No. _____

IN THE

SUPREME COURT OF UNITED STATES

NICHOLAS RYAN HEMSHER - PETITIONER

vs.

UNITED STATES OF AMERICA – RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

JUSTIN L. BELL
May, Adam, Gerdes and Thompson, LLP
PO Box 160
Pierre, SD 57501-0160
(605) 224-8803
jlb@mayadam.net
Attorney for Petitioner

QUESTIONS PRESENTED

1) Whether the Eighth Circuit Court of Appeals erred in finding that the statutory direction to avoid unwarranted disparities among defendants, 18 U.S.C. § 3553(a)(6), does not apply to co-conspirators?

2) The Eighth Circuit Court of Appeals holding that "the another felony" enhancement in U.S.S.G. § 2K2.1(b)(6)(B) may be applied to a violation of second violation of statute of conviction is a matter of public importance.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER REFERENCES

IN THE

SUPREME COURT OF UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the petition and is reported at 893 F.3d 525. A transcript of the opinion of the United States District Court for the District of South Dakota appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit decided this case was June 20, 2018. A timely petition for rehearing was denied by the United States Court of Appeals on August 3, 2018, and a copy of the order denying rehearing appears at Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S. Code § 3553, in pertinent part, states:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]

U.S.S.G. § 2K2.1(b)(6)(B) states, in pertinent part:

> 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, increase by 4 levels.

Application Note 13(D) of the Commentary to U.S.S.G. § 2K2.1 states, in pertinent part:

> In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

Application Note 14(C) of the Commentary to U.S.S.G. § 2K2.1 states, in pertinent part:

> "Another felony offense", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

STATEMENT OF THE CASE

On February 18, 2016, the Sioux Falls (South Dakota) Police Department received a late report of a burglary. JT 51:19-22. The report was made when Jack Huslcher returned home from work that day. JT 89:20-90:5. When law enforcement arrived at the scene, a report was made by Jack Hulscher that "two gun cases and several guns and ammunition" were stolen. JT 52:19-23.

Patrol Officer Brady Fox of the Sioux Falls Police Department and Jack Hulscher testified that pickup tracks were left in the mud by the driveway, and

there were signs of forced entry evident to the door into the garage, including a dent and it being partially opened at the time. JT 52:10-13; 66:7-13; 90:8-15.

Law enforcement interviewed Robert Hulscher, the son of Jack Hulscher, who lived in the home, regarding the reported theft. JT 74:14-76:13. Robert Hulsher's statements were wildly inconsistent, and it is presumed he was under the influence of some sort of narcotic during at least the first statement. JT 74:14-76:13;79:25-81:15; 125:15-21. At one-point Robert Hulscher indicated he took the safes and threw them in the river. JT 75:9-13. However, none of Robert Hulsher's statements to his father indicate tor law enforcement stated Hemsher was involved. JT 137:1-3

On February 22, 2016, Nicolas Wingler ("Wingler") was arrested by the Minnehaha County Sherriff's office. JT 321:1-7. Nick Wingler was arrested on a warrant unrelated to the instant offense with a pocketful of Xanax pills and marijuana. JT 321:12-17. He immediately asked to make a deal to name others regarding an unrelated firearm theft in an effort to spare detention. JT 321:21-25.

Based upon the information initially provided by Wingler, the Sioux Falls Police Department executed a warrant at Wingler's residence on February 22, 2016 at approximately 10:00 pm. JT 330:6-7. Matthew Marshall ("Marshall") was detained at the residence. Marshall presumably was trying to hide a black duffel bag of six firearms. JT 342:12-343:11.

Prior to execution of the search warrant, because of the information provided by Wingler, Sargent Scott Van Roekel, and another detective, of the Sioux Falls Police Department were surveilling Winger's residence from roughly 145 to 160 feet

away, starting at about 8:20 in the evening (in the dark), in an unmarked car. JT 176:13-20; 178:18-20; 179:10-15. Sargent Van Roekel testified they saw a four-door silver Toyota Camry arrive at 8:30 pm. JT 179:21-23. He testified he was not able to identify the driver. JT 179:24-180:1. At approximately 10:30 pm, Sargent Van Roekel testified he saw the Toyota Camry again, with a driver and a passenger, and testified that this time he could this time identify the driver as Hemsher. JT 180:19-181:10. He testified that Hemsher alone got out of the Camry, walked around the apartment complex without entering, and then came back to the vehicle a minute or two later and left. JT 181:1-5; 182:3-5.

Sargent Van Roekel testified he followed the Camry in his unmarked car. JT 182:7-8. Sargent Van Roekel testified the car drove at a high rate of speed and he lost contact with the Camry. JT 182:25-183:3. He testified that he eventually re-established contact and a stop of the Camry ensued. JT 184:2-4. When the vehicle was stopped, only one person was in the Camry. JT 323:12-19. Hemsher was arrested because of an outstanding arrest warrant. JT 323:1-7. No firearms were found on the body of Hemsher nor seen in the vehicle at the time of the stop. JT 324:24-325:13.

Hemsher's vehicle was towed and impounded by Anderson Towing that evening, February 22, 2017, at approximately 11:45 pm. JT 202:20-22. The tow truck driver did not remember seeing a firearm in the vehicle. JT 206:21-23. In fact, no records of Anderson Towing indicted an employee reported a firearm being

in the Camry, despite law enforcement's testimony to the contrary. JR 206:22-207:5; 335:13-23.

Law enforcement requested and received a search warrant on the Camry, which, although potentially being registered in her parents' names, was owned by Amber Weber, Hemsher's girlfriend at the time. JT 218:17-22; 256:3-4; 336:17-22. Despite not seeing any gun the night before, when the Camry was searched, a Glock 22 .40 caliber handgun was found on the floor mat in front of the driver's side seat. JT 257:10-19; Exh 38. In addition, ammunition for the Glock was found. JT 261:14-16. Based on information given from Wingler stating that firearms were located there, a search warrant was also executed on Word of Mouth Tattoo Shop, a tattoo shop owned by Hemsher. JT 295:2-10. No firearms or items of significance were found at Word of Mouth Tattoo Shop. JT 296:6-8.

On June 21, 2016, Robert Hulscher was indicted for stealing firearms and being a felon in possession of a firearm. Nicholas Hemsher was indicted with being in possession of stolen firearms and being a felon in possession of a firearm. Nicolas Wingler was indicted with possession of stolen firearms. Mathew Marshall was indicted with being a felon in possession of a firearm. On November 3, 2016, Wingler entered into a plea agreement pleading guilty to possession of stolen firearms. On November 25, 2016, Marshall entered into a plea agreement pleading guilty to felon in possession of a firearm.

Wingler and Marshall testified at trial as a cooperating co-defendant seeking a sentence reduction because of their cooperation. Their testimony suffered from

substantial inconsistencies. However, the jury found Hemsher guilty of being in possession of stolen firearms and being a felon in possession of a firearm. DCD 284. Hulscher was acquitted. *Id.*

At sentencing, the district court applied a four-level enhancement under U.S.S.G. § 2K2.1(b)(1)(B) reasoning that Hemsher was in possession of eight firearms, ST 5:3-24, and applied an enhancement under U.S.S.G. § 2K2.1(b)(6)(B) reasoning that Hemsher was involved in "another felony' in attempting to traffick stolen firearms, ST 7:18-19:6. Further, the Court applied a two-level enhancement for obstruction of justice under §3C1.1.

Hemsher was sentenced to 120 months imprisonment on each count to run concurrently. DCD 340. Marshall was sentenced to six months imprisonment concurrent to any state court sentence. DCD 307. Wingler was sentenced to seven months imprisonment concurrent to any state court sentence. DCD 303. A timely notice of appeal was filed May 23, 2017. DCD 347.

The Court of Appeals for the Eighth Circuit affirmed Hemsher's conviction and sentence, rejecting Hemsher's challenges to the sufficiency of the evidence, the district court's ruling on hearsay objections, and district court's application of the sentencing guidelines/factors. *See generally United States v. Hemsher,* 893 F.3d 525 (8th Cir. 2018).

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit Court of Appeals holding that the statutory direction to avoid unwarranted disparities among defendants does not apply to co-conspirators is a misapplication of this Court's holding in Gall and continues a split of the Circuits that should be settled by this Court.

In *Gall v. United States*, 552 US 38 (2007), the United States Supreme Court reversed the Eighth Circuit Court of Appeals for reversing a district court's sentence that considered the impact of co-conspirator sentences in applying the § 3553(a) factors. Specifically, the Court found that "it is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the *need* to avoid unwarranted similarities among other co-conspirators who were not similarly situated." *Id.* at 55 (emphasis added).

In the case at hand, the Eighth Circuit has ruled that a district court need not consider co-defendant/co-conspirator sentencing disparities, except in consolidated cases. *United States v. Hemsher*, 893 F.3d 525, 535 (8th Cir. 2018). That rationale is inconsistent with the basis "the *need* to avoid unwarranted similarities among other co-conspirators who were not similarly situated." *Gall*, 552 US at 55.

The sentencing issue raised by this case is especially important in its implications for uniformity of the law and fair sentencing practices among the federal courts. Indeed, the rule articulated in the decision below demands correction because it undermines what experience and empirical study have shown about sentencing outcomes since *Booker*. A study first conducted in 2010 and revised and updated through August 2016 analyzed sentences imposed on remand after

Guidelines sentences had been vacated on appeal for failure to consider § 3553(a) arguments. *See* Jennifer Niles Coffin, Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation, available at https://www.fd.org /sites/default/files/criminal_ defense_topics/essential_topics/ sentencing_resources/where-procedure-meets-substance-making-the-mostof-the-need-for-adequate-explanation.pdf (the "Study").

The Study found that 58.1% of sentences imposed on remand were less severe than the within-Guidelines range sentence originally imposed. *Id.* at 18.3. Thus, district courts' mandatory consideration of the § 3553(a) factors has important, real-world consequences: In a majority of cases, it results in a less severe sentence than is imposed where courts blindly follow the Guidelines.

It is perhaps unsurprising that this is the case since numerous factors that are considered not relevant or not ordinarily relevant to sentencing under the Guidelines have been repeatedly deemed by courts to be highly relevant to their consideration of the personal history and characteristics of the defendant and whether the sentence is sufficient or greater than necessary to serve the purposes of sentencing.

Sentencing disparities are such a factor. Ten of the cases cited in the Study turned on the district court's initial failure to make an individualized assessment of each defendant and consider him vis a vis similarly-situated defendants, and in each of these cases, the district court on remand imposed a lesser sentence when it explicitly considered the need to avoid unwarranted disparities.

In the case at hand, co-defendants Marshall and Wingler pled guilty to being part of the same scheme that the Court found at sentencing Hemsher was a party. The evidence presented at trial conspiracy is laid out in the Statement of the Case, *supra.* Indeed, it is not, and cannot be disputed that it was Wingler that had actual possession of at least seven of the firearms and was actively making efforts to traffick the stolen weapons. *Id.* Marshall and Wingler were sentenced prior to Hemsher. Marshall was sentenced to six months imprisonment concurrent to any state court sentence. DCD 307. Wingler was sentenced to seven months imprisonment concurrent to any state court sentence. DCD 303. Without any consideration or mention of potential disparate sentencing issues, Hemsher was sentenced to 120 months imprisonment on each count to run concurrently. DCD 340.

The Eighth Circuit holding that the District Court need not consider such issues between co-defendants conflicts with other circuit holdings. In *United States v. Friedman*, 658 F.3d 342 (3d Cir. 2011), for example, the defendant was convicted of bribery with two co-defendants – the public official to whom the bribe was paid and another individual who paid the same official a bribe. See id. at 363. Those co-defendants were sentenced to 24 months' imprisonment and three years' probation, respectively. *Id.* The district court imposed a Guidelines sentence of 34 months without meaningfully addressing the defendant's argument that such a sentence would create an unwarranted disparity with the sentences his co-defendants received. *See id.* ("The District Court's only discussion of this alleged disparity in

sentencing was that the District Court noted that it was required to 'consider a fairness with regard to other offenders who are sentenced by the Court.'"). The Third Circuit held this was procedural error, stating that "[t]he District Court must address whether there is a sentencing disparity because there is no explicit discussion or indication in the record that it was considered." *Id.* On remand, the district court resentenced the defendant to 24 months.

In *United States v. DeYoung*, 571 F. App'x 231 (4th Cir. 2014) (unpublished per curiam op.), the defendant was convicted of conspiracy to distribute and to possess with intent to distribute oxycodone. *Id.* at 232. At sentencing, she requested that the district court give her the same benefit of a reduction in drug weight that the government recommended for her co-defendant at his sentencing. *Id.* at 234. The district court rejected that request and sentenced the defendant to the bottom of the advisory Guidelines range, imposing a sentence of 70 months' imprisonment – the same sentence received by the co-defendant. *Id.* The Fourth Circuit held that although the defendant's sentence was within the Guidelines range, the sentencing "court erred by ignoring her nonfrivolous arguments for a different sentence and failing to explain the sentencing choice," and that the outcome of this error was that "[w]hile the co-defendant was more culpable, he received the same sentence." Id. (internal quotation marks omitted). As in Friedman, the Court of Appeals found this was "procedurally unreasonable," *id.* at 233, and remanded for resentencing. On remand, the defendant received a sentence of time served, which at that time was 15 months.

To the extent the Eighth Circuit relied on *Gall*, it overread language in this Court's decision and ignored the circumstances of the case. The Court noted in *Gall* that, based on the colloquy between the district judge and prosecutor at sentencing, "it is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted similarities among other c o-conspirators who were not similarly situated." *Gall*, 552 U.S. at 55. Thus, Gall affirmed the district court's recognition that a within-Guidelines sentence can create an unwarranted disparity, which was the basis for the district court's variance below the 30-37 month Guidelines range in that case to a term of probation. *See id.* at 593. The Court should grant certiorari to resolve the circuit split and make clear that the mandatory language of the statute governs.

The decision below missed this point. Far from supporting any abdication of the court's responsibility to consider the § 3553(a) factors independently of the Guidelines, *Gall* is a case-study in why such consideration is necessary for fair sentencing outcomes. The Court should grant certiorari to resolve the circuit split and make clear that the mandatory language of the statute and the holding of *Gall* governs.

II. The Eighth Circuit Court of Appeals holding that "the another felony" enhancement in U.S.S.G. § 2K2.1(b)(6)(B) *may be applied to a violation of the same of statute of conviction is in error and a matter of public importance.*

The district court applied a four-point enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for Hemsher reasoning he "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[.]" *Id.* The Court reasoned the enhancement applied because: "The Defendant was convicted of possession of stolen firearms. The other felony that would be in connection with that offense would be trafficking of stolen firearms." ST 7:19-22. The district court further clarifies that, though there was not actual trafficking that occurred, there was an attempt or intent, presumably reasoning that is sufficient to grant the enhancement under U.S.S.G. § 2K2.1(b)(6)(B).

"'Another felony offense', for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained." *See* Application Note 14(C) to U.S.S.G. § 2K2.1. That definition is interpreted by other application notes within the guidelines to mean application of U.S.S.G. § 2K2.1(b)(6)(B) is only available if the offenses is an offense other than a firearms possession or trafficking offense. *See* Application Note 13(D) to U.S.S.G. § 2K2.1 ("If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.").

The Eighth Circuit Court of Appeals rejected the argument that because of the the word "the" rather than "a" is used in Application Note 14(C) to U.S.S.G. § 2K2.1, use of the word "a" in Application Note 13(D) to U.S.S.G. § 2K2.1 is not

determinative. Hemsher would submit that Application Note 13(D) to U.S.S.G. § 2K2.1 clarifies that definition by stating "[i]f the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply." This language is not a specific limitation for use in subsection (b)(5), but rather explanation as to the very meaning of "another felony offense" generally used in U.S.S.G. § 2K2.1 and specifically for application in subsection (b)(6)(B). *See* Merriam-Webster Online Dictionary, available at *https://www.merriam-webster.com/dictionary/i.e.* (last visited January 3, 2017) (defining i.e. as "that is" and further explaining "i.e. stands for *id est*, which means "that is" in Latin. It introduces a rewording or a clarification of a statement that has just been made or of a word that has just been used").

However, the biggest area of public importance with the Eighth Circuit Court of Appeals opinion is that possession of a stolen firearm and sale of a stolen firearm are not only both firearms possession and trafficking offenses, but are in fact the same felony offense as both violate the identical statute, ie 18 USC 922(j) ("It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, . . .").

In this case, the district court reasoned the enhancement applied because: "The Defendant was convicted of possession of stolen firearms. The other felony that would be in connection with that offense would be trafficking of stolen firearms." ST 7:19-22. The district court further clarified that, though there was not actual

trafficking that occurred, there was an attempt or intent, presumably reasoning that is sufficient to grant the enhancement under U.S.S.G. § 2K2.1(b)(6)(B). In short, no specific statute, federal or state, was identified by the district court or the panel. However, under federal law, the action identified by the district court would be volitive of the same statute as the offense of conviction, specifically, 18 USC 922(j). Because the only "other offense" addressed in this case is a violation of the same offense of conviction, application of the enhancement was in error.

In such a situation, application of the "another felony" enhancement opens the floodgates for application for uses clearly outside the intended scope of the sentencing guidelines, which would dramatically increase its application. The Court should grant certiorari to resolve the to make clear that the "another felony" enhancement found in U.S.S.G. § 2K2.1(b)(6)(B) does not apply to situations where the "other felony" is a violation of the same statute as the offense of conviction.

CONCLUSION

For the foregoing reasons, Hemsher respectfully requests that the petition for a writ of certiorari should be granted.

Dated this ___ day of September, 2018.

MAY, ADAM, GERDES & THOMPSON LLP

BY: _____

JUSTIN L. BELL
503 S. Pierre Street
PO Box 160
Pierre, SD 57501
(605) 224-8803
jlb@mayadam.net
Attorneys for the Petitioner