

NUMBER \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM 2019

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WILLIAM JAMES SPRINGER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

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## **I. QUESTION PRESENTED FOR REVIEW**

Whether a defendant's sentence can be enhanced under U.S.S.G. § 2D1.1(b)(1) for possession of a firearm in connection with a drug trafficking offense when he did not have actual possession of the firearm, which was possessed without his knowledge by a confederate in a location where the defendant was not present.

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#### **IV. LIST OF ALL DIRECTLY RELATED PROCEEDINGS**

- *United States v. Springer*, No. 5:17-cr-00212-1, U.S. District Court for the Southern District of West Virginia. Judgment entered July 20, 2018.
- *United States v. Springer*, No. 18-4545, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on October 15, 2019.

#### **V. OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Springer*, \_\_\_ F. App'x \_\_\_, 2019 WL 5166272 (4th Cir. 2019), is an unpublished opinion and is attached to this Petition as Appendix A. The basis of the issue presented in this Petition was ruled upon by the district court at sentencing. The relevant portion of the sentencing hearing transcript is attached to this Petition as Appendix B. The final judgment order of the district court is unreported and is attached to this Petition as Appendix C.

#### **VI. JURISDICTION**

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on October 15, 2019. This Petition is filed within ninety days of the date the court's judgment. No petition for rehearing was filed. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

## **VII. STATUTES AND REGULATIONS INVOLVED**

The issue in this Petition requires interpretation and application of two provisions of the United States Sentencing Guidelines. The first is U.S.S.G. § 2D1.1, which provides, in pertinent part:

**(b) Specific Offense Characteristics:**

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

The second is U.S.S.G. § 1B1.3, which provides, in pertinent part:

**(B) In the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were –**

- (i) within the scope of the jointly undertaken criminal activity,**
- (ii) in furtherance of that criminal activity, and**
- (iii) reasonably foreseeable in connection with that criminal activity;**

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense

## **VIII. STATEMENT OF THE CASE**

### **A. Federal Jurisdiction**

This Petition arises from the final judgment and sentence imposed upon William James Springer (“Springer”) following his conviction on one count of a six-count indictment for distribution of drugs. On July 21, 2016, an indictment was filed in the Southern District of West Virginia charging Springer with six counts of

distribution of oxymorphone, in violation of 21 U.S.C. § 841(a)(1). J.A. 7-12.<sup>1</sup> Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Springer pleaded guilty to Count Three of the indictment. J.A. 57-60. A Judgment and Commitment Order was entered on July 20, 2018. J.A. 118-125. Springer filed a timely notice of appeal on August 1, 2018. J.A. 126. The United States Court of Appeals for the Fourth Circuit had jurisdiction to review this matter pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

#### **B. Facts Pertinent to the Issue Presented**

This case arises from the separate prosecutions of Springer and three others, including Tremaine Pool (“Pool”), for distributing oxymorphone in Greenbrier County, West Virginia. During the course of that distribution, Pool possessed a firearm. Springer’s sentence was enhanced based on Pool’s possession of that firearm.

- 1. Springer, charged singly in a six-count indictment, pleads guilty to the distribution of oxymorphone.**

Between April and December 2016, investigators in Greenbrier County made a series of controlled purchases of oxymorphone. Six of them, made between September 28 and October 28, involved Springer. J.A. 138. The other six involved

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<sup>1</sup> “J.A.” refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

Joshua Smith (“Smith”). One also involved his girlfriend, Jessica Honaker (“Honaker”). J.A. 141.

On December 2, 2016, investigators executed a search warrant at the home of Smith and Honaker. Pool, Springer’s nephew, was also there, “lying on a mattress on the floor by the living room.” J.A. 144. In addition to \$1835 in cash and several cell phones, investigators found a handgun in the home, “located under the couch in the living room and next to numerous oxymorphone tablets.” J.A. 147. Smith was arrested on an unrelated warrant and all three of them were taken to the Greenbrier County Sheriff’s Department where they gave statements to investigators. J.A. 144.

Pool told investigators that he came to Greenbrier County from Michigan to distribute oxymorphone, beginning in November, and had been to West Virginia twice. Upon arriving in West Virginia, Pool received sixty tablets from an “unknown woman,” then gave those tablets, along with sixty others, to Smith and Honaker to distribute from their home. Pool stayed with them while the pills were sold. J.A. 144. Pool told investigators that the handgun and pills found nearby belonged to him. J.A. 145. He explained that he brought the gun from Michigan for his own personal protection. Pool also stated that Springer introduced him to Smith and arranged for his transportation to Smith and Honaker’s home. J.A. 146.

Smith told investigators that Springer was the source of the pills he sold in Greenbrier County and sometimes stayed at his home. Generally, however, “unknown individuals” would bring Pool to Smith’s house where he “would stay for

several days during the trip.” J.A. 145. Honaker confirmed that in her statement. J.A. 146.

Springer was arrested on December 13, 2016. J.A. 140. On December 5, 2017, Springer was charged with six counts of distribution of oxymorphone based on the six controlled purchases made in 2016. J.A. 7-12. Pool, Smith, and Honaker were all indicted together and pleaded guilty to distribution of oxymorphone. J.A. 133. Springer entered into a plea agreement with the Government in which he agreed to plead to Count Three of the indictment and the other counts would be dismissed. J.A. 47. Springer entered his guilty plea on April 13, 2018. J.A. 57-60.

**2. The district court enhances Springer’s sentence based on Pool’s possession of a firearm.**

After Springer’s guilty plea a Presentence Investigation Report (“PSR”) was prepared to assist the district court at sentencing. J.A. 137-174. The probation officer recommended a base offense level of 24 based on relevant conduct totaling between 100 and 400 kilograms of marijuana equivalent, as well as a two-level enhancement for being a leader or supervisor. J.A. 152. The probation officer did not recommend a two-level enhancement under U.S.S.G. § 2D1.1(b)(1) for possession of a dangerous weapon. The probation officer explained that the gun was found in Smith’s home under a couch next to “approximately 68 oxymorphone pills.” J.A. 150. Pool told investigators he got the gun in Michigan brought it to West Virginia “for his protection.” *Id.* While Springer “occasionally stayed at Smith’s residence” there was “no information included within the investigative discovery material that

suggests Mr. Springer had any knowledge" of Pool obtaining a firearm. *Id.* Springer was last at the home "more than one month" before the gun was discovered. J.A. 151. Finally, the others involved – Pool, Smith, and Honaker – were attributed the gun in their cases because they were all present when it was discovered. *Id.*

After a three-level reduction for acceptance of responsibility, the recommended final offense level was 23. J.A. 152. Combined with a Criminal History Category V, Springer's recommended advisory Guideline range was 84 to 105 months in prison. J.A. 156, 162.

The Government objected to the PSR's failure to recommend an additional two-level enhancement for possession of a weapon. J.A. 166-167. The Government argued that Springer engaged in "jointly undertaken criminal activity with several others" involving the sale of pills. J.A. 166. That included "putting a person of [Springer]'s choosing" in Smith's home "to handle the drugs and money and to distribute drugs." *Id.* That person was Pool. *Id.* The Government concluded that "in a scheme to bring drugs from Detroit to sell here, the fact that a drug dealer/monitor from Detroit would have a firearm to protect the drugs and drug money was foreseeable" to Springer. J.A. 167.

Springer responded to the Government's objection in a memorandum filed prior to sentencing, arguing that it was not foreseeable that Pool would possess a firearm during the operation in West Virginia. J.A. 67-69. Springer argued that there was no evidence in this case of the kind of large-scale drug operation involving large amounts of cash that was present in other cases where the enhancement had

been applied on the basis of possession of a firearm by a confederate. In addition, there was no evidence that Springer knew anything about Pool's possession of the gun. J.A. 68-69.

A sentencing hearing for Springer was held on July 18, 2018. J.A. 82-117. The Government reiterated its objection to the PSR not applying the two-level enhancement for possession of a gun. It argued that it was not necessary for Springer and Pool to be charged in a conspiracy for the firearm to be attributed to Springer. J.A. 85. Springer countered that in his statement Pool told investigators he brought the gun to West Virginia just a week before it was seized and had not brought it with him on any prior trips. Furthermore, there was no evidence to suggest Pool obtained the gun at Springer's direction. J.A. 86. He also argued that there was no evidence that Springer had any "involvement with setting this house up to the extent that he was paying the rent, he was paying bills, he was funding their expenses, none of that." J.A. 87. Springer also reiterated the point that cases where the enhancement had been applied based on foreseeability typically involve amounts of money or drugs that were much greater than were involved in this case or the guns were found in a house the defendant maintained for the purpose of selling drugs. J.A. 88-89.

Noting that "the parties are essentially arguing with respect to the issue of foreseeability," the district court sustained the Government's objection. J.A. 89-90. The district court concluded that there was "no dispute . . . that possession of the firearm was within the scope of the jointly undertaken criminal activity or in

furtherance of that activity.” J.A. 90. “Based on the undisputed facts,” the district court continued “I find that it is reasonably foreseeable to Mr. Springer that his nephew, Mr. Pool, would possess a firearm while he carried out his role of delivering drugs to West Virginia for Smith and his girlfriend to sell.” J.A. 91. The district court went on to explain that it was not necessary for Springer to know about the firearm or to have directed Pool to obtain it. J.A. 92. The district court also noted that “firearm possession is not unusual in drug distribution” and that “firearms have at times been referred to as a tool of the drug trade.” J.A. 93. The district court concluded that “given the nature of the offense, the quantity, and the fact that Pool was bringing drugs here and staying with people he didn’t otherwise know while and until the drugs were sold, this Court finds that his possession of a firearm was, in fact, reasonably foreseeable.” *Id.*

With the resolution of the Government’s objection, the district court calculated the advisory Guideline range to be 100 to 125 months in prison. J.A. 97. After hearing arguments from the parties, the district court sentenced Springer to a term of 96 months in prison, followed by a five-year term of supervised release. J.A. 109.

**3. The Fourth Circuit affirms Springer’s convictions and sentence.**

Springer appealed his sentence to the Fourth Circuit Court of Appeals, which affirmed in an unpublished opinion. *United States v. Springer*, \_\_\_\_ F. App’x \_\_\_, 2019 WL 5166272 (4th Cir. 2019). As relevant to this petition, Springer argued that

the district court clearly erred by concluding that “he could have reasonably foreseen Pool’s possession of a firearm.” *Id.* at \*2. While recognizing that “this is a close case,” the court concluded that the district court’s conclusion “does not constitute clear error.” *Id.* That was due to the “large quantity” of drugs involved and the fact that “Pool, at Springer’s direction, had been ‘bringing drugs to and staying with people he didn’t otherwise know’ – a potentially perilous undertaking.” *Id.* While the amount of drugs involved “do not compel the district court’s finding” it was “sufficient for us to conclude that the finding does not constitute clear error.” *Id.* In addition, that “Pool’s firearm was found in proximity to a large quantity of oxymorphone that Springer had arranged for Pool to distribute” was sufficient to support the district court’s conclusion that “the firearm was within the scope of Springer and Pool’s joint criminal activity.” *Id.* at \*3.

## **IX. REASONS FOR GRANTING THE WRIT**

**The writ should be granted to determine whether a defendant’s sentence can be enhanced under U.S.S.G. § 2D1.1(b)(1) for possession of a firearm in connection with a drug trafficking offense when he did not have actual possession of the firearm, which was possessed without his knowledge by a confederate in a location where the defendant was not present.**

In this case there has never been a dispute that Springer and Pool were confederates in a scheme to distribute prescription pills. Likewise, there was no dispute that the firearm at issue was only possessed by Pool and that Springer knew nothing of his nephew’s possession of that weapon. Whether the enhancement of Springer’s sentence for possession of a firearm in such circumstances is

appropriate is an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c).

**A. More than jointly undertaken activity involving drugs is needed before concluding that the possession of a firearm by a confederate is foreseeable to a defendant.**

Sentencing Guidelines require that the base offense level of a defendant who has been convicted of a drug crime be increased by two levels if “a dangerous weapon (including a firearm) was possessed.” U.S.S.G. § 2D1.1(b)(1). Guideline commentary further states that the increase “should 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, cmt. n.3. Courts have held that “possession of a weapon during commission of an offense is all that is needed to invoke the enhancement.” *United States v. Apple*, 962 F.2d. 335, 338 (4th Cir. 1992). In addition, “the proximity of guns to illicit narcotics” can support the enhancement. *United States v. Harms*, 128 F.3d 850, 852 (4th Cir. 1997).

A defendant may also receive the enhancement if one of his confederates possessed a firearm. Under U.S.S.G. § 1B1.3(a)(B)(iii), where there is “jointly undertaken criminal activity” a defendant may receive the enhancement if the confederate’s possession of the firearm was “reasonably foreseeable in connection with that criminal activity.” See *United States v. Brooks*, 957 F.2d 1138, 1148 (4th Cir. 1992)(“Brooks is subject to a sentence enhancement for Peay’s possession of firearms if such possession was in furtherance of the conspiracy and reasonably

foreseeable to Brooks"). Jointly undertaken activity includes any "criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy." U.S.S.G. § 1B1.3, cmt. n.3.

It has been recognized that firearms are "tools" of the drug trade and that possession of them often go hand in hand with the sale of drugs. *United States v. Manigan*, 592 F.3d 621, 629 (4th Cir. 2010)(collecting cases). However, that recognition does not mean that an enhancement for possession of firearms is appropriate in every drug case when firearms are present that. See *United States v. Clay*, 376 F.3d 1296, 1302-1303 (11th Cir. 2004)(enhancement should not apply "absent some specific connection between the firearms and the particular drug activity"). That is particularly true when the enhancement is applied vicariously, because the possession of a firearm by a confederate was reasonably foreseeable to a defendant involved in the drug trade.

The Seventh Circuit faced this issue in *United States v. Vold*, 66 F.3d 915 (7th Cir. 1995). Vold was convicted of conspiring to manufacture methcathinone with Cox, who had previously manufactured the drug with another man, Dean. When working with Dean, Cox manufactured the drug in his home, where Dean knew Cox had several firearms, including a derringer pistol he "always carried with him." *Id.* at 917. After Cox's girlfriend put an end to that operation (due to the smell), Cox met Vold and manufactured the drug twice at Vold's home. Cox's girlfriend later confirmed to investigators that he always carried the derringer and that "he would rather shoot it out with police than be arrested." *Id.* Vold's sentence

was enhanced based on Cox's possession of a firearm during their jointly undertaken criminal activity because such possession was reasonably foreseeable "based upon the use of the weapon and the knowledge that weapons are used in this type of criminal activity." *Id.* at 920

On appeal, the court vacated Vold's sentence and held that the enhancement should not apply. It concluded that the district court's findings to support the enhancement were "clearly erroneous," noting that there was no evidence that Cox possessed a firearm during the operations with Vold and "simply assumed from [Cox's girlfriend]'s statement that Cox conducted himself in the same manner during every" operation. *Id.* at 920-921. However, even assuming that Cox was actually in possession of a firearm when he was with Vold, "the government failed to prove that Cox's possession was reasonably foreseeable to Vold" because it "presented no evidence that Cox fired or brandished the derringer in Vold's presence, or that the derringer was anything but concealed while Cox and Vold were together." *Id.* at 921. In reaching that conclusion the court rejected the Government's argument that "the risk of manufacturing methcathinone establishes the reasonable foreseeability of a concealed firearm to Vold." *Id.* While noting that it had "often recognized that firearms and drug trafficking go hand in hand," the court noted that it had "never established . . . that the mere risk involved in a drug manufacturing conspiracy establishes reasonable foreseeability." *Id.* To do so "would establish strict liability for possession of a firearm under the Guideline for every drug manufacturing conspirator if any one co-conspirator possessed a firearm

during the conspiracy.” *Id.* Such a result “vitiates the government’s burden of proof at sentencing as well as the district court’s obligation under the Guidelines to conduct an individualized inquiry to ensure that the defendant is sentenced only on the basis of a conspiracy that was reasonably foreseeable to him.” *Id.* (internal quotation marks omitted); *see also United States v. Block*, 705 F.3d 755, 763-765 (7th Cir. 2013)(vacating sentence where enhancement was applied where there was evidence that some members of conspiracy possessed firearms, but no evidence that defendant ever saw them or knew of them).

It is thus critical to the foreseeability analysis to determine whether possession of firearms was within the scope of the jointly undertaken criminal activity in which the defendant and his confederates participated. In *United States v. Tabron*, 437 F.3d 63 (D.C. Cir. 2006), the defendant pleaded guilty to conspiring to sell drugs. *Id.* at 316. Although there was some dispute about whether Tabron actually possessed a firearm himself, the district court ultimately applied the enhancement after concluding that “he should have foreseen that his co-conspirators would have guns” because it was “hard to conceive of anyone not understanding what was going on out there as people were shooting at each other.” *Id.* at 66. The court vacated Tabron’s sentence because the district court had failed to determine whether the scope of the conspiracy he joined involved guns. Thus, “instead of finding that Tabron participated in the broader conspiracy with Mahdi, the district court simply determined that the Mahdi gang’s use of guns was reasonably foreseeable.” *Id.* at 318. That was error because the “extent of a

defendant's vicarious liability under conspiracy law is *always* determined by the scope of his agreement with his co-conspirators. Mere foreseeability is not enough . . . ." *Id.* at 67, quoting *United States v. Saro*, 24 F.3d 283, 288 (D.C. Cir. 1994); *see also United States v. Ramirez*, 783 F.3d 687, 691 (7th Cir. 2015)(district court was "required to undertake an individualized inquiry about the foreseeability of the coconspirators' gun possession from the perspective of the defendant" because "the mere fact that Ramirez was a member of a drug-distribution ring does not make her strictly liable for all concealed weapons possessed by other conspirators").

**B. Pool's possession of a firearm for a week was not foreseeable to Springer.**

This case lacks the factors that have led courts to find that possession of a firearm by a confederate was reasonably foreseeable to the defendant. First, this is not a case where the defendant actually saw a confederate with a gun in his hands. *See Brooks*, 957 F.2d at 1149 ("Brooks himself testified that at about the time of one of the murders, he was threatened at gunpoint by two of his coconspirators"); *United States v. Kimberlin*, 18 F.3d 1156, 1160 (4th Cir. 1994). Second, this is not a case where the defendant helped maintain the home that was being used as a location to distribute drugs and where firearms were stored. *See United States v. Gomez-Jimenez*, 750 F.3d 370, 382 (4th Cir. 2014)(affirming finding that defendant "was tied to the residence [where guns were found] both through his presence there when the police arrived as well as the existence of an energy bill for the residence in his name"). Finally, this is not a case that involved a large-scale drug operation that

included large amounts of cash that required protection. *See Id.* at 375, 381-382 (defendant was “responsible for more than 8000 grams of cocaine and 700 grams of cocaine base” and more than \$55,000 in cash was recovered from residence where guns were located).

By contrast, in this case there is no evidence that Springer knew anything about the gun that Pool possessed. Pool had only had the gun for a week when police searched Smith’s home, a search during which Springer was not present. J.A. 86. Indeed, Springer had last been in the home more than a month earlier. J.A. 151. There was no evidence that Springer’s agreement with Pool to enter into a criminal scheme included the possession of firearms. Nor did Springer have anything to do with the upkeep of the home from which the drugs were sold and in which the firearm was found. The home belonged to Smith, who lived there with his girlfriend. There is no evidence that Springer provided any assistance with rent, utilities or any form of upkeep.<sup>2</sup> Finally, the drug operation in which Springer played a part was not the kind of large-scale operation which suggests that firearms will inevitably become involved. Springer was attributed 300 oxymorphone tablets – about 74 grams of the actual drug – in comparison to the kilograms involved in *Kimberlin*. Similarly, investigators recovered less than \$2000 in cash from the

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<sup>2</sup> Springer was not assessed an enhancement for maintaining a premises for the purpose of distributing drugs. U.S.S.G. § 2D1.1(b)(12).

residence where the gun was found, as opposed to the tens of thousands involved in *Kimberlin*.<sup>3</sup>

There is insufficient evidence in this case to conclude that it was reasonably foreseeable to Springer that Pool possessed a firearm. Even though the district court was correct that Pool was going to West Virginia to stay in the home of “people he didn’t otherwise know” to sell drugs, J.A. 93, he was doing so at Springer’s direction. Springer knew Smith and introduced Pool to him. J.A. 145-146. It was thus not reasonable for Springer to think Pool would obtain a firearm to protect himself from other confederates in the scheme. The Government failed to carry its burden that the enhancement should apply. *United States v. Harris*, 882 F.2d 902, 907 (4th Cir. 1989)(“if the government seeks to enhance the sentence, it should bear the burden of proof and concomitant burdens of production and persuasion”). Therefore, Springer’s sentence is procedurally unreasonable because it was based on an incorrect calculation of the advisory Sentencing Guideline range.

## **X. CONCLUSION**

For the reasons stated, the Supreme Court should grant certiorari in this case.

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<sup>3</sup> To further the comparison, Springer’s relevant conduct converted to 367.5 kilograms of marijuana, whereas the amounts involved in *Kimberlin* would have produced ten times that amount and produced a base offense level eight levels higher. J.A. 148-149; U.S.S.G. § 2D1.1(c).

Respectfully submitted,

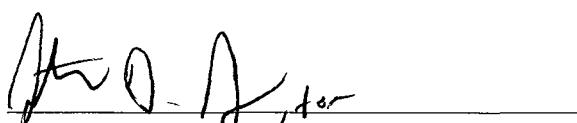
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