22 caliber rifle that's also
7 in the bedroom. And the day before there's been a controlled
8 buy. So even if Mr. Morrison takes issue with the fact of
9 whose methamphetamine it was, even though we have an admission
10 from him saying that it's his, there's also the independent
11 basis of the prior controlled purchase --

12 **THE COURT:** I agree with you.

13 **MR. SEGOVIA:** -- of marijuana.

14 **MR. MORRISON:** I would object, your Honor. And
15 certainly he wasn't charged with possession with intent to
16 distribute marijuana. He wasn't charged with any sale of
17 marijuana. No marijuana was recovered here. So the connection
18 suggesting that a marijuana sale from the day before is tenuous
19 when the issue here is, we objected to the issue of the
20 government saying it's a controlled substance, and that being
21 meth, and we're saying it's not. I was very clear. They could
22 just get a lab report. It's not -- it's not that hard to do,
23 Judge. That would have clarified this issue completely.

24 **THE COURT:** Yeah. But wrong. So I'm going to
25 (indiscernible)

1 **MR. MORRISON:** Note my objection, Judge.

2 **THE COURT:** (indiscernible)

3 **MR. MORRISON:** Thank you.

4 **THE COURT:** So what's the government's position
5 (indiscernible) and then I want to hear from the defendant.

6 **MR. SEGOVIA:** As to sentencing, your Honor, I believe
7 Mr. Martinez wrote in his response that a sentence at the low
8 end -- that a guideline range sentence is absolutely
9 appropriate so he doesn't oppose a sentence at the low end of
10 the range. I think, you know, a big part of Mr. Templeton's
11 argument is --

12 **THE COURT:** What is the guideline range?

13 **MR. SEGOVIA:** I'm sorry, your Honor. Forty six to 57
14 months is the guideline range.

15 Mr. Templeton has a lifetime of involvement in
16 criminal activities. He largely notes the fact that he's the
17 father of many different children and, you know, he notes the
18 negative impact that this could have on his children. You
19 know, quite frankly, your Honor, that ship has long sailed.
20 You know, this defendant's criminal history spans back, you
21 know, I think it was several pages. I'd also note that most of
22 his children are now adults and have been adults for a long
23 time. Some of the younger children, his most recent child, he
24 doesn't know the child's name. He doesn't have any information
25 or any connection with them. That's -- the same is true for

APPENDIX C

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 3, 2018

**Elisabeth A. Shumaker
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LEWIS TEMPLETON,

Defendant - Appellant.

No. 17-2091
(D.C. No. 2:16-CR-03859-JFM-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **MORITZ** and **EID**, Circuit Judges.

Lewis Templeton was convicted of being a felon in possession of a firearm. The conviction arose out of a search of his home following Templeton's sale of marijuana to a confidential informant. On appeal, Templeton challenges a four-level enhancement to his offense level for possessing firearms that had the potential of facilitating another felony offense. Templeton alleges that evidence presented in the district court regarding the physical proximity between the firearms and the marijuana sale was insufficient to establish that the firearms had the potential of facilitating the drug sale. We hold that Templeton waived this argument because he did not raise it at the sentencing hearing.

* 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.

Having jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we affirm the district court's application of the four-level enhancement under § 2K2.1(b)(6)(B) of the 2016 United States Sentencing Guidelines ("USSG").

I.

On November 2, 2015, a confidential informant advised agents with the Lea County Drug Task Force that Templeton was selling marijuana from his home. Presentence Report ("PSR") ¶ 6. The same day, at the request of the agents, the confidential informant successfully purchased an unknown amount of marijuana from Templeton "at his residence." *Id.* ¶ 39. On November 3, 2015, agents from the drug task force executed a search warrant at Templeton's address. *Id.* ¶ 7.

During the execution of the search warrant, Templeton agreed to speak with an agent and disclosed that there were three baggies of methamphetamine in a tin in his bedroom. Agents found the baggies, which weighed approximately 1.8 grams and field tested positive for methamphetamine. *Id.*; Addendum to PSR at 1.

Agents also found two loaded semi-automatic rifles between the mattress and box spring in Templeton's bedroom. PSR ¶¶ 7–8. One of the rifles had a sawed-off barrel and lacked registration. *Id.* ¶ 8.

A federal warrant was issued for Templeton's arrest and he was arrested on May 4, 2016. *Id.* ¶ 10. Templeton pleaded guilty to a one-count Information filed in the United States District Court for the District of New Mexico, charging Templeton with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2). PSR ¶¶ 1–2.

According to USSG § 2K2.1, a violation of 18 U.S.C. § 922(g)(1) yields a base offense level of 20 when the defendant is a prohibited person who possessed a sawed-off rifle. PSR ¶ 15; *see also* USSG §§ 2K2.1(a)(4)(B)(i)(II) and (ii)(I). The presentence report included an enhancement to Templeton’s base offense by four levels because “the defendant possessed two rifles in connection with his possession of approximately 1.8 grams of methamphetamine.”¹ PSR ¶ 16; *see also* USSG § 2K2.1(b)(6)(B). The offense level was decreased by a total of three levels because Templeton demonstrated acceptance of responsibility for the offense and assisted the investigation “by timely notifying the authorities of the intention to enter a plea of guilty.” PSR ¶¶ 22–23; *see also* USSG § 3E1.1. Based on a total offense level of 21 and a criminal history category of III, the imprisonment range under the USSG was forty-six to fifty-seven months. PSR ¶ 82; USSG Ch. 5, Part A.

On January 6, 2017, Templeton filed an objection to paragraph sixteen of the presentence report, which stated that Templeton “possessed two rifles in connection with his possession of approximately 1.8 grams of methamphetamine,” PSR ¶ 16, on the grounds that he did not possess methamphetamine. He asserted that the substance was not confirmed to be methamphetamine and that it belonged to his girlfriend. R. on Appeal, Vol. I, Def.’s Objection to PSR (Doc. 27) at 1–2. Templeton objected to the government’s four-level enhancement under USSG § 2K2.1(b)(6)(B) on this basis,

¹ Section 2K2.1(b)(6)(B) prescribes a four-level enhancement 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.”

contending that the offense level should be 17, which would result in a sentence of thirty to thirty-seven months. *Id.* at 9 n.1. Templeton requested a thirty-month sentence. *Id.*

The government responded to Templeton's objection, asserting that the four-level enhancement was appropriate because methamphetamine was packaged for distribution and two rifles were found in Templeton's bedroom. R. on Appeal, Vol. I, Govt.'s Resp. to Def.'s Objection to PSR (Doc. 28) at 2.

At the sentencing hearing on May 22, 2017, Templeton challenged the government's failure to obtain a lab report identifying the substance contained in the baggies found in Templeton's bedroom and contended that there was no proof that the baggies contained methamphetamine. R. on Appeal, Vol. III, Tr. at 3:8–9, 15–20; 4:14–5:7. Templeton's counsel asserted that the four-level enhancement should not apply because the government did not establish that there was methamphetamine in Templeton's home. *Id.* at 3:10–20. After hearing this argument, the court stated that it would not add the four-level enhancement. *Id.* at 5:22.

The government then offered the sale of marijuana to the confidential informant the day before Templeton's arrest as an alternative basis for the four-level enhancement.² The court indicated that it agreed with the government's argument. *Id.* at 6:12.

Counsel for Templeton objected, stating:

² The government stated, "a controlled buy was done at [Templeton's] residence for marijuana the day before the search warrant was executed. . . . So even if [Templeton's counsel] takes issue with the fact of whose methamphetamine it was, . . . there's also the independent basis of the prior controlled purchase." R. on Appeal, Vol. III, Tr. at 5:25–6:11.

[C]ertainly 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.

Id. at 6:15–21. The court was not persuaded by the objection. *Id.* at 6:24–25.

The court imposed a sentence of forty-six months in custody with two years of supervised release. *Id.* at 13:2–8. The district court entered a judgment and Templeton filed a timely notice of appeal. R. on Appeal, Vol. I, Docs. 34, 35.

On appeal, Templeton contends that the government did not present sufficient evidence that the firearms were possessed “in connection with” the sale of marijuana to support the application of § 2K2.1(b)(6)(B). Aplt. Br. at 6. In particular, Templeton argues that the government did not show that the firearms were in “close proximity” to the marijuana sale. *See* Application Note 14(B)(ii) to § 2K2.1. The government argues that Templeton failed to raise the argument that there was insufficient evidence to support the application of that enhancement in district court. Aple. Br. at 4. Specifically, the government asserts that Templeton “raised no issue regarding the location of the firearms in relation to the marijuana sale at Templeton’s residence or the potential for the firearms to facilitate the drug transaction.” *Id.* at 3. We agree, and therefore conclude that Templeton waived the argument.

II.

We generally review issues on appeal that were not raised in district court for plain error. *United States v. Courtney*, 816 F.3d 681, 684 (10th Cir. 2016). However, we

decline to review for plain error factual issues regarding the application of the U.S. Sentencing Guidelines that were not raised before the district court. *United States v. Deninno*, 29 F.3d 572, 580 (10th Cir. 1994). As we explained in *Deninno*, a factual challenge regarding the application of the guidelines that was not raised before the trial court at sentencing “acts as an admission of fact” and is waived for appeal. *Id.* at 580. The rationale behind this approach is that “when a defendant properly raises the disputed factual issues in the district court, a record sufficient to permit adequate review is thereby developed. On the other hand, when a defendant fails to raise the issue below, we have no factual record by which to review the application of the guidelines.” *United States v. Saucedo*, 950 F.2d 1508, 1518 (10th Cir. 1991), overruled on other grounds by *Stinson v. United States*, 508 U.S. 36 (1993); *see also United States v. Bass*, 411 F.3d 1198, 1208 (10th Cir. 2005) (Tymkovich, J., concurring in part and dissenting in part) (noting that where a defendant has failed to make a factual challenge before the district court, “we do not have a sufficient record to evaluate the accuracy of the district court’s determination of those facts. This is precisely the concern that has in the past led the court to decline to review factual sentencing claims for plain error.”). Thus, a failure to raise a factual challenge before the trial court at sentencing prevents the development of the record on the particular factual issue in question, precluding review. That is what occurred in this case.

Templeton argues that he did in fact raise the issue of the physical proximity between the marijuana and the firearms in the district court. In particular, he points to the objection that was made by his counsel at the sentencing hearing, which stated, “the

connection suggesting that a marijuana sale from the day before is tenuous when the issue here is, we objected to this issue of the government saying it's a controlled substance, and that being meth, and we're saying that it's not." R. on Appeal, Vol. III, Tr. at 6:17–21. Before this court, Templeton focuses on the word "tenuous," suggesting that the term raised the issue of physical proximity between the marijuana and the firearms. However, that term cannot bear the weight that Templeton places on it.

The context of the objection was that the district court had agreed with Templeton that the methamphetamine could not serve as a basis for a sentencing enhancement under § 2K2.1(b)(6)(B). When the government asserted that the sale of marijuana to the confidential informant the day before Templeton's arrest could serve as an alternative basis for the application of the enhancement, Templeton argued that the marijuana could not serve that purpose because the buy and the search did not occur on the same day. Thus, when Templeton referred to the "tenuous" connection, he was referring to a *temporal* relationship between the marijuana sale and the discovery of the firearms, rather than a *spatial* connection between the two. The issue of the physical proximity between the location of the marijuana sale and the firearms was never brought to the district court's attention.

Templeton's failure to raise an objection to the sentencing enhancement in the district court based on the physical proximity of the firearms to the marijuana sale prevented the district court from addressing the factual dispute and, as a result, the record is not developed on this issue on appeal. At oral argument, for example, a key factual dispute involved whether the presentence report's reference to the marijuana sale taking

place “at his residence” established that the drug sale took place inside Templeton’s residence, or instead, on the porch or in the driveway of Templeton’s residence. The district court was deprived of the opportunity to resolve the meaning of “at his residence” because the factual dispute was not raised at the sentencing hearing. Because Templeton did not raise the issue of the physical proximity or connection between the firearms and the marijuana sale before the district court, he waived his right to raise this issue on appeal, and we therefore do not reach the merits of his challenge.

For the reasons stated above, we AFFIRM the district court’s application of the four-level sentencing enhancement pursuant to USSG § 2K2.1(b)(6)(B).

Entered for the Court

Allison H. Eid
United States Circuit Judge

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK**

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

October 03, 2018

Chris Wolpert
Chief Deputy Clerk

Mr. Donald Morrison
Office of the Federal Public Defender
District of New Mexico
506 South Main Street, Suite 400
Las Cruces, NM 88001

RE: 17-2091, United States v. Templeton
Dist/Ag docket: 2:16-CR-03859-JFM-1

Dear Counsel:

Attached is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40, any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. If requesting rehearing en banc, the requesting party must file 6 paper copies with the clerk, in addition to satisfying all Electronic Case Filing requirements. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

A handwritten signature in black ink, reading "Elisabeth A. Shumaker". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Elisabeth A. Shumaker
Clerk of the Court

cc: Paige Messec

EAS/at