IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

NO. _____

Sunni Askari Newell,

Petitioner,

-vs.-

United States of America,

Respondent.

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit
(8th Cir. Case No. 19-2680)

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QUESTION PRESENTED

I. WHETHER THE EIGHTH CIRCUIT HAS MISCONSTRUED U.S.S.G. § 2K2.1(b)(6)(B), CONTRARY TO EVERY OTHER CIRCUIT, RESULTING IN DEFENDANTS CONVICTED OF FIREARMS POSSESSION OFFENSES IN THE NORTHERN AND SOUTHERN DISTRICTS OF IOWA RECEIVING LONGER SENTENCES THAN ANYWHERE ELSE IN THE COUNTRY?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Sunni Askari Newell, respectfully requests that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINION BELOW

On July 30, 2020, the United States Court of Appeals for the Eighth Circuit entered its Opinion and Judgment, App. 1, 4, affirming the July 31, 2019, Judgment and sentence of the United States District Court for the Northern District of Iowa.

JURISDICTION

The Eighth Circuit's jurisdiction was based on 28 U.S.C. § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Eighth Circuit filed its Opinion and Judgment on July 30, 2020. App. 1, 4. Mr. Newell filed a timely Petition for Rehearing and Rehearing En Banc on August 27, 2020.[1] The Eighth Circuit summarily denied that Petition on September 18, 2020. This Petition for Writ of Certiorari is timely filed within one hundred-fifty (150) days

1The Eighth Circuit granted an extension of time to file a Petition for Rehearing/Rehearing En Banc after counsel lost electricity and internet for a week after the August 10, 2020, derecho. App. 5.

of the filing of the Eighth Circuit's denial of Mr. Newell's Petition for Rehearing and Rehearing En Banc.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> If the defendant –
>
> . . . .
>
> > (B) used or possessed any firearm or ammunition in connection with another felony offense; . . .
>
> increase by 4 levels.

U.S.S.G. § 2K2.1(b)(6)(B)

[2]The deadline for filing a Petition for Writ of Certiorari was extended to 150 days by this Court's Order of March 19, 2020. As the 150th day fell on a federal holiday (President's Day, February 15, 2021), the deadline was extended to the next day, February 16th.

STATEMENT OF THE CASE

Defendant-Appellant Sunni Askari Newell was indicted for one count of Possession of a Firearm by a Person Convicted of Domestic Violence, in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2). (DCD 2 - Indictment).[3]

Mr. Newell pled guilty. (DCD 22 - Report and Recommendation to accept guilty plea; DCD 23 - Order adopting Report and Recommendation and accepting guilty plea).

Several issues were raised at sentencing. One was asserted on appeal and is raised in this Petition for Writ of Certiorari.

The Presentence Investigation Report recommended that a four level increase be assessed pursuant to U.S.S.G. § 2K2.1(b)(6)(B) (DCD 28 at PSIR ¶ 12). Mr. Newell objected. *Id*. The District Court concluded that it was bound by the Eighth Circuit's decision in *United States v. Walker*, 771 F.3d 449 (8th Cir. 2014), and imposed the adjustment. (DCD 44 - Sent. Tr. 10-11).

The panel of the Eighth Circuit also concluded that it was bound by *Walker*. App. 2. Mr. Newell filed a Petition for Rehearing *En Banc* requesting that the full Eighth Circuit address this issue. The Eighth Circuit denied that request. App. 6.

U.S.S.G. § 2K2.1(b)(6)(B) imposes a four-level increase if the firearm is possessed in connection with another felony offense. The Northern and Southern

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3"DCD" refers to the District Court's docket in *United States v. Newell*, N.D. Iowa No. 18-CR-2070.

Districts of Iowa routinely apply this adjustment, reasoning that possession of the firearm violates Iowa Code § 724.4(1) - Carrying Weapons. The Eighth Circuit, in *Walker*, approved the use of that adjustment based on that Iowa statute. Petitioner Newell asks this Court to grant certiorari to review this issue because:

> 1. No other Circuit has adopted the interpretation of U.S.S.G. § 2K2.1(b)(6)(B) adopted by the Eighth Circuit, as discussed in Section I below;
>
> 2. The Eighth Circuit has misinterpreted the Guideline, as discussed in Section II below;
>
> 3. The Eighth Circuit has refused to correct this error in numerous cases, the Sentencing Commission has been without a quorum for several years and is thus unable to correct this error, and accordingly, this Court should grant certiorari to correct this error that affects numerous defendants sentenced for firearms possession offenses in the Northern and Southern Districts of Iowa, as discussed in Section III below.

REASONS FOR GRANTING THE WRIT

Certiorari is properly granted as the Eighth Circuit's decision in this case conflicts with the decisions of all, or almost all, of the other Circuits. *See* Supreme Court Rule 10(a) ("a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

I. NO OTHER CIRCUIT COURT OF APPEALS HAS ADOPTED THE APPROACH TAKEN BY THE EIGHTH CIRCUIT

There does not appear to be a single other Court of Appeals which has followed, or even cited with approval, the Eighth Circuit's analysis and decisions in *Walker* or *Jackson* or similarly interpreted U.S.S.G. § 2K2.1(b)(6)(B).

In fact, counsel has been unable to locate any case in any other Circuit wherein the Court has approved (or even discussed) applying § 2K2.1(b)(6)(B) when the other offense is "carrying weapons" or a similar state possession of a firearm offense.[4] Although there are numerous cases in other Circuits applying § 2K2.1(b)(6)(B), they all involve obviously independent crimes with conduct greater than mere possession of the firearm. *See, e.g.*, *United States v. Oliveira*, 907 F.3d 88, 91-92 (1st Cir. 2018) (possession of marijuana with intent to distribute); *United States v. Brake*, 904 F.3d 97, 99 (1st Cir. 2018) (burglary in which possessed firearms were stolen); *United States v. Colby*, 882 F.3d 267, 273 (1st Cir. 2018) (criminal threatening with a dangerous weapon); *United States v. Ryan*, 935 F.3d 40, 42 (2nd Cir. 2019) (distribution of heroin); *United States v. Young*, 811 F.3d 592, 595 (2nd Cir. 2016) (transferring firearm knowing it would

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[4]Counsel conducted an internet database search (using Fastcase) and looked at every Circuit Court opinion citing U.S.S.G. § 2K2.1(b)(6)(B), over 400 published and unpublished cases. The vast majority of the cases involve possession of the firearm in connection with: (1) a drug trafficking offense; (2) a burglary in which the firearm is stolen; (3) a robbery using the firearm; or (4) assaultive conduct using the firearm.

be used in a drug trafficking offense); *United States v. Foster*, 891 F.3d 93, 113 (3rd Cir. 2018) (conspiracy to commit robbery); *United States v. Harris*, 751 F.3d 123, 128 (3rd Cir. 2014) (assault); *United States v. Jones*, 740 F.3d 127, 132 (3rd Cir. 2014) (resisting arrest); *United States v. Gattis*, 877 F.3d 150, 161 (4th Cir. 2017) (conspiracy to commit burglary and possess stolen property); *United States v. Alcantar*, 733 F.3d 143, 144-45 (5th Cir. 2013) (possession of cocaine with intent to deliver); *United States v. Shanklin*, 924 F.3d 905, 911-12 (6th Cir. 2019) (drug trafficking offense); *United States v. Goldston*, 906 F.3d 390, 393 (6th Cir. 2018) (assault); *United States v. Sweet*, 776 F.3d 447, 448 (6th Cir. 2015) (distribution of heroin); *United States v. Adkins*, 729 F.3d 559, 564 (6th Cir. 2013) (aggravated assault); *United States v. Stafford*, 721 F.3d 380, 401 (6th Cir. 2013) (unlawful discharge of firearm); *United States v. Briggs*, 919 F.3d 1030 (7th Cir. 2019) (drug trafficking); *United States v. Shelton*, 905 F.3d 1026, 2029 (7th Cir. 2018) (train robbery); *United States v. Mancillas*, 880 F.3d 297, 300 (7th Cir. 2018) (criminal recklessness); *United States v. Bare*, 806 F.3d 1011, 1015 (9th Cir. 2015) (disorderly conduct involving discharge of firearm); *United States v. Chadwell*, 798 F.3d 910, 916-17 (9th Cir. 2015) (drug trafficking); *United States v. Griffith*, 928 F.3d 855, 874 (10th Cir. 2019) (drug trafficking); *United States v. Martinez*, 824 F.3d 1256, 1257 (10th Cir. 2016) (burglary); *United States v. Hoyle*, 751 F.3d 1167, 1170 (10th Cir. 2014) (criminal threat); *United States v. Lange*,

862 F.3d 1290, 1293 (11th Cir. 2017) (drug distribution).

The Sixth Circuit has most directly addressed the issue, coming to the opposite conclusion of the Eighth Circuit. In *United States v. Fugate*, 964 F.3d 580 (6th Cir. 2020), the Sixth Circuit specifically rejected the Eighth Circuit's reasoning:

> Application Note 13(D) to § 2K2.1(b)(5) states that an enhancement under § 2K2.1(b)(6)(B) will apply in addition to § 2K2.1(b)(5) "[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)." (emphasis added). Application Note 14(C) to § 2K2.1(b)(6)(B) echoes the instruction in Application Note 13(D) by defining "another felony offense" as "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." (emphasis added). Thus, the Application Notes carve out firearms possession or trafficking offenses from felony offenses that qualify for the § 2K2.1(b)(6)(B) enhancement.
>
> There is one notable difference, however, between the language in Application Notes 13(D) and 14(C). Application Note 13(D) to § 2K2.1(b)(5) says "an offense other than a firearms possession or trafficking offense," whereas Application Note 14(C) to § 2K2.1(b)(6)(B) says "any . . . offense, other than the explosive or firearms possession or trafficking offense." (emphasis added). The use of "a" in Application Note 13(D) suggests that a defendant cannot receive a second enhancement under § 2K2.1(b)(6)(B) for any firearms possession or trafficking offense. The use of "the" in Application Note 14(C), on the other hand, could signal that only the underlying firearms possession or trafficking offense of conviction—here, Fugate's conviction for being a felon in possession of a firearm in violation of § 922(g)(1)—is

> excluded from the types of felony offenses that qualify for the § 2K2.1(b)(6)(B) enhancement. The Eighth Circuit adopted the latter interpretation in *United States v. Hemsher*, 893 F.3d 525, 535 (8th Cir. 2018). In doing so, the Eighth Circuit reasoned that the use of "the" in Application Note 14(C) controls because Application Note 14(C) is tasked with explaining § 2K2.1(b)(6)(B), the enhancement at issue. *Id*. at 534-35. Therefore, in the Eighth Circuit's view, any firearms possession or trafficking offense other than the underlying offense of conviction can qualify for the § 2K2.1(b)(6)(B) enhancement.
>
> We see it the other way around.

Fugate, 964 F.3d at 585-86. *See also United States v. Atherton*, No. 13-5276, slip op. at 2 (6th Cir. June 2, 2014) (unpublished) (holding that while state conviction for carrying a concealed deadly weapon based on same possession underlying federal conviction is not "another felony" under § 2K2.2(b)(6)(B), Atherton also was convicted of first-degree stalking, which justified the enhancement).

The Third Circuit somewhat addressed the issue in *United States v. Hester*, 910 F. 3d 78 (3rd Cir. 2018), using reasoning that would be inconsistent with the Eighth Circuit's reasoning. Hester was convicted of being a felon in possession of a firearm. The District Court applied the four-level enhancement on the theory that the possession constituted the state offense of evidence tampering. Hester had been given a firearm used in a robbery for the purpose of disposing of it. The Third Circuit reversed.

The Third Circuit reasoned, in part, that "the district court incorrectly interpreted the Guidelines provision, as a matter of law, by finding that the

possession itself - which was coextensive with the alleged secondary felony - occurred 'in connection with' the subsequent felony offense." *Hester*, 910 F.3d at 88. The Third Circuit further explained:

> However, even without regard to whether the Government met its burden to show that Hester tampered with evidence, the sentencing enhancement under (b)(6)(B) would not apply to Hester's circumstances as a matter of law. The Guidelines provide for a four-point offense level enhancement "[i]f 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." U.S.S.G. § 2K2.1(b)(6)(B) (emphasis added). . . .
>
> In *Smith v. United States*, the Supreme Court expressed concern that this enhancement, as enshrined in an earlier analogous provision, would be erroneously applied to defendants who committed subsequent felonies while merely also possessing a firearm. 508 U.S. 223, 237-38, 113 S. Ct. 2050, 124 L.Ed.2d 138 (1993). There, the Court emphasized that "the gun at least must facilitate, or have the potential of facilitating" the subsequent offense for the enhancement to apply. *Id*. at 238, 113 S. Ct. 2050.
>
> Following this decision, the commentary to the Sentencing Guidelines was amended in 2006 to include, *inter alia* Application Note 14, which clarified that the (b)(6)(B) enhancement applies "if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense." U.S.S.G. § 2K2.1(b)(6)(B), cmt. n.14. Application Note 14 specifically cites burglary or drug trafficking offenses as those scenarios in which the enhancement might apply. *Id* .
>
> We subsequently agreed with this understanding of the enhancement, holding that it applies when the defendant has "committed another felony offense ... that the firearm

facilitated." *West*, 643 F.3d at 110. We clarified that, in the drug context, the enhancement typically applies in situations of trafficking, whereas mere possession of drugs by a person who also possessed a gun was insufficient. *West*, 643 F.3d at 113.8 We further admonished more generally that our past precedent "should not be read to imply that simply possessing a firearm during the commission of another felony offense is sufficient to invoke the enhancement of § 2K2.1(b)(6)." *West*, 643 F.3d at 115-16.

In *United States v. Keller*, mere months after we decided *West*, we permitted the enhancement's application where the firearm at issue had been used in the commission of a burglary. 666 F.3d at 107. There, we reasoned that burglary and felon in possession differed on an element-by-element basis. "[M]ore than mere possession of the firearm—brandishment or other use—was an integral aspect of the predicate offense." *Id*. at 106 (quoting *United States v. Navarro*, 476 F.3d 188, 196 (3d Cir. 2007)). In reaching our conclusion we also relied on the 2006 amendment, finding that the Guidelines confirmed both that "facilitation" was a critical component of any predicate offense, and that "burglary" was the type of crime contemplated by the enhancement. *Id*. at 107.

Hester's possession of the firearm did not facilitate or enhance his ability to tamper with evidence in the manner contemplated by the Guidelines. He did not brandish or otherwise use the firearm to tamper with evidence; he merely possessed it. Indeed, Hester's purported evidence tampering was coextensive with the possession of the weapon itself. The Government argues that "Hester's possession of the firearm was not an integral aspect of the evidence tampering offense." Appellee Br. at 35. But had Hester not possessed the gun, there would be no discussion regarding whether he tampered with it and there would also be no underlying charge.

Consistent with our clear precedent and the Guidelines commentary, we hold that applying the § 2K2.1(b)(6)(B) enhancement to a sentence for an underlying offense of possession of a weapon is improper when the alleged evidence

> tampering involves merely possessing that same weapon. Rather, in order for the enhancement to apply, the weapon must facilitate a subsequent felony offense of the kind contemplated by the Guidelines and our precedent. *West*, 643 F.3d at 110.

Hester, 910 F. 3d at 89-90 (emphasis added) (footnotes omitted).

Thus, no other Circuit has adopted the interpretation of 2K2.1(b)(6)(B) adopted by the Eighth Circuit and at least the Sixth Circuit has reached the opposite conclusion and expressly rejected the Eighth Circuit's logic.

II. THE EIGHTH CIRCUIT HAS MISCONSTRUED THE SENTENCING GUIDELINES IN PERMITTING IMPOSITION OF THE FOUR-LEVEL ADJUSTMENT IN WITH RESPECT TO THE IOWA OFFENSE OF CARRYING WEAPONS[5]

U.S.S.G. § 2K2.1(b)(6)(B) imposes a four-level enhancement if the defendant "used or possessed [the] firearm . . . in connection with another felony offense." "Another felony offense" includes "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." *Id*. at cmt. n. 14(C).

The District Court relied upon *United States v. Walker*, 771 F.3d 449 (8th Cir. 2014), in imposing that adjustment against Mr. Newell with respect to the Iowa offense of Carrying Weapons in violation of Iowa Code § 724.4(1). The error that led to the decision in *Walker* appears to have been an unintended

5Construction and application of the Sentencing Guidelines is reviewed *de novo*. *See United States v. Olson*, 646 F.3d 569, 572 (8th Cir. 2011).

consequence of the Sentencing Commission amending what is now Application Note 14(C) to solve a different problem. Applying the adjustment in this case also results in double counting.

The analysis of how the Eighth Circuit reached its ultimate conclusion in Walker begins with *United States v. English*, 329 F.3d 615 (8th Cir. 2003), decided prior to the Sentencing Guidelines amendment at issue. In that case, firearms were found in the search of defendant's home. The question was whether the "another felony offense" adjustment applied because the guns possessed were stolen and thus, Mr. English was in possession of stolen property with a value over $1,000. The Eighth Circuit ultimately concluded that the possession of stolen property state offense was sufficiently different than the federal felon in possession offense that there would be no double counting.

In reaching that conclusion, the Eighth Circuit addressed the argument that a felon possessing stolen guns will always be possessing stolen property. *See English*, 329 F.3d at 618. The Eighth Circuit stated that "[w]e share our sister Circuit's concern that it would be unreasonable, and hence presumably contrary to the Commission's intent, to allow the "additional felony" to be an offense that the defendant has to commit, in every case, in order to commit the underlying offense." *Id*. Further, the Eighth Circuit stated that "we believe that the very purpose of Application Note 18 [now 14C] is to define those instances in which

the Commission believed that impermissible double counting would occur." *Id*. at 619. Finally, the Eighth Circuit held, in applying the Application Note, "[w]e hold that a firearms offense is necessarily an offense which contains, as an element, the presence of a firearm." *Id*. at 618. As possession of stolen property does not require possession of a firearm, the other felony offense at issue was not excluded by the Application Note.

The next case of significance is *United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005). The other felony offense asserted in *Lindquist* was Iowa Code § 724.16, which prohibits acquiring ownership of a firearm without a permit. The Eighth Circuit found this offense fell within the exclusion of the Application Note because "Lindquist's violation of § 724.16 involved essentially the same conduct as his conviction for being a felon in possession of a firearm." *Id*., 421 F.3d at 756. This result avoids double counting because "[u]nlawfully acquiring a handgun, by whatever name it is called, is essentially accounted for in the calculation of Lindquist's base offense level under § 2K2.1." *Id*.

The decisions in the other Circuits discussed in Section I above are consistent with the Eighth Circuit's decisions in *English* and *Lindquist*.

Iowa Code § 724.4(1) is also a firearms possession statute. That crime is tied to where the firearm is possessed, in this case someone "who . . . within the limits of any city, goes armed with any pistol or revolver." Thus, a person

previously convicted of a misdemeanor domestic violence offense or any felony who violates Iowa Code § 724.4(1) will necessarily violate 18 U.S.C. § 922(g)(1) or (g)(9). It is impossible to violate Iowa Code § 724.4(1) without also violating 18 U.S.C. § 922(g)(1) or (g)(9).

Although a defendant can violate 18 U.S.C. § 922(g)(1) or (g)(9) without violating Iowa Code § 724.4(1), for example by possessing the firearm in his home, many defendants (such as all felon or domestic violence misdemeanant defendants who carry a firearm on their person or in a vehicle) will violate both statutes. That leads to the routine imposition of the adjustment in many cases where there is no criminal conduct outside of the possession of the firearm. *See Lindquist*, 421 F.3d at 756 (“”Because almost every weapons crime could also be charged as a state law offense, [the district court’s] reading of the guideline would lead to a routine four-level enhancement and defeat the purpose behind the structure to the Guidelines.”” (citation omitted).

At the time *English* and *Lindquist* were decided, Application Note 18 (now 14(C)) read: ““another felony offense” . . . refer[s] to offenses other than explosives or firearms possession or trafficking offenses.” As discussed above, that was interpreted to exclude state law offenses that were based upon the possession of firearms. The Application Note was amended, effective November 1, 2006, *See* Amendment 691. The amended Note reads:

> "Another felony offense," for purposes of subsection (b)(6), 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. (emphasis added).

The Sentencing Commission explained the reason for this amendment as follows:

> Fourth, the amendment addresses a circuit conflict pertaining to the application of current §2K2.1(b)(5) (re-designated by this amendment as §2K2.1(b)(6)) and (c)(1)), specifically with respect to the use of a firearm "in connection with" burglary and drug offenses. The amendment, adopting the language from Smith v. United States, 508 U.S. 223 (1993), provides at Application Note 14 that the provisions apply if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. Furthermore, the amendment provides that in burglary offenses, these provisions apply to a defendant who takes a firearm during the course of the burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary. In addition, the provisions apply in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia. The Commission determined that application of these provisions is warranted in these cases because of the potential that the presence of the firearm has for facilitating another felony offense or another offense.

Amendment 691, at Reason for Amendment.

The purpose of the amendment was to clarify that the adjustment applies in certain circumstances, such as when a defendant takes a firearm during a burglary and in drug offenses when a firearm is found in close proximity to the drug

activity. A Circuit conflict had developed on those issues. Significantly, the Commission did not state any intent to eliminate the prior case law of the Eighth Circuit or other Circuits holding that state law firearms possession offenses are excluded from this adjustment.

The next Eighth Circuit case of relevance is *United States v. Jackson*, 633 F.3d 703 (8th Cir. 2011). *Jackson* involved the Missouri offense of unlawful use of a weapon and evidence that the defendant had threatened others with a firearm and fired several shots. The Court considered the amendment and concluded that the Commission's use of "the explosive or firearms possession or trafficking offense" instead of the use of "any", "an," or "a" firearms offense meant that the "plain language of application note 14(C) excludes only the underlying firearms offense of conviction from the definition of "another felony offense."" *Jackson*, 633 F.3d at 705-06. In other words, the Eighth Circuit found that the Commission intended to bring into the adjustment *all* state offenses involving firearms and intended to exclude only the federal offense of conviction.

The *Jackson* decision does not discuss the reason given by the Commission for the amendment. The Commission's reason was to resolve a Circuit conflict as to how certain burglary and drug offenses are treated. The Commission did not express an intention to sweep as broadly as found in *Jackson*. The Commission did not express an intention to overturn the case law holding that state court

firearms possession offenses are excluded. Thus, the use of "the" rather than "a" in the amended Application Note appears to have resulted as an unintended consequence, rather than an intentional change. *Cf. United States v. Gomez-Hernandez*, 300 F.3d 974, 979 (8th Cir. 2002) ("But our search is for the Sentencing Commission's intent, not for perfect drafting.").

The interpretation of the Guideline by *Jackson* also makes little sense. By the use of "another" in "another felony offense," the Guideline obviously intends to refer to something other than the federal offense of conviction. "[O]ther than the explosive or firearms possession or trafficking offense" thus merely states the obvious and is surplusage. A Guideline should not be interpreted to render a portion of it superfluous. *Cf. United States v. Boesen*, 541 F.3d 838, 847 (8th Cir. 2008) ("This court construes statutes to avoid rendering sections of statutes superfluous.").

Additionally, a defendant with a felony or misdemeanor domestic assault conviction who is in possession of a firearm would <u>always</u> violate both the federal felon in possession statute and any state felon in possession statute based upon the exact same conduct. *See, e.g.*, Iowa Code § 724.26(1). Under the logic of *Jackson*, such a defendant would always receive the four level increase because *Jackson* interpreted Note 14(C) to exclude <u>only</u> the federal offense of conviction.

Walker relies upon the holding of *Jackson*. *See Walker*, 771 F.3d at 452. *Walker*, therefore, fails to properly interpret the Application Note as discussed above.

Walker is also distinguishable because there was evidence that the defendant in that case had used the firearm in a drive-by shooting shortly before the traffic stop that discovered the firearm in the vehicle. *See Walker*, 771 F.3d at 450. Thus, Walker's use of the firearm involved conduct separate and distinct from the mere possession of the firearm in the vehicle. A large part of the rationale for the four-level increase is to apply that adjustment when there is evidence that the defendant used the firearm in another offense, substantially increasing the risk of violence, injury or death with respect to that other offense. Obviously, actual use of a firearm in a drive-by shooting creates a risk of violence, injury or death above and beyond the mere possession of a firearm.

Accordingly, the four-level adjustment should not be applied with respect to the Iowa offense of Carrying Weapons or similar offenses.

III. THE SUPREME COURT SHOULD RESOLVE THIS ISSUE AS THE EIGHTH CIRCUIT HAS REFUSED TO CORRECT ITS ERROR AND AS THE SENTENCING COMMISSION CANNOT BECAUSE IT HAS LACKED A QUORUM FOR SEVERAL YEARS

This case presents a recurring issue in the Eighth Circuit, *i.e.* whether *United States v. Walker*, 771 F.3d 449 (8th Cir. 2014), should be reconsidered and overruled. *Walker* approved a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) when the defendant has also violated the Iowa statute prohibiting the carrying of weapons, Iowa Code § 724.4(1). The Eighth Circuit is the only Circuit which has so interpreted that Guideline.

There have been numerous petitions for rehearing *en banc* on this issue which have been denied by the Eighth Circuit. Several judges of the Eighth Circuit have criticized *Walker*, with some suggesting that the Court should take up the issue *en banc*. *See United States v. Boots*, 816 F.3d 971 (8th Cir. 2016) (Judge Melloy, concurring); *United States v. Stuckey*, 729 F. App'x 494 (8th Cir. 2018) (unpublished) (Judge Grasz, concurring); *United States v. Sanford*, 813 F.3d 708 (8th Cir. 2016) (Judge Bye, concurring). However, the Eighth Circuit has not done so.

This adjustment has been applied in the Eighth Circuit in numerous cases. In addition to the ones cited above, *see, e.g., United States v. Rogers*, No. 19-3732 (8th Cir. Feb. 4, 2021); *United States v. Grandberry*, No. 20-1329 (8th Cir. Feb. 1,

2021); *United States v. Watson*, No. 19-1837 (8th Cir. May 8, 2020); *United States v. Green*, 946 F.3d 433, 440 (8th Cir. 2019); *United States v. Houston*, 820 F.3d 1168, 1174 (8th Cir. 2019); *United States v. Arceo*, No. 18-3601 (8th Cir. Nov. 25, 2019); *United States v. Pierce*, No. 18-3629 (8th Cir. Nov. 25, 2019).

The Sentencing Commission is presently unable to address this issue. The Sentencing Commission has lacked a quorum since 2018. Without a quorum, the Sentencing Commission cannot act.

Accordingly, at this point, only the Supreme Court of the United States can correct this issue. Petitioner Newell respectfully requests this Court to do so.

CONCLUSION

Petitioner Sunni Askari Newell respectfully requests this Court to grant certiorari in this matter. Petitioner Newell further requests this Court to reverse and remand this matter to Court of Appeals for the Eighth Circuit with directions to remand to the District Court for resentencing.

Respectfully Submitted,

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