Selected Post-*Booker* and Guideline Application Decisions for the Eighth Circuit

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U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS — EIGHTH CIRCUIT

This document contains annotations to Eighth Circuit opinions that involve issues related to the federal sentencing guidelines. The document was developed to help judges, lawyers and probation officers locate relevant authorities involving federal sentencing guidelines. The document is not comprehensive and does not include all authorities needed to apply the guidelines correctly. Instead, it presents authorities that represent Eighth Circuit jurisprudence on selected guidelines and guideline issues. The document is not a substitute for reading and interpreting the *Guidelines Manual* or researching specific sentencing issues; rather, the document serves as a supplement to reading and interpreting the *Guidelines Manual.*

ISSUES RELATED TO *UNITED STATES V. BOOKER*, 543 U.S. 220 (2005)

I. Procedural Issues

A. Sentencing Procedure Generally

United States v. Rivera, 439 F.3d 446 (8th Cir. 2006), *vacated on other grounds*, 552 U.S. 1173 (2008). "First, the district court should determine the [g]uidelines sentencing range. Second, the district court should determine whether any traditional departures are appropriate. Third, the district court should apply all other section 3553(a) factors in determining whether to impose a [g]uidelines or non-[g]uidelines sentence."

United States v. Garcia-Gonon, 433 F.3d 587 (8th Cir. 2006). "Under an advisory [g]uidelines regime, sentencing judges are only required to find sentence-enhancing facts by a preponderance of the evidence." (internal citations omitted).

United States v. Kicklighter, 413 F.3d 915 (8th Cir. 2005). Even though the statement of reasons indicated that the court did not apply the sentencing guidelines, the transcript of the hearing revealed that the district court considered the guidelines. Where the district court makes a detailed explanation and the sentence is not unreasonable, a remand is not required.

United States v. Mashek, 406 F.3d 1012 (8th Cir. 2005). "If the sentence was imposed as the result of an incorrect application of the guidelines, we will remand for resentencing as required by 18 U.S.C. § 3742(f)(1) without reaching the reasonableness of the resulting sentence in light of § 3553(a)."

B. Burden of Proof

United States v. Villareal-Amarillas, 562 F.3d 892 (8th Cir. 2009). The court reaffirmed that post-*Booker*, guideline facts, which increased the advisory range from 121-151 months to 235-293 months, need only be proven by a preponderance of the evidence:

> Under the prior mandatory Guidelines regime, we repeatedly held "that the facts relied upon by the district court at sentencing need be proved only by a

> preponderance of the evidence." . . . However, for many years, we have recognized, but never applied, an exception to this general standard–due process requires that sentencing determinations "that have an 'extremely disproportionate' effect on a defendant's sentence" be proved by clear and convincing evidence (citation omitted). . . . [T]his principle derives from a misreading of the Supreme Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). We now join three other circuits in concluding that, even if valid when the Guidelines were mandatory, this principle did not survive the Supreme Court's recent decisions in *United States v. Booker*, 543 U.S. 220 (2005), and *Gall v. United States*, 552 U.S. 38 (2007).

United States v. Roberson, 517 F.3d 990 (8th Cir. 2008). The district court did not err by basing the defendants' sentences on drug quantities not found by a jury. The court reiterated that "[u]nder the now-advisory guidelines, a district court may still find its own facts that enhance the base offense level of the guidelines range, so long as the statutory maximum is not surpassed."

C. Confrontation Rights

United States v. Brown, 430 F.3d 942 (8th Cir. 2005). "*Crawford v. Washington*, 541 U.S. 36 (2004), in which the Supreme Court held that admission of testimonial hearsay at trial violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant, 'does not alter the pre-*Crawford* law that the admission of hearsay testimony at sentencing does not violate confrontation rights.'" (quoting *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005)).

D. Resolution of Disputed Factual Issues

United States v. Keller, 413 F.3d 706 (8th Cir. 2005). The facts in the presentence report not specifically objected to are deemed admitted for *Booker* purposes. Here, the facts in the PSR justified the district court's enhancement for restraint of a victim.

E. Acquitted Conduct

United States v. Papakee, 573 F.3d 569 (8th Cir. 2009). "It is settled in this circuit . . . that the Constitution does not preclude a district court from considering acquitted conduct in sentencing a criminal defendant."

F. Prior Convictions

United States v. Carrillo-Beltran, 424 F.3d 845 (8th Cir. 2005). In addition to determining the "fact of a prior conviction," the district court can also determine those facts so "intimately related" to the prior conviction as to fall within the *Apprendi* exception; thus, a court can determine whether the defendant has a prior conviction under an alias. The court explained that *Shepard* did not abandon the rule that a court, rather than a jury, may consider prior criminal history in sentencing a defendant.

G. Ex-Post Facto

United States v. Kelly, 436 F.3d 992 (8th Cir. 2006). The court rejected the appellant's claim that an upward variance from the guidelines range violated the *ex post facto* clause where the offense occurred pre-*Booker*. The court explained that the sentencing court could have imposed a sentence above the guideline range before *Booker*, and found that the defendant's sentence was not "unexpected or 'indefensible by reference to the law which had been expressed prior to the conduct in issue.'" (quoting *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001)).

II. Departures

United States v. Miller, 479 F.3d 984 (8th Cir. 2007). Conflating departure issues and variance analysis can be harmless error where the ultimate sentence is not unreasonable.

United States v. Frokjer, 415 F.3d 865 (8th Cir. 2005). The court found that *Booker* did not change the rule that a sentencing court's decision not to depart downward is unreviewable.

United States v. Mashek, 406 F.3d 1012 (8th Cir. 2005). "[W]e will review a district court's decision to depart from the appropriate guidelines range for abuse of discretion."

III. Specific 3553(a) Factors

A. Unwarranted Disparities

1. Fast Track

United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006), *abrogated on other grounds by United States v. Jimenez-Perez*, 659 F.3d 704 (8th Cir. 2011). The court, recognizing that fast-track programs create sentence disparity, explained that the policymaking branches of government determined that certain disparities are warranted. Thus, courts need not avoid the disparity created by fast-track programs and the defendant's sentence was not unreasonable. *But see Jimenez-Perez*, 659 F.3d 704 (clarifying that "the absence of a [F]ast-[T]rack program and the resulting difference in the guidelines range should not be *categorically excluded* as a sentencing consideration").

2. Co-defendants

United States v. McDowell, 676 F.3d 730 (8th Cir. 2012). On appeal, defendant raised claim of unwarranted disparity where his co-defendant was sentenced to a much lower term of imprisonment. McDowell's sentence was imposed before the district court had imposed the other sentence. The circuit court found no procedural error because at the time of McDowell's sentence, the district court could not have been contemplating the co-defendant's sentence. The circuit court noted that defendant had not requested delaying his sentence and that, since the co-defendant's sentence had not been appealed, the sentences could not be compared for disparities.

United States v. Crumley, 528 F.3d 1053 (8th Cir. 2008). Sentencing disparities between co-defendants "generally are not unwarranted where one defendant cooperates and one does not, or where one defendant plays a greater role in the conspiracy than the other."

United States v. Jeremiah, 446 F.3d 805 (8th Cir. 2006). The court rejected the appellant's argument that 18 U.S.C. § 3553(a)(6) requires the sentencing court to consider the sentences imposed in state courts for comparable conduct by similarly situated defendants and to impose a sentence designed to reduce the disparity between state and federal court sentences. The court stated that "[u]nwarranted sentencing disparities among federal defendants remains the only consideration under § 3553(a)(6) – both before and after *Booker*."

B. Protection of the Public

United States v. Molina, 563 F.3d 676 (8th Cir. 2009). "Although sentencing courts are required to consider the sentencing factors set out in 18 U.S.C. § 3553(a), the cost of imprisonment is not among them. . . . Like cost, the likelihood of deportation is not among the sentencing factors set out in § 3553(a). Nevertheless, § 3553(a)(2)(C) provides that a court shall consider 'the need for the sentence imposed . . . to protect the public from further crimes of the defendant.'"

C. Post-Sentence Rehabilitation

Pepper v. United States, 131 S. Ct. 1229 (2011). The Supreme Court held that "when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the now-advisory Federal Sentencing Guidelines []." Pepper had pleaded guilty to methamphetamine distribution and was initially sentenced to 24 months' imprisonment, well below the 97 to 121 month guideline range. This sentence was appealed (*Pepper I*). Upon remand, the court imposed the same 24-month sentence based on explicit evidence of Pepper's post-sentencing rehabilitation, including his recovery from drug addiction, enrollment in college, and full-time employment. Again, the government appealed (*Pepper II*) and the court held that post-sentencing rehabilitation was an impermissible factor to consider in granting a downward variance from the advisory guideline range. After Pepper was re-sentenced to a 65-month prison term, he appealed (*Pepper III)*, and sought Supreme Court review after the Eighth Circuit affirmed the 65-month sentence. The Supreme Court remanded the case back to the Eighth Circuit noting that, at re-sentencing, a court is not bound by the law of the case to use the departure percentage applied at the initial sentencing.

IV. Forfeiture

United States v. Hively, 437 F.3d 752 (8th Cir. 2006). The court rejected the appellant's argument that a forfeiture order must be based on factual findings made by a jury because "*Booker* specifically referred to the forfeiture provision of the Sentencing Reform Act . . . which incorporates the relevant provisions of [18 U.S.C.] § 1963 [criminal penalties], as 'perfectly valid.'" (internal citations omitted).

V. Restitution

United States v. Carruth, 418 F.3d 900 (8th Cir. 2005). The court held that "*Booker* does not affect restitution orders [because] they are not subject to any prescribed statutory maximum" and are civil remedies, not criminal penalties.

VI. Reasonableness Review

A. General Principles

United States v. Washington, 515 F.3d 861 (8th Cir. 2008). Citing *Gall v. United States*, 552 U.S. 38 (2007), the court set forth its procedure for reviewing sentences:

> [O]ur first task on appeal is to "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." Our second task on appeal, if we are certain that the district court's decision is "procedurally sound," is to "then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." When the sentence is within the Guidelines range, we are permitted, but not required, to apply a presumption of reasonableness. When the sentence is outside the Guidelines range, a presumption of reasonableness is not available, but we "may consider the extent of the deviation, [giving] due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."

The court "urge[d] district courts to continue to engage in the three-step process of first ascertaining the applicable [g]uidelines range, then considering any permissible departures within the [g]uidelines' structure, and finally, deciding whether a non-[g]uidelines sentence would be more appropriate under the circumstances pursuant to § 3553(a)." *See also United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009) (en banc) (District court did not abuse its discretion when imposing a sentence based on "defendant-specific determinations.")

United States v. Williams, 474 F.3d 1130 (8th Cir. 2007). The court reversed a below-guidelines sentence imposed after government substantial assistance motions, filed pursuant to §5K1.1 and 18 U.S.C. § 3553(e), authorized a sentence below the statutory minimum. The court held that § 3553(e) authorized "a sentence below a mandatory minimum only '*so as to reflect a defendant's substantial assistance*.'" *See also United States v. Billue*, 576 F.3d 898 (8th Cir. 2009) ("'[I]n reducing a sentence below the statutory minimum under 18 U.S.C. § 3553(e) for a defendant's substantial assistance, a court . . . may not use the factors in 18 U.S.C. § 3553(a) to decrease the sentence further.'" (quoting *United States v. Johnson*, 517 F.3d 1020, 1023 (8th Cir. 2008)).

B. Procedural Reasonableness

United States v. Barker, 556 F.3d 682 (8th Cir. 2009). The district court committed procedural error by using the wrong guideline manual at sentencing. Because tax evasion is a continuing offense, the court erred in using the manual in effect when the original tax payment was due, rather than the manual applicable to the last act of evasion.

United States v. Bain, 586 F.3d 634 (8th Cir. 2009). The district court did not indicate it presumed the guideline range reasonable when it stated the guidelines "are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable" and that "[t]he [s]entencing [g]uidelines are presumed reasonable here in the Eighth Circuit Court of Appeals." Judges are presumed to know the law and the court merely indicated that the guidelines are presumed reasonable on appeal. But, the court committed *Gall* error when it stated that extraordinary circumstances were required to justify defendant's requested statutory minimum, below guideline sentence. To preserve this error, "the defendant must object to the district court's erroneous application of the law," not simply request a non-guidelines sentence. Under plain error review defendant's substantial rights were not affected.

United States v. Brandon, 521 F.3d 1019 (8th Cir. 2008). The district court plainly erred by imposing a non-mandatory, concurrent life sentence without calculating the guideline range or referring to the § 3553(a) factors. Determining that "[t]o allow a procedural oversight to increase a sentence from a fixed term to life imprisonment would undermine the public's confidence in the fairness and integrity of criminal sentencing process," the court remanded for re-sentencing.

United States v. Greene, 513 F.3d 904 (8th Cir. 2008). The district court erroneously applied a presumption of reasonableness to the applicable guideline range. On appeal, the court noted that the district court recognized that it had limited discretion under circuit precedent at the time. Because "[t]he record makes clear [that] had the district court properly exercised its discretion, it would have found that the relevant factors and purposes compelled a sentence below the advisory [g]uidelines range," the court concluded that the error was not harmless and remanded for resentencing. *But see, e.g., United States v. Marston*, 517 F.3d 996 (8th Cir. 2008) (finding that the district court plainly erred by applying a presumption of reasonableness to a within-guideline sentence, but affirming because the defendant could point to no evidence showing that the district court "was inclined to impose a more favorable sentence"); *United States v. Sigala*, 521 F.3d 849 (8th Cir. 2008) (holding that the district court did not apply a presumption of reasonableness when it stated that it used the federal sentencing guidelines to determine a reasonable sentence).

United States v. Desantiago-Esquivel, 526 F.3d 398 (8th Cir. 2008). After an illegal alien pleaded guilty to a drug offense, the court imposed a sentence of 36 months if the defendant voluntarily stipulated to removal after serving her sentence, and an alternative sentence of 99 months if the defendant did not stipulate to removal. The court reversed, holding that the district court's imposition of an alternative sentence constituted a significant error that required reversal.

United States v. Hill, 513 F.3d 894 (8th Cir. 2008). The district court's sentence of 84 months in prison, despite a guideline range of 33-41 months, was procedurally and substantively reasonable. The district court did not specify whether it arrived at its sentence using an upward

variance or a departure, but the court properly considered both at the sentencing hearing, and adequately explained the defendant's sentence with sufficient justifications for the upward departure or variance.

United States v. Leon-Alvarez, 532 F.3d 815 (8th Cir. 2008). The district court is required to follow the guidelines' instructions for calculating the defendant's criminal history category before determining whether the defendant is eligible for safety-valve relief. According to the court, "[o]nly after the [g]uidelines are correctly calculated should the district court decide whether to impose a sentence outside the range suggested by the [g]uidelines."

United States v. Shy, 538 F.3d 933 (8th Cir. 2008). The defendant received a sentence of three years of probation, a downward variance from a guideline range of 37-46 months in prison. The district court committed procedural error by failing to "adequately explain [the defendant's] sentence with sufficient justifications for the downward variance." The district court's reliance on the fact that the defendant had worked to rehabilitate herself and had participated in drug treatment was "undercut" by the fact that the defendant was in possession of methamphetamine at the time of her arrest. The court remanded "to allow the district court to consider all of [the defendant's] conduct, including the methamphetamine possession, in fashioning a sentence."

C. Substantive Reasonableness

United States v. Richart, 662 F.3d 1037 (8th Cir. 2011). Defendant pled guilty to making a false statement and conspiracy to make a false statement to cover up a murder. The district court did not err when it imposed an enhancement for role in the offense and varied or departed upward 114 months from the guideline range of 0-6 months. A split panel affirmed the procedural and substantive reasonableness of the 120-month sentence finding that the grisly facts supported the upward variance or departure (Richart murdered her niece in 1999 and commanded everyone in the household to mislead the authorities). The majority noted that the court referenced both §5K2.9 (Criminal Purpose (Policy Statement)) and the § 3553(a) factors in imposing the 120 month-sentence. Further, there was no error or harmless error in the imposition of the 2-level enhancement for role in the offense as the enhancement did not increase the guideline range.

United States v. Rubashkin, 655 F.3d 849 (8th Cir. 2011). A 324-month sentence at the low end of the guideline range was substantively reasonable for fraudulent conduct that caused 27 million dollars in actual loss**.** The loss amount was correctly calculated and the court properly considered the § 3553(a) factors.

United States v. Kane, 639 F.3d 1121 (8th Cir. 2011). On a second remand from the Supreme Court, the panel reversed the district court's downward variance to 120 months. The defendant, a mother, compelled her nine-year-old daughter to submit to the sexual gratification of a pedophile more than 200 times. Although the sentence was not procedurally unreasonable in its reliance on post-sentencing rehabilitation, the sentence was substantively unreasonable. "Even if Kane were to serve every day of her 120-month sentence, she would spend less than three weeks in prison for each violation of her daughter. That punishment is unreasonably lenient under the totality of the circumstances of this case, judged in light of all the § 3553(a) factors."

United States v. Kiderlen, 569 F.3d 358 (8th Cir. 2009). On appeal, the court rejected the argument that the sentence was substantively unreasonable because it was "the product of congressional direction in the PROTECT Act . . . rather than the Sentencing Commission's application of empirical data and national experience." The court said:

> The Supreme Court has held that a court of appeals may apply a presumption of reasonableness to a sentence within the advisory guideline range, because such a presumption "recognizes the real-world circumstance that when the judge's discretionary decision accords with the [Sentencing] Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Rita v. United States*, 551 U.S. 338, 350-51 (2007). It is true that USSG § 2G2.2 is the product of congressional direction rather than the empirical approach described by *Rita*, 551 U.S. at 348-49. The upshot is that the sentencing judge's discretionary decision under § 3553(a) in this case accords with Congress' view of the appropriate application of § 3553(a) in the mine-run case, rather than with the Commission's independent view of the matter. We are inclined to think, however, that in the real-world circumstance where a sentencing judge agrees with Congress, then the resulting sentence is also probably within the range of reasonableness.

United States v. O'Connor, 567 F.3d 395 (8th Cir. 2009). Defendant asserted that the district imposed a substantively unreasonable sentence by giving significant weight to an improper sentencing factor – Congress and the Sentencing Commission's desire to avoid sentences below the guidelines range for sexual offenses involving minors. The court held that even "assuming that a sentencing court *may* disregard [a guideline] on pure policy grounds, *Kimbrough* and *Spears* do not hold that a district court *must* disagree with any sentencing guideline, whether it reflects a policy judgment of Congress or the Commission's 'characteristic' empirical approach." *Quoting United States v. Barron*, 557 F.3d 866, 871 (8th Cir. 2009) (alteration in original).

United States v. Austad, 519 F.3d 431 (8th Cir. 2008). After *Gall*, the argument that an 84-month sentence (from a guideline range of 36-46 months) must be justified by extraordinary circumstances is no longer valid. The district court properly weighed the § 3553(a) factors and determined that a higher sentence was necessary to promote deterrence and to protect the public from further crimes by the defendant. *See also, e.g., United States v. Hill*, 552 F.3d 686 (8th Cir. 2009) (affirming upward variance from the guideline range of 15-21 months to a sentence of 51 months in prison, noting that the district court's comparison between the low-range for this prostitution offense and the guideline range for drug trafficking or child pornography cases was not improper, and the district court's disagreement with the guidelines was well within the court's discretion following the Supreme Court's decision in *Kimbrough*).

United States v. Bueno, 549 F.3d 1176 (8th Cir. 2008). The court affirmed a downward departure (based on §5H1.6) from a guideline range of 108-135 months to five years' probation. The court had previously determined an 18-month sentence was an unreasonable departure from the guideline range. Citing both "more detailed evidence submitted at resentencing regarding

[the defendant's wife's] physical and emotional condition and the Supreme Court's . . . opinion in *Gall v. United States*, 552 U.S. 38 (2007)," the court this time held that the defendant's sentence was reasonable. *See also, e.g., United States v. Lehmann*, 513 F.3d 805 (8th Cir. 2008) (affirming a below-guidelines sentence of probation where the district court found that a prison sentence would have negatively affected the defendant's disabled young son).

United States v. Garate, 543 F.3d 1026 (8th Cir. 2008). On remand from the Supreme Court following *Gall*, the court affirmed the district court's sentence of 30 months in prison notwithstanding a 57-71 guideline range. The court said *Gall* makes it "quite clear that the fact that [the appeals court] may have weighed some facts differently . . . [and] would not have imposed the same 30-month sentence . . . 'is insufficient to justify reversal of the district court.'"

D. Plain Error

United States v. Molnar, 590 F.3d 912 (8th Cir. 2010). The district court committed plain error when it justified a substantial upward variance on clearly erroneous factual findings that defendant's actions impaired the police department's use of "drug buy" money. Although defendant, a police officer, embezzled seized money from the police department's evidence room, Arkansas law clearly established that drug task force officers are not allowed to use such money as "drug buy" money until the seized money is officially ordered forfeited by the court and designated as "drug buy" money. There was no evidence that drug task force agents were impaired in their abilities to perform drug prevention work due to defendant's actions.

United States v. Rieland, 432 F.3d 900 (8th Cir. 2006). An appellant has not met his burden under the plain error test if the court of appeals must speculate about whether the district court would have imposed a lesser sentence.

United States v. Lopez, 431 F.3d 313 (8th Cir. 2005). The court explained that to show plain error, an appellant "must demonstrate some evidence – apparent from the face of the record – that the district court was willing but considered itself unable to impose a lesser sentence."

United States v. Rodriguez-Ceballos, 407 F.3d 937 (8th Cir. 2005). Plain error was found when defendant showed a reasonable probability that the district court would have imposed a more favorable sentence, as the court repeatedly expressed its belief that the guidelines resulted in a disproportionate sentence and its dismay that it had no authority to depart.

E. Harmless Error

United States v. Papakee, 573 F.3d 569 (8th Cir. 2009). The court declined to decide whether defendant's prior conviction was a crime of violence for career offender status because the district court stated it would have varied up to the same sentence regardless, rendering any error in career offender designation harmless.

United States v. Huff, 514 F.3d 818 (8th Cir. 2008). "The government bears the burden of proving the district court's error was harmless, and must show that no 'grave doubt' exists as to whether the error substantially influenced the outcome of the proceedings." (quoting *United States v. Cullen*, 432 F.3d 903, 905-06 (8th Cir. 2006)). The court held that, "[g]iven the

record,. . . the error substantially influenced the outcome of the proceedings and, therefore, was not harmless."

United States v. Henderson, 440 F.3d 453 (8th Cir. 2006). Mandatory application of the guidelines is harmless error when the district court had the discretion to impose a lesser sentence but instead sentenced the defendant in the top of the sentencing range.

United States v. White, 439 F.3d 433 (8th Cir. 2006). "The fact that a district court chose not to exercise its discretion to impose a lesser sentence is evidence that the same sentence would have been imposed under an advisory guidelines regime."

United States v. Turnbough, 425 F.3d 1112 (8th Cir. 2005). "[G]ranting a § 5K1.1 motion does not render a *Booker* error harmless because a sentencing court is limited by the factors identified in § 5K1.1 when determining the extent of the downward departure."

F. Waiver of Right to Appeal

United States v. Killgo, 397 F.3d 628 (8th Cir. 2005). The fact that the appellant did not anticipate the *Blakely/Booker* rulings does not invalidate appeal waiver.

United States v. Reynolds, 432 F.3d 821 (8th Cir. 2005). The appellant waived his *Booker* issue by agreeing "not to appeal or otherwise challenge the constitutionality or legality of the [s]entencing [g]uidelines."

VII. Revocation

United States v. Perkins, 526 F.3d 1107 (8th Cir. 2008). The district court did not commit plain error when, at the revocation sentencing, the court stated that "the record speaks for itself." The court that imposed the defendant's initial sentence presided over the revocation hearing, so the circuit court was "satisfied that the court was familiar with [the defendant's] history, characteristics, and conduct."

United States v. Nelson, 453 F.3d 1004 (8th Cir. 2006). "In fashioning an appropriate revocation sentence, the district court is to consider the sentencing range, but also 'must take into account certain of the factors listed in 18 U.S.C. § 3553(a), including the statutory goals of deterrence, incapacitation, and rehabilitation; the pertinent circumstances of the individual case; applicable policy statements; sentencing uniformity; and restitution.'" (internal citation omitted).

United States v. Coleman, 404 F.3d 1103 (8th Cir. 2005). "[T]he advisory sentencing guidelines scheme that *Booker* creates is precisely what prevailed before *Booker* with respect to fixing penalties for violating . . . release conditions . . . . In such circumstances, § 3583 leaves to the discretion of the district judge the decision to revoke a term of supervised release and impose imprisonment, provided the judge takes into account the relevant considerations set out in 18 U.S.C. § 3553(a)." (internal citations omitted).

VIII. Retroactivity

Never Misses A Shot v. United States, 413 F.3d 781 (8th Cir. 2005). The court held that the rule announced in *Booker* does not apply to criminal convictions that became final before the rule was announced and thus it does not apply to cases on collateral review. *See also*, *Hodge v. United States*, 602 F.3d 935 (8th Cir. 2010) (like *Booker*, *Gall* is a procedural decision and does not apply retroactively to cases that became final prior to its filing).

IX. Crack Cases

United States v. Reeves, 717 F.3d 647 (8th Cir. 2013). "We join the overwhelming majority of our sister circuits and hold that the Fair Sentencing Act does not apply retroactively to defendants who were sentenced before August 3, 2010, and who seek a reduction in their sentences under section 3582(c)(2)."

United States v. Golden, 709 F.3d 1229 (8th Cir. 2013). The defendant pled guilty to conspiracy to distribute crack cocaine. Due to his substantial assistance in another case, he was sentenced 39 percent below the guideline range to 160 months. After the 2008 crack amendments, he received a sentencing reduction to 146 months. When the Commission further amended the guidelines a couple of years later, the defendant moved for another reduction, but the district court refused, because the amendment had not changed the applicable guideline range, which remained the statutory mandatory minimum sentence: 240 months. The Eighth Circuit agreed with the district court's analysis, holding that the defendant's sentence was not "based on a sentencing range" that was subsequently lowered by the amendment, as required under 18 U.S.C. § 3582(c)(2). The court stated, "Under [USSG §5G1.1,] 'where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.' This remains the rule even when a sentencing judge has imposed a sentence below the statutory minimum due to the defendant's substantial cooperation."

United States v. Logan, 710 F.3d 856 (8th Cir. 2013). The defendant pled guilty to conspiracy to distribute crack cocaine and was sentenced to 156 months. After the 2008 amendments, the district court denied his motion for a sentencing reduction, because he was previously sentenced based on "binding" stipulations in a Rule 11(c)(1)(C) plea agreement. He later provided substantial assistance and received a sentencing reduction under Rule 35(b) to 120 months, the statutory mandatory minimum. After the 2011 amendments, he again moved for a sentencing reduction, which the district court denied, because he was already serving the statutory minimum sentence. The defendant appealed. The Eighth Circuit reversed. Relying on Justice Sotomayor's concurrence in the plurality opinion in *Freeman v. United States*, 131 S. Ct. 2685 (2011), the court held that the defendant's sentencing range was "based on" the plea agreement, not the district court's consideration of the guidelines. "Therefore, although the district court limited its prior reduction to the statutory minimum, it was not required to do so and now has the *discretion* to grant a § 3582(c)(2) reduction comparable to that originally provided under Rule 35(b), even though such a reduction would bring [the defendant's] sentence below the applicable statutory minimum."

United States v. Woods, 603 F.3d 1037 (8th Cir. 2010). After the defendant pled guilty to conspiracy to distribute crack cocaine, the district court determined that the guideline range was 292 to 365 months. While noting that the crack guidelines might be amended, the court found

that the appropriate sentence, even with the possible amendment, was 292 months, with a 15% downward departure for substantial assistance, resulting in a sentence of 248 months. After the crack guideline amendment, the court resentenced the defendant to the same 248 months, noting that the new guideline range would be 235 to 293 months' imprisonment and that, with the 15% downward departure for substantial assistance, the range would become 200 to 249 months. The court held that the same 248 month sentence was appropriate after analyzing all the 18 U.S.C. § 3553(a) factors. On appeal, the court found that the district court was not required to sentence the defendant to the bottom of the revised range, concluding that while the district court had discretion to consider the crack versus powder cocaine disparity, it was not required to apply this consideration by lowering the defendant's sentence further.

United States v. Davis, 538 F.3d 914 (8th Cir. 2008). The defendant was sentenced for possession with intent to distribute crack cocaine before the Supreme Court's decision in *Kimbrough*. At his sentencing, the defendant did not raise the issue of the disparity created by the crack-cocaine ratio, but the district court's statements show that it sentenced him based on an erroneous belief that it was bound by congressional policies. On appeal, the court held that: 1) the rationale of *Kimbrough* applied to the defendant's case even though the defendant was sentenced under the 2007 version of the guidelines, 2) the district court committed plain error by applying the 100:1 ratio to an individual sentencing decision, and 3) the error affected the defendant's substantial rights because without the error, the district court "probably [would] have significantly decreased [the defendant's] sentence."

X. Miscellaneous

United States v. Wysong, 516 F.3d 666 (8th Cir. 2008). The district court imposed a suspended sentence on the defendant, despite an advisory guideline range of 51-63 months. The court held that *Booker* did not restore the district court's authority to suspend terms of sentences. The defendant's sentence was without statutory authority and must be remanded for resentencing

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Jennings, 487 F.3d 564 (8th Cir. 2007). When sentencing a defendant in cases where more than one guideline section may apply, a district court is instructed to "determine which of the referenced guideline sections is most appropriate for the offense conduct charged in the count of which the defendant was convicted."

United States v. Casey, 158 F.3d 993 (8th Cir. 1998). The defendant, who used his inside knowledge as an employee of a property management company to break into three ATM machines, was convicted of bank theft. The district court chose the burglary guideline as the applicable guideline and the defendant appealed. A court may apply an offense guideline other than that applicable to the offense of conviction only when the defendant has stipulated to a more serious offense and when the case is atypical. The circuit court further explained that this does

not mean that "whenever a defendant's total criminal conduct includes some acts that would constitute an offense more serious than the offense of conviction, the guideline for the more serious offense may be used." Because the defendant did not stipulate to a burglary, the court of appeals remanded the case for resentencing.

United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998). The district court properly considered the criminal sexual abuse guideline when departing upward from the defendant's guidelines sentencing range for the extreme conduct and injury involved in the robbery. Although the applicable guideline for robbery was §2B3.1, the district court, in deciding an appropriate level for departure, properly referred to §2A3.1 (Criminal Sexual Abuse) based on the defendant's rape of a restaurant employee during the robbery.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Mahone, 688 F.3d 907 (8th Cir. 2012). Defendant pled guilty to being a felon in possession of a firearm, and the government dismissed a charge of possession with intent to distribute marijuana. The charges stemmed from a search which yielded the marijuana, two firearms, and a video of the defendant at a shooting range with a Glock pistol. The defendant's conviction related to the gun he possessed at the shooting range. The district court enhanced his sentence, finding that, pursuant to §1B1.3(a)(2), the two other firearms were considered relevant conduct. The circuit court affirmed the decision holding that "a defendant's pattern of unlawfully possessing multiple firearms over the course of several months constitutes 'the same course of conduct' for relevant conduct purposes."

United States v. Resinos, 631 F.3d 886 (8th Cir. 2011) (en banc). En banc court overrules *United States v. Jenkins*, 537 F.3d 894 (8th Cir. 2008) to hold that the "only drug quantities that may trigger a mandatory minimum sentence for a discrete violation of [21 U.S.C.] § 841(a) are those involved in the count of conviction." The district court cannot aggregate drug quantities derived from relevant conduct. The case was remanded for resentencing.

United States v. Perry, 640 F.3d 805 (8th Cir. 2011). The defendant entered into a proffer agreement which appeared to provide that information relating to drug quantity disclosed during proffer sessions would not be used against him. The district court erred when it used that information to establish the guideline range in violation of the proffer agreement and §1B1.3.

United States v. Ault, 598 F.3d 1039 (8th Cir. 2010). The defendant was found with syringes with drug residue and was convicted in state court of possession of paraphernalia. She later pleaded guilty in federal court to conspiracy to possess pseudoephedrine knowing it would be used to manufacture methamphetamine. On appeal, the defendant argued that the district court erred in treating her state paraphernalia conviction as a prior sentence under §§4A1.1 and 4A1.2 and not as relevant conduct under §1B1.3(a)(1). The court affirmed, concluding that the prior conviction was not relevant conduct because, while the paraphernalia and conspiracy offenses were proximate in time, they took place in different counties and involved different victims.

United States v. Allebach, 526 F.3d 385 (8th Cir. 2008). The defendant was convicted of possessing powder cocaine with the intent to manufacture cocaine base. He argued on appeal that any cocaine base he purchased as cocaine base and did not manufacture should not be included in his relevant conduct. The court held that the district court did not err in including cocaine base the defendant purchased because the defendant's "possession of crack cocaine was part of the same course of conduct as his possession with intent to manufacture crack cocaine."

United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008). The court set forth the requirements for conspiracy liability under the guidelines (compared to statutory or common-law conspiracy liability):

> [I]nitially the district court must make the required findings that the actions of others were within the scope of the joint activity undertaken by the defendant, rather than the scope of the conspiracy as a whole; that the acts were in furtherance of that activity; and that they were known to or reasonably foreseeable by the defendant. Only if all these elements are satisfied will the defendant continue to be liable unless and until he withdraws from the conspiracy in accordance with the common-law rule.

United States v. Whiting, 522 F.3d 845 (8th Cir. 2008). The district court did not clearly err by considering drugs and firearms in the defendant's brother's house as relevant conduct. The court explained that "[e]vidence at trial indicated that [the defendant] knew about the drug trafficking and manufacturing in the house, had access to the guns and drugs there, had handled and moved some of those guns, and had retrieved drugs from one room of the house for delivery to two customers."

United States v. McIntosh, 492 F.3d 956 (8th Cir. 2007). Inclusion of an uncharged check cashing scheme in relevant conduct was not error because there "was a clear connection between the individuals involved in the various methods of fraud and in the intent to fraudulently obtain money and property" which connected the check cashing scheme to the charged access device fraud.

United States v. Moore, 212 F.3d 441 (8th Cir. 2000). In computing the defendant's sentence, the district court attributed to the defendant 31.8 grams of cocaine base which were solely possessed by the person who sold the drugs to the defendant. On appeal, the defendant argued that this quantity should not be included in determining his offense level. The circuit court agreed, stating, "[m]erely purchasing drugs from someone for resale does not demonstrate that the sale of all drugs remaining in the seller's possession is an activity jointly undertaken between the seller and the buyer." The court further found that living with that person, alone, does not warrant a finding that there was a joint activity undertaken, or that the defendant aided and abetted the other person in trying to sell the drugs. Therefore, the court clearly erred in including that quantity to determine the defendant's base offense level.

United States v. Madrid, 224 F.3d 757 (8th Cir. 2000). The district court did not err when it included in the drug amounts a quantity of methamphetamine which formed the basis of a possession with intent to distribute count, for which the defendant was acquitted. The

defendant's involvement with those drugs was proven by a preponderance of the evidence. Moreover, since the defendant was convicted of a conspiracy, the inclusion of the drugs for sentencing purposes was reasonably foreseeable to the defendant as a participant in a jointly undertaken criminal activity. *See also United States v. Tyndall*, 521 F.3d 877 (8th Cir. 2008).

United States v. Alvarez, 168 F.3d 1084 (8th Cir. 1999). The defendant pled guilty to two counts of distributing a total of 56.7 grams of methamphetamine. At the sentencing hearing, the government presented testimony of law enforcement officers and reports from interviews with a codefendant in an effort to have the defendant held accountable for more than a kilo of methamphetamine. The court attributed 933.57 grams to the defendant, and assessed a final sentencing range of 121 to 151 months – a four-fold increase from the 30-month range that would have applied if the defendant were held accountable only for the 56.7 grams. The circuit court affirmed, holding that the district court could consider "conduct charged in dismissed counts" as relevant conduct.

§1B1.8 Use of Certain Information

United States v. Loesel, 728 F.3d 749 (8th Cir. 2013). The court ruled that the sentencing judge appropriately used defendant's proffer statements about using and distributing meth to determine drug quantity, and to calculate guidelines range. The proffer agreement listed various exceptions to the government's promise not to use those statements, in exchange for defendant's guilty plea, including one permitting the government to use defendant's proffer statements to rebut his claim at sentencing that his girlfriend's drug purchases were not attributable to him.

§1B1.10 Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

United States v. Maxwell, 590 F.3d 585 (8th Cir. 2010). Defendants were sentenced in 1993 for crack offenses. The district court departed downward, sentencing defendants to 240 months on a guideline range of 360 months' to life because it found that the 100:1 ratio disparately impacted African Americans and that such disparity was not intended or considered by Congress or the Commission. On appeal, the court vacated the sentences, and on remand the district court imposed a guideline range sentence, citing its lack of authority to depart. Defendants moved for a sentence reduction under 18 U.S.C. § 3852(c)(2), and the district court again imposed a sentence of 240 months. The circuit court held that such proceedings do not constitute full resentencings, and that defendants who were originally sentenced within the mandatory guideline range cannot receive an amended sentence below the amended guideline range. On the other hand, defendants who originally received a below-range sentence may receive a reduction from the amended guidelines range that is comparable to the original reduction. Even though defendants here were "originally sentenced" below the guideline range, the original sentence was vacated and had no legal effect. The district court lacked authority to impose a sentence below the amended guideline range.

United States v. Clark, 563 F.3d 722 (8th Cir. 2009). The court held "the modification of a defendant's sentence pursuant to [18 U.S.C.] § 3582(c)(2) does not constitute a full resentencing" and the district court was not required to provide a detailed explanation of all the

18 U.S.C. § 3553(a) factors upon resentencing pursuant to §1B1.10. *See also United States v. Harris*, 568 F.3d 666 (8th Cir. 2009) (no right to counsel during § 3582(c) proceedings); *United States v. Harris*, 574 F.3d 971 (8th Cir. 2009) (proceedings under 18 U.S.C. § 3582(c)(2) are "not a do-over of an original sentencing proceeding" and "[a]ll other guideline application decisions remain unaffected," including whether to run a sentence concurrent or consecutive to a state sentence).

United States v. Gamble, 572 F.3d 472 (8th Cir. 2009). The district court denied defendant's motion to reduce sentence and request for resentencing. "To be eligible for a retroactive reduction, a defendant must currently be serving a sentence for a crack cocaine offense." Gamble was convicted of a crack cocaine offense and sentenced to 60 months. While in prison, Gamble was convicted and sentenced on a marijuana offense, to be served consecutively to the crack sentence. Gamble was serving time on the marijuana conviction when he filed for reduction of sentence. On appeal, the court held: "There is no statutory requirement that the district court meld the two sentences into a single, aggregate term of imprisonment. The district court thus correctly concluded that Gamble had served his crack cocaine sentence, to which his subsequent [marijuana] sentence ran consecutively. Accordingly, at the time Gamble moved for a reduction of his sentence he was no longer serving a term of imprisonment for his crack cocaine conviction and was not eligible for a reduction under Amendments 706 and 713."

United States v. Starks, 551 F.3d 839 (8th Cir. 2009). The court held that *Booker* does not apply to sentencing reductions based on retroactive guideline amendments pursuant to 18 U.S.C. § 3582(c) and §1B1.10. *See also United States v. Wagner*, 563 F.3d 680 (8th Cir. 2009) (if defendant's original term of imprisonment was within the applicable guideline range, defendant may not be resentenced below the amended guideline range regardless of whether defendant was initially sentenced under mandatory or advisory sentencing guidelines).

United States v. McFadden, 523 F.3d 839 (8th Cir. 2008). The defendant appealed the district court's decision denying the defendant's motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) based on Amendment 706. The circuit court affirmed the district court's denial of the defendant's motion, holding that the defendant was not entitled to the reduction because the amendment did not have the effect of lowering his applicable guideline range. *See also United States v. Jones*, 523 F.3d 881 (8th Cir. 2008) (holding that the "district court properly concluded that [the defendant's] guidelines range was unaffected by the recent amendments to the crack quantity guidelines because of the statutory mandatory minimum, USSG § 5G1.1(b)"); *United States v. Clay*, 524 F.3d 877 (8th Cir. 2008) (holding that the defendant was "not eligible for a sentence reduction based on the amendments to the crack sentencing guideline because his sentencing range was determined by the career offender provision"); *United States v. Scurlark*, 560 F.3d 839 (8th Cir. 2009) (holding that the court had no authority to reduce a binding Rule 11(c)(1)(c) sentence because the sentence was based upon the agreement and not on a sentencing range that had subsequently been lowered by the Sentencing Commission); *United States v. Tolliver*, 570 F.3d 1062 (8th Cir. 2009) (the district court did not err in denying motion for reduction of sentence because sentence was based on a stipulation of the parties and not on a subsequently lowered guideline range); *United States v. Wanton*, 525 F.3d 621 (8th Cir. 2008) (affirming district court's order denying the defendant's

request for relief pursuant to the guideline amendments because "the new amendment does not apply where more than 4.5 kilograms of crack is involved.").

United States v. Whiting, 522 F.3d 845 (8th Cir. 2008). The defendant was sentenced before Amendment 706 came into effect, but the Amendment became retroactive during his appellate proceedings. The court remanded defendant's case for consideration on whether his sentence should be modified in light of the retroactive amendment despite the fact that the district court stated in the sentencing proceedings that the defendant's sentence would not be affected by Amendment 706 and had sentenced the defendant at a point in the guideline range that would apply if Amendment 706 became effective.

United States v. Adams, 104 F.3d 1028 (8th Cir. 1997). In deciding whether to apply an amendment retroactively, §1B1.10(b) directs the court to "consider the sentence that it would have imposed had the amendment [ ] . . . been in effect." The court held that it is implicit in this directive that the district court is to leave all of its previous factual decisions intact. It was error for the court to take into account the possibility that the defendant may have been accountable for more plants than he had agreed to under the plea bargain. *See also United States v. Jones*, 523 F.3d 881 (8th Cir. 2008) ("In considering a reduction to a defendant's term of imprisonment under [18 U.S.C.] § 3582(c)(2), the district court must determine the guidelines range as if the relevant amendment had been in place at the time of the original sentencing, and it may consider only the retroactive amendment in determining the amended guidelines range.").

United States v. Douglas, 64 F.3d 450 (8th Cir. 1995). The defendant was convicted of being a felon in possession of a firearm and originally sentenced as a career offender to 120 months' imprisonment. Amendment 433, which became effective on November 1, 1991, amended the guidelines commentary to provide that a firearm possession is not a "crime of violence" under §4B1.1 and thus cannot trigger the application of the career offender provision. Amendment 433 also stated that it was a clarifying change rather than a substantive one and was approved by the Sentencing Commission for retroactive use. The defendant moved for a reduction of his sentence, arguing that he should have been sentenced under the November 1991 guidelines, which would yield a range of 27 to 33 months. Upon resentencing, the district court sentenced the defendant to 108 months' imprisonment by using a later version of the guidelines. The circuit court vacated the sentence, ruling that the defendant was entitled to be resentenced wholly under the guidelines version employed by the original district court, "but in light of a retroactive amendment clarifying that the court applied the wrong provision of that version."

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Comstock, 154 F.3d 845 (8th Cir. 1998). The district court erred in applying the 1995 version of §5G1.3(c) for acts that took place between November 1992 and January 1994. Under the 1993 guidelines, the defendant would have faced a maximum total punishment of 37 months' imprisonment because the 1993 version of §5G1.3 would have required that at least some of the defendant's federal sentence run concurrently with his undischarged state sentences to achieve a "reasonable incremental penalty" for the instant offense. Instead, the court used a later version of the guidelines and imposed a 54-month term of

imprisonment. Because the *ex post facto* violation affected defendant's substantial rights, the defendant was entitled to be resentenced under the 1993 guidelines.

United States v. Cooper, 63 F.3d 761 (8th Cir. 1995). The application of the 1991 sentencing guidelines to offenses the defendant committed prior to their effective date did not violate the *ex post facto* clause because one of the offenses occurred after the effective date of the 1991 amendments. Although the application of the post-November 1, 1991, grouping rules increased the defendant's penalty because his last groupable offense occurred in January 1991, the defendant "had 'fair warning' of the total penalty this additional criminal conduct would entail," which is all that is required by the *ex post facto* clause (citation omitted).

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

United States v. Martinez-Hernandez, 593 F.3d 761 (8th Cir. 2010). The court upheld the district court's imposition of a 4-level abduction enhancement under §2A3.1(b)(5). The court held that the abduction enhancement "requires only that force necessary to overcome the particular victim's will." This force need not be physical, but may be accomplished by veiled coercion or inveigling. The defendant had authority over the victim as her stepfather, he took her 1,100 miles from home, and the victim was totally dependent on the defendant during the trip. The district court did not err in concluding that defendant manipulated the victim to a degree of force necessary to overcome the victim's will through his trickery and deceit.

United States v. Two Elk, 536 F.3d 890 (8th Cir. 2008). The court held that the district court did not err in applying the enhancement under §2A3.1(b)(1) for sexual assault by use of force or threat. In addition to the "substantial discrepancy between the body mass of [the defendant], a twenty-five year old male, and that of [the victim], a two-and-a-half-year-old female," the district court found that the defendant lifted the victim off the floor and placed her on the bed, and muffled the victim's cries with his hand. The court concluded that the "net result of these actions certainly supports the district court's conclusion that [the defendant] used force to accomplish these sexual assaults."

United States v. Tyndall, 521 F.3d 877 (8th Cir. 2008). The district court did not err in calculating the base offense level as 30 under §2A3.1 rather than as level 18 under §2A3.2. The defendant was convicted of sexual abuse of a minor in violation of 18 U.S.C. § 2243(a), but was acquitted of engaging or attempting to engage in a sexual act with a person physically incapable of consenting in violation of § 2242(c). The district court applied the cross-reference to §2A3.1 found in §2A3.2 because it found, by a preponderance of the evidence, that the defendant's conduct violated § 2242(c). The court held that the application of the cross-reference was appropriate because a district court can take into account in sentencing relevant conduct, "even if that conduct formed the basis of a criminal charge on which a jury acquitted the defendant."

United States v. Blue, 255 F.3d 609 (8th Cir. 2001). The defendant was convicted of sexually abusing a 21-month-old child in Indian country, and appealed a 4-level enhancement

under §2A3.1(b)(1) for sexual assault by use of force or threat. The record lacked any evidence that the defendant had threatened the child in a physical or verbal manner. The only factor suggesting use of force was the size differential between the defendant and the child. The court held that "size difference alone cannot establish the use of force under section 2A3.1(b)(1)." The court also held that the district court erred in assessing an enhancement because the child was in the "custody, care, or supervisory control of the defendant." The evidence failed to establish that the defendant either had care of the child transferred to him or was a person the victim trusted.

§2A3.4 Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

United States v. Sharpfish, 408 F.3d 507 (8th Cir. 2005). The district court did not err when applying the base offense level corresponding to the use of force in abusive sexual contact where the defendant had "great size advantage over the victim." The court distinguished *Sharpfish* from *Crow* (summarized below) because the defendant "weigh[ed] 235 to 240 pounds, whereas [the victim] was three years old." Also, the court found that the defendant used his size to immobilize the child, noting that a "defendant who physically restrains a victim from escaping uses 'force' in committing the crime as contemplated by section 2241(a)."

United States v. Crow, 148 F.3d 1048 (8th Cir. 1998). The district court erred in using a base offense level of 16 in sentencing the defendant for abusive sexual contact with a child under the age of 12 within Indian country. Level 16 applies if the defendant used force in the attack. Although the victim testified she did not want the defendant to remove her clothes and that he hurt her, the record lacked evidence regarding the defendant's and victim's relative sizes, whether the victim felt she could not escape, or what she meant when she said the defendant hurt her, that is, whether he hurt her to force her to submit, or whether the sexual contact itself hurt her. The court of appeals remanded for resentencing.

§2A3.5 Failure to Register as a Sex Offender

United States v. Myers, 598 F.3d 474 (8th Cir. 2010). The defendant pled guilty to failing to register as a sex offender. On appeal, he claimed that the court engaged in impermissible double-counting by using a prior felony conviction to calculate both his base offense level and his criminal history category. The circuit court held that because the harm of the defendant's prior conviction was not fully accounted for under either §§2A3.5 or 4A1.1, no impermissible double-counting occurred. The court also referenced the Application Notes to §1B1.1, which state "[a]bsent an instruction to the contrary," the sentencing court must calculate the base offense level and criminal history cumulatively.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

United States v. Coyle, 309 F.3d 1071 (8th Cir. 2002). After the defendant pled guilty to carjacking and kidnapping charges, he argued that the district court erred as a matter of law by enhancing counts I and II under §2A4.1(b)(3) for use of a dangerous weapon. The court found that holding the knife against the mother's leg and pointing the knife at the baby to secure the mother's cooperation constituted use of a dangerous weapon.

United States v. Sickinger, 179 F.3d 1091 (8th Cir. 1999). The district court erred in applying the 4-level increase under §2A4.1(b)(2) for permanent bodily injury sustained by the kidnapping victim's friend who was not abducted. The increase is authorized only if "the victim" received bodily injury and "plainly refers solely to the victim of the kidnapping, and not to persons suffering collateral injury during the kidnapping . . . ." The district court did not err, however, in refusing to grant a 1-level reduction for release of the victim within 24 hours under §2A4.1(b)(4)(c). Even though the victim could have escaped within 24 hours because she had been left alone on two occasions, the defendant's "abusive behavior" towards the victim could have prevented the victim from attempting to escape.

§2A6.1 Threatening or Harassing Communications; Hoaxes; False Liens

United States v. Humphreys, 352 F.3d 1175 (8th Cir. 2003). The district court did not commit clear error in denying the defendant a 4-level decrease under §2A6.1(b)(5) (2002). The decrease is authorized in threatening communications offenses where (1) no other §2A6.1 adjustments are applicable, and (2) "the offense involved a single instance evidencing little or no deliberation." The court determined that the decrease applies only to "defendants whose threats are the product of a single impulse, or are a single thoughtless response to a particular event." (internal citation and quotation marks omitted). The defendant threatened to pour a flammable material on President Bush and set him alight and communicated the threat to different people on different occasions. Given these facts, he was not entitled to the decrease.

Part B Basic Economic Offenses

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

Loss Issues (§2B1.1(b)(1))

United States v. Markert, 732 F.3d 920 (8th Cir. 2013). In a case involving the misapplication of funds through a nominee loan scheme, a check kiting defendant appealed the district court's determination of loss for purposes of calculating his guideline range under §2B1.1. The court of appeals held that the monetary value of the nominee loans that the bank received in exchange for the misapplied funds, measured at the time of detection, must be credited against actual loss. Because the district court made no effort to determine that monetary value, and because the resulting 16-level increase in the loss calculation was not harmless, the court of appeals remanded the case for resentencing.

United States v. Alexander, 679 F.3d 721 (8th Cir.), *cert. denied*, 133 S. Ct. 379 (2012). In a false statements mortgage fraud case, the defendant argued that the bank suffered no loss because the fair market value of the property exceeded the unpaid principal amount of the loan. Citing Application Note 3(E)(ii), the circuit court ruled that the district court had properly offset the amount of loss by the amount that was recovered from the property's sale at foreclosure, not the fair market value of the collateral.

United States v. Mancini, 624 F.3d 879 (8th Cir. 2010). Defendant pleaded guilty to wire fraud after falsely securing a mortgage refinance loan by misrepresenting his employment and wages. After defaulting on his rental payments, the lender repossessed and sold the property for a $44,000 loss; defendant's mortgage insurance company then paid the lender that sum. Over defendant's objection, the district court found that the lender and the insurer were victims of the fraud and included the $44,000 loss in the guideline loss calculus. On appeal, as a matter of first impression, the court affirmed and joined the First, Third, Seventh, and Eleventh Circuits in concluding that "loss resulting from a mortgage fraud includes loss to the mortgage insurer. . . . '[T]he loss to the insurance company is . . . a direct loss that [is] properly included within the loss calculations' because 'insurance simply shifts the loss to another victim (the insurance company).'" (internal citations omitted).

United States v. Miller, 588 F.3d 560 (8th Cir. 2009). Defendant was convicted of conspiracy to commit wire fraud by selling fraudulent mortgages (made fraudulent by misrepresenting the value of the properties and the qualifications of the borrowers, among other things) to financial institutions. The district court rejected the PSR's measurement of loss as defendant's gain, i.e., the fees and commissions paid to defendant, because gain is a substitute measure for actual loss or intended loss and here, actual loss could be determined even though the government produced no evidence of actual loss. The district court also rejected an enhancement for an offense involving more than ten victims and a mass-marketing enhancement because "the crime itself was [not] committed through mass marketing." Finally, the district court rejected an enhancement for deriving more than $1,000,000 in gross receipts from a financial institution but imposed an aggravated role enhancement.

On appeal, the court agreed that actual loss could have been determined by examining each transaction and any subsequent foreclosures, and that the government did not so prove. The amount of intended loss attributable to defendant, however, is the amount by which the fraudulent loans purchased by the financial institutions exceeded the amount that those institutions would have paid had they known the truth. But the court did not apply this measure of intended loss because it was not raised by either party. The defendant's gain may not be used to support an enhancement on its own absent actual or intended loss, so no enhancement for loss applies. Next, the court agreed that the offense must involve mass-marketing in order for the enhancement under §2B1.1(b)(2)(A)(ii) to apply, and here, defendant's mass marketing was to consumers not related to his crime, perpetrated on financial institutions. Finally, the sentence was not unreasonable.

United States v. Hodge, 588 F.3d 970 (8th Cir. 2009). The district court did not err in imposing a 12-level enhancement under §2B1.1(b)(1)(G) for losses over $200,000. Defendant pleaded guilty to wire fraud based on fraudulent submission of 1,762 reimbursement claims for life insurance health examinations never performed. The insurance company confirmed as fraudulent 50 submissions. A testing laboratory confirmed 253 submissions as fraudulent, and the FBI confirmed as fraudulent 20 submissions before indictment and 100 submissions following defendant's guilty plea. The court held that the evidence was sufficient to establish a nexus between defendant and each of the 1,762 submissions because of the striking similarities between the 20 charged submissions and the remaining uncharged submissions. Furthermore,

the government showed that each of the 1,762 submissions was fraudulent even though the government did not investigate each submission. The submissions each contained two materially false statements in that they all listed the same insurance company and the same insurance agents, although neither the company nor the agents actually participated in the submissions.

United States v. Kowal, 527 F.3d 741 (8th Cir. 2008). The district court's determination that Kowal obtained credit cards with the "intent to defraud" the issuers was not clearly erroneous. The court found that the defendant's claims that he intended to pay off the balances of the credit cards was "self-serving" and that "[h]is representations to the issuers that they were dealing with a different person strongly suggests intent to defraud." Because it determined that there was intent to defraud, the court affirmed the 4-level enhancement under §2B1.1(b)(1)(c) and the 2-level enhancement for more than ten victims under §2B1.1(b)(2)(A)(I).

United States v. DeRosier, 501 F.3d 888 (8th Cir. 2007). Costs incurred by a bank for investigating its own employee (the defendant) are not consequential damages barred from loss by §2B1.1, Application Note 3(D), because the investigation was an "immediate response" to the defendant's conduct. The court reasoned that such an investigation was "reasonable and foreseeable" and thus such costs are appropriately included in loss calculations.

United States v. Hartstein, 500 F.3d 790 (8th Cir. 2007). While the sentencing judge may make reasonable estimates as to loss, the government must prove loss amounts. It is not the defendant's "burden to disprove the final loss amount." The government must meet its burden of proof "regarding the defendant's intent as to any particular victim or group of victims" before it can be shown that any scheme was intended to be a "Ponzi scheme," and thus apply the provisions of §2B1.1, Application Note 3(F)(iv), which disallows credits for the gain of one victim offsetting the loss of another.

United States v. Holthaus, 486 F.3d 451 (8th Cir. 2007). The value of assets concealed in a bankruptcy fraud serves as relevant evidence in determining intended loss. When the defendant fails to offer more than "bare assertions" that he intended no loss, the sentencing judge may rely on a reasonable estimate of intended loss.

United States v. Ameri, 412 F.3d 893 (8th Cir. 2005). The district court did not err in determining the value of stolen software to be $1.4 million. The evidence of its importance to a $10 million contract, its $700,000 development cost, and the defendant's willingness to pay others $200,000 to use the software distinguished the case from *United States v. Rivers*, 917 F.2d 369 (8th Cir. 1990), which cautioned that the owner's hearsay opinion as to the value of the property "should not be based on hypothesis, conjecture, or speculation alone."

United States v. Craiglow, 432 F.3d 816 (8th Cir. 2005). A defendant who commits a fraud does not get credit against loss for any business expenses spent in perpetuating the fraud. The defendant argued that he was entitled to credit under §2B1.1, comment (n.3(e)(I)), for services rendered to the victims in a fraudulent scheme where he solicited investors to buy ATM machines. While the defendant provided some return to the victims, when money is transferred to a victim in perpetuation of a scheme such as a Ponzi scheme or the fraud in this case, that value is not credited to the defendant for the purposes of calculating loss. *See also United States*

v. Mooney, 425 F.3d 1093 (8th Cir. 2005) (in response to the defendant's suggestion that the loss figure be credited with losses in stock value in an insider trading scheme, that there could be no credit for "money spent perpetuating a fraud" (internal citation and quotation marks omitted)).

United States v. Henderson, 416 F.3d 686 (8th Cir. 2005). In a case where the defendant was convicted of wire fraud related to social security disability insurance payments, the court held that, because the defendant intended to continue to receive the benefits fraudulently until retirement age, the loss figure should include estimated payments through that date.

United States v. Radtke, 415 F.3d 826 (8th Cir. 2005). A defendant convicted of failing to withhold taxes or benefit payments from employees' checks argued that he should be credited the amount of other fringe benefits the employer supplied when calculating the loss figure. The court disagreed regarding any fringe benefits paid, as these items were not the taxes or benefit payments that were the subject of the fraud. The court found that these benefits were paid in part to "entice [the victims] to accept cash checks and thus to further the scheme to defraud."

United States v. Liveoak, 377 F.3d 859 (8th Cir. 2004). The evidence did not reasonably support the loss estimate of $122,386.81 used by the district court when sentencing a defendant convicted of conspiring to certify certain patients as homebound to make them eligible to receive home health services. The government failed to present any evidence regarding the amount of loss as it related to defendant, and the defendant presented testimony from two nurses indicating that the total loss to the government for overpayment of services, as it related to defendant, was only $12,478.36.

Victims Table (§2B1.1(b)(2))

United States v. Hall, 604 F.3d 539 (8th Cir. 2010). The court held that the district court did not err in applying a mass-marketing enhancement of 2-levels to a defendant convicted of one count of mail fraud and two counts of wire fraud. The defendant argued that the mass-marketing enhancement should not have applied because his victims would have invested in his fund notwithstanding its website. The circuit court noted that in amending §2B1.1(b)(2)(A)(ii) the Commission's intent was for the enhancement "to apply in cases in which mass-marketing has been used to target a large number of persons, regardless of the number of persons who have sustained an actual loss or injury" (internal citation and quotation marks omitted). Whether few people fell into the defendant's virtual trap had little relevance for §2B1.1 so long as the defendant attempted to use the website to solicit funds from a large number of persons.

United States v. Cunningham, 593 F.3d 726 (8th Cir. 2010). The district court imposed a 2-level enhancement for the number of victims, a 4-level enhancement for the defendant's aggravating role and a 2-level enhancement for obstruction of justice. The circuit court found that there was no clear error in the district court's application of the enhancements. The defendant's conduct involved more than ten and less than fifty victims because governmental entities can be considered victims for the purpose of sentence enhancement. The defendant's role as an Executive Director and associated responsibilities were undisputed, as was the notion that without her none of the fraud scheme could have occurred. Furthermore, while any enhancement for obstruction of justice must be found by a preponderance of the evidence, in this

case the defendant's PSR indicated that prior to an auditor's visit, the defendant ordered the destruction of time records and other materials, which the court found to be obstructive conduct.

Theft From The Person Of Another (§2B1.1(b)(3))

United States v. Jankowski, 194 F.3d 878 (8th Cir. 1999). The district court erred in applying the enhancement for "theft from the person of another" pursuant to §2B1.1(b)(2). The driver of the armored car involved in the robbery was not actually holding the money, nor was the money within his arm's reach. Instead, he was separated from the money by a bulkhead with a plexiglass window. The commentary to the guideline explains that "from the person of another" refers to property that was being held by that person or was within arm's reach of that person.

Sophisticated Means (§2B1.1(b)(9))

United States v. Septon, 557 F.3d 934 (8th Cir. 2009). Defendant was convicted of bank fraud and conspiracy to commit mail and bank fraud where he submitted numerous fraudulent loan applications to banks and mortgage lending companies. Many fraudulent loans went into default causing losses in excess of two million dollars. The court affirmed an enhancement for the use of "sophisticated means" where defendant used a variety of business entities to facilitate his fraudulent scheme and hide from lenders the fact that he was providing bridge loans to borrowers. Defendant also used "those same entities to act as sham employers for borrowers in order to falsely verify and substantiate their sources of income."

United States v. Vega-Iturrino, 565 F.3d 430 (8th Cir. 2009). Defendant objected to a 2-level adjustment pursuant to §2B1.1(b)(9)(A) for relocating a fraudulent scheme from another jurisdiction to evade law enforcement claiming "the government did not establish that she relocated with the intent to evade a specific threat of imminent arrest." The court rejected this claim holding the guideline did not require "the relocation be motivated by a 'specific' threat of arrest as opposed to a more general intent to evade law enforcement." Here, defendant's flight from California to Kansas City under assumed names with the purpose of stealing credit cards from shoppers, use of the credit cards using the identities of her victims, and possession of counterfeit drivers licenses and other identification documents supported the district court's finding that defendant relocated with the intent to evade law enforcement.

United States v. Finck, 407 F.3d 908 (8th Cir. 2005). The district court did not err when it found the defendant's use of repetitive and coordinated conduct in a scheme to fraudulently acquire automobiles warranted the enhancement for sophisticated means. Although no one step is particularly complicated, the result of all coordinated steps can be a sophisticated scheme.

Means of Identification (§2B1.1(b)(11)(B)(I))

United States v. Salem, 587 F.3d 868 (8th Cir. 2009). The district court erroneously increased defendant's base offense level by 2-levels by finding his offense involved the production of an unauthorized access device under §2B1.1(b)(10)(B)(I) [now §2B1.1(b)(11)(B)(I)]. Defendant placed a fraudulent bar code label reflecting a much lower price on expensive items. On appeal, the court held that, according to the plain language of the

guidelines, "where a defendant did not manufacture, alter, or otherwise produce an access device, the enhancement is inappropriate." The district court noted at sentencing that there was no evidence that defendant manufactured or produced the fraudulent bar code. Evidence of defendant's use of the bar code was not sufficient to trigger the enhancement.

Possession of a Dangerous Weapon (§2B1.1(b)(14)(B))

United States v. Jackson, 639 F.3d 479 (8th Cir. 2011). The district court correctly imposed an enhancement for possession of a dangerous weapon on a defendant who was a policeman. The defendant argued that possession of the weapon was not "in connection with" the offense. The court disagreed finding that it was the defendant's uniform, including the gun, that cloaked him with authority to arrest the victim.

Financial Institution (§2B1.1(b)(15)(B))

United States v. Zech, 553 F.3d 663 (8th Cir. 2009). The district court did not err in applying the substantial-jeopardy enhancement pursuant to §2B1.1(b)(13)(B) [now (b)(15)(B)] where defendant stole $770,000 of the credit union's $3,000,000 in total assets. The fact the credit union managed to avoid insolvency through the use of a bond to protect against employee fraud and theft did not preclude application of the enhancement because actual insolvency is not required. "But for the bond, and the insurer's willingness to pay on the bond . . . the credit union would have become insolvent. [Defendant's] conduct put the credit union in a harrowing position and required the credit union to go to extraordinary efforts to ensure its financial viability by attempting to collect on the bond."

§2B3.1 Robbery

Financial Institution or Post Office (§2B3.1(b)(1))

United States v. McNeely, 20 F.3d 886 (8th Cir. 1994). The defendant's offense level was properly enhanced 2-levels under §2B3.1(b)(1) for robbing a "financial institution or post office." The court rejected the argument that the enhancement was unconstitutionally lacking a rational basis, holding that it "reflects both the seriousness of the offense and past practice."

Otherwise Use a Firearm (§2B3.1(b)(2)(B))

United States v. Paine, 407 F.3d 958 (8th Cir. 2005). "Otherwise used" under §2B3.1(b)(2) includes conduct by the defendant where he pointed the gun at the victim, with his finger on the trigger, and said "this is a stick up. Hand me your large bills . . . I mean it." The court ruled that this conduct was more than just displaying the weapon, the weapon was "employed" or used to threaten the victim.

Otherwise Use a Dangerous Weapon (§2B3.1(b)(2)(D))

United States v. Bartolotta, 153 F.3d 875 (8th Cir. 1998). The district court did not err in concluding that mace is a dangerous weapon under §2B3.1(b)(2)(D). The victim testified that she developed chemical pneumonia as a result of being sprayed with the mace, missed two weeks of work, and had to take steroid injections daily for four months and steroid pills for one

year to cleanse the mace from her system. This evidence established that the mace was a dangerous weapon as defined in the guidelines.

Brandish or Possess a Dangerous Weapon (§2B3.1(b)(2)(E))

United States v. Roberts, 253 F.3d 1131 (8th Cir. 2001). The defendant was convicted of bank robbery and was sentenced to 112 months' imprisonment. On appeal, the defendant asserted that the district court erroneously imposed a 5-level enhancement under §2B3.1(b)(2)(C), which had been recommended in the PSR, for brandishing or possessing a firearm during the commission of the robbery. The evidence indicated that the co-conspirator's gun was in the glove compartment of the car and was not brought into the bank. Because the district court did not make any findings as to whether the co-conspirator possessed the gun in furtherance of the conspiracy for purposes of imputing that conduct to the defendant, the court vacated the defendant's sentence and remanded for resentencing.

Threat of Death (§2B3.1(b)(2)(F))

United States v. Tolen, 143 F.3d 1121 (8th Cir. 1998). The district court erred in finding that the defendant made an express threat of death. The evidence that the defendant, whose left hand was hidden from view, demanded that the teller put cash in a bag "and no one will get hurt" did not support a finding that the defendant was asserting that he was armed.

Abduction/Physical Restraint (§2B3.1(b)(4)(B))

United States v. Ewing, 632 F.3d 412 (8th Cir. 2011). The district court erred when it imposed the §2B3.1(b)(4)(B) enhancement for physical restraint of a victim of a prior uncharged offense because such conduct was not "in preparation for the offense of conviction" and did not fall under the umbrella of relevant conduct.

United States v. Lee, 570 F.3d 979 (8th Cir. 2009). The district court did not err by imposing a 2-level enhancement for restraint of a person under §2B3.1(b)(4)(B). "Physically restrained" is defined as "the forcible restraint of the victim such as by being tied, bound, or locked up" which includes conduct in which "the defendant creates circumstances allowing the persons no alternative but compliance." Here, a codefendant "physically restrained the woman attempting to leave the post office when he struck her with his handgun" which facilitated the crime and created "circumstances allowing the [woman] no alternative but compliance" (quoting *United States v. Kirtley*, 986 F.2d 285, 286 (8th Cir. 1993) (alteration in the original)). *See also United States v. Stevens*, 580 F.3d 718 (8th Cir. 2009) (even though the vault door was not locked and the victims easily could have freed themselves because they were not "tied, bound, or locked up," 2-level enhancement properly applied. "[Defendant's] subsequent actions, including cutting the phone line, moving the ramp, and ensuring the victims would not suffocate, demonstrated to the employees his intent for them to remain in the vault. The gun and threats ensured the employees would comply. The circumstances of this case created no alternative to compliance with the implied, yet obvious, demand to remain in the vault.").

Carjacking §2B3.1(b)(5)

United States v. Ewing, 632 F.3d 412 (8th Cir. 2011). The district court erred when it imposed the §2B3.1(b)(5) enhancement because the carjacking occurred during a prior uncharged offense and was not a part of the offense of conviction. The carjacking was not in preparation for the offense of conviction.

Cross Reference (§2B3.1(c))

United States v. French, 719 F.3d 1002 (8th Cir. 2013). In a robbery case, §2B3.1(c)(1) instructs a sentencing court to apply §2A1.1(a), the first-degree murder guideline, "[i]f a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111." The defendant argued that the district court erred in applying §2A1.1(a) because, although he shot the victim, evidence from a separate medical malpractice case suggested that the gunshot wound was not the ultimate cause of death. The Eighth Circuit upheld the district court's application of §2A1.1(a), noting that the court reviewed the entire record, including conflicting expert testimony, and "properly 'consider[ed] the full context of [the defendant's] offense,'" to determine that he intentionally and maliciously "shot to kill" the victim.

United States v. Weasel Bear, 356 F.3d 839 (8th Cir. 2004). The defendant pled guilty to robbery and second degree murder in Indian Country. The defendant was sentenced for first degree murder under the robbery cross reference that applies "[if] a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such a killing taken place within the territorial or maritime jurisdiction of the United States" (alteration in original, quoting USSG §2B3.1(c)(1)). The defendant argued that the cross reference converted his second degree murder plea into a *de facto* conviction for first degree murder and that the cross reference applies only where the victim is killed outside the territorial jurisdiction of the United States. The appellate court held that the district court correctly applied the cross reference because the defendant pled to second degree murder during the course of a robbery.

Part C Offenses Involving Public Officials and Violations of Federal Election Campaign Laws

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

United States v. Griffin, 154 F.3d 762 (8th Cir. 1998). The district court did not err in applying §2C1.1 (bribes) rather than §2C1.2 (gratuities) in sentencing the defendant who pled guilty to bribery and mail fraud. While Speaker of the House, the defendant received two checks from an individual the defendant had recommended to be a lobbyist. The defendant argued that the payments were gratuities that he received after making the recommendation so §2C1.2 was the applicable guideline. The court disagreed, holding that "[t]he distinction between a bribe and an illegal gratuity is the corrupt intent of the person giving the bribe to receive a *quid pro quo*, something that the recipient would not otherwise have done." Here the defendant admitted that he made the recommendation knowing that he would be paid for his efforts.

Part D Offenses Involving Drugs and Narco-Terrorism

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

Base Offense Level (§2D1.1(a))

United States v. Montes-Medina, 570 F.3d 1052 (8th Cir. 2009). Defendant argued "that he should have received the benefit of the 10% margin of error in the drug quantity determination stipulated to by the Government, which in turn would have yielded a lower advisory [g]uidelines range . . . ." In affirming the sentence, the court held "the district court was not required to use the lab's margin of error to drive the drug quantity down into a lower offense level" and found the drug quantity determination was supported by the record.

United States v. Houston, 338 F.3d 876 (8th Cir. 2003). The district court clearly erred in finding that the defendant was accountable for more than 50 but less than 150 grams of actual methamphetamine. The issue was whether the government proved that the methamphetamine quantities the defendant admitted he helped manufacture were "actual" methamphetamine quantities, rather than mixture quantities. The government offered no proof regarding what was recovered in the search of the defendant's home. None of the methamphetamine manufactured by the co-conspirators was recovered and tested for purity. The court concluded that the record was devoid of any evidence to justify a finding of at least 50 grams of actual methamphetamine, or 500 grams of a methamphetamine mixture, the minimum alternative quantities necessary to place the defendant's offense in base offense level 32. Therefore, the court remanded the case for resentencing. *See also United States v. Mesner*, 377 F.3d 849 (8th Cir. 2004) (holding that, for calculating the quantity of the "actual" methamphetamine manufactured by the defendant, the sentencing court was required to apply the percentage of actual methamphetamine found in three samples seized at time of arrest, which varied from 15 percent to 19 percent, to the admitted gross quantity of unrecovered substance previously manufactured by defendant; the court could not simply use admitted quantity as quantity of "actual" methamphetamine).

United States v. Raines, 243 F.3d 419 (8th Cir. 2001). The defendant was convicted of cultivating marijuana plants. The government appealed the sentence, asserting that the court erred in finding that the defendant had cultivated fewer than 1,000 plants. At sentencing, a law enforcement officer testified that he had sampled one out of every ten similarly sized plants and counted only those that had identifiable root hairs. Based on this sample, the officer extrapolated that the defendant had produced 1,051 plants. The district court found that the estimate was not sufficiently reliable to prove by a preponderance of the evidence that at least 1,000 plants had identifiable root hairs. The court affirmed the sentence, holding that the district court did not err by rejecting the government's sampling technique.

United States v. Alvarez, 168 F.3d 1084 (8th Cir. 1999). Drug quantity determinations may be based on conduct from dismissed counts. Reliable hearsay evidence may be sufficient to support the determination of drug quantity.

Brown v. United States, 169 F.3d 531 (8th Cir. 1999). The district court did not err in holding the defendants accountable for drug quantities from a negotiated deal that was never consummated, because there was an actual agreement to supply the drugs and the defendants were reasonably capable of providing the agreed-upon quantity.

United States v. Davidson, 195 F.3d 402 (8th Cir. 1999). The defendant was found guilty of conspiracy to manufacture methamphetamine. On appeal, the defendant argued that the court erred by not making a specific finding that the quantity of methamphetamine found or producible at a particular lab was reasonably foreseeable to her. The evidence indicated that the defendant had ordered and delivered precursor chemicals to the lab, and that those chemicals could have been used to produce 2,500 grams of methamphetamine. The court affirmed the sentence, holding that there was sufficient evidence to establish that the production of the lab was within the scope of the conspiracy and was reasonably foreseeable to the defendant.

United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir. 1994). The defendants were convicted of drug trafficking. One challenged the inclusion of drugs found in the possession of his co-conspirators during a vehicle stop that occurred while he was incarcerated. The district court found that the defendant helped to procure the car in which the narcotics were being transported, and the activities of his co-conspirators were in furtherance of the conspiracy and were known to or reasonably foreseeable by him. The circuit court affirmed, holding that a defendant may be guilty of conspiracy even if he was incarcerated at the time the purpose of the conspiracy was effected.

Drug Quantity (§2D1.1(a)(5))

United States v. Walker, 688 F.3d 416 (8th Cir.), *cert. denied*, 133 S. Ct. 801 (2012). Upholding district court's attributing "ice" methamphetamine to defendants under §2D1.1 without laboratory analysis, noting the circuit had "consistently rejected arguments demanding direct evidence of drug quantity, identity or purity." Circumstantial evidence and witnesses' testimony had sufficient indicia of reliability to support the finding.

United States v. Clarke, 564 F.3d 949 (8th Cir. 2009). Law enforcement seized a mason jar containing a biphase liquid, consistent with one of the middle steps in the methamphetamine manufacturing process. The court held the total weight of the biphase liquid containing methamphetamine should be used to determine statutory penalties under 21 U.S.C. § 841(b)(1) and the base offense level under §2D1.1. *See also United States v. Kuenstler*, 325 F.3d 1015 (8th Cir. 2003) (holding that the total weight of the solution, not just the weight of the solid methamphetamine, should be counted under 21 U.S.C. § 841); *United States v. Gentry*, 555 F.3d 659 (8th Cir. 2009) (holding that the definition of "mixture or substance' is the same whether charged with manufacture or distribution and that despite claim that the liquid solution was not a mixture or substance of methamphetamine due to its toxic, unusable, and unmarketable state, the full weight of the cloudy liquid should be used to determine the statutory penalties).

United States v. Minnis, 489 F.3d 325 (8th Cir. 2007). Estimations by the sentencing judge based on evidence presented of "possible . . . cuts" that could be done on a quantity of uncut heroin, relying in part on the defendant's "normal pattern" of conduct, is not error.

United States v. Fraser, 243 F.3d 473 (8th Cir. 2001). Drug quantities intended for personal use should not be included in base offense level for possession, or attempted possession, with intent to distribute. The court vacated the sentence and remanded for a hearing to determine what portion of the total drug quantity was intended for distribution.

United States v. Hunt, 171 F.3d 1192 (8th Cir. 1999). The district court properly considered opinion testimony of a DEA agent regarding production capacity of the defendant's laboratory, which was consistent with the defendant's admitted objective of manufacturing 100 grams of methamphetamine on the day he was arrested. Application Note 12 to §2D1.1 states that in determining the base offense level the court may consider the "size or capability of any laboratory involved."

United States v. Marsalla, 164 F.3d 1178 (8th Cir. 1999). The district court did not err in relying solely on lay witness testimony of a codefendant that the substance distributed was crack cocaine. The court found that the codefendant's experience with crack as a "maker, buyer, handler, observer, and seller" was sufficient to support a finding that the substance distributed was crack cocaine. *See also United States v. Williams*, 557 F.3d 556 (8th Cir. 2009) (court did not err in finding by a preponderance of the evidence at sentencing that substance distributed was crack cocaine where defendant referred to drug as "crack cocaine" throughout trial, lab report described it as off-white chunks of cocaine base, and agent, trained in drug identification, called it crack).

United States v. Palacios-Suarez, 149 F.3d 770 (8th Cir. 1998). The defendant was properly sentenced based on the amount of cocaine and amphetamine in his car, despite the defendant's belief that he was transporting only marijuana. Reasonable foreseeability is relevant in sentencing determinations only with respect to the conduct of those with whom a defendant has conspired or jointly acted. The defendant was sentenced based on the drugs in his own possession, not in the possession of a co-conspirator.

United States v. Maza, 93 F.3d 1390 (8th Cir. 1996). The district court committed clear error in finding that the government did not prove by a preponderance of the evidence that the drug distributed by the defendant was d- rather than l-methamphetamine. The evidence presented by the government included laboratory testing of the samples taken from the defendant, expert testimony regarding the effects of l- and d-methamphetamine, and a co-conspirator's testimony regarding the drugs he received from the defendant. The government sustained its burden of proof by a preponderance of the evidence.

United States v. Wilson, 49 F.3d 406 (8th Cir. 1995). The district court did not err in its application of the guidelines by using the plant count to weight conversion estimates of §2D1.1(c) instead of the harvested drug weight to determine the defendant's base offense level. The defendant claimed that application of the plant count conversion in his case would "drastically extend the scope of the conversion principle because . . . . the marijuana attributed to him was harvested, shucked, packaged, and sold . . . months before law enforcement [officials] intervened."

Dangerous Weapon (§2D1.1(b)(1))

United States v. Ruiz-Zarate, 678 F.3d 683 (8th Cir.), *cert. denied*, 133 S. Ct. 454 (2012). The district court did not err in applying enhancement for possessing a dangerous weapon in connection with a drug offense. The following evidence pointed to constructive possession and foreseeability: defendants had access to basement where gun was located and there were other indicia that defendants had been in the basement; the government presented evidence at trial that guns are commonly used to protect the drugs that the defendants are distributing; in a drug conspiracy, gun possession is reasonably foreseeable. The court found it was not clearly improbable that the gun was connected to the drug offense because it was located near drug paraphernalia.

United States v. Peroceski, 520 F.3d 886 (8th Cir. 2008). The district court did not err in applying a 2-level enhancement for possessing a dangerous weapon in connection with a drug crime. The defendant pleaded guilty to possessing methamphetamine with the intent to distribute it. Police found the drugs in the defendant's girlfriend's garage, and they found at least two guns inside a camper-trailer on the girlfriend's property. The defendant denied that the guns had any connection with the drugs. The court recognized that "[t]here are two competing lines of cases in [the] circuit on the question of when it is appropriate to apply an enhancement for possessing a dangerous weapon in connection with a drug crime under U.S.S.G. § 2D1.1(b)(1)." The first line of cases "emphasizes the commentary to the federal sentencing guidelines that says that the enhancement 'should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.'" In contrast, the second line of cases "hold that 'the government must show that the weapon was present and that it is at least probable that the weapon was connected with the offense.'" The court chose to follow the first line of cases, holding that, in order for the enhancement to apply, the "government must simply show that it is not clearly improbable that the weapon was connected to the drug offense." *See also United States v. Smith*, 656 F.3d 821 (8th Cir. 2011). (rifle accessible in open closet of residence related to drug activity because defendant normally stored drugs at home).

United States v. Harris, 493 F.3d 928 (8th Cir. 2007). The uncorroborated testimony of a witness about a "guns-for-drugs" transaction is sufficient to apply the specific offense characteristic for possession of a dangerous weapon. Because the sentencing judge's assessment of witness credibility is "virtually unassailable" such an application is warranted.

United States v. Adams, 401 F.3d 886 (8th Cir. 2005). The district court did not err in applying a 2-level gun enhancement where a loaded pistol was found in the bedroom along with heroin, baggies, cutting agents, blenders, a scale, and notebooks with drug and weapons notations. The presence of these articles supported finding that some of the drug activities were conducted in the room, and that the gun was used in connection with those activities.

United States v. Ingles, 408 F.3d 405 (8th Cir. 2005). The district court did not err in applying the §2D1.1(b)(1) enhancement for possession of a dangerous weapon during the commission of a drug offense when a loaded rifle was within arm's reach of the defendant at his methamphetamine lab. *See also United States v. Torres*, 409 F.3d 1000 (8th Cir. 2005) (holding that the court did not err in applying the enhancement when defendant took the informant into a room where another man sat with a visible gun on his hip).

United States v. Mathijssen, 406 F.3d 496 (8th Cir. 2005). The weapon enhancement under §2D1.1 was applied where the defendant carried a small knife during a drug purchase. The district court did not commit error when it concluded that the knife was dangerous and was likely "connected with the offense" even though the knife was only one and a half to two inches long.

United States v. Lopez, 384 F.3d 937 (8th Cir. 2004). Absent any evidence that the defendant knew or should have known that a co-conspirator owned a gun, a 2-level sentencing enhancement for possession of a firearm by a co-conspirator in a narcotics crime, was improperly applied at sentencing for conspiring to distribute methamphetamine. The defendant was across town in a hotel room when police found the gun under the driver's seat in a co-conspirator's car. The government did not present any evidence that showed that the defendant knew that the co-conspirator owned a gun or carried a gun when he delivered drugs. The court disagreed with the government's contention that the court could infer a defendant's knowledge based solely on the nature of drug dealing and held that the "[2]-level firearm enhancement can only be applied if the Government shows that the defendant knew or should have known based on specific past experiences with the co-conspirator that the co-conspirator possessed a gun and used it during drug deals."

United States v. Pierce, 388 F.3d 1136 (8th Cir. 2004). In calculating a defendant's offense level for a drug conviction, it does not constitute impermissible double-counting to apply a sentencing enhancement for the defendant's possession of a dangerous weapon in connection with a drug offense, even though the defendant has also been convicted for possessing the same firearm under the statute prohibiting a felon from being in possession of a firearm.

United States v. Perez-Guerrero, 334 F.3d 778 (8th Cir. 2003). The defendant was convicted of methamphetamine offenses. The district court applied a 2-level sentencing enhancement pursuant to §2D1.1(b)(1) for possessing a dangerous weapon in connection with the conspiracy. At the traffic stop during which the weapon was recovered, defendant possessed the key to a motel room, where police discovered large quantities of methamphetamine. Thus, the defendant had constructive possession of both the drugs and the weapon. A canine search of the defendant's car indicated that drugs had been stored there. The court affirmed the enhancement.

Brown v. United States, 169 F.3d 531 (8th Cir. 1999). Two defendants challenged the firearm enhancement. The district court did not err in enhancing the first defendant's sentence for firearms found in a clubhouse where police found the number, type, and state of readiness of the firearms, in addition to intercepted conversations that "suggested" that the defendant was willing to use the firearms to defend the drug operations. The district court did not err in enhancing the second defendant's offense level under §2D1.1(b)(1) for a 26-piece firearm collection, consisting mostly of long guns and collector's items kept locked in a safe where the defendant made cocaine sales from his house, and, during a search, agents found $3,500, including four $20 marked bills from controlled buys in the safe with the guns.

United States v. Newton, 184 F.3d 955 (8th Cir. 1999). The district court did not err in applying a 2-level enhancement under §2D1.1(b)(1) for a weapon used as collateral for the purchase of a truck. The defendant entered into an agreement with an undercover agent to obtain a loan to buy a replacement for the vehicle he had wrecked while distributing drugs. Defendant posted the guns as collateral and agreed to repay the loan with drugs. After purchasing a new truck, the defendant continued to deliver drugs to the informant and the agent.

United States v. Rogers, 150 F.3d 851 (8th Cir. 1998). The district court did not err in applying the firearm enhancement under §2D1.1(b)(1). A drugs-for-guns trade is sufficient to warrant a firearm enhancement.

Safety Valve (§2D1.1(b)(16))

United States v. Barrera, 562 F.3d 899 (8th Cir. 2009). On appeal, defendant argued that *Booker* made the assessment of criminal history advisory and the court could use its discretion to reduce his criminal history to meet the requirements of the safety valve for a sentence below the mandatory minimum. The panel held that *Booker* did not give district courts discretion to treat the safety valve provision of 18 U.S.C. § 3553(f) as advisory. The district court is to correctly calculate the guidelines, including criminal history points, when determining whether a defendant qualifies for a safety valve reduction under the guidelines and under 18 U.S.C. § 3553(f)(1).

United States v. Alvarado-Rivera, 412 F.3d 942 (8th Cir. 2005). The defendant, not the government, bears the burden of proving to the court that she has "truthfully provided to the [g]overnment all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." Whether a defendant has satisfied the provisions of the safety valve statute are determined by the district court and reviewed for clear error. *See also United States v. Marshall*, 411 F.3d 891 (8th Cir. 2005) (the defendant has the burden of demonstrating he is entitled to a more lenient sentence).

United States v. Rojas-Coria, 401 F.3d 871 (8th Cir. 2005). The district court did not err in denying a reduction of the defendant's sentence pursuant to the safety valve provision when the defendant refused to provide information regarding his transportation of drugs.

Maintaining Premises (§2D1.1(b)(12))

United States v. Miller, 698 F.3d 699 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 1296 (2013). Finding that §2D1.1(b)(12) "requires proof that the specific defendant being sentenced maintained the premises 'for the purpose of' drug manufacture and distribution." Also finding that §2D1.1(b)(12) applies when a defendant uses a family home "for the purpose of substantial drug-trafficking activities."

Claim of Sentencing Entrapment

United States v. Torres, 563 F.3d 731 (8th Cir. 2009). The court rejected a claim of sentencing entrapment or manipulation where a series of six controlled buys over six weeks fell within range of legitimate law enforcement goals and investigatory choices, i.e., to establish guilt

beyond a reasonable doubt, to probe depth and extent of criminal enterprise, to determine existence of coconspirators, to trace the drug deeper into the distribution hierarchy, and to determine what quantity of drugs a defendant will deal.

§2D1.10 Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000). The defendant was convicted of manufacturing methamphetamine and endangering human life while doing so. The presentence report grouped the counts and determined the offense level based on the endangering life count because it was the most serious count. The district court applied §2D1.10 and calculated the base offense level by adding 3-levels established by the drug quantity table in §2D1.1. On appeal, the panel held that the base offense level was correctly calculated under §2D1.10. The court reversed the sentence and remanded, however, because the district court incorrectly applied the environmental harm enhancement found in §2D1.1(b)(5). Section 2D1.10(a)(1) directs only that the drug quantity table be used and does not refer to the rest of §2D1.1. The court *sua sponte* reversed on this issue, which the defendant did not raise below or on appeal, because the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit[1]

United States v. Hance, 501 F.3d 900 (8th Cir. 2007). The use of a post office box and fake testimonials in the commission of a fraud do not, alone, constitute "sophisticated means" as such conduct lacks intricacy, deliberation, or complexity.

United States v. Young, 413 F.3d 727 (8th Cir. 2005). The district court did not err when it found the defendants' fraudulent cattle buying schemes put financial institutions in jeopardy. A financial institution need not be the direct victim of the fraud nor does the offense need to be the sole cause of the jeopardy to the bank's safety and soundness for the §2F1.1(b)(8)(A) enhancement to apply.

United States v. Shevi, 345 F.3d 675 (8th Cir. 2003). The defendant pled guilty to mail fraud, structuring cash transactions, and five counts of filing false tax returns. At sentencing, the district court found the mail fraud loss to be $305,133.38 under §2F1.1. The defendant appealed. The appellate court held that "[w]hen a defendant has concealed assets to perpetrate bankruptcy fraud, the intended loss normally may not exceed the value of the liabilities the debtor hoped to discharge or otherwise avoid." Because the district court made no finding regarding the value of the defendant's concealed assets, the court remanded for redetermination of the mail fraud loss.

United States v. Piggie, 303 F.3d 923 (8th Cir. 2002). The defendant created and pursued a secret scheme to pay talented high school athletes to play basketball for his "amateur" summer

[1] Effective November 1, 2001, §§2F1.1, 2B1.2, and 2B1.3 were deleted by consolidation with §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). *See* USSG App. C, amend. 617.

team. As a part of the scheme, the high school athletes falsely certified that they had not previously received payments to play basketball. As a result of this false certification, the universities and one high school had to pay NCAA penalties, lost scholarships, and conducted costly investigations. The district court calculated the amount of loss attributable to the defendant to include these amounts, and defendant argued that he did not intend any loss to the universities. The circuit court found that the district court did not err when it determined the greater loss for consideration under the guidelines was the intended loss to the universities, including forfeited scholarships, investigation costs, and fines, because all of these losses were the natural and probable consequences of the defendant's actions.

United States v. Wheeldon, 313 F.3d 1070 (8th Cir. 2002). The court held that the defendant's intended loss was the value of assets that the defendant concealed from the bankruptcy court, rather than the amount of the total debt the defendant sought to discharge in bankruptcy.

United States v. Whitehead, 176 F.3d 1030 (8th Cir. 1999). The district court properly calculated the loss amount in a check-kiting offense based on the amount in float at the time of discovery. The district court found that the intended loss was zero and that the actual loss was "the amount of the 'insufficient fund check that had to be covered when the check kiting was discovered.'" The district court properly refused to use a restitution amount promised after the offense was discovered to offset the loss figure used to calculate the offense level.

United States v. Coon, 187 F.3d 888 (8th Cir. 1999). The district court did not err in failing to exclude from the loss calculation money repaid to the victims of the insurance fraud after closing the account used to perpetrate the fraud. The amount of fraud loss for sentencing purposes is the greater of the loss defendants intended to inflict at the time of the fraud, or the actual loss, so later repayments do not necessarily affect the loss determination under §2F1.1.

United States v. McCord, Inc., 143 F.3d 1095 (8th Cir. 1998). The district court enhanced the defendant's fraud sentence for "conscious or reckless risk of serious bodily injury," under §2F1.1(b)(4)(1). The court of appeals held that to apply the enhancement, "the government must prove not only that the fraudulent conduct created a risk of serious bodily injury, but also that [the] defendant was in fact aware of and consciously or recklessly disregarded that risk." In this case, the evidence that the defendants knew of the safety risk they created in falsifying truck driver logs to conceal violations of regulations was sufficient to warrant application of the enhancement.

United States v. Shoff, 151 F.3d 889 (8th Cir. 1998). The district court erred in including in the amount of loss an amount identified in the presentence report as a loss to an offshore investor who was defrauded. No government witness identified this investor, and the defendant objected to the presentence report finding. The government did not introduce any evidence concerning this victim at sentencing. The court of appeals held that a presentence report to which the defendant has objected may not be evidence at sentencing and remanded for resentencing.

United States v. Akbani, 151 F.3d 774 (8th Cir. 1998). The district court did not err in its calculation of the loss caused by the defendant's check-kiting scheme. The calculation was not limited to the amount of the "float" at the time of discovery, but rather was determined by considering all of the checks in the scheme for which there were insufficient funds.

United States v. Anderson, 68 F.3d 1050 (8th Cir. 1995). The district court determined that the intended loss the defendant had attempted to inflict was larger than the actual loss, and used the intended loss as the estimated loss for purposes of determining the defendant's base offense level under §2F1.1. The circuit court concluded that the district court's calculation of intended loss as the "difference between the maximum potential loss based on the undisclosed assets and the amount [the defendant] actually repaid in settlements to creditors who did not know the true extent of his assets" was not clearly erroneous.

United States v. Peters, 59 F.3d 732 (8th Cir. 1995). The defendant was convicted of various counts of conspiracy to defraud the United States, causing false and fraudulent claims to be filed against the United States, and theft of property belonging to the United States. The district court determined the amount of loss to be $153,476 – the full amount of the false claims the defendant had submitted. The defendant challenged the loss computation on appeal. The circuit court ruled that even if a portion of the $153,476 could be characterized as a loan, it was still an interest free loan and therefore best characterized as a government benefit and included in the offense level computation. "[I]n a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses."

Part G Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity

§2G1.3 Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

United States v. Young, 613 F.3d 735 (8th Cir. 2010). After a jury convicted the defendant of one count of attempting to entice a minor to engage in sexual activity, the district court enhanced his sentencing range by two levels for misrepresenting his identity. *See* §2G1.3(b)(2)(A). On appeal, the court noted the specific issue as one of first impression but referred to its case law in an analogous setting to conclude that the enhancement properly lies "when the misrepresentation is 'instrumental in getting the victims to engage in sexually explicit conduct.'" Here, defendant–a married father of three and high school band teacher–portrayed himself online to an alleged minor as an unmarried engineer. Thus, the court affirmed the enhancement.

§2G2.1 Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

United States v. Pappas, 715 F.3d 225 (8th Cir. 2013). The defendant pled guilty to two counts of sexual exploitation of a minor and two counts of receipt of child pornography. At sentencing, the district court applied a 4-level enhancement under §2G2.1(b)(4), because the record included a video of the defendant engaging in "sadistic or masochistic conduct or other depictions of violence." The video showed cuts to the victim's buttocks, along with dialogue in which the defendant admits to making the cuts. On appeal, the defendant argued that the enhancement was applied in error, because there was no violence in video, rather the video showed the aftermath of violence. The Eighth Circuit disagreed because the evidence was sufficient to show that the defendant had inflicted pain on the victim by cutting her just prior to the filming. *See also United States v. Cannon*, 703 F.3d 407 (8th Cir. 2013) ("An image does not have to depict ongoing violent conduct to be 'sadistic' for the purposes of § 2G2.1(b)(4)").

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

United States v. Sampson, 606 F.3d 505 (8th Cir. 2010). After the defendant pled guilty to transportation of child pornography and being a felon in possession of a firearm, the district court assessed a 3-level enhancement under §2G2.2(b)(7)(B), because it found that he possessed 179 illegal images. To arrive at this figure the district court assessed 75 images for each of the two times that the defendant emailed the same illegal video and included 29 photographs found on the defendant's computer. The defendant challenged application of the enhancement on appeal. The circuit court affirmed the district court's calculation of the number of images, noting that with each such transmission, the volume of illegal child pornography is increased and the exploitation of the child depicted is repeated. Relying on a plain reading of the guideline provision, the court determined that each time a video or image is transmitted, it must be counted: "'*Each* video' and '[e]ach photograph' which a defendant distributes is to be counted under § 2G2.2(b)(7), regardless of whether it is a duplicate."

United States v. Starr, 533 F.3d 985 (8th Cir. 2008). The defendant was convicted of sexual exploitation, receipt and possession of child pornography, and the district court sentenced him to 720 months in prison. The district court applied (1) the cross-reference to the guideline for the manufacture of child pornography; (2) the 4-level enhancement for involvement of sadistic or masochistic conduct; (3) the 2-level enhancement for vulnerable victims; and (4) the 2-level enhancement for misrepresentation of identity. The panel upheld the application of the cross-reference to §2G2.1 and all four enhancements. The court found that the evidence was sufficient to show that the defendant manufactured child pornography, the self-penetration by a foreign object qualified as violence, even where the victim is 17 and there is no evidence of pain or injury, the defendant's awareness of one of the victim's issues with self-mutilation supported the vulnerable victim enhancement, and the misrepresentation regarding defendant's age "was instrumental in getting the victims to engage in sexually explicit conduct."

United States v. Bauer, 626 F.3d 1004 (8th Cir. 2010). The district court correctly applied the cross-reference to §2G2.1 where defendant sought to have a minor produce sexually explicit images even when the "minor" was a law enforcement officer posing as a minor.

Distribution (§2G2.2(b)(3))

United States v. Durham, 618 F.3d 921 (8th Cir. 2010). After the defendant pleaded guilty to child pornography offenses, the district court applied a "distribution" enhancement based on the defendant's use of Limewire, a peer-to-peer file-sharing program. After an in-depth evidentiary and case law review, the circuit court reiterated that a defendant's mere usage of such a program does not support a §2G2.2 distribution enhancement and that the government maintains the burden to prove such an enhancement on a case-by-case basis. The court noted that, here, the lower court had found that the defendant had no intent to distribute; that another person – and not the defendant – had installed the file-sharing program and had testified of defendant's ignorance of the program's workings; that the program's "shared files" folder was empty; and that there was no evidence of defendant having uploaded files. The court noted that, unlike other cases where defendants were sophisticated users of such programs, "there is no such evidence of his knowledge of *uploading*, i.e. distributing files, over the program, which is a critical distinction in this case." The court reiterated that it had "consistently prohibited the automatic application of distribution enhancements based solely on a defendant's use of a file-sharing program" and vacated the sentence.

United States v. Griffin, 482 F.3d 1008 (8th Cir. 2007). As a matter of first impression, the court held that distribution occurred when a defendant "used [a] file-sharing network [Kazaa] to distribute and access child pornography." The court held that distribution under §2G2.2 occurs where a defendant "downloads and shares child pornography files via an internet peer-to-peer file-sharing network, as these networks exist – as the name 'file-sharing' suggests – for users to share, swap, barter, or trade files between one another." *See also United States v. Estey*, 595 F.3d 836 (8th Cir. 2010) (the defendant's conduct amounted to distribution where the defendant collected images from program searches and other users were able to receive these images through his file-sharing folder).

United States v. Clawson, 392 F.3d 324 (8th Cir. 2004), *aff'd on reh'g*, 408 F.3d 556 (8th Cir. 2005). The district court applied the 5-level enhancement under the sentencing guidelines for "distribution" of child pornography to a minor upon the defendant's conviction of receiving and possessing child pornography. The circuit court determined that the presence of the computer disks containing child pornography in a minor's home, along with her knowledge of their presence, and the fact that the defendant placed the disks in the closet from which they were later retrieved by the minor was sufficient to support the enhancement, even though the minor never viewed the disks.

Sadistic or Masochistic Conduct (§2G2.2(b)(4))

United States v. Diaz, 368 F.3d 991 (8th Cir. 2004). After conviction of receiving child pornography, the defendant received a sentencing enhancement pursuant to §2G2.2(b)(4) for images that were sadistic, masochistic, or depictions of violence. The panel affirmed, finding that the images, which included the sexual penetration of a minor girl by an adult male and an adolescent male performing anal sex on a young boy, were sadistic or depictions of violence within the meaning of §2G2.2(b)(4). *See also United States v. Dodd*, 598 F.3d 449 (8th Cir. 2010) (the district court properly applied *Diaz* where one of the videos found on the defendant's computer depicted an adult male vaginally penetrating a prepubescent female).

United States v. Stulock, 308 F.3d 922 (8th Cir. 2002). The court held the application of the enhancement under §2G2.2(b)(3) was proper based on files recovered from the defendant's computer portraying a minor female in bondage with a nude male possessing a whip.

Pattern of Activity (§2G2.2(b)(5))

United States v. Woodard, 694 F.3d 950 (8th Cir. 2012). Holding that juvenile adjudications could be considered for enhancement purposes under §2G2.2(b)(5) and that this subsection contains no temporal limitation based on the age of the prior sexual abuse.

United States v. Pharis, 176 F.3d 434 (8th Cir. 1999). The district court properly found inapplicable the 5-level enhancement in §2G2.2(b)(4) because the defendant's prior misdemeanor offenses did not constitute a "pattern of activity involving the sexual abuse or exploitation of a minor." The defendant's state convictions involved obscene phone calls to young girls and indecent exposure. Conduct constituting "sexual abuse or exploitation" must involve either physical sexual contact with children or the creation of child pornography, neither of which existed in the defendant's case.

Use of a Computer (§2G2.2(b)(6))

United States v. Stulock, 308 F.3d 922 (8th Cir. 2002). The defendant was convicted of knowingly receiving a child pornography videotape, which he received in the mail after he responded to an e-mail set up by law enforcement. The district court enhanced the defendant's sentence for use of a computer in connection with the transmission or advertisement of child pornography and the defendant's possession of other pictures showing violent child pornography. The defendant challenged the enhancements on appeal. The appellate court concluded that §2G2.2(b)(5) (current §2G2.2(b)(6)) applies to a defendant "who receives child pornography that he received a notice or advertisement of through [the] use of [his] computer."

Part H Offenses Involving Individual Rights

§2H1.1 Offenses Involving Individual Rights

United States v. Webb, 252 F.3d 1006 (8th Cir. 2001). The defendant, a county sheriff, was convicted of violating the civil rights of a victim by sexually assaulting her and soliciting sexual favors. The defendant, a 370-pound man, pushed the victim down on the couch and laid on top of her. At the first sentencing, the district court found the base offense level to be six under §2H1.1(a)(4). On appeal, the government argued that the proper base level was ten for use of force during the offense. Although the circuit court had not previously interpreted the term "use of force" under §2H1.1(a)(3)(A), the court had considered similar language in other contexts, holding that force "sufficient to prevent the victim from escaping the sexual contact" satisfies the force element. The court adopted this standard as the appropriate "use of force" under §2H1.1(a)(3)(A), and remanded with instructions to reconsider the base offense level in light of the disparity in size between the defendant and the victim. On remand, the district court declined to apply the enhancement and the government appealed again. The Eighth Circuit

determined that the district court's finding that the defendant had not used force was clearly erroneous, and remanded with instructions for the district court to impose the enhanced sentence.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

United States v. Plumley, 207 F.3d 1086 (8th Cir. 2000). The defendant's base offense level was increased by eight levels pursuant to §2J1.2(b)(1) because the court found the defendant had threatened his cohorts with physical violence if they testified against him. The defendant argued that his conduct was not serious enough for the 8-level enhancement. Agreeing with other circuits, the court found no "seriousness" requirement existed beyond the fact of a violent threat. Accordingly, the court upheld application of the enhancement.

§2J1.6 Failure to Appear by Defendant

United States v. Jacobo, 700 F.3d 1159 (8th Cir. 2012). Finding that "there is no requirement… that the prosecution prove the underlying offense" for which the defendant failed to appear and which served as the basis for a 9-level guidelines enhancement.

United States v. Woodard, 675 F.3d 1147 (8th Cir. 2012). Defendant pleaded guilty to criminal contempt of court after failing to appear for a supervised release revocation hearing. The circuit court ruled that the phrase "underlying offense in respect to which defendant fails to appear" in subsection (b)(2) refers to the crime for which defendant was on supervised release, not the conduct which gave rise to the supervised release violation.

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

Base Offense Level (§2K2.1(a))

United States v. Davis, 668 F.3d 576 (8th Cir. 2012). Defendant argued that, although inoperable pistol met the definition of firearm, the higher "offense level in §2K2.1(a)(3) should only apply "if the 'semiautomatic firearm that is capable of accepting a large capacity magazine' was operable at the time of the offense." The circuit court upheld the lower court's decision, and held that the higher base offense level for offenses involving semiautomatic firearms capable of accepting a large capacity magazine applied to a pistol that, although inoperable, "was in fairly good condition" and "could be fixed to fire."

United States v. Williams, 627 F.3d 324 (8th Cir. 2010). Procedural error occurred when the court relied on unchallenged factual assertions in the PSR which, in turn, relied on a police report to determine if a prior escape conviction was a crime of violence after *Chambers* and

Begay. The case was remanded with instructions to follow the modified categorical approach under *Taylor* and *Shepard*. *See also United States v. Thomas*, 630 F.3d 1055 (8th Cir. 2011) (government limited to "one bite at the apple" and cannot produce more evidence to establish that escape conviction qualifies as a crime of violence. Government had produced acceptable documents but agreed that they were insufficient. Remand limited to record before the court).

United States v. Ossana, 638 F.3d 895 (8th Cir. 2011). The district court found a prior state conviction for aggravated assault was a crime of violence. Using the modified categorical approach to determine under which part of the state statute the defendant was convicted, all the panel could determine was that a vehicle was involved. Case was remanded to allow government to expand sentencing record if additional admissible materials existed.

United States v. Williams, 537 F.3d 969 (8th Cir. 2008). The district court applied the §2K2.1(a)(2) enhancement because the defendant had two prior felonies that qualified as crimes of violence — auto theft and auto tampering. In light of *Begay*, the court held that Missouri auto theft by deception, auto theft by consent, and auto tampering are not crimes of violence. The court reversed and remanded so that the district court could "consider [the] permissible materials . . . and determine the particular offense involved in [the defendant's] auto theft conviction." *But see, Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (Supreme Court recently advised that the decision in *Williams*, like those of nearly all our sister circuits, "overreads" the significance of the phrase "purposeful, violent, and aggressive" in the *Begay* opinion. *Sykes v. United States*, __ U.S. ___, 131 S. Ct. 2267, 2275–76 (2011). Moreover, whether new judicial interpretations of the career offender guidelines provisions are new substantive rules for retroactivity purposes is far from clear.)

United States v. Appleby, 380 F.3d 365 (8th Cir. 2004). The base offense level for making a false written statement in connection with the acquisition or attempted acquisition of a firearm would be determined under the guideline applicable to prohibited transactions involving firearms, rather than the guideline applicable to attempt, even though the defendant cancelled the order after giving false information and thus never obtained possession of the firearm. The guidelines provide that §2K2.1 applies to all violations of 18 U.S.C. § 922(a), and the defendant was a "prohibited person" as defined in 18 U.S.C. § 922(g)(8) and (9).

Lawful Sporting Purpose or Collection (§2K2.1(b)(2))

United States v. Hadash, 408 F.3d 1080 (8th Cir. 2005). The district court erred in finding that the defendant possessed the six firearms he stole from a postal facility "solely for lawful sporting purpose or collection" where the defendant did not present evidence that he stored or used the guns for collection purposes and he had sold one and given another away.

Destructive Device (§2K2.1(b)(3))

United States v. Hardy, 393 F.3d 747 (8th Cir. 2004). The defendant's ten-gauge double-barrel shotgun, which had a barrel-length of less than 18 inches and an overall length less than 26 inches, was a "destructive device." His sentence for possessing an unregistered firearm was properly enhanced because the firearm was a destructive device.

United States v. Lee, 351 F.3d 350 (8th Cir. 2003). The 2-level enhancement pursuant to §2K2.1(b)(3) for possession of a destructive device is conceptually separate from part (a) which sets forth the base offense level for certain firearms crimes. Application of the enhancement was not impermissible double counting for a defendant whose base offense level was higher because he possessed a short-barreled shotgun.

Stolen Firearm (§2K2.1(b)(4))

United States v. Bates, 584 F.3d 1105 (8th Cir. 2009). Defendant pled guilty to possession of a firearm by a drug user and the court applied a 2-level increase because the firearm was stolen. Defendant objected, arguing that it was unclear whether the firearm was actually stolen or simply lost. The court noted the "guideline commentary instructs that § 2K2.1(b)(4) 'applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen'. . . but the sentencing guidelines do not define the term 'stolen.'" The court found that all felonious or wrongful takings, regardless of whether the theft constitutes common-law larceny, supported the enhancement.

United States v. Cole, 525 F.3d 656 (8th Cir. 2008). After conviction for failing to register a "sawed-off" shotgun, the defendant challenged the district court's application of a 2-level enhancement for possessing a stolen firearm. She admitted that one of the firearms found was stolen, but argued that the connection between the stolen handgun and the crime of conviction was "too attenuated" for the enhancement to apply. The panel held, as a matter of first impression, that the phrase, "any firearm" in §2K2.1(b)(4) is not limited to firearms that the defendant was convicted of possessing. The phrase should be construed broadly, but "does not mean . . . that the phrase . . . encompasses firearms that are totally unconnected to the offense of conviction." Instead, the phrase "mean[s] that the enhancement applies whenever a stolen firearm is involved in the offense of conviction or in relevant conduct."

United States v. Hedger, 354 F.3d 792 (8th Cir. 2004). At sentencing, the district court imposed a §2K2.1(b)(4) enhancement because the firearm was stolen, and a §2K2.1(b)(5) enhancement because the firearm was possessed in connection with another felony offense, stealing the same firearm. The defendant argued that, because he possessed the firearm as a consequence of stealing it, assessing both enhancements constituted impermissible double counting. Because the (b)(4) enhancement accounts only for the stolen nature of the possessed firearm, not the act of stealing it, and subsection (b)(5) addresses conduct surrounding the possession of firearms, the two enhancements were conceptually distinct. Thus, the district court's application of both enhancements did not amount to impermissible double-counting.

Trafficking of Firearms (§2K2.1(b)(5))

United States. v. Willett, 623 F.3d 546 (8th Cir. 2010). After the defendant pleaded guilty to possessing stolen firearms, the district court enhanced his advisory guideline range under §2K2.1(b)(5) for trafficking the guns. Under a §1B1.3(a)(1)(B) "reasonably foreseeable" analysis, the court found that the defendant could reasonably foresee his co-defendants' trafficking the firearms. On appeal, the court reversed and noted that §2K2.1(b)(5)'s commentary expressly defined "[t]he term 'defendant,' consistent with §1B1.3 (Relevant Conduct), [to] limit[] the accountability of the defendant to the defendant's own conduct and

conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused." The court said this language, coupled with the language in the other application notes, limited the enhancement to conduct described in §1B1.3(a)(1)(A).

In Connection With Another Felony Offense (§2K2.1(b)(6)(B))

United States v. Guiheen, 594 F.3d 589 (8th Cir. 2010). Upon being approached by several officers, the defendant drew a billy club from his waistband and raised it in a threatening manner. Once in custody the officers noticed a rifle under a coat in the area of the defendant. The defendant was convicted of being a felon and unlawful user of controlled substances in possession of a firearm. The district court applied the enhancement for possession of the rifle in connection with another felony offense. The defendant appealed and the court affirmed the 4-level enhancement, relying on *United States v. Mack*, 343 F.3d 929, 936 (8th Cir. 2003), because "[k]eeping a firearm 'at an easily accessible location' while committing another felony 'permits the interference that the firearm emboldened the defendant' to engage in the illegal act."

United States v. Hill, 583 F.3d 1075 (8th Cir. 2009). The district court did not err when it applied a 4-level enhancement under §2K2.1(b)(6) for use of a firearm in connection with a felony offense (felony resisting arrest) and a 6-level enhancement under §3A1.2(b) for creating a substantial risk of injury to an official victim. While attempting to evade a pursuing officer, the defendant stopped and attempted to retrieve a gun. Reaching for a gun creates a substantial risk of serious physical injury or death even though the defendant did not draw, point, or fire the weapon. Nor did the district court improperly "double-count" the enhancements. Enhancements under Chapter Two and adjustments under Chapter Three are to be applied cumulatively even if triggered by the same conduct. Furthermore, the enhancements address distinct aspects of the defendant's conduct; §2K2.1(b)(6) addresses the connection between a felony and the use of a firearm and §3A1.2(b) addresses the identity of the victim of the defendant's assaultive conduct.

United States v. Fuentes Torres, 529 F.3d 825 (8th Cir. 2008). The court held that, in a case in which the other felony is a drug *possession* offense, the term "in connection with" in §2K2.1(b)(6) requires a finding that "the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense." The court distinguished this rule from the one that applies to a drug *trafficking* offense, in which the enhancement applies unless it is clearly improbable that the firearm was used in connection with the defendant's drug trafficking felony.

United States v. Washington, 528 F.3d 573 (8th Cir. 2008). The court held that §2K2.1(b)(6) applied because the defendant possessed a firearm in connection with another felony offense. While the defendant never touched the gun because, after he selected it and offered the drugs in return, he was arrested, the court found that the defendant "constructively possessed the firearm by knowing of it and having the intent and ability to exercise control over it."

United States v. Betts, 509 F.3d 441 (8th Cir. 2007). The defendant pleaded guilty to being a felon in possession of a firearm. The district court sentenced the defendant to 120 months' imprisonment, to run consecutive to his state sentences, after applying a 4-level enhancement for using a firearm in connection with another felony offense, *i.e.*, the crime of unlawful use of a weapon, a Missouri class D felony punishable with up to four years'

imprisonment. Because there was no conviction, the government was required to prove, by a preponderance, "all of the essential elements of the underlying felony offense, including the absence of any defenses." The court held that the district court did not err "(1) in concluding [the defendant] did not act in lawful self defense, (2) in holding [the defendant] used a firearm in connection with the crime of unlawful use of a weapon, and (3) in applying a four level enhancement pursuant to Guidelines § 2K2.1(b)(5)."

United States v. Raglin, 500 F.3d 675 (8th Cir. 2007). When there is no prior conviction for the offense the government seeks to use as the basis for enhancement for the use of a firearm in connection with another felony offense, the government must prove, by a preponderance of the evidence, that the defendant committed the underlying offense. When the defendant submits evidence supporting a defense (*e.g.* self-defense) to the underlying offense, the government must negate that defense for the enhancement to apply.

United States v. Gollhofer, 412 F.3d 953 (8th Cir. 2005). The district court did not err when it used a Missouri conviction of "unlawful use of a weapon" as the basis for a possession in connection with another felony enhancement because the conviction was in the PSR and the defendant did not object.

United States v. Hedger, 354 F.3d 792 (8th Cir. 2004) (discussed in previous subheading).

United States v. Martinez, 339 F.3d 759 (8th Cir. 2003). The defendant pled guilty to being an unlawful user of a controlled substance and a felon in possession of firearms. The district court imposed a 2-level enhancement under §2K2.1(b)(4) because one of the two firearms was stolen, and a 4-level enhancement under §2K2.1(b)(5) because the firearms were used in connection with another felony offense. The defendant appealed the (b)(5) enhancement arguing that the government did not show that the firearms were used or possessed in connection with another felony offense. The circuit court agreed. "In the plea agreement, the government stipulated that it did 'not have any evidence that Defendant was committing another felony offense at the time of his apprehension on October 18, 2001, during which he possessed the firearms in question other than receipt/possession of stolen property.'"

United States v. Scolaro, 299 F.3d 956 (8th Cir. 2002). The defendant assaulted an acquaintance, tied him up, threatened to kill him, and placed him in a closet. Shortly thereafter, the defendant broke into the victim's gun closet and stole at least 13 firearms. The district court applied the 4-level enhancement under §2K2.1(b)(5), reasoning that the stolen firearms were possessed in connection with the assault. The circuit court affirmed the court's interpretation of "in connection with," reasoning that the assault enabled the defendant's possession of the guns.

United States v. James, 172 F.3d 588 (8th Cir. 1999). The district court properly enhanced the defendant's sentence pursuant to §2K2.1(b)(5) after finding that the defendant transferred firearms with knowledge, intent, or reason to believe that the firearms would be used or possessed in connection with another offense. The court applied the 4-level enhancement based on evidence including the defendant's admission that he was a member of a gang; that 43

of the recovered firearms were traced to criminal activity; that two of the transferees were gang members involved in drug and firearm offenses; and that firearms are used to protect drugs.

United States v. Cooper, 63 F.3d 761 (8th Cir. 1995). §1B1.11.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

United States v. De Oliveira, 623 F.3d 593 (8th Cir. 2010). After the defendant pleaded guilty to harboring aliens, the district court enhanced his advisory guideline range under §2L1.1(b)(6) for intentionally or recklessly creating a substantial risk of death or injury (the defendant housed over 20 people in accommodations designed for 10 people, the homes lacked heat, and the people lacked food). It also applied the §3A1.1(b) "vulnerable victim" enhancement because the aliens "were particularly susceptible to exploitation and perhaps unwarranted danger due to their illegal status." On appeal, the circuit affirmed the "substantial risk" enhancement but remanded because of an improper application of the "vulnerable victim" enhancement.

In affirming the §2L1.1(b)(6) enhancement, the court said "this type of severe overcrowding together with lack of heat and furnishings present an inherent health-and-safety risk to each of the occupants such that the application of this enhancement is warranted." It analogized the situation to an overloaded-vehicle, which it had consistently held justified the enhancement. The court reversed the §3A1.1(b) "vulnerable victim" enhancement because: (1) it amounted to impermissible double-counting in that the aliens' immigration status – alienage – is already factored into the offense guideline itself; and (2) the victims of the "harboring" offense at issue are, by definition, illegal aliens – their immigration status alone does not distinguish them from other potential victims of the same offense.

United States v. Shan Wei Yu, 484 F.3d 979 (8th Cir. 2007). Evidence at trial showed that the defendant was in the business of transporting illegal aliens, that 23 of the 24 workers identified in the case were in the United States illegally, and that the defendant provided jobs for at least 6,000 workers over the period alleged in the indictment. The court held it was not clearly erroneous to apply an upward departure based on the defendant transporting substantially more than 100 illegal aliens by assuming at least 77 of the remaining 6,000 workers were illegal aliens.

United States v. Flores-Flores, 356 F.3d 861 (8th Cir. 2004). The defendant was hired to transport illegal aliens from Arizona to Michigan. During the trip, the defendant asked a passenger to drive. The passenger fell asleep at the wheel, caused an accident, and two aliens died. At sentencing, the district court increased the offense level by two under §2L1.1(b)(5) (2-level increase if the offense involved recklessly creating a substantial risk of serious bodily injury to another) and by eight under §2L1.1(b)(6) (increase if any person dies). On appeal, the defendant argued that the §2L1.1(b)(6) increase should not apply to him because the driver's negligent operation of the vehicle, rather than his conduct, proximately caused the deaths. The court stated that the death of the two passengers was causally connected to the dangerous conditions created by defendant's unlawful conduct, and the negligence of the driving passenger

was not an intervening cause relieving defendant of responsibility for the aliens' deaths. Thus, the court held that the district court correctly applied §2L1.1(b)(6).

§2L1.2 Unlawfully Entering or Remaining in the United States

Drug Trafficking Offense (§2L1.2(b)(1)(A)(i), (B))

United States v. Garcia-Medina, 497 F.3d 875 (8th Cir. 2007). The defendant's prior conviction under California law qualified as a "drug trafficking offense" even though the California statute included acts that do not meet the sentencing guidelines' definition of "drug trafficking offense." The criminal information from the defendant's state conviction set forth the elements of drug trafficking, and therefore the enhancement was properly based on the documents produced by the government.

Crime Of Violence (§2L1.2(b)(1)(A)(ii)

United States v. Roblero-Ramirez, 716 F.3d 1122 (8th Cir. 2013). Using the categorical approach, the Eighth Circuit held that the defendant's prior conviction under the "sudden quarrel" provision of Nebraska's manslaughter statute (Neb. Rev. Stat. § 28-305) was not a crime of violence for purposes of the 16-level enhancement under §2L1.2(b)(1)(A)(ii), because the Nebraska statute criminalizes involuntary killing (unintentional conduct), whereas the generic federal definition of manslaughter requires at least a *mens rea* of recklessness.

United States v. Paz, 622 F.3d 890 (8th Cir. 2010). The district court found that an Arkansas conviction for second-degree sexual assault qualified as a "crime of violence," triggering the 16-level enhancement. Defendant appealed and argued that, under *Johnson v. United States*, 130 S. Ct. 1265, 1269-74 (2010), a "mere touching" of a five-year old's genital area does not implicate the necessary "physical force" to support the enhancement. The court rejected the defendant's argument and noted that "the sentencing guideline at issue lists 'sexual abuse of a minor' as an enumerated felony that is a 'crime of violence.' Because enumerated offenses are crimes of violence regardless of whether force was used, the catch-all definition of a 'crime of violence' in the commentary to U.S.S.G. § 2L1.2 is irrelevant."

United States v. Lopez-Zepeda, 466 F.3d 651 (8th Cir. 2006). A district court may review charging documents to determine whether a conviction under Minnesota's offense of "third-degree criminal sexual conduct" constituted a "crime of violence" for the purposes of §2L1.2(b)(1)(A)(ii). *See also United States v. Medina-Valencia*, 538 F.3d 831 (8th Cir. 2008) (prior conviction under Texas law for "indecency with a child" constituted a crime of violence under the categorical approach; the district court did not err by referring to the indictment and plea to determine whether the defendant admitted facts that fit the generic description of sexual abuse of a minor). *But see United States v. Reyes-Solano*, 543 F.3d 474 (8th Cir. 2008) (vacating and remanding for resentencing where the district court improperly proceeded to the second-step of the categorical approach – looking at the defendant's admissions under oath – before it identified the state statutes or local ordinances that the defendant pleaded guilty to violating).

United States v. Montenegro-Recinos, 424 F.3d 715 (8th Cir. 2005). The court found the defendant's California conviction for "lewd and lascivious acts" with respect to a 15-year-old child was a "crime of violence" that triggered the 16-level enhancement at §2L1.2(b)(1)(A)(ii).

United States v. Gonzalez-Lopez, 335 F.3d 793 (8th Cir. 2003). The defendant's automobile homicide was a crime of violence under §2L1.2(b)(1)(A)(ii) because the Utah offense of automobile homicide contained, as an element, the use of physical force against another.

United States v. Gomez-Hernandez, 300 F.3d 974 (8th Cir. 2002). A conviction for unlawful intercourse with a minor under the age of 16 by a person 21 years of age or older, and a conviction for being armed with a weapon with the intent to use such weapon without justification constitute crimes of violence for the 16-level enhancement in §2L1.2(b)(1)(A).

Aggravated Felony (§2L1.2(b)(1)(C))

United States v. Chavarria-Brito, 526 F.3d 1184 (8th Cir. 2008). The defendant's Iowa conviction for possession of a false document with intent to perpetrate fraud or with knowledge that possession was facilitating fraud qualified as an "aggravated felony." The definition of "aggravated felony" includes "an offense relating to . . . forgery" (internal quotation marks and citations omitted). Because the defendant's felony conviction related to forgery, the court held that his prior conviction was an aggravated felony, and upheld the district court's application of the 8-level enhancement.

United States v. Estrada-Quijas, 183 F.3d 758 (8th Cir. 1999). The district court properly treated as an "aggravated felony" the defendant's 1987 conviction for corporal injury on a spouse, even though the prior conviction was not designated an aggravated felony at the time the defendant reentered the country in 1991. A violation of 8 U.S.C. § 1326 (illegal reentry) is a continuing offense that continues until the individual is discovered. The defendant was "found" in this country in 1997, after the changes to the guidelines. There was no *ex post facto* violation. *But see, e.g.*, *United States v. Franco*, 2011 WL 2746648 (N.D. Ill. July 13, 2011) (circuit split exists on whether illegal reentry constitutes a continuing offense) (citing cases).

United States v. Tejeda-Perez, 199 F.3d 981 (8th Cir. 1999). The district court erroneously concluded that the defendant's second-degree felony theft conviction did not constitute an aggravated felony because the defendant's sentence of one to 15 years had been suspended. The definition for "aggravated felony" includes "a theft offense . . . for which the term of imprisonment [is] at least one year" (internal quotation marks and citation omitted) and "term of imprisonment" is defined as the sentence imposed by the judge without regard to suspension or execution of that sentence. The court thus remanded for resentencing and application of the 16-level enhancement.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

United States v. Mitchell, 613 F.3d 862 (8th Cir. 2010). After the jury convicted the defendant of money laundering, he objected to the imposition of (1) a 6-level enhancement pursuant to §2S1.1(b)(1) because he knew or believed that the money he was laundering was the proceeds of or intended to promote the distribution of a controlled substance; and (2) a 4-level enhancement pursuant to §2S1.1(b)(2)(C) because he was in the business of money laundering. The court affirmed the 6-level enhancement because the objective nature of the funds does not control the issue, but rather whether a defendant subjectively either believes or knows the funds were proceeds of unlawful activity controls. Nonetheless, the court vacated the sentence and remanded after finding that the district court clearly erred when finding that the defendant had generated a substantial amount of money – some $42,000.00 – through his laundering when the record suggested a figure falling between $2,250.00 and $4,500.00. (The government did not oppose a remand for the lower court to reconsider the application of the enhancement should the panel find clear error.) The court concluded that "such a remand is warranted, because the difference between the two calculations is significant for determining whether [defendant] derived 'substantial revenue' from these transactions and whether the enhancement should apply."

§2S1.3 Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts

United States v. Sweeney, 611 F.3d 459 (8th Cir. 2010). A jury convicted the defendant of manufacturing and distributing cable descramblers (and conspiracy) for use in intercepting cable signals as well as for currency restructuring. At sentencing, the district court denied her request for a 2-level reduction based on §2S1.3(b)(3)'s "safe harbor" provision, which applies when, among other things, the funds underlying the structuring at issue are the proceeds of lawful activity. The circuit court affirmed the adjustment's non-application after noting that "[t]he defendant bears the burden of proving a reduction applies" and that she had failed to do so.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

United States v. Sherman, 372 F. App'x 668 (8th Cir. 2010). The court affirmed the district court's finding that expert witness testimony was not needed to show the actual tax dollar loss, in order to calculate the appropriate advisory guideline range for sentencing purposes. The court held that the "total amount of loss that was the object of the offense" under §2T1.1(c)(1)- the total amount of taxes that the defendant sought to avoid paying by failing to properly report income and making false declarations on his tax return.

United States v. Blevins, 542 F.3d 1200 (8th Cir. 2008). The court affirmed the district court's determination of tax loss under §2T1.1. The court sided with the Fourth, Fifth, Seventh, and Tenth Circuits, holding that the investors' offsetting capital losses cannot be taken into account in determining tax loss. The court did not, however, rule out the possibility that, in some rare cases, an unclaimed tax benefit may offset tax loss.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Vega-Iturrino, 565 F.3d 430 (8th Cir. 2009). Defendant objected to a 2-level adjustment pursuant to §3A1.1(b)(1) for an offense involving vulnerable victims. Here, while defendant targeted victims 80 years of age and older in a credit card theft scheme, no evidence was presented in the presentence report or at sentencing showing why the victims were unusually vulnerable. In remanding for resentencing the court stated:

> To apply an enhancement under § 3A1.1(b)(1), "the sentencing court must still determine whether a victim was . . . unusually vulnerable due to age or some other characteristic." . . . "In making this determination, we do not apply a blanket assumption that an advanced age is sufficient to render a victim vulnerable." . . . This enhancement "requires a fact-based explanation of why advanced age or some other characteristic made one or more victims 'unusually vulnerable' to the offense conduct, and why the defendant knew or should have known of this unusual vulnerability." (internal citations omitted).

United States v. Schwalk, 412 F.3d 929 (8th Cir. 2005). The district court did not err in finding that the vulnerability of a four-year-old victim of assault at the hands of his father warranted an upward departure in addition to the vulnerable victim enhancement. The child's vulnerability was of a degree not adequately taken into consideration by the Sentencing Commission, because as a child dependent on his parents, he was especially vulnerable to abuse.

United States v. Plenty, 335 F.3d 732 (8th Cir. 2003). The district court properly imposed the vulnerable victim enhancement where the victim was asleep when the defendant entered her residence and began to assault her.

United States v. Washington, 255 F.3d 483 (8th Cir. 2001). The district court did not err in applying the vulnerable victim enhancement in a prosecution for mail fraud where the defendants targeted the elderly in need of money and had acquired specific knowledge about the victims' ages, infirmities, and vulnerabilities.

§3A1.2 Official Victim

United States v. Mann, 701 F.3d 274 (8th Cir. 2012). Holding that official victim enhancement applied where victim was officer of a medical board which was not funded by the State, because the board did in fact receive its powers from the State legislature and performed a traditional state police power function.

United States v. Hampton, 346 F.3d 813 (8th Cir. 2003). The §3A1.2 sentencing enhancement was not supported where the officer was struck by the defendant's vehicle after she lost control during a car chase. Section 3A1.2 does not apply to reckless behavior.

United States v. Goolsby, 209 F.3d 1079 (8th Cir. 2000). The defendant was convicted of conspiracy and possession with intent to distribute cocaine base, and was sentenced to concurrent terms of life imprisonment. The district court enhanced the defendant's sentence because he assaulted a corrections officer during his escape from custody while awaiting sentencing. Section 3A1.2 specifies that the enhancement "is proper only where the 'offense of conviction' is motivated by the victim's status." Because the defendant's offenses of conspiracy and possession to distribute cocaine base were not targeted at the corrections officer, application of the enhancement was not proper but was harmless error where a life sentence was still required.

§3A1.3 Restraint of Victim

United States v. Plenty, 335 F.3d 732 (8th Cir. 2003). The district court correctly applied the restraint of victim sentencing enhancement to a defendant who broke into a house at night and dragged the victim from bed to an adjoining room. This conduct is akin to "being bound by something" because the defendant physically restrained the victim's arms.

United States v. Waugh, 207 F.3d 1098 (8th Cir. 2000). The district court did not err in enhancing the defendant's sentence two levels for restraint where the defendant pinned the victim's arms behind her back. The enhancement was permissible because restraint is not an element of the assault offense itself.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Moreno, 679 F.3d 1003 (8th Cir. 2012). A defendant who supervises drug conspiracy deliveries and payments exercises management responsibilities over the property, assets or activities of a criminal organization, and thus supervisory role enhancement was proper.

United States v. Williams, 605 F.3d 556 (8th Cir. 2010). The defendant argued that a 4-level leadership enhancement created an unwarranted disparity among similarly-situated codefendants. The court affirmed the enhancement upon finding that the defendant was a leader or organizer of the drug conspiracy. The court determined that a sentence is not unreasonable simply because it creates some disparity among co-defendants. Each case must be judged on its own facts, and as the defendant's role was unique from the roles of his codefendants, the 4-level enhancement did not cause unwarranted sentencing disparities.

United States v. Shallal, 410 F.3d 434 (8th Cir. 2005). The district court did not err in applying the aggravating role adjustment under §3B1.1(b) because the defendant need only supervise one person in an extensive conspiracy to qualify for the enhancement.

United States v. Austin, 255 F.3d 593 (8th Cir. 2001). The district court did not err in applying a 2-level enhancement based on the defendant's leadership role where two of the defendant's codefendants testified extensively as to the defendant's influential role in the offense and the defendant's only witnesses were properly discounted after they refused to submit to cross-examination. Because the district court found that the defendant was a supervisor or manager but did not make a finding that his criminal operation involved more than five other participants or was otherwise extensive, the district court properly applied only a 2-level enhancement for the defendant's role.

§3B1.2 Mitigating Role

United States v. Gayekpar, 678 F.3d 629 (8th Cir.), *cert. denied*, 133 S. Ct. 375 (2012). The district court did not err in finding that transportation to gather supplies and to meet the targeted victim, together with promised compensation for participation, was substantial enough participation to preclude adjustment for minor role.

United States v. Johnson, 408 F.3d 535 (8th Cir. 2005). The district court did not err in denying a reduction for a minor role to a defendant who was responsible for finding a large supplier of pseudoephedrine for his co-conspirators' methamphetamine lab. A less culpable defendant is not entitled to a reduction if he was deeply involved.

United States v. Morehead, 375 F.3d 677 (8th Cir. 2004). The district court improperly referred to contested portions of the presentence report in denying defendant a role reduction as a minor participant under the sentencing guidelines. When a defendant disputes material facts in his presentence report, the sentencing court must either refuse to take those facts into account or hold an evidentiary hearing. Because the circuit court was unable to determine if the trial court's reliance on the disputed portions of the presentence report was harmless error, the court remanded for resentencing.

United States v. Speller, 356 F.3d 904 (8th Cir. 2004). The defendant pled guilty to conspiracy to distribute 500 grams or more of cocaine and conspiracy to distribute cocaine and cocaine base within 1,000 feet of a playground. The district court denied the defendant a 2-level minor role reduction because the defendant was only held responsible for drugs she personally distributed and not for any drugs others distributed. On appeal, the court affirmed, noting that the propriety of a downward adjustment was determined by comparing the acts of each participant in relation to the relevant conduct for which the participant was held accountable and by measuring each participant's individual acts and relative culpability against the elements of the offense. Reduction for a defendant's role in an offense was not warranted when the defendant was not sentenced upon the entire conspiracy but only upon his own actions. Therefore, the district court did not err in denying the reduction.

United States v. Yirkovsky, 338 F.3d 936 (8th Cir. 2003). The district court erred in granting the defendant a 4-level minimal role reduction. The defendant offered no evidence at sentencing to show her minimal participation. The court stated that whether a downward adjustment was warranted was determined not only by comparing the acts of each participant in relation to the relevant conduct for which the participant was held accountable, but also by measuring each participant's individual acts and relative culpability against the elements of the

offense. The defendant fully satisfied the elements of each offense of which she was convicted, and certain aspects of her criminal activity exceeded the minimum necessary to be found guilty of the offense. The court left the defendant with a 2-level minor role reduction because the presentence report recommended it and the government did not object to it.

United States v. Bush, 352 F.3d 1177 (8th Cir. 2003). The defendant pled guilty to conspiracy to possess cocaine base with intent to distribute and argued for a minor role reduction. The sentencing court granted the role reduction, until it realized that recent amendments to the guidelines would result in an offense level cap of 30. The court then denied the adjustment in part on its assessment that the sentence resulting from the adjustment would be too lenient. The defendant appealed. The court rejected the defendant's argument that she was less culpable than the other defendants and thus entitled to a minor role reduction. Consequently, the court held that the district court did not err when it determined that the defendant did not play a minor role. The court remanded for resentencing, however, because the district court erred in basing its decision about the adjustment in part on the length of the sentence the adjustment would compel. The court stated that when considering guidelines enhancements, "the district court may exercise its discretion only in finding whether the facts that trigger[ed] the enhancement exist[ed] and not in deciding whether application of the enhancement [would] have a desirable effect on the defendant's punishment."

United States v. Camacho, 348 F.3d 696 (8th Cir. 2003). The appellate court affirmed the district court's refusal to grant a 2-level minor role reduction, holding that the mere fact that a defendant was less culpable than his codefendants did not entitle the defendant to a minor participant status.

United States v. Snoddy, 139 F.3d 1224 (8th Cir. 1998). The district court erred in concluding that the defendant was ineligible for a minor participant reduction because he was charged with a sole participant possession offense rather than conspiracy to distribute. The defendant presented undisputed evidence that he was not the only participant in the scheme to distribute marijuana and that his role was limited compared with that of others involved. The court of appeals vacated and remanded, holding that §3B1.2 directs consideration of the contours of the underlying scheme, not just of the elements of the offense. The court concluded that a defendant convicted of a sole participant offense may be eligible for a mitigating role reduction if he can show: (1) that the relevant conduct for which the defendant would otherwise be accountable involved more than one participant and (2) that the defendant's culpability for such conduct was relatively minor compared to that of the other participant(s).

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Gilbert, 721 F.3d 1000 (8th Cir. 2013). The court held that a police officer defendant's use of his police radio to monitor law enforcement activity while his accomplices attempted to rob an armored truck constituted an abuse of his position of trust in order to facilitate defendants' conspiracy, and thus warranted application of sentencing guidelines enhancement under §3B1.3.

United States v. Godsey, 690 F.3d 906 (8th Cir. 2012). Holding that §3B1.3, Application Note 2(B) provides an independent basis for applying an adjustment under this guideline.

United States v. Hayes, 574 F.3d 460 (8th Cir. 2009). "Whether the defendant may occupy a position of trust is a question of law; if so, whether she did is a question of fact." For "the abuse-of-trust adjustment to apply in the fraud context, there must be a showing that the victim placed a special trust in the defendant beyond ordinary reliance on the defendant's integrity and honesty that underlies every fraud scenario." Within the health care fraud context, the court joined the majority of circuits that have addressed the question and "held that health care providers who defraud Medicaid or Medicare may be subject to the abuse-of-trust enhancement." However, the district court erred in finding defendant occupied a position of trust as "the district court's superficial reasoning [did] not demonstrate that Hayes and Medicaid's relationship was such that it went beyond the ordinary commercial relationship which is insufficient to invoke the abuse-of-trust enhancement."

United States v. Septon, 557 F.3d 934 (8th Cir. 2009). Defendant was convicted of bank fraud and conspiracy to commit mail and bank fraud where he submitted numerous fraudulent loan applications to banks and mortgage lending companies. Many fraudulent loans went into default causing losses in excess of two million dollars. Citing recent circuit precedent, the court affirmed an abuse-of-trust enhancement involving an arms-length commercial relationship between a mortgage broker and lender. The court said due to the nature of the mortgage industry, the loan application process cultivates trust between brokers and lenders. The lenders rely upon the statements of brokers, who they have repeated dealings with, that they have verified all relevant information before submitting loan applications. The court quoted the Fifth Circuit with approval: "Although there is no legally recognized-relationship of trust between brokers and lenders, such legal recognition is not required . . . . The relationship here is not lender-borrower, which we agree will seldom be a relationship of trust. It's lender-middleman, and there is a difference."

United States v. Anderson, 349 F.3d 568 (8th Cir. 2003). The defendant sold many of his victims' annuities offered by insurance companies and living or family trusts, transactions that acquainted him with their assets. He then persuaded these clients to exchange the annuities and other investments for "private tender offers" in the Premier Group. These fraudulent investments gave him complete discretion over client funds. The defendant commingled those funds, which facilitated both the commission and the concealment of his fraud offenses. The court did not err in imposing the abuse-of-trust enhancement.

United States v. Trice, 245 F.3d 1041 (8th Cir. 2001). The defendant pled guilty to making a fraudulent statement and his sentence was enhanced two-levels for abuse of a position of trust. The defendant was a president of the board of a non-profit corporation formed to build a housing complex for handicapped individuals. The defendant falsely stated on a HUD form that he had never been convicted of a felony. Because the victim of the defendant's offense was the United States and the defendant was not in a position of trust *vis-á-vis* the United States, the district court erred in applying the enhancement.

United States v. Baker, 200 F.3d 558 (8th Cir. 2000). The district court did not err in applying a 2-level upward adjustment on the ground that the defendant abused a position of

private trust where the defendant, an insurance agent, persuaded her elderly clients to give her personal control over their premium payments and then misappropriated those funds.

United States v. Jankowski, 194 F.3d 878 (8th Cir. 1999). The district court erred in finding that the defendant's position as a messenger for an armored car company was a position of trust within the meaning of the guideline. The position required the defendant to deliver and pick up money at various businesses, and was not characterized by professional or managerial discretion.

Use of Special Skill

United States v. Bush, 252 F.3d 959 (8th Cir. 2001). The district court did not err in applying a 2-level enhancement based upon the defendant's use of his special skills, where the defendant was a former investment counselor and manager at a major national brokerage firm, and his extensive experience allowed him to bring victims into the securities fraud scheme more easily than someone without his skills.

United States v. Covey, 232 F.3d 641 (8th Cir. 2000). The defendant was convicted of conspiracy to commit money laundering and aiding and abetting money laundering. The defendant used his special skills as an accountant to effectuate the money laundering scheme, prepared an amortization schedule, a loan agreement, and other loan-related financial documentation, and used multiple bank accounts in order to carry out the scheme. The circuit court upheld the district court's application of the adjustment, holding that the legal question is not whether the task could be performed by a person without special skills, but whether the defendant's special skills aided him in performing the task.

§3B1.4 Using a Minor to Commit a Crime

United States v. Williams, 590 F.3d 616 (8th Cir. 2010). Defendant pled guilty to making a threatening telephone communication. Defendant called his mother and told her to initiate a three-way call to defendant's estranged wife. Defendant's mother put defendant's 16 year-old niece on the phone, and defendant relayed a threatening message, through his niece, on his wife's voicemail. The district court added a 2-level enhancement for use of a minor. Defendant argued that because it was his mother, and not him, who put the niece on the phone, the enhancement does not apply. The court held that the term "use" in §3B1.4 includes "directing or commanding" a minor in the commission of an offense, which defendant clearly did.

United States v. Birdine, 515 F.3d 842 (8th Cir. 2008). The district court did not err by finding the evidence sufficient to enhance the defendant's sentence based on the use or attempted use of a minor. The defendant argued that "he did not 'use' a minor, because the minor who was involved in his offense was the drug supplier and the leader or supervisor of the criminal activity." The court found, however, that "there [wa]s sufficient evidence that [the defendant] directed, commanded, encouraged, intimidated, counseled, trained, procured, recruited or solicited [the minor] to commit the offense during [the minor's] minority."

United States v. Tipton, 518 F.3d 591 (8th Cir. 2008). The defendant was convicted of hiring, harboring, and conspiring to hire and harbor aliens working at her restaurant. The district

court increased the defendant's offense level under §3B1.4 for use of a minor to commit the offense. The court held that the district court's finding that two of the aliens were minors was sufficient to support the increased sentence, and that, under a plain error standard, hiring and harboring the minors is enough to warrant the increase, "regardless of special advantage to the defendant." According to the court, "[t]he purpose of the enhancement – 'to protect minors as a class' – is served by punishing the use of minors whether or not there was a comparative advantage in using minors rather than adults."

Part C Obstruction and Related Adjustments

§3C1.1 Obstructing or Impeding the Administration of Justice

***See United States v. Cunningham*, 593 F.3d 726 (8th Cir. 2010), §2B1.1(b)(2).**

United States v. Wahlstrom, 588 F.3d 538 (8th Cir. 2009). The court rejected defendant's argument that the obstruction enhancement does not apply where a defendant targets a prosecutor or his family. The application notes to §3C1.1 cover "attempt[s] to obstruct or impede[] the administration of justice" and it makes no distinction between different actors involved in the justice system. Although prosecutors are not specifically named in the application notes, the nature and seriousness of the conduct is more important than the particular targets.

United States v. Whiting, 522 F.3d 845 (8th Cir. 2008). The court stated that "[a] defendant commits perjury by testifying falsely under oath in regard to a material matter and by doing so willfully, rather than out of confusion, mistake, or faulty memory," and suborns perjury by "procuring another to commit perjury." According to the court, "[b]efore imposing an enhancement under § 3C1.1, the district court 'must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice.'" The court held that the district court did not err by finding that the defendant both committed and suborned perjury, stating that "[a] sentencing enhancement under U.S.S.G. § 3C1.1 may be based on the experienced trial judge's finding that the defendant lied to the jury." Further, the court acknowledged that, "[w]hile 'it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding,' it is sufficient if 'the court makes a finding of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury.'" (citation omitted). Because the district court pointed to specific instances in which it believed the defendant and his witness lied to the jury, the adjustment was proper. *See also United States v. Tyndall*, 521 F.3d 877 (8th Cir. 2008.) ("[W]e once again emphasize the importance of detailed findings to the effect that the defendant testified falsely about a material matter with a willful intent to deceive the factfinder.").

United States v. Thundershield, 474 F.3d 503 (8th Cir. 2007). The defendant argued on appeal that the "district court failed to apply an 'objective standard' under which no enhancement may be imposed if a reasonable factfinder could have believed him." The defendant relied primarily on *United States v. Iversen*, 90 F.3d 1340 (8th Cir. 1996), and *United States v. Cabbell*, 35 F.3d 1255 (8th Cir. 1994). The circuit court noted that "[b]oth of those cases . . . were decided under an earlier version of § 3C1.1, which contained the following commentary: 'In applying this provision in respect to alleged false testimony or statements by

the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant.'" Since the 1997 amendment to §3C1.1, which removed this "most favorable" language and substituted the following: "[T]he court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice," the district court is to "apply a preponderance-of-the-evidence standard, under which a district court's choice between two permissible views of the evidence cannot be considered clearly erroneous."

United States v. Ellerman, 411 F.3d 941 (8th Cir. 2005). The obstruction enhancement applied where the defendant informed co-conspirators that the undercover agent was a police officer. The defendant earlier signed an agreement to cooperate with law enforcement.

United States v. Finck, 407 F.3d 908 (8th Cir. 2005). Although false statements alone do not rise to the level of obstruction of justice, the district court did not err when it found the defendant's false statements impeded the progress of the investigation and thus applied the obstruction of justice enhancement.

United States v. Lincoln, 408 F.3d 522 (8th Cir. 2005). The district court properly applied the obstruction of justice 2-level enhancement when the defendant failed to appear in court for jury selection because his brother could not give him a ride to the courthouse.

United States v. Peters, 394 F.3d 1103 (8th Cir. 2005). The defendant's failure to appear at a probation revocation hearing did not support a 2-level enhancement for obstruction of justice, where the hearing had been scheduled on short notice, the defendant had contacted her attorney prior to the hearing and told him that she would not be there, the hearing was continued until two days later, and the defendant voluntarily attended the rescheduled hearing.

United States v. Stolba, 357 F.3d 850 (8th Cir. 2004). An investment advisor who embezzled his clients' funds and provided them with fraudulent account statements over a period of 26 years, pleaded guilty to two counts of mail fraud. At sentencing, the district court imposed an upward adjustment pursuant to §3C1.1 because the defendant had deleted files relating to the fraudulent conduct from his computer. At the time he did so, no official criminal investigation had commenced. The court stated that an obstruction adjustment was unavailable because no official investigation relating to the defendant's offenses was underway when he deleted the computer files. The court concluded that the temporal limitations in §3C1.1 required a holding that the defendant's obstructive conduct fell beyond the reach of that guideline.

United States v. Aguilar-Portillo, 334 F.3d 744 (8th Cir. 2003). The defendant was convicted of conspiring to distribute, possession with intent to distribute, and distributing methamphetamine. At trial, the defendant denied he participated in any conspiracy to distribute methamphetamine and denied several other material matters. The district court refused to find obstruction of justice because there were several contradictions in various witnesses' testimony; a probable lie by one of the prosecution's witnesses; the jury deliberated for a day and a half; the defendant did not look evasive; and because the defendant merely made unembellished denials. In other words, the district court was of the view that the defendant's "no's" were not perjurious.

The circuit court affirmed because the district court believed that the government did not prove by a preponderance of the evidence that the defendant was lying.

United States v. O'Dell, 204 F.3d 829 (8th Cir. 2000). The defendant was convicted of conspiracy to commit money laundering, money laundering, and conspiracy to distribute controlled substances. The district court found that the defendant committed perjury when he testified before a magistrate judge in a bond revocation hearing held after he was charged with a drug crime he committed while he was out on pretrial release. At that hearing, the defendant testified that he did not know he had the drugs on his person. On appeal, the defendant challenged the decision to increase his offense level for obstruction of justice. He argued that the perjury must be material to the underlying offense to qualify for the enhancement. The court disagreed and held that an adjustment under §3C1.1 was appropriate even where the perjurious testimony did not go to the underlying charge. The circuit court stated that the issue being determined by the court was whether the defendant's pretrial release should be revoked, and thus, his perjurious testimony had the potential to influence or affect that determination.

United States v. Thompson, 210 F.3d 855 (8th Cir. 2000). The district court did not err in applying the obstruction of justice enhancement where the evidence showed the defendant directed acts of intimidation toward two prosecution witnesses. *See also United States v. Carrillo*, 380 F.3d 411 (8th Cir. 2004) (The defendant was properly sentenced to a 2-level enhancement for obstruction of justice for his participation in assault of the codefendant who had furnished information against the defendant and was scheduled to testify against the defendant; a prison videotape caught part of the attack on tape and the defendant also threatened violence against the codefendant's family during the attack).

United States v. Brooks, 174 F.3d 950 (8th Cir. 1999). The district court erred in applying a 2-level adjustment for obstruction of justice where the government failed to prove that the defendant perjured himself at trial regarding the existence of certain trusts. The court of appeals reversed and remanded.

United States v. Moss, 138 F.3d 742 (8th Cir. 1998). The district court did not err in enhancing the defendant's sentence for obstruction of justice after he made a cutthroat gesture toward an adverse witness during a recess at trial.

§3C1.2 Reckless Endangerment During Flight

United States v. McDonald, 521 F.3d 975 (8th Cir. 2008). The district court properly applied an adjustment for reckless endangerment during flight. The defendant barricaded himself in a hotel room for over two hours, claimed to be armed with a gun, and hurled furniture through a closed second story window. "Even though [the defendant] lied about having a gun, officers were nevertheless at heightened risk of physical injury as a result of having to enter [the defendant's] hotel room with force to arrest him."

United States v. Pierce, 388 F.3d 1136 (8th Cir. 2004). Imposition of a sentencing enhancement was warranted for the defendant's conduct in recklessly creating a substantial risk of death or serious bodily injury to others while fleeing from law enforcement. When police

officers attempted to apprehend the defendant, he rammed an officer's vehicle with his truck multiple times, and then collided with parked cars.

United States v. Moore, 242 F.3d 1080 (8th Cir. 2001). The district court did not err in enhancing the defendant's sentence pursuant to §3C1.2. The police identified themselves as police officers and two were in front of the defendant's car wearing raid vests with the word "POLICE" on them when the police turned on the flashing lights in their car and pursued the defendant. The defendant raced down a highway, ran lights, and threw a scale from his car.

United States v. Goolsby, 209 F.3d 1079 (8th Cir. 2000). The district court applied an adjustment for reckless endangerment. The defendant pushed his minor child into the path of an oncoming police car as he fled from law enforcement officers attempting to execute a search warrant on his home. This conduct qualified him for the enhancement even though he was not under arrest or otherwise required to submit to the officers when he fled.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Espinosa, 539 F.3d 926 (8th Cir. 2008). The defendant pleaded guilty to two methamphetamine manufacturing counts and entered an *Alford* plea to possession of a firearm as an unlawful user of methamphetamine. For purposes of sentencing, the district court grouped the two methamphetamine counts, but not the firearm count. The court affirmed, holding that the district court did not clearly err in finding that the firearms were not connected to the defendant's manufacture of methamphetamine. The court stated that, while the guns were found in the same garage as the items associated with the manufacture of methamphetamine, that fact "does not dictate a conclusion that the guns and drugs were connected." The court pointed out that: (1) the firearms were stolen at the same time as a variety of other personal property, and it is possible the defendant used the garage for the storage of stolen goods as well as the manufacture of methamphetamine; (2) the drugs and guns were not an enhancement for each other in this case; and (3) none of the firearms were loaded, and all were long rifles or shotguns.

§3D1.3 Offense Level Applicable to Each Group of Closely Related Counts

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000). The defendant was convicted of manufacturing and attempting to manufacture methamphetamine and endangering human life while doing so. The court grouped the counts for sentencing and used the offense level applicable to the endangering-life count. On appeal, the defendant argued that the group's offense level should be set by the manufacturing count because it carries the maximum term of imprisonment (life) and not by the endangering-life count (10 years). The circuit court held that "the most serious count [wa]s not the count with the greatest available maximum statutory term of imprisonment[, but it was] the count with the highest offense level.

§3D1.4 Determining the Combined Offense Level

United States v. Brown, 287 F.3d 684 (8th Cir. 2002). The defendant was convicted of three counts of assault resulting in substantial bodily injury to a child under 16 and one count of

assault resulting in serious bodily injury. The grouping rules required the court to disregard the less severe crimes of assault when determining the combined offense level. As a result, the district court departed upward under §3D1.4. The appellate court expressly concurred with the lower court that the defendant's case was an unusual circumstance where the sentencing range was too restrictive to compensate for the disregarded counts. Thus, the district court did not err in departing upward.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. William, 681 F.3d 936 (8th Cir. 2012). Defendant who committed a robbery and attempted to manufacture exculpatory evidence while awaiting sentence was not entitled to acceptance of responsibility reduction.

United States v. Yellow, 627 F.3d 706 (8th Cir. 2010). Government did not breach plea agreement when it recommended an acceptance-of-responsibility reduction, albeit unenthusiastically, and also presented evidence of obstruction of justice. The district court denied the 3-level reduction.

United States v. Wineman, 625 F.3d 536 (8th Cir. 2010). The district court did not procedurally err when denying an acceptance-of-responsibility reduction where the defendant: (1) posted an online commentary complaining of drug task force police and their snitches; (2) lied about his authorship of the post; and (3) tested positive for methamphetamine while on release pending sentencing. The court observed that the defendant's lie and/or his drug use would each support the denial of acceptance. But, it also noted that the post evinced his lack of responsibility for his offense by his placing responsibility on others.

United States v. Crumley, 528 F.3d 1053 (8th Cir. 2008). The district court did not err in refusing to grant the defendant an acceptance of responsibility reduction where the defendant did not put on any witnesses at trial, but her attorney cross-examined the government's witnesses and argued that the evidence was insufficient to support a verdict. "[A] reduction is [generally] not appropriate if the Government goes through the burden of proving its case at trial, unless the defendant was merely ascertaining the viability of an issue unrelated to [the defendant's] guilt, such as a constitutional challenge to a statute." (internal citation omitted).

United States v. Mousseau, 517 F.3d 1044 (8th Cir. 2008). The defendant's appeal waiver, which foreclosed the defendant's ability to appeal the district court's denial of acceptance of responsibility, was not a miscarriage of justice because the defendant's sentence was "authorized by the judgment of conviction" and was not "greater or less than the permissible statutory penalty for the crime."

United States v. Bradford, 499 F.3d 910 (8th Cir. 2007), *abrogated on other grounds, United States v. Villareal-Amarillas*, 562 F.3d 892 (8th Cir. 2009). A defendant may remain silent in respect to relevant conduct evidence and still receive acceptance of responsibility reductions, but a defendant who contests or denies relevant conduct that the court later determines to be true does not merit acceptance of responsibility.

United States v. Bell, 411 F.3d 960 (8th Cir. 2005). The district court did not err in denying the defendant convicted at trial a reduction for acceptance of responsibility. Although in a "rare situation," a defendant convicted at trial may receive the reduction, he does so only in cases where the purpose at trial was to assert issues unrelated to factual guilt. The defendant in this case moved twice for acquittal on the insufficiency of the evidence and employed other tactics aimed at challenging the government's evidence against the defendant, thus not relieving the government of its burden of proof at trial. *See also United States v. Cruz-Zuniga*, 571 F.3d 721 (8th Cir. 2009) ("The district court's refusal to grant [defendant] a downward variance equivalent to a [2]-level Guidelines reduction for acceptance of responsibility did not wrongfully punish [defendant] for exercising his constitutional right to stand trial.").

United States v. Morton, 412 F.3d 901 (8th Cir. 2005). Where the government breaches a plea agreement by failing to move for an additional 1-level reduction pursuant to §3E1.1 but the defendant has honored the agreement, the defendant is entitled to resentencing.

United States v. Patient Transfer Serv., Inc., 413 F.3d 734 (8th Cir. 2005). Acceptance of responsibility, particularly when the defendant goes to trial, must consist not only of accepting responsibility for managing company accused of committing crimes, but also accepting responsibility for committing those crimes.

United States v. Harris, 390 F.3d 572 (8th Cir. 2004). Any error in giving the defendant a 2-level downward adjustment for acceptance of responsibility, instead of the 3-level adjustment he requested, was harmless. The district court indicated an unwillingness to impose a lesser sentence within the overlapping area between the two putative ranges even if the defendant had received further adjustment.

United States v. Ortiz, 242 F.3d 1078 (8th Cir. 2001). The district court did not err in only granting a 2-level acceptance of responsibility reduction where the defendant communicated to the government his intention to proceed to trial after petitioning to plead guilty, causing the government to prepare for trial even though he changed his mind and pled guilty.

United States v. Lim, 235 F.3d 382 (8th Cir. 2000). The district court did not err in denying a reduction for acceptance of responsibility where the defendant pled guilty and admitted guilt to all relevant conduct but also firmly refused to assist in any way in the recovery of the stolen jewelry and showed no remorse for his conduct.

United States v. Goings, 200 F.3d 539 (8th Cir. 2000). The defendant pled guilty to involuntary manslaughter based on driving while under the influence of alcohol. The defendant requested an adjustment for his acceptance of responsibility, but the district court denied the request because he failed to complete a court-ordered alcohol treatment program and did not appreciate the gravity of his criminal conduct. The circuit court held that this determination was not clearly erroneous.

United States v. Barris, 46 F.3d 33 (8th Cir. 1995). After defendant's insanity defense was rejected by the jury, the defendant requested a 2-level reduction for acceptance of

responsibility under §3E1.1. The district court held that the insanity defense is inconsistent with acceptance of responsibility as a matter of law. But the circuit court reversed, holding that a "defendant who goes to trial on an insanity defense, thus advancing an issue that does not relate to his factual guilt, may nevertheless qualify for an acceptance-of-responsibility reduction under the sentencing guidelines." The court then remanded the case for resentencing to allow the district court to decide whether the defendant had accepted responsibility.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Heath, 624 F.3d 884 (8th Cir. 2010). At defendant's sentencing for child pornography, the district court assessed criminal history points based upon a previous revocation arising from conduct which gave rise to, in part, the instant offense. The defendant then appealed on the basis of impermissible double-counting. The defendant was initially sentenced to two years' imprisonment for a 2006 assault conviction for which he received a suspended sentence and two years probation. In 2008, when he subsequently "(1) provid[ed] alcohol to a minor, (2) entic[ed] a minor, (3) exploit[ed] a minor, and (4) possess[ed] a firearm as a felon," the State revoked his probation. The circuit court noted that had the probated sentence remained intact, it would have generated just one criminal history point in the instant offense. But because it did not, the assessment of three criminal history points was not error. "[A]lthough [defendant's] instant offense conduct played a part in the revocation of his probation, his post-revocation sentence was imposed as punishment solely for the 2006 assault conviction, which is not 'a kind of harm that has already been fully accounted for' in calculating his offense level."

United States v. Spikes, 543 F.3d 1021 (8th Cir. 2008). The district court erred by adding two additional criminal history points for committing the instant offense while under a "criminal justice sentence." At the time the defendant committed the instant offense, the defendant's only sentence for the state court offense was a fine. The court found it important that the defendant's state-court prosecution (and not sentence) was deferred with conditions, and that the defendant only pleaded guilty after it was clear she had not met the conditions for dismissal.

United States v. Martinez-Cortez, 354 F.3d 830 (8th Cir. 2004). The defendant faced a mandatory minimum sentence of ten years in prison unless the safety valve applied. Before sentencing, he filed motions in state court to modify his state sentences. Over the government's objection, the district court calculated the criminal history based on the modified state sentences and found the defendant eligible for the safety valve. After the government appealed, the panel concluded that, as a matter of federal law, the modification of the defendant's sentences after they were served, for reasons unrelated to his innocence or errors of law, was not a valid basis for excluding the sentences for criminal history purposes. The guidelines required the district court to conclude that the defendant had four criminal history points and was ineligible for the safety valve. The court reversed and remanded for imposition of the mandatory minimum sentence.

United States v. Evans, 285 F.3d 664 (8th Cir. 2002). The district court assessed two criminal history points to the defendant in accordance with §4A1.1(d). The defendant argued that there was no evidence in the presentence report or elsewhere that he was on probation at the time of the commission of the instant offense. The government responded that the defendant had received various stayed sentences, and that the defendant had not established that these stayed sentences were not a form of probation. The appellate court determined that if the defendant's prior sentences were stayed, then the enhancement would be appropriate. In reaching its conclusion, the panel considered that the term "instant offense" is to be interpreted broadly. Because the conspiracy for which the defendant was convicted was of considerable length and breadth, the appellate court held, on plain error review, that the defendant failed to establish that the instant offense did not occur during the stayed sentences.

United States v. Johnson, 43 F.3d 1211 (8th Cir. 1995). The district court assessed one criminal history point under §4A1.1(c) based upon a state conviction for obstructing the legal process. The state court "stayed" the imposition of the sentence for one year and then dismissed the case. Because the sentence had been imposed without an accompanying term of probation, it did not constitute a sentence of probation under §4A1.2(c)(1) and should not have been counted.

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Barrientos, 670 F.3d 870 (8th Cir. 2012). USSG Amendment 709, enacted on November 1, 2007 resolved a circuit split in directing that a common sense approach should be used in determining whether a non-listed offense is similar to an offense listed at §4A1.2(c)(1) or (c)(2). Amendment 709 therefore trumped the circuit's prior decision in *United States v. Webb*, 218 F.3d 877 (8th Cir. 2000).

United States v. Burman, 666 F.3d 1113 (8th Cir. 2012). Holding that the occasions on which the defendant uploaded child pornography from the internet prior to the earliest date listed in the indictment were properly considered relevant conduct. Therefore, they could be considered for purposes of determining the "commencement of the instant offense" in assessing criminal history points.

See United States v. Ault, 598 F.3d 1039 (8th Cir. 2010), §1B1.3.

See United States v. Myers, 598 F.3d 474 (8th Cir. 2010), §2A3.5.

United States v. Chibukhchyan, 491 F.3d 722 (8th Cir. 2007). The fact that an arrest for a state offense leads to the discovery of evidence of a federal offense is not sufficient to consider the conduct to be related. Where a defendant produced two fraudulent social security cards, one with a false name and one with a correct name but altered, and was subsequently prosecuted in state court on charges based on one document and in federal court on charges based on the second document, the conduct giving rise to the state and federal offense was distinct. Because the two documents were produced at different times in different manners, the fact that they were recovered at the same time did not mean they were related offenses for the purposes of §4A1.2.

United States v. Postley, 449 F.3d 831 (8th Cir. 2006). Although the prior conviction was an "aggravated misdemeanor" under Iowa law, it was properly treated as a "felony offense" under the guidelines as it was punishable by a term of imprisonment exceeding one year.

United States v. Townsend, 408 F.3d 1020 (8th Cir. 2005). The sealing of the defendant's record did not constitute expungement for §4A1.2(j), and the district court properly counted the prior conviction in determining the criminal history category. The state court conviction for third-degree burglary was not expunged due to constitutional invalidity, innocence, or a mistake of law, as required by the guidelines. The conviction was sealed to permit defendant a clean start and to restore some civil rights. *See also United States v. Nelson*, 589 F.3d 924 (8th Cir. 2009) (holding that *"Townsend* was predicated on the basis for expunging the state conviction, not on the effect of expungement", and that an Arkansas expungement statute limited public access to the records of a defendant's prior conviction but did not permit defendant to commit more crimes free of additional punishment based on his recidivism).

United States v. Ingles, 408 F.3d 405 (8th Cir. 2005). The district court did not err in determining the defendant's criminal history on the basis of the defendant's admission at the proffer interview and the PSR.

United States v. Morgan, 390 F.3d 1072 (8th Cir. 2004). The defendant had been "incarcerated," as defined by federal law, while at an Iowa violator facility because the defendant was not free to leave that facility. Physical confinement without being free to leave is a key factor in determining whether a sentence is one of "incarceration" and whether a prior sentence counts for criminal history purposes is a question of federal, not state law.

United States v. Berry, 212 F.3d 391 (8th Cir. 2000). The defendant pled guilty to crack and powder cocaine offenses. Based on two prior state felony convictions for drug offenses, the district court calculated a criminal history category of III and a sentencing range of 210-262 months. The defendant appealed, asserting that the prior convictions were part of a "single common scheme or plan" and thus were related for purposes of §4A1.2. The defendant argued that the court should give the phrase "common scheme or plan" in Application Note 3 to §4A1.2 the same broad interpretation that it is given in Application Note 9 of §1B1.3(a)(2). The court disagreed and held that §4A1.2 includes the additional word "single," indicating that it should be construed narrowly. And, a broad interpretation under §4A1.2 would produce the "illogical result" that a defendant who is repeatedly convicted of the same offense, like the defendant, would not be a multiple offender under the guidelines. The court affirmed the defendant's sentence. *Cf. United States v. Charles*, 209 F.3d 1088 (8th Cir. 2000) (holding that two prior burglary convictions had been consolidated for sentencing and should have been treated as a single prior sentence for purposes of §4A1.2). *But see United States v. McCracken*, 487 F.3d 1125 (8th Cir. 2007) (holding that two prior robberies that were sentenced on the same day by the same judge, but where one robbery was transferred from a different district under Fed. R. Crim. P. 20, the cases were not related because there was no formal consolidation order and the two offenses did not have "any particular relationship" to each other).[2]

[2] The Commission amended §4A1.2 in 2007 by striking Application Note 3 referred to in these cases and replacing it with an Upward Departure Provision. *See* USSG Supp. to App. C., Amendment 709 (Nov. 2007).

United States v. Holland, 195 F.3d 415 (8th Cir. 1999). The defendant pled guilty to drug trafficking offenses and was sentenced under the career offender guideline based on two prior drug convictions in state court. The defendant objected to the use of one of the prior convictions because the offense was committed when he was 17 and the sentence had been suspended. The defendant argued that his suspended sentence cannot be used as a predicate conviction for the career offender guideline. The court disagreed because §4A1.2(a)(3) specifically counts a suspended sentence as a "prior sentence" receiving points under §4A1.1(c), making it available as a predicate conviction under the career offender guideline.

§4A1.3 Departures Based on Inadequacy of Criminal History Category (Policy Statement)

United States v. Johnson, 648 F.3d 940 (8th Cir. 2011). The district court did not err in imposing an 125-month upward departure based on under-representation of criminal history, §4A1.3(a)(1), where the defendant narrowly missed being classified as a career offender and the district court properly considered the §3553(a) factors. The panel found that it was permissible to consider the career offender range as an indicator of a reasonable sentence.

United States v. Mejia-Perez, 635 F.3d 351 (8th Cir. 2011). The district court did not err when it imposed a sentence greater than the guideline range because of the inadequacy of defendant's criminal history category. The court took into account defendant's prior uncharged illegal reentries and found that defendant's immigration history was evidence of "obvious incorrigibility" and that leniency had not been effective.

United States v. Ortiz, 636 F.3d 389 (8th Cir. 2011). No error was found when representatives of retailers victimized by the defendant's shoplifting testified at sentencing. The district court did not err when it departed upward from criminal history category II to VI and added further offense level for criminal history. The court considered the § 3553(a) factors and indicated it would impose the same sentence for the same reasons.

United States v. Azure, 536 F.3d 922 (8th Cir. 2008). After the defendant pleaded guilty to two counts of assault with a dangerous weapon, the defendant was sentenced to 180 months. The sentence was based on an upward departure from criminal history category I to category VI. The district court considered defendant's "detailed history of violence, including the use of dangerous weapons, knives, forks, and other things, biting people." On appeal, the court held that the district court abused its discretion when it did not attempt "to assign hypothetical criminal history points to the conduct that did not result in convictions," and did not discuss "intermediary categories II, III, IV, or V before deciding on category VI." Where the defendant only had one prior serious conviction, and where the district court did not provide "additional analysis," the sentence must be remanded.

United States v. Mills, 491 F.3d 738 (8th Cir. 2007). On remand for sentencing, a sentencing judge may not depart based on over-represented criminal history when such facts were not included in the original written statement of reasons in connection with the previous sentencing of the defendant prior to the appeal.

United States v. Wallace, 377 F.3d 825 (8th Cir. 2004). The defendant was not entitled to a downward departure on the ground that his criminal history category overstated the seriousness

of the threat the defendant posed to the community. The defendant was 36 at the time of his conviction, his first criminal conviction occurred at age 16, and he had three prior felony convictions and 12 misdemeanor convictions.

United States v. Archambault, 344 F.3d 732 (8th Cir. 2003). The defendant pled guilty to one count of arson. Relying on §§4A1.3 and 5K2.7, the district court departed upward finding that the defendant's criminal acts significantly disrupted a governmental function and that his criminal history category significantly under-represented his past criminal conduct. On appeal, the court affirmed the decision to depart upward because the defendant's criminal history category of I did not adequately reflect the seriousness of his past criminal conduct because one of the defendant's arson counts was dismissed, and the defendant admitted to – among other things – selling marijuana, abusing inhalants, alcohol, amphetamines, and marijuana, and stealing approximately $1,000 per week. Accordingly, the sentence was affirmed. *See also United States v. Jones*, 596 F.3d 881 (8th Cir. 2010) (affirming upward departure for unrepresented criminal history because the defendant's criminal history was extensive, the defendant amassed 19 of his criminal history points in just 10 years, and none of the charges were petty).

United States v. Chesborough, 333 F.3d 872 (8th Cir. 2003). The defendant pled guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and admitted to possessing six firearms. The defendant had a lengthy criminal record, many of which were not included in the criminal history calculation because they were too stale. Based on these facts, the district court increased the defendant's criminal history level by three levels—from category II to V. On appeal, the defendant argued that a Criminal History Category II did not understate the seriousness of his past criminal conduct. The court rejected this argument and affirmed the departure. The court noted that the PSR indicated that defendant was a recidivist criminal and the defendant's criminal history score failed to reflect his actual criminal conduct over the years. The court also noted that convictions "'excluded from a defendant's criminal history score due to their age may [properly] be' the basis for an upward departure."

United States v. Flores, 336 F.3d 760 (8th Cir. 2003). The defendant pled guilty to possession with intent to distribute approximately 391 grams of LSD. The district court found that Criminal History Category IV did not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that he would commit future crimes and departed upward to Criminal History Category VI. The court noted more than 25 arrests on criminal charges and that, if the defendant had been 18 at the time of the drug offense and had pled guilty to a pending state charge before the sentencing in this case, he would have been considered a career offender under §4B1.1. Accordingly, the district court also enhanced the defendant's offense level and imposed a 235-month sentence. On appeal, the defendant argued that the district court erred in departing upward and that the extent of the departure was unreasonable. The court held that an upward departure was justified by the facts of this case and the district court did not abuse its discretion as to the extent of its departure.

United States v. Levi, 229 F.3d 677 (8th Cir. 2000). The defendant was convicted of mail fraud, wire fraud, and conspiracy. The district court departed upward finding that the defendant's criminal history calculation did not adequately reflect his prior foreign convictions

nor his potential for recidivism. The panel determined that the departure was reasonable, particularly given the similarity of the foreign convictions to the crimes at issue.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Dawn, 685 F.3d 790 (8th Cir. 2012). Both parties on appeal agreed that case should be remanded to determine whether one predicate conviction qualified as a crime of violence under the guidelines. The issue was whether the record should be reopened on remand to allow the government to present additional evidence. The decision depends on "whether the government had an opportunity to present the evidence but failed and how definitively the defendant raised the issue." Dawn's case was remanded because this issue had not been clearly raised before the district court.

United States v. Boyce, 633 F.3d 708 (8th Cir. 2011). A state misdemeanor punishable by imprisonment for less than two years qualifies as a violent felony conviction for career offender purposes under the definition set forth in §4B1.2(c). The Sentencing Commission is not bound by the definition set forth in ACCA.

United States v. Robinson, 639 F.3d 489 (8th Cir. 2011). The district court erred when it sentenced the defendant as a career offender based on a prior felony conviction for violating state drug tax stamp law because the state law criminalizes both conduct that does and does not qualify as a controlled substance offense. Using the modified categorical approach, the panel found that the evidence put forth indicated that the defendant was charged with unlawfully possessing ten or more dosage units of Oxycodone without the proper stamp tax affixed. Because this evidence was insufficient to support more than mere possession, the panel found that the prior conviction did not qualify as a predicate controlled substance offense for career offender purposes. Further, because the government already had its opportunity to present its case, the court was instructed to resentence the defendant based on the record before it.

United States v. Cantrell, 530 F.3d 684 (8th Cir. 2008). The court held that the defendant's prior conviction for second-degree burglary in violation of Missouri law qualified as a "crime of violence." The court concluded that "the district court did not err in determining, regardless of whether [the defendant's] state court burglary conviction was a 'generic burglary' as defined in Taylor, [the defendant] was subject to an increased range of punishment as a career offender . . . because [the defendant's] state court second-degree burglary conviction constituted a 'crime of violence' under the 'otherwise involves conduct that presents a serious potential risk of physical injury to another' clause of U.S.S.G. § 4B1.2."

United States v. Mills, 491 F.3d 738 (8th Cir. 2007). The court refused to overturn circuit precedent that requires that cases be consolidated in a written order so that multiple convictions can be treated as one arrest for the purposes of determining the career offender enhancement. *See United States v. Blahowski*, 324 F.3d 592 (8th Cir. 2003); *United States v. McCracken*, 487 F.3d 1125 (8th Cir. 2007).

United States v. Peters, 215 F.3d 861 (8th Cir. 2000). The defendant was convicted of bank robbery and was sentenced to 72 months. On appeal, the government argued that the career offender guideline applied to the defendant based on prior state convictions for third-degree assault and first-degree burglary. The defendant argued that the burglary charge was not a prior felony for purposes of §4B1.1 because it had been consolidated for sentencing with an earlier charge of receipt of stolen property and, therefore, would not receive criminal history points. The circuit court remanded for resentencing, so the district court could decide whether or not the burglary charge should receive criminal history points.

§4B1.2 Definitions of Terms Used in Section 4B1.1

United States v. Williams, 690 F.3d 1056 (8th Cir. 2012). Defendant challenged the district court's determination to sentence him as a career offender, alleging that the instant count of conviction, 18 U.S.C. § 844(e), was not a crime of violence because its definition encompassed non-violent conduct. The court employed a modified categorical approach in analyzing whether the crime met the definition of violent felony. The court found that the charging document and jury instructions did not provide enough detail to determine whether the conviction qualified as a crime of violence. However, since the dispute revolved around the instant offense of conviction, the court found it could consider the "readily available trial evidence" and found that the defendant's conviction qualified as a crime of violence.

United States v. Cowan, 696 F.3d 706 (8th Cir. 2012). Finding that the residual clause in §4B1.2's definition of crime of violence is not unconstitutionally vague.

United States v. Dawn, 685 F.3d 790 (8th Cir. 2012). Holding that sexual offenses involving persons incapable of giving consent or sexual offenses involving person in positions of authority over minors are crimes of violence. Among other things, the circuit court reasoned that said conduct possesses inherent risks, that the victims are vulnerable, and that there is always a substantial risk that physical force may be used. The case was reversed and remanded on other grounds.

United States v. Lee, 625 F.3d 1030 (8th Cir. 2010). Relying on *Chambers v. United States*, 555 U.S. 122 (2009) and *United States v. Pearson*, 553 F.3d 1183 (8th Cir. 2009), the court held that the Illinois Escape statute's Class II felonies all qualify as violent felonies under ACCA because "each of [them] that appear in § 5/31-6 constitutes an escape from custody. Because we have held that all escapes from custody are violent felonies . . . [the defendant's] escape is a violent felony." (internal citations omitted).

United States v. Parks, 620 F.3d 911 (8th Cir. 2010). A divided panel concluded that Missouri's Escape or Attempted Escape from Confinement statute (Mo. Rev. Stat. §575.210) qualified as a crime of violence and supported a career offender enhancement under the §4B1.2 residual clause. The panel applied a modified categorical approach and noted that the defendant had "escaped from St. Mary's Honor Center by running past the front door officer and out the door at about the stated time as the door was opened for a routine intake of returning inmates." The panel majority took issue with the Seventh Circuit's contrary conclusion about the Missouri statute (that it is textually indivisible, not susceptible to a modified categorical analysis, and categorically *not* a crime of violence).

The panel dissent agreed with the majority regarding application of the modified categorical approach but disagreed with the majority's "fact-specific inquiry into the particular level of security present at the time of [the] escape." The dissent would have held that "a walkaway escape from a halfway house, as it is generally committed, is not a crime of violence." *Cf. United States v. Williams*, 627 F.3d 324 (8th Cir. 2010) (when determining whether Nebraska offense of attempted felony escape was a crime of violence, sentencing court procedurally erred when considering actual conduct at issue: "Under the modified categorical approach, the court examines the *Taylor* and *Shepard* documents not to see how the particular crime at issue was committed on this occasion, but '*only* to determine which part of the statute the defendant violated.' The court then determines whether a violation of that statutory subpart constitutes a crime of violence 'in the ordinary case.'" (internal citations omitted).

United States v. Clay, 622 F.3d 892 (8th Cir. 2010). After the defendant pleaded guilty to drug and firearms offenses, the district court enhanced his advisory guideline range under §2K2.1(a)(4) upon determining that the defendant's 2006 Iowa conviction for attempting to elude a pursuing law enforcement vehicle was a crime of violence. On appeal, the court relied on its 2010 decision in *United States v. Malloy*, 614 F.3d 852, 864 (8th Cir. 2010), to find that eluding a pursuing vehicle is a crime of violence. *Malloy* reviewed an Iowa statute that included all of the instant statute's elements (plus an additional requirement that the offender also be committing a public offense, e.g., a DUI or drug crime, etc). The court reasoned that, under *Malloy*, eluding pursuit of a pursuing law enforcement vehicle must also be a crime of violence.

United States v. Malloy, 614 F.3d 852 (8th Cir. 2010). At defendant's sentencing for methamphetamine offenses, the district court sentenced him as a career offender after finding that the defendant's Iowa convictions for extortion and interference with official acts causing bodily injury were crimes of violence. On appeal, the court affirmed both classifications. As to the extortion offense, the court noted that, under the "modified categorical approach," the extortion involved only threats to harm property and not a person. But it also noted that the offense falls among §4B1.2's enumerated offenses. The court reasoned that "restricting 'extortion' in § 4B1.2(a)(2) to include only threats of physical harm would render the guideline redundant, as the Guidelines [already] make 'any crime that has as an element the threatened use of physical force against the person of another a crime of violence.'" As to the conviction for interference with official acts causing bodily injury, the court noted that to convict someone under the Iowa statute, the defendant must have: (1) knowingly resisted or obstructed a person, (2) he knew to be a peace officer, (3) in the performance of an act within the scope of that officer's lawful duty, and (4) in doing so, inflicted bodily injury other than serious injury. The court looked to this last element and its use of the word "inflict" to find that it would be "difficult, if not impossible, to imagine how the charged conduct could be carried out without actually using physical force against the person of another."

United States v. Furqueron, 605 F.3d 612 (8th Cir. 2010). The court held that the defendant's conviction for violating Minnesota's escape from custody statute qualified as a crime of violence under §4B1.2. Using the modified categorical approach, the court determined that the offense conduct – escape from a county jail – presented the same risk of physical injury and involved the same risks of purposeful, aggressive conduct as would a burglary. Recognizing that

the Supreme Court's opinion in *Chambers v. United States*, 555 U.S. 122 (2009), which reviewed a failure to report to a penal institution, had overruled much of the circuit's precedent (that "all escape offenses are crimes of violence"), the court explained that escapes such as the one at issue still qualified as crimes of violence: "[T]he main risk of escape from a penal institution arises not from leaving custody, but from the possibility of being discovered in the act of escaping."

United States v. Hennecke, 590 F.3d 619 (8th Cir. 2010). Defendant's prior conviction for felony stealing under Missouri law is a violent felony under the residual "otherwise involves" clause of §4B1.2(a)(2). Although Missouri law broadly defines stealing as "appropriat[ing] property or services of another . . .", defendant was charged with appropriating money "by physically taking it from the person of [the victim] . . . ." The court held, under *Begay*, that felony stealing from a person involves purposeful conduct similar to the enumerated offense of burglary. Furthermore, as required under *Begay*, the crime involves violent and aggressive conduct. Physically stealing from a person poses the same risk of violent confrontation with the victim or a third person as attempted or completed burglary and is therefore within the ambit of §4B1.2(a) crimes of violence.

United States v. Boaz, 558 F.3d 800 (8th Cir. 2009). Defendant appealed his sentence under the Armed Career Criminal Act claiming he did not have three qualifying felony convictions. The court held that "burglary of a structure" and "terroristic threatening" convictions are violent felonies. In light of *United States v. Williams*, 537 F.3d 969 (8th Cir. 2008), the court held that "conspiracy to commit auto theft" was not a violent felony. While "exhibiting a deadly weapon other than in self-defense" is a violent felony, the court remanded the case to determine whether defendant had actually been convicted of this offense.

United States v. Gordon, 557 F.3d 623 (8th Cir. 2009). In resolving whether an offense is a violent felony, the court stated it follows cases interpreting the term "violent felony" for purposes of ACCA and the term "crime of violence" under the guidelines "because the relevant definitions of the two terms are 'virtually identical'" and the court "[does] not recognize a distinction between them." Here, the court found "endangering the welfare of a child" under Missouri law was not a violent felony for ACCA. The court found that while the offense ordinarily involves conduct that presents a serious potential risk of physical injury to another, it was not similar in kind to burglary, arson, extortion or offenses involving explosives. The court stated nothing in the statutory definition of the offense suggested it typically involves a similar potential for either violent or aggressive behavior.

United States v. Hudson, 577 F.3d 883 (8th Cir. 2009). The court found that a conviction under Missouri law for resisting arrest by fleeing "in such a manner that the person fleeing creates a substantial risk of serious physical injury or death to any person" was a crime of violence for purposes of determining the base offense level under USSG §2K2.1. The defendant pleaded guilty to being a felon in possession of a firearm and the district court assigned a base offense level of 20 under §2K2.1(a)(4) based on the defendant's prior resisting arrest conviction. While the Court of Appeals recognized that *Begay* and *Chambers* "without question . . . altered the test for determining a crime of violence by adding the 'purposeful, violent, and aggressive'

component," it found that resisting arrest as defined under Missouri law contains such a purposeful element and remains a crime of violence post *Begay* and *Chambers.*

United States v. Pearson, 553 F.3d 1183 (8th Cir. 2009). *Chambers v. United States*, 555 U.S. 122 (2009), "overrules this circuit's precedent that all escapes – including failures to return or report to custody – are crimes of violence, but leaves intact our precedent holding that escape from custody is a crime of violence."

United States v. Stymiest, 581 F.3d 759 (8th Cir. 2009). The court held that generic burglary continues to be classified as a "crime of violence" post-*Begay v. United States*, 553 U.S. 137 (2008). Here, defendant's third-degree burglary offense was "roughly similar in kind" to generic burglary, and it was generic burglary as defined in *Taylor v. United States*, 495 U.S. 575 (1990). It would be an enumerated offense under §4B1.2(a)(2) but for the Commission's "arbitrary 'of a dwelling' limitation." Even under the "otherwise involves" residual provision, nothing in *Begay* or *Chambers* suggests that an offense so similar to an enumerated offense, which presents the same kind of risk of violent confrontation recognized in *James v. United States*, 550 U.S. 192, 203-05 (2007), would be classified differently than the attempted burglary at issue in *James*. Thus, prior circuit decisions classifying generic burglaries of structures other than "dwellings" as crimes of violence under the "otherwise involves" provision of §4B1.2(a)(2) were not implicitly overruled by *Begay*. "Alternatively, if *Begay* requires a different result under the 'otherwise involves' provision, . . . the 'of a dwelling' limitation in §4B1.2(a)(2) was invalidated by the Supreme Court's decision in *Taylor*."

United States v. Vincent, 575 F.3d 820 (8th Cir. 2009). The court stated "[t]he statutory definition of 'violent felony' is viewed as interchangeable with the guidelines definition of 'crime of violence.'" Applying *Begay*, guideline commentary, and guideline case law, the court found possession of a sawed-off shotgun is similar, in kind as well as degree of risk posed, to the offenses listed in § 924(e) and was an ACCA-qualifying violent felony.

United States v. Whaley, 552 F.3d 904 (8th Cir. 2009). Defendant argued that a Missouri conviction for "knowingly burning or exploding" was not a crime of violence for purposes of ACCA. The court held that generic arson, of which it found the Missouri offense to be, "has as elements the malicious burning of real or personal property of another" and constitutes a "crime of violence" for sentencing enhancement purposes under 18 U.S.C. § 924(e).

United States v. Mathijssen, 406 F.3d 496 (8th Cir. 2005). The district court did not err when it sentenced the defendant as a career offender based on two burglary convictions and a carjacking conviction, properly concluding that all three were crimes of violence. Per circuit precedent, burglary is categorically a crime of violence, and the California crime of carjacking is also a crime of violence by its elements.

United States v. Jernigan, 257 F.3d 865 (8th Cir. 2001). Negligent homicide constituted a "crime of violence" for career offender purposes where the conviction arose from the death of another person that occurred while the defendant was driving under the influence of alcohol. *See United States v. Shepard*, 340 F. App'x 349 (8th Cir. 2009) (unpublished) (Kansas conviction for involuntary manslaughter is a violent felony for purposes of 18 U.S.C. § 924(e) and §4B1.4).

United States v. Hascall, 76 F.3d 902 (8th Cir. 1996). Second-degree burglary of commercial space qualified as a crime of violence under §4B1.2 because a burglary of a commercial space still poses a potential for substantial episodic violence. Therefore, the defendant qualified as a career offender. *See also United States v. Grummitt*, 390 F.3d 569 (8th Cir. 2004) (burglary of a residence that had been temporarily vacated constituted a burglary of a dwelling, and was a crime of violence); *United States v. Mohr*, 407 F.3d 898 (8th Cir. 2005) (Burglary of a commercial building is a crime of violence as defined by §4B1.2(a)).

§4B1.4 Armed Career Criminal (ACCA)

United States v. Moore, 683 F.3d 927 (8th Cir. 2012). Defendant challenged the imposition of base offense level 34 for possession of a firearm in connection with a controlled substance offense. The court held that, "where the defendant held only a small amount of drugs for personal use, the standard for showing a connection is more stringent." The court upheld the higher offense level because defendant "chose to carry his illegal drugs into the public while possessing a firearm, and it was not clearly improbable that the weapon was connected with the offense."

United States v. Bynum, 669 F.3d 880 (8th Cir.), *cert. denied*, 133 S. Ct. 200 (2012). The circuit court concluded that an offense of "knowingly offering to sell drugs" is a "serious drug offense" under the ACCA. In reaching this conclusion, the circuit court noted that the ACCA's definition and the guidelines' definitions for "controlled substances offense" and "drug trafficking offense" are different. The court refused to interpret the ACCA's definition narrowly, and it rejected the defendant's arguments that the ACCA required an offer to exchange drugs for value as opposed to an offer to distribute them gratuitously.

United States v. Boyce, 633 F.3d 708 (8th Cir. 2011). Post *Begay*, a prior conviction for possession of a weapon in a correctional facility qualifies as a predicate crime of violence under ACCA. Case was remanded for resentencing under ACCA.

United States v. Webster, 636 F.3d 916 (8th Cir. 2011). Reliance on a 1988 state burglary conviction referenced in a 1999 presentence report for a prior federal crack cocaine conviction does not violate *Shepard* and thus qualifies as a predicate crime of violence for ACCA purposes when the state statute did not embrace any conduct that did not qualify as a violent felony. Case was remanded for resentencing.

United States v. Nash, 627 F.3d 693 (8th Cir. 2010). After the defendant pleaded guilty to illegally possessing a firearm, the district court treated his Minnesota 1995 extended juvenile jurisdiction (EJJ) for First Degree Criminal Sexual Assault as a "violent felony" under ACCA. On appeal, the defendant argued that the 1995 adjudication fell outside ACCA's ambit but the circuit court concluded to the contrary. Noting that ACCA looks to state law when determining whether a particular proceeding qualifies as a "violent felony," the court observed that Minnesota courts treat EJJ convictions as "adult convictions" for purposes of state mandatory minimum sentences as well as the state sentencing guidelines. The circuit court affirmed the treatment of a Minnesota EJJ conviction as an ACCA predicate.

United States v. Forrest, 611 F.3d 908 (8th Cir. 2010). After the defendant pleaded guilty to illegally possessing a firearm, the district court treated four of his previous convictions as ACCA "violent felonies" and enhanced his sentence. On appeal, the court joined the Tenth Circuit and held that Colorado's Felony Menacing statute – "knowingly placing or attempting to place someone in fear of imminent serious bodily injury by the use of a deadly weapon – 'easily satisfies' the requirement of 'the threatened use of physical force against the person of another'" and thus qualifies as an ACCA predicate. The court also found that the Colorado robbery statute (Col. Rev. Stat. Ann. § 18-4-301) is an ACCA "violent felony" predicate. Finally, the court also held that defendant's Kansas conviction for attempted burglary and Colorado's second-degree burglary statute qualified as ACCA violent felonies.

United States v. Daniels, 625 F.3d 529 (8th Cir. 2010).. The district court sentenced the defendant to ACCA's 15-year statutory minimum after finding that his burglary convictions amounted to three predicate "violent felonies." On appeal, the defendant contended that the offenses did not trigger ACCA because: (1) they allegedly occurred during a criminal spree; and (2) he had only been arrested two times. The court rejected that claim and noted that "[the defendant's] prior burglaries spanned a one-year period, occurred on different dates, related to different victims, and were committed at different locations. Therefore, these offenses occurred on different occasions."

United States v. King, 598 F.3d 1043 (8th Cir. 2010). The defendant was sentenced to 180 months' imprisonment under the ACCA. One of the predicate convictions was a juvenile conviction for the criminal use of a prohibited weapon, pursuant to Ark. Code Ann. § 5-73-104, which criminalizes using, possessing, making, repairing, selling, or otherwise dealing in prohibited weapons. The panel could not determine from the record whether the defendant possessed a sawed-off rifle or some other implement such as a knife. The court overturned the district court's finding that the Arkansas conviction was a conviction that "otherwise involves conduct that presents a serious potential risk of physical injury to another," pursuant to 18 U.S.C. § 924(e)(2)(B)(ii). The panel concluded that the district court had misapplied the categorical approach because, while possession of a sawed-off rifle would be a violent felony, it did not follow that possession of every weapon prohibited by § 5-73-104 would qualify.

United States v. Heikes, 525 F.3d 662 (8th Cir. 2008). The court held that the Supreme Court's decision in *Begay v. United States*, 553 U.S. 137 (2008) entitled the defendant to plain error relief because his three DWI convictions no longer qualify as violent felonies under the Armed Career Criminal Act.

United States v. Howard, 413 F.3d 861 (8th Cir. 2005). Under §2K2.1(b)(5), the court has defined "in connection with" to mean that "a firearm (1) must have some purpose or effect with respect to and (2) must facilitate, or have the potential of facilitating another felony offense; its presence or involvement cannot be the result of accident or coincidence." The circuit court held that "in connection with" means the same in §4B1.4(b)(3)(A) as in §2K2.1(b)(5). Thus, stealing a firearm during a burglary is possession "in connection with" a crime of violence, for purposes of the Armed Career Criminal guideline.

§4B1.5 Repeat and Dangerous Sex Offender Against Minors

United States v. Leach, 491 F.3d 858 (8th Cir. 2007). For the purposes of determining whether a prior offense is a "conviction" under §4B1.5(a), the defendant need not have been sentenced for the prior offense at the time of the instant offense, there need have only been a "finding of guilt by a judge or jury" to qualify as a "conviction" and trigger the enhancement.

United States v. Cramer, 414 F.3d 983 (8th Cir. 2005). The defendant was convicted of transporting a minor with intent to engage in criminal sexual activity. The court imposed the enhancement under §4B1.5. The district court then upwardly departed from the sentencing guidelines range, based upon the fact that defendant's criminal history category did not adequately reflect the seriousness of the criminal history or likelihood of recidivism. The defendant challenged the upward departure on appeal. The circuit court held that the departure was not barred by imposition of the sentencing increase for being a repeat child sex offender under §4B1.5. Application of the two sentencing guidelines did not double count, since the defendant engaged in other sex offenses that did not result in conviction, and which were not considered in calculating his criminal history category, and the seriousness of the defendant's offenses and likelihood of recidivism were not taken into consideration in the sentencing increase for being a repeat child sex offender.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Foote, 705 F.3d 305 (8th Cir. 2013). The defendant was previously convicted of petty misdemeanor possession of marijuana in Minnesota, resulting in a second criminal history point that made him ineligible for safety valve relief under 18 U.S.C. § 3553(f) and USSG §5C1.2. On appeal, he argued that this prior conviction should not have resulted in a criminal history point, likening it to a minor traffic infraction. The Eighth Circuit disagreed. A petty misdemeanor possession of marijuana offense differs from a traffic offense in its "elements, culpability and likelihood of recurrence," and it is not similar to any enumerated exception to the requirements set forth in USSG §4A1.2(c)(2).

United States v. Jackson, 552 F.3d 908 (8th Cir. 2009). Joining a majority of the circuits, the court found "there is no reason to distinguish between actual, physical possession and constructive possession when defining what constitutes 'possession' for purposes of § 5C1.2" and held that "constructive possession is sufficient to preclude a defendant from receiving safety valve relief . . . ."

United States v. Delgado-Paz, 506 F.3d 652 (8th Cir. 2007). "While § 2D1.1(b)(1) may be applied based on a co-conspirator's reasonably foreseeable possession of a firearm in furtherance of jointly undertaken criminal activity, the circuits are unanimous in holding that possession of a weapon by a defendant's co-conspirator does not render the defendant ineligible for safety-valve relief unless the government shows that the defendant induced the co-conspirator's possession."

United States v. Alvarado-Rivera, 412 F.3d 942 (8th Cir. 2005). The defendant, not the government, bears the burden of proving to the court that she has "truthfully provided to the [g]overnment all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The determination of whether a defendant has satisfied the provisions of the safety valve statute are to be determined by the district court and reviewed for clear error by the appellate court.

United States v. Koons, 300 F.3d 985 (8th Cir. 2002). The district court did not err in determining that the defendant was not eligible to be sentenced under the safety valve provision of §5C1.2. The defendant pled guilty to possession of methamphetamine with intent to distribute within 1,000 feet of a public playground, in violation of 18 U.S.C. §§ 841(a) and 860(a). As a matter of law, defendants convicted under 18 U.S.C. § 860 are not entitled to a safety valve reduction.

United States v. Surratt, 172 F.3d 559 (8th Cir. 1999). The district court did not clearly err in finding that the defendant did not satisfy the fifth prong of the safety valve criteria because the defendant failed to provide all information regarding his own complicity in the charged drug offenses. The defendant's proffer included no information about his own guilt, and the court did not find this credible.

United States v. Tournier, 171 F.3d 645 (8th Cir. 1999). The district court did not clearly err in finding that defendant qualified for safety valve relief, even though the defendant was uncooperative with the government until just before the sentencing hearing. Under 18 U.S.C. §3553(f)(5), the defendant must truthfully provide to the government all information and evidence the defendant has concerning the offense "not later than the time of the sentencing hearing." Unlike the 3-level reduction for acceptance of responsibility, safety valve relief is "even available to defendants who put the government to the expense and burden of a trial."

Part D Supervised Release

§5D1.2 Term of Supervised Release

United States v. Bongiorno, 139 F.3d 640 (8th Cir.1998). The imposition of a six-year term of supervised release following the defendant's drug conviction was not plainly erroneous. Although it exceeds the three-year supervised release maximum for a Class C felony found in 18 U.S.C. § 3583(b)(2), the term was imposed pursuant to 21 U.S.C. § 841(b)(1)(C), which required a minimum three-year term for the defendant. The supervised release terms of the Anti-Drug Abuse Act of 1986 override those in section 3583.

§5D1.3 Conditions of Supervised Release

United States v. Fonder, 719 F.3d 960 (8th Cir. 2013). The defendant pled guilty to receiving and distributing child pornography. As part of his sentence, the district court imposed a special condition of supervised release, prohibiting the defendant form possessing or viewing "any material that is sexually stimulating or sexually oriented." The defendant appealed, arguing that the condition was unconstitutionally overbroad and vague. The Eighth Circuit held that the district court did not abuse its discretion by including the special condition, because the

defendant had accessed child pornography for approximately seven years and possessed tens of thousands of images. Thus, the "restriction is obviously relevant to [the defendant's] admitted child pornography addiction." *See also United States v. Hobbs*, 710 F.3d 850 (8th Cir. 2013) (upholding identical special condition where the defendant had over 20,000 images and had accessed child pornography for over seven years).

United States v. Curry, 627 F.3d 312 (8th Cir. 2010), *vacated on other grounds*, 132 S. Ct. 1533 (2012). Conditions limiting defendant's access to a computer and the internet were improper because there was no record of prior computer or internet use. Likewise, a prohibition against possession of pornography was struck because the court failed to make individualized findings.

United States v. Kelly, 625 F.3d 516 (8th Cir. 2010). During defendant's sentencing for felon-in-possession of a firearm, the district court reversibly erred when imposing a special condition of his supervised release barring him from possessing any material which "contains nudity or that depicts or alludes to sexual activity or depicts sexual [sic] arousing material." The defendant appealed on two grounds: (1) the condition was not reasonably related to the section 3553(a) sentencing factors; and (2) the condition was constitutionally overbroad. On appeal, the court agreed with both arguments.

United States v. Carlson, 406 F.3d 529 (8th Cir. 2005). The district court did not err when it applied a special condition of supervised release preventing the defendant from working in the medical field during the term of supervision. The condition was proper because it related directly to the defendant's offense of fraudulently obtaining prescription pain medicine through his position as a physician's assistant.

United States v. Cooper, 171 F.3d 582 (8th Cir. 1999). The district court imposed a special condition prohibiting the defendant "from employment as a truck driver if it involves absence from Cedar Rapids, [Iowa], for more than 24 hours." Although a court has broad discretion to impose special conditions of supervised release, the conditions must be reasonably related to the defendant's offense and not overly burdensome. The defendant had been convicted of unlawfully transporting explosives and storing them in a locker. The occupational restriction bore no relationship to the offense, and therefore, imposing the condition was an abuse of discretion.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Vanhorn, 399 F.3d 884 (8th Cir. 2005). The district court did not abuse its discretion when it denied the defendant's motion for adjustment of his schedule of restitution payments because of his diagnosis of HIV. The court held that an HIV diagnosis alone does not immediately change one's economic circumstances warranting an adjustment.

§5E1.2 Fines for Individual Defendants

United States v. Kay, 717 F.3d 659 (8th Cir. 2013). The district court erred in imposing a $500,000 fine, where the court had adopted the factual findings of the PSR stating that the defendant did not have the ability to pay, and the government offered only speculation regarding the defendant's history of concealing assets to support its request for a fine.

United States v. Koestner, 628 F.3d 978 (8th Cir. 2010). An above guideline fine of $100,000 ($70,000 above advisory guideline range) was not substantively unreasonable when defendant was a millionaire and fine was within statutory limits.

United States v. Alston, 626 F.3d 397 (8th Cir. 2010). The district court imposed a life sentence and $5,000 fine on the defendant after the jury convicted him of crack cocaine distribution. Terms of the fine required the defendant to pay the greater of $25 per quarter, or ten percent of his quarterly income. On appeal, the defendant claimed that the district court had not complied with §5E1.2(d)(3), which requires a court to consider, among other things, "the burden that the fine places on the defendant and his dependents relative to alternative punishments." On plain error review, the court concluded that the defendant failed to carry his burden to demonstrate that the district court would have levied a more favorable sentence absent the alleged error. The court also noted that the imposed payment schedule would allow the defendant to dedicate 90% of his income to satisfy his obligations to his dependents.

United States v. Allmon, 500 F.3d 800 (8th Cir. 2007). When a defendant refuses to provide a financial report or otherwise cooperate with the pre-sentence investigation, it is not plain error for the sentencing judge to impose a fine, and it is the defendant's burden to establish that he cannot pay the fine.

United States v. Hines, 88 F.3d 661 (8th Cir. 1996). The district court erred in imposing a fine of approximately $300,000 based on the fact that the defendant was to receive $1,550,000 in personal injury payments over the next 35 years. Enforcement of the fine left the defendant's new wife and stepson with no financial support during his incarceration, and the court overlooked his legal obligation to take care of them.

§5E1.4 Forfeiture

United States v. Hull, 606 F.3d 524 (8th Cir. 2010). After the defendant pled guilty to distributing child pornography, the district court ordered that he forfeit 19 acres of realty pursuant to 18 U.S.C. § 2253(a)(3), which states that a person convicted of a § 2252 child pornography offense shall forfeit all property "used or intended to be used to commit or to promote the commission of such offense." As a matter of first impression, the circuit court affirmed the forfeiture in its entirety and rejected the argument that, while the house that the defendant built on the acreage may have been used to commit the offense, the remaining acreage had not. Reviewing similar forfeiture statutes (21 U.S.C. § 853(a) and 18 U.S.C. § 982(a)(1)) and their case law, the court reasoned that "the natural source for defining 'property' subject to forfeiture is the instrument creating the defendant's interest in the property." Here, because the defendant purchased his acreage in one land contract, the district court had no authority to subdivide the land and thus had not erred when treating the property as a single unit of property subject to forfeiture.

United States v. Bieri, 68 F.3d 232 (8th Cir. 1995). The circuit court held that forfeiture of the defendants' entire farm was required by 21 U.S.C. § 853(a)(2), and the forfeiture was not an excessive fine in violation of the Eighth Amendment. To determine whether property is forfeitable under 21 U.S.C. § 853(a)(2), the district court's only inquiry is whether the defendant used the property "in any manner or part" to commit or to facilitate a drug trafficking offense. If the property was used for a drug trafficking offense, the forfeiture is mandatory, not discretionary. The circuit court examined the enumerated factors and concluded that the defendants' culpability far outweighed the intangible value of the property, and that the adverse effect of forfeiture on the defendants' children did not render the forfeiture unconstitutionally excessive. The circuit court thus ruled that the district court's decision not to forfeit the farm was not justified by the district court's findings of fact or by the Eighth Amendment, and reversed the order of the district court.

Part G Implementing the Total Sentence of Imprisonment

§5G1.1 Sentencing on a Single Count of Conviction

United States v. Vong, 171 F.3d 648 (8th Cir. 1999). The court did not err in departing from a sentencing range that exceeded the statutory maximum sentence. The sentencing range was 70-87 months, but the statutory maximum for one count was 60 months. The court granted a downward departure under §5K1.1 and sentenced the defendant to 30 months. The defendant argued that the court should have reduced the guideline sentence to 60 months before departing downward. Under §5G1.1 the statutory maximum becomes the guideline sentence when the guideline range is greater than the statutory maximum. The circuit court held that the sentence did not violate §5G1.1 because the sentence imposed was less than the statutory maximum of 60 months. *But see United States v. Diaz*, 546 F.3d 566 (8th Cir. 2008) (holding that, in a case in which the guideline range was lower than the mandatory minimum term of imprisonment, the district court properly determined that the starting-point for a substantial assistance departure was the mandatory minimum sentence).

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Rutherford, 599 F.3d 817 (8th Cir. 2010). The court held that §5G1.2 does not limit the district court's decision to sentence consecutively when the total punishment is less than the statutory maximum.

United States v. Lee, 502 F.3d 780 (8th Cir. 2007). While a court may impose consecutive sentences, it must "adequately explain" its reasoning and its consideration of the factors listed in Application Note 2(B) to §5G1.2.

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

United States v. McDonald, 521 F.3d 975 (8th Cir. 2008). The district court did not err by ordering the defendant's sentence to be served consecutively to his other undischarged terms of imprisonment. The court noted that a district court must "consider[] the factors set forth in 18

U.S.C. § 3553(a) to determine whether to impose a consecutive or concurrent sentence," and that the district court has "'wide discretion'" under §5G1.3(c) to order a consecutive sentence.

United States v. Meyers, 401 F.3d 959 (8th Cir. 2005). Where a defendant received a 2-level enhancement for the use of a stun gun in an abduction offense, his state conviction for threatening a sheriff's deputy with a firearm was not related to the instant offense and was thus not the type of situation for which the guidelines recommend a concurrent sentence.

United States v. Burch, 406 F.3d 1027 (8th Cir. 2005). A district court's decision whether to apply §5G1.3(b), giving credit for an undischarged term of imprisonment, turns upon the fact-based inquiry into whether the offenses in question are related. Such decisions are reviewed for clear error.

United States v. White, 354 F.3d 841 (8th Cir. 2004). The defendant was convicted of being a felon in possession of a firearm. On appeal, the defendant requested that his case be remanded to the district court, claiming that the district court did not recognize its authority to depart under §5G1.3 to account for time served on a discharged sentence. Finding that Application Note 7 to §5G1.3 does allow for such a departure where the current and prior offense involved the same conduct, the court remanded for consideration of whether a departure was appropriate, since the record reflected that the district court had thought it lacked the authority to depart.

United States v. Terry, 305 F.3d 818 (8th Cir. 2002). The district court ordered the defendant's federal sentences to run consecutively to his undischarged state sentences. The defendant claimed on appeal that §5G1.3(b) required the district court to order the federal sentences to run concurrently to the undischarged state sentences because the criminal conduct giving rise to the undischarged state sentences was used to determine the appropriate offense level for the federal sentences. On appeal, the court noted that §5G1.3(b) does mandate that a federal sentence run concurrently to an undischarged state sentence if the offense giving rise to the state conviction was fully taken into account in the determination of the offense level for the federal conviction. In the defendant's case, however, the offenses that led to defendant's state convictions were not considered by the district court for sentencing purposes either as relevant conduct or when determining his criminal history category. Accordingly, the district court correctly determined that §5G1.3(b) was inapplicable.

United States v. Otto, 176 F.3d 416 (8th Cir. 1999). The defendant had requested a downward departure to take into account conduct that was part of the instant offense for which the defendant had already completed a state prison sentence. If the defendant had not completed his state prison sentence, under §5G1.3, the sentence for the federal offense would have run concurrently to the undischarged state sentence. At sentencing, the government argued that the Bureau of Prisons, at the direction of the court, would credit the defendant with time served for the Kansas offense. After sentencing, the government acknowledged that the Bureau of Prisons has no such authority. Because "[j]udges are presumed to know the law and to apply it in making their decisions," it is presumed that the court was not misled by the government. Moreover, the district court did not state that the defendant was entitled to credit for the state

sentence. Finally, it is not a denial of due process to give credit for unexpired sentences and not expired sentences.

United States v. Comstock, 154 F.3d 845 (8th Cir. 1998). It was plain error for the district court to apply the 1995 version of §5G1.3(c), rather than the 1993 version in effect at the time the defendant committed his offenses, when sentencing the defendant who was subject to state sentences for some of the same conduct. Under the 1993 version, the court would have sentenced the defendant as if he were being sentenced on his federal and state convictions at the same time under the guidelines. The court of appeals determined that, because the previous version required that the defendant's federal sentence be at least partially concurrent with his state sentences, sentencing him under the 1995 version meant he would serve more time, thereby constituting an *ex post facto* violation. The court vacated and remanded for resentencing.

United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998). The district court did not err in departing downward to give the defendant credit for time served on his expired state sentence which involved the same conduct underlying the offense for which he was being sentenced.

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Rimell, 21 F.3d 281 (8th Cir. 1994). The district court did not err in refusing to depart below the applicable guideline range based on the defendant's age. Section 5H1.1 permits downward departures only when the defendant is "elderly and infirm." There was no record evidence that the defendant was infirm. *See United States v. Robinson*, 516 F.3d 716 (8th Cir. 2008) (the district court properly "concluded that [the defendant], at sixty-one and with health conditions typical for that age and controllable with medications, was not so old and infirm that the prison system could not adequately care for him").

§5H1.4 Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

United States v. Coughlin, 500 F.3d 813 (8th Cir. 2007). The defendant's physical condition, and a physician's testimony that he must "avoid stress," is not sufficient grounds for departure when evidence also included that the Bureau of Prisons provides inmates with any medication or necessary medical care.

§5H1.6 Family Ties and Responsibilities (Policy Statement)

United States v. Underwood, 639 F.3d 1111 (8th Cir. 2011). After a three day evidentiary hearing, the district court denied the defendant's request for a downward departure based on family responsibilities (defendant's son suffered from muscular dystrophy); the court did not find the evidence entirely credible or compelling. The panel affirmed observing that it

will not review a court's denial of a downward departure motion unless the district court had an unconstitutional motive or believed it was without authority to depart.

United States v. Spero, 382 F.3d 803 (8th Cir. 2004). The district court's decision to downwardly depart based upon the defendant's family circumstances was upheld because the defendant's family circumstances qualified as exceptional and warranted granting him a downward departure. When one parent is critical to a child's well-being, as in this case, that qualifies as an exceptional circumstance justifying a downward departure.

§5H1.11 Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

United States v. Robinson, 516 F.3d 716 (8th Cir. 2008). The court held that the district court knew about the defendant's public and military service, and took these factors into account. It did not abuse its discretion in declining to depart downward.

Part K Departures

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Perez, 526 F.3d 1135 (8th Cir. 2008). The district court did not abuse its discretion in denying the defendant's motion to compel an evidentiary hearing regarding why the government did not make a substantial assistance motion. The circuit court stated that "[a] district court may review the government's refusal to make a substantial assistance motion under section 3553(e) or section 5K1.1, if such refusal (1) was prompted by an unconstitutional motive, such as the defendant's race or religion; or (2) was not rationally related to a legitimate government interest." The court noted that "[t]here is an intra-circuit split whether bad faith is an additional basis for compelling a motion for downward departure based on substantial assistance." *Compare United States v. Moeller*, 383 F.3d 710 (8th Cir. 2004) (bad faith provides no basis) *with United States v. Wolf*, 270 F.3d 1188 (8th Cir. 2001) (bad faith refusal may grant defendant relief) *and United States v. Kelly*, 18 F.3d 612 (8th Cir. 1994) (same).

United States v. McClure, 338 F.3d 847 (8th Cir. 2003). The defendant failed to show that the government's refusal to move for a downward departure for substantial assistance was based on an unconstitutional motive or bad faith. The district court did not abuse its discretion by denying the defendant's motion to compel. *See also United States v. Freemont*, 513 F.3d 884 (8th Cir. 2008) (holding that "the government's reason for not making the [substantial assistance] motion . . . fits within the permissible bounds of prosecutorial discretion and was a 'rational assessment of the cost and benefit that would flow from moving' because the decision was based on [the defendant's] overall assistance").

United States v. Anzalone, 148 F.3d 940, *vacated and reinstated by* 161 F.3d 1125 (8th Cir. 1998). The district court denied the defendant's motion to compel the government to move for a substantial assistance departure based on a plea agreement. The government based its refusal to file the motion on information that the defendant had recently possessed and used controlled substances. The court of appeals held that §5K1.1 and 18 U.S.C. § 3553(e) do not give prosecutors a general power to control the length of sentences; the prosecutor's discretion is

limited to the substantial assistance issue. Therefore, the government cannot base its §5K1.1 decision on factors other than the substantial assistance provided by the defendant. The government may advise the sentencing court if there are unrelated factors that in the government's view should preclude or severely restrict any downward departure relief. And, the district court may weigh such alleged conduct in exercising its departure discretion. Accordingly, the court remanded the case to the district court for further proceedings.

United States v. Stockdall, 45 F.3d 1257 (8th Cir. 1995). The district court did not err in finding that the government neither violated the defendants' plea agreements nor exceeded its authority under 18 U.S.C. § 3553(e) by limiting its substantial assistance motions to only one of the defendants' applicable mandatory minimum sentences. The circuit court held that the government was permitted to limit its substantial assistance motion because "the plain language of section 3553(e) authorizes the government to make a separate substantial assistance motion decision for each mandatory minimum sentence to which a defendant is subject." The court reversed, however, finding that the government may not limit its substantial assistance motions to only one of the defendants' applicable mandatory minimum sentences in order to reduce the district court's discretion to depart. Because the record contained evidence indicating that a desire to dictate the sentence might have been part of the government's motive in filing its substantial assistance motion, the court remanded the case for further proceedings.

§5K2.0 Grounds for Departure (Policy Statement)

In General

United States v. Timberlake, 679 F.3d 1008 (8th Cir. 2012). "Any procedural error in granting an upward departure is harmless when the district court makes it clear that the sentence is also based on an upward variance."

Upward Departure

United States v. Cole, 357 F.3d 780 (8th Cir. 2004), *vacated on other grounds*, 2005 U.S. App. LEXIS 13361 (8th Cir. Jul. 5, 2005). The defendant pled guilty to transmitting a threat in interstate commerce by making a bogus threat of an Anthrax attack on a school. At sentencing, the district court departed upward five levels based on the following four factors: (1) the disruption of governmental functions caused by the defendant's call – §5K2.7; (2) the significant danger to the public health and safety posed by defendant's call – §5K2.14; (3) the defendant's recidivistic tendencies; and (4) the timing of the offense. The defendant appealed the upward departure. The court stated that the district court's reliance on §5K2.7 was misplaced because the specific offense characteristics of §2A6.1 already provided for an increase in the base offense level if governmental functions are substantially disrupted. Because the district court did not increase the defendant's base offense level under this provision, it implicitly found the governmental functions of the school and mail delivery system were not disrupted to a substantial degree. Accordingly, the district court was presented with facts insufficient to warrant a departure under §5K2.7. Similarly, the facts appearing in the record did not satisfy a

departure based on §5K2.14 because the defendant's threat was empty and posed no danger to national security, public health, or safety. Because the court was unable to determine the weight, if any, the lower court had given to the timing of the offense when structuring the departure, the court remanded the case to the district court for resentencing.

United States v. Loud Hawk, 245 F.3d 667 (8th Cir. 2001). The court affirmed a 10-level upward departure based on extreme barbaric circumstances in the murder of defendant's parents.

United States v. Lewis, 235 F.3d 394 (8th Cir. 2000). The court affirmed an upward departure based on extreme psychological injury when an illegal alien was held captive and subject to abuse.

United States v. Moskal, 211 F.3d 1070 (8th Cir. 2000). The defendant, a partner at a prominent law firm, was convicted of embezzling large sums of money from the firm and its clients. Before sentencing, the district court notified all parties that it would consider an upward departure on identified factors. At sentencing, the district court departed upward based on five findings: (1) the embezzlement involved a large number of vulnerable victims; (2) the defendant manipulated these victims to gain their trust; and (3) the defendant employed a number of methods to defraud his victims; (4) the defendant's conduct damaged the law firm's goodwill and standing in the legal community; and (5) the defendant's conduct adversely impacted the legal profession and justice system. The Court found all five factors for departure to be permissible under the guidelines and found no abuse of discretion in the extent of the departure.

United States v. Merrival, 176 F.3d 1079 (8th Cir. 1999). The district court did not err in imposing a 12-level upward departure based on death and physical injury that resulted from a drunk driving incident. The court at sentencing mentioned four grounds for departure including (1) extensive involvement of alcohol; (2) two deaths; (3) three people seriously injured; and (4) "the defendant's prior criminal record consist[ing] solely of tribal arrests." In imposing the sentence, however, the court mentioned only death and injury. Although the district court "acted at the outermost limits of its discretionary authority," these two factors were sufficient to support the 70-month sentence imposed.

United States v. Hipenbecker, 115 F.3d 581 (8th Cir. 1997). The defendant embezzled while she was free on bond pending her federal sentencing. Based on her continued criminal conduct, the district court departed upward two levels under §5K2.0 and declined to grant the request for a 2-level reduction under §3E1.1. The defendant asserted that the district court impermissibly double counted. The circuit court reviewed the decision *de novo* and affirmed, finding that §5K2.0 and §3E1.1 concern conceptually separate notions relating to sentencing. Accordingly, joint application of these two sections was not impermissible double counting.

Downward Departure

United States v. Chapman, 356 F.3d 843 (8th Cir. 2004). Atypical post-offense rehabilitation could by itself be the basis for a departure under §5K2.0 and did not necessarily require the defendant to accept responsibility or commence rehabilitative efforts before his arrest.

United States v. Aguilar-Portillo, 334 F.3d 744 (8th Cir. 2003). The court reviewed the issue of the downward departure based on cultural assimilation *de novo*. The district court, relying on *United States v. Lipman*, 133 F.3d 726, 729-731 (9th Cir. 1998), granted the defendant a 1-level departure for "cultural assimilation" because the defendant had lived in the United States since 1987 and had children in the United States. The circuit court held that the departure was not appropriate because a "cultural assimilation" departure is "relevant to the character of a defendant . . . insofar as his culpability might be lessened if his motives were familial or cultural rather than economic." A downward departure for "cultural assimilation" has no role in sentences for drug crimes.

United States v. Heilmann, 235 F.3d 1146 (8th Cir. 2001). The defendant pled guilty to a charge of traveling interstate to promote and facilitate the commission of felony drug offenses. At sentencing, the district court relegated one of the defendant's criminal history points for trespassing to a "family feud," as suggested by the defendant's motion for downward departure and lowered defendant's criminal history to a category I. The court then imposed a sentence below the minimum of the applicable range for that criminal history category. On appeal, the government argued that the district court provided no factual basis for its downward departure. The court agreed that the lower court abused its discretion because the lack of a prior criminal history can never furnish the basis for a downward departure. The court remanded the case for resentencing. *See also United States v. McCart*, 377 F.3d 874 (8th Cir. 2004) (same).

United States v. Lopez-Salas, 266 F.3d 842 (8th Cir. 2001). The court held that deportable-alien status and the collateral consequences flowing from that status may serve as a basis for departure in an exceptional case. Because the defendants failed to distinguish their situations as unusual or atypical from other defendants who would be ineligible for the same benefits, the court reversed the departure. *Cf. United States v. Cardosa-Rodriguez*, 241 F.3d 613 (8th Cir. 2001) (holding that deportable-alien status cannot be considered as a basis for departure when the defendant was sentenced under §2L1.1, and stating that because deportable-alien status is an element of the offense, it alone cannot take the case outside the guideline's heartland).

United States v. Sheridan, 270 F.3d 669 (8th Cir. 2001). The defendant pled guilty to sexual abuse of a minor child more than four years younger than himself within an Indian reservation. The district court departed downward because the victim was apparently promiscuous, having given the defendant a sexually transmitted disease. The appellate court found that this was an impermissible ground because §2A3.2 already adequately takes into account a victim's willingness to engage in the act.

United States v. Allery, 175 F.3d 610 (8th Cir. 1999). The case was remanded for resentencing because the district court granted a downward departure based on both valid and invalid grounds. The valid ground for departure was based on the relatively minimal amount of

force used to commit abusive sexual contact which made the case atypical enough to warrant a downward departure. The district court erred, however, in concluding that the defendant's lack of criminal behavior before and after being convicted on the instant offense supported a departure based on "aberrant behavior." Simply obeying the law following a conviction does not take a case out of the heartland. Further, "aberrant behavior" must be a "spontaneous and seemingly thoughtless act," but here, the defendant's acts required planning.

United States v. DeShon, 183 F.3d 888 (8th Cir. 1999). The district court did not abuse its discretion in granting a downward departure based on post-offense rehabilitation and sufficiently explained the extent of the departure. During investigation of the offense, but before indictment, the defendant "made a decision to radically alter his lifestyle" and "renewed his life in church." Witnesses at the sentencing hearing, including victims of the defendant's crime, testified that the defendant frequently attended church services, participated in counseling, and admitted to the community his guilt and shame. In addition, a pretrial services officer testified that the defendant's efforts at rehabilitation were "extraordinary." The "concrete change of life," was "exceptional enough to be atypical of cases in which the acceptance of responsibility reduction is usually granted."

United States v. Woods, 159 F.3d 1132 (8th Cir. 1998). The district court did not abuse its discretion in granting a downward departure based on the nature of the defendant's money laundering offense and the defendant's charitable activities. The court found the defendant's underlying offense, bankruptcy fraud, fell outside the "heartland" of the typical money laundering offense. The circuit court determined that this finding was supported by the Commission's extensive study of the money laundering guidelines, statements made in a report of the House Judiciary Committee in rejecting proposed money laundering amendments, the Department of Justice report on charging practices, and the Commission's response to that report. The circuit court also affirmed the additional departure based on the defendant's charitable activity because the defendant's exceptional efforts to provide for two troubled young women and an elderly friend provided an appropriate basis for departure.

United States v. Weise, 89 F.3d 502 (8th Cir. 1996). The defendant, who lived on the Red Lake Reservation, was convicted of second-degree murder for stabbing an individual after a night of drinking. The district court departed downward based on the difficult reservation conditions, the defendant's consistent employment record, unique family ties and responsibilities, and because the conduct was a single act of aberrant behavior. The circuit court stated that a departure based on trying conditions on a reservation is not authorized unless the defendant demonstrates that he himself had struggled under difficult conditions. The court found that the record was inadequate to show how the defendant struggled, so it remanded for a "refined assessment" of the issue. The court reversed the departure based on aberrant behavior, stating that aberrant behavior is more than being out of character and contemplates an action that is "spontaneous and seemingly thoughtless." The defendant, unprovoked, went and got a knife from across the room to stab the victim; this conduct was not a single act of aberrant behavior.

§5K2.1 Death (Policy Statement)

United States v. Mousseau, 517 F.3d 1044 (8th Cir. 2008). The district court's finding that the victim died as a result of the defendant's actions was not clearly erroneous. According

to the circuit court, "[a]lthough [the victim] did not die until the day after [the defendant] provided her methamphetamine, [the victim's] physical distress began almost immediately after ingesting the drug. Given this close temporal proximity and the autopsy report indicating that the methamphetamine use was likely related to the medical condition that killed [the victim], the district court did not clearly err." The court also found that the district court did not err in departing under §5K2.1. Even though the defendant did not intend to harm the victim, the court found that it was "clear that her actions were very dangerous and that she disregarded a known risk by giving an unknown substance, suspected to be a narcotic, to a minor to ingest."

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998). An upward departure based on extreme conduct and injury was supported by evidence that the defendant's conduct was unusually cruel and degrading and the victim suffered extreme psychological injury.

§5K2.7 Disruption of Governmental Function (Policy Statement)

United States v. Archambault, 344 F.3d 732 (8th Cir. 2003). The defendant pled guilty to one count of arson. At sentencing, the district court upwardly departed under §5K2.7. On appeal, the defendant challenged the departure, arguing that a Native American Tribal District was not a "governmental entity" for purposes of §5K2.7. The court disagreed, holding that the Rock Creek District was a recognized governing authority of the Standing Rock Sioux Tribe–a sovereign entity under federal law. The court then held that the upward departure was justified because the facts showed that defendant's arson significantly interrupted a governmental function because the vans that the defendant destroyed or damaged were used to "deliver meals on wheels, to transport district youth to community events, and to provide transportation to community members for travel. . . . [T]he District Chairman testified the loss caused many of the [] members of the community to lose their source of transportation for three months."

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Wallace, 605 F.3d 477 (8th Cir. 2010). The court affirmed an upward departure well above the guidelines range for conduct that was considered "extreme." The circuit court agreed that the district court did not abuse its discretion by imposing a 240-month sentence because the defendant imprisoned and prostituted a mentally disabled young woman and committed such acts as inflicting injuries upon the victim with knives and cigarettes, forcing the victim to drink urine, and forcing the victim to perform acts of bestiality.

United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998). An upward departure sentence based on extreme conduct and injury was supported by the evidence. The defendant threatened the victim and a male co-worker with a sawed off shotgun and forced them to disrobe. The defendant unsuccessfully attempted to penetrate the victim and then repeatedly forced her to perform oral sex and penetrated her digitally and with his penis, left her lying naked on the floor, and threatened to return and kill her if she called the police.

§5K2.9 Criminal Purpose (Policy Statement)

United States v. Richart, 662 F.3d 1037 (8th Cir. 2011). Defendant pled guilty to making a false statement and conspiracy to make a false statement to cover up the murder of her niece in 1999. The district court did not err when it imposed an enhancement for role in the offense and varied or departed upward 114 months from the guideline range of 0-6 months. A split panel affirmed the procedural and substantive reasonableness of the 120-month sentence finding that the grisly facts supported the upward variance or departure (the defendant murdered her niece in 1999 and commanded everyone in the household mislead the authorities). The majority noted that the court referenced both §5K2.9 (Criminal Purpose (Policy Statement)) and the § 3553(a) factors in imposing the 120 month-sentence.

United States v. Martin, 195 F.3d 1018 (8th Cir. 1999). The defendant pled guilty to one count of being a felon in possession of a firearm. Because the defendant's prior conviction was based on stalking and harassment, and the conduct underlying the second conviction was very similar to the first, the district court departed upward under §5K2.9. On appeal, the defendant argued that the government failed to prove that he possessed the shotgun to facilitate or conceal the commission of another offense. The court disagreed, holding that the upward departure was appropriate even in a situation where the defendant was apprehended before the other offense was completed or attempted.

§5K2.11 Lesser Harms (Policy Statement)

United States v. Lewis, 249 F.3d 793 (8th Cir. 2001). The defendant pled guilty to one count of being a felon in possession of a firearm and one count of making a false statement in an attempt to obtain a firearm. The firearm in question was an heirloom, which the defendant inherited from his father. The defendant filed a motion for a §5K2.11 departure for lesser harms, claiming that his possession of the firearm and false statement on the ATF form were not the kinds of harms that Congress envisioned in enacting the laws proscribing those offenses. The district court denied the motion. On appeal, the defendant argued that the district court did not believe it had the authority to depart on the false statement count under §5K2.11. As a matter of first impression, the Court determined that the lesser harms rationale of §5K2.11 permits a sentencing court to depart for violations of the statute barring the making of a false statement in connection with the acquisition of a firearm.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Lighthall, 389 F.3d 791 (8th Cir. 2004). The defendant's diminished capacity, in the form of an obsessive-compulsive disorder that allegedly compelled him to gather child pornography over the internet even though he knew it was wrongful, and even though he had previously provided his online user names and passwords to police and knew that they were virtually certain to discover his continued activity, was a legally permissible basis for downward departure. The 12-month downward departure was not an abuse of discretion.

United States v. Woods, 364 F.3d 1000 (8th Cir. 2004). The district court denied a downward departure pursuant to §5K2.13 to a defendant who pled guilty to a bank robbery. The defendant was unarmed at the time of the robbery, but he eventually walked out of the bank with $19,800. The issue on appeal was the interpretation of the text of §5K2.13 which was substantially amended in 1998. The court remanded to permit the district court to determine if a

bank robbery committed by intimidation involved a "serious threat of violence," precluding a downward departure on basis of the defendant's diminished mental capacity under this section.

§5K2.21 Dismissed and Uncharged Conduct (Policy Statement)

United States v. Azure, 536 F.3d 922 (8th Cir. 2008). At sentencing, the district court relied upon a dismissed murder count when fashioning its sentence. The district court properly acknowledged that the government bore the burden to prove that the defendant committed the murder by a preponderance of the evidence. However, the district court stated that it was "unsure of the proper allocation of the burden of proof when considering the issue [of self-defense] at sentencing." On appeal, the court held that this was "significant procedural error," and remanded the case so that the district court re-hear the issue of self-defense, this time requiring the government to prove the absence of such defense. According to the court, "although the quantum of proof is less than the beyond-a-reasonable-doubt formulation used at trial, the burden of proof remains unchanged at sentencing: the government bears the burden."

CHAPTER SIX: *Sentencing Procedures, Plea Agreements, and Crime Victims' Rights*

Part B Plea Agreements

§6B1.2 Standards for Acceptance of Plea Agreements (Policy Statement)

United States v. Cottier, 358 F. App'x 752 (8th Cir. 2009). In a plea agreement, the government agreed to recommend a 2-level reduction under §3E1.1(a) for acceptance of responsibility but stated that it would recommend a sentence within the guideline range as determined by the court. The court denied the reduction and the government did not object. Although the government indicated it stood by its position with respect to the reduction, it noted that the court made the ultimate decision. On appeal, defendant argued the government breached the plea agreement by failing to object to the denial of the reduction and by arguing for a sentence in the upper end of the guideline range. The panel held that the government did not breach the plea agreement, which only required the government to recommend the reduction, finding that a "lack of enthusiasm does not breach the agreement."

Morris v. United States, 73 F.3d 216 (8th Cir. 1996). The defendant set her unfaithful husband's bed on fire on a military reservation, and pled guilty to assault with intent to do bodily injury. The plea agreement bound the government to take no position on a defense motion for a downward departure on the ground of aberrant behavior prompted by the husband's infidelity. At the sentencing, a clinical psychologist testified about domestic violence and spousal abuse. The government cross-examined the witness to try to narrow the source of domestic turbulence to the incident of marital infidelity. The defendant argued on appeal that the government violated the plea agreement by taking a position on the departure motion. In a case of first impression, the court addressed the boundaries of "taking a position" on departures from guideline sentences. Finding that control of cross-examination during a sentencing hearing "must be guided by specific facts and argument in each case," the court stated that there are no "black letter lists of permitted and not permitted questions" at a sentencing hearing. Thus, the

court refused to establish a black letter rule and held "where the witness began to shift the focus of the grounds for a downward departure from the agreed fact that marital infidelity had precipitated the offense, to a larger collection of grievances based upon spousal abuse, the prosecutor had the right to employ reasonable cross examination to bring the inquiry back to the agreed facts."

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Benton, 627 F.3d 1051 (8th Cir. 2010). District court did not err in finding that throwing stars were dangerous weapons as defined by state law.

United States v. Hartman, 57 F.3d 670 (8th Cir. 1995). The district court did not err in imposing an additional term of supervised release after a term of imprisonment following revocation of the defendant's initial term of supervised release. A revocation sentence imposed under 18 U.S.C. § 3583(e) may include imprisonment and supervised release. *See also United States v. Palmer*, 380 F.3d 395 (8th Cir. 2004) (*en banc*) (holding that the period of supervised release imposed upon revocation can exceed the initial term of supervised release).

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Walker, 513 F.3d 891 (8th Cir. 2008). The court held that it is not a violation of the "parsimony doctrine" of 18 U.S.C. § 3553(a) for the district court to impose an additional term of supervised release to follow the defendant's post-revocation term of imprisonment. *See also United States v. Defoor*, 535 F.3d 763 (8th Cir. 2008).

United States v. Cotton, 399 F.3d 913 (8th Cir. 2005). The district court did not err when it sentenced defendant to a sentence which exceeded the range recommended by §7B1.4. The guideline range is not binding on the court, and the court had four good reasons for the sentence: the defendant repeatedly violated the conditions of her release, she had received a substantial reduction of her original sentence, the nature of the violations put her at risk for serious criminal conduct, and she could best receive drug treatment within prison.

United States v. Edwards, 400 F.3d 591 (8th Cir. 2005). Even prior to the *Booker* decision, the federal sentencing guidelines associated with revocation of supervised release were advisory, and the district court did not err in consulting the guidelines when determining the defendant's sentence upon revocation of his supervised release.

United States v. Hendricks, 171 F.3d 1184 (8th Cir. 1999). The district court erred in sentencing a defendant who qualified for the safety valve to a period of supervised release that applied to the otherwise applicable mandatory minimum statute and exceeded the term required by the guidelines. When a defendant meets the criteria for the safety valve, the court must

sentence the defendant without regard to any statutory minimum, including the applicable term of supervised release.

United States v. Baker, 491 F.3d 421 (8th Cir. 2007). A sentencing judge's decision to exceed the suggested policy range is not considered a departure.

United States v. Kaniss, 150 F.3d 967 (8th Cir. 1998). The district court did not abuse its discretion when it sentenced the defendant to a longer prison term upon revocation of supervised release than that suggested by the guidelines. The defendant had repeatedly violated a condition of his release by using marijuana. His first sentence had been lenient, and he had failed to avail himself to substance abuse programs.

CHAPTER EIGHT: *Sentencing of Organizations*

Part C Fines

§8C3.3 Reduction of Fine Based on Inability to Pay

United States v. Patient Transfer Serv., Inc., 413 F.3d 734 (8th Cir. 2005). The sentencing court must make a specific finding on the record regarding the defendant's ability to pay the fine and its burden on the defendant. In the absence of such a finding, the sentence was vacated and the case remanded for resentencing.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32

United States v. Long Soldier, 431 F.3d 1120 (8th Cir. 2005). The court rejected the appellant's argument that Rule 32(h) entitled him to notice of the district court's intent to vary above the guidelines range because "notice pursuant to Rule 32(h) is not required when the adjustment to the sentence is effected by a variance, rather than by a departure." *See Irizarry v. United States*, 553 U.S. 708 (2008) (holding that Rule 32(h) does not apply to variances).

Rule 35(b)

United States v. Lewis, 673 F.3d 758 (8th Cir. 2011). The defendant's plea agreement guaranteed the defendant the right to be present in any proceeding related to his case. The district court erred when it allowed the Rule 35(b) hearing to go forward without the defendant present. The judgment was vacated and case remanded for a new Rule 35(b) hearing.

United States v. Williams, 590 F.3d 579 (8th Cir. 2009). The court is without jurisdiction to review Rule 35(b) reduced sentences for substantial assistance unless one of four criteria are met under 18 U.S.C. § 3742(a); the sentence was imposed in violation of law; the sentence was imposed using an incorrect application of the guidelines; the sentence is greater than the applicable guideline range; or the sentence is imposed for an offense without a sentencing guideline and is plainly unreasonable. Defendant here argued his Rule 35(b) sentence was

imposed in violation of law because he was denied an opportunity to be heard in response to the government's Rule 35(b) motion and because the reduction did not reflect defendant's substantial assistance. The court rejected the claim and noted it "has never held that a Rule 35(b) defendant has the right to an opportunity to be heard" and "[a]bsent an unconstitutional motive, the extent to which a district court . . . depart[s] downward is not subject to review." (internal quotations and citations omitted).

CONSTITUTIONAL CHALLENGES

Due Process

United States v. Villareal-Amarillas, 562 F.3d 892 (8th Cir. 2009), *See supra* Section I.B.

Eighth Amendment

United States v. Whiting, 528 F.3d 595 (8th Cir. 2008). The defendant's mandatory life sentence on a drug conspiracy count did not violate his Eighth Amendment right to be free from cruel and unusual punishment. The defendant pled guilty to conspiring to distribute and possess with the intent to distribute cocaine and 50 grams or more of cocaine base within 1,000 feet of a playground. He had previously been convicted of two felony drug offenses.

Ex Post Facto

United States v. Behler, 14 F.3d 1264 (8th Cir. 1994). The district court sentenced the defendant pursuant to the guidelines in effect at the time of sentencing instead of the version in effect at the time he committed the offense. The defendant argued that his sentence for methamphetamine distribution violated the *ex post facto* clause because the method used to determine the quantity of methamphetamine imposed harsher penalties than the method in effect at the time the defendant committed his offense. Under the 1987 version, the quantity of methamphetamine was determined by the weight of the entire mixture or substance containing the methamphetamine. Under the 1992 version, the quantity of methamphetamine was determined by either the actual weight of the drug contained in the mixture or substance or by the weight of the entire mixture or substance containing the methamphetamine. The guidelines then require that the court use the quantity that results in the higher offense level. The district court used the actual weight which produced a base offense level that was four levels higher than what would have been imposed under the 1987 version of the guidelines. On appeal, the court agreed that this was an *ex post facto* violation and remanded with instructions to resentence the defendant according to the guidelines in effect at the time he committed the offense. *See also United States v. Comstock*, 154 F.3d 845 (8th Cir. 1998) (holding that the district court's use of the guidelines in effect at sentencing, which resulted in a harsher sentence, constituted an *ex post facto* violation).

Challenges to Amendment 759 to §1B1.10

United States v. Harris, 688 F.3d 950 (8th Cir. 2012). Holding that Amendment 759 did not violate the Administrative Procedure Act, nor did it exceed the Commission's powers or violate the separation of powers doctrine. *See also United States v. Anderson*, 686 F.3d 585 (8th

Cir. 2012), *cert. denied*, 133 S. Ct. 1275 (2013) (holding that recent amendments fell within the Commission's statutory authority, that policy statements like §1B1.10 are constitutionally valid and do not violate the separation of powers doctrine).

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 3553(e)

United States v. Burns, 577 F.3d 887 (8th Cir. 2009) (en banc). The court reaffirmed its pre-*Gall* holding that "after reducing a sentence based on the factors set forth in 18 U.S.C. § 3553(e), a district court may not reduce the sentence further based on factors, other than assistance, set forth in 18 U.S.C. § 3553(a): 'Where a court has authority to sentence below a statutory minimum only by virtue of a government motion under § 3553(e), the reduction below the statutory minimum must be based exclusively on assistance-related considerations.'"

United States v. Christensen, 582 F.3d 860 (8th Cir. 2009). Defendant contended the court erred in determining the starting point for a downward departure from life under 18 U.S.C. § 3553(a) and §5K1.1. As "[t]he [g]uidelines do not prescribe a life sentence equivalent in months," the court did not err in "selecting 406-months – one month above the highest non-life sentence in the [g]uidelines table – as the starting point for the sixty percent departure, instead of considering the § 3553(a) factors in selecting a point between 360 and 470 months." The court previously affirmed the "use of a 470-month starting point, based upon life expectancy data in the Sentencing Commission's 2001 Sourcebook of Federal Sentencing Statistics," and found "the use of 405 months was not error." The court has "upheld the use of 360 months but noted 'that figure represents *no* incremental punishment from Level 42 to Level 43.' As these decisions illustrate, when the district court elects to apply a percentage reduction to an estimate of a life sentence in months – which is not the only permissible departure methodology – the critical question for purposes of our review is the substantive reasonableness of the resulting sentence."

18 U.S.C. § 3583

United States v. Engelhorn, 122 F.3d 508 (8th Cir. 1997). "[A]lthough the term of incarceration imposed upon a defendant convicted under the ACA [Assimilated Crimes Act, 18 U.S.C. § 13] may not exceed that provided by state substantive law, the total sentence imposed – consisting of a term of incarceration followed by a period of supervised release – may exceed the maximum term of incarceration provided for by state law." Under the South Dakota law assimilated in this case, a period of probation involving government supervision can follow a term of incarceration, and serves society's goal of rehabilitation. Thus, "the sentence imposed by the [federal] district court – a period of incarceration plus a term of supervised release – was [similar to] a punishment the defendant could have faced in a state court."

21 U.S.C. § 841

United States v. Foxx, 544 F.3d 943 (8th Cir. 2008). The court held that, despite the Commission's amendment of relevant conduct rules to exclude the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that

conduct, when determining drug quantity in the 18 U.S.C. § 841(b) context, reasonably foreseeable quantities can be included, even if those quantities were distributed before the defendant joined the conspiracy.