

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



**Prepared by  
the Office of General Counsel  
U.S. Sentencing Commission**

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

This document contains annotations to Eighth Circuit judicial opinions addressing some of the most commonly applied federal sentencing guidelines. The document was developed to help judges, lawyers and probation officers locate relevant authorities when applying the federal sentencing guidelines. It does not include all authorities needed to correctly apply the guidelines. Instead, it presents authorities that represent Eighth Circuit jurisprudence on selected guidelines. The document is not a substitute for reading and interpreting the actual guidelines manual; 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). “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. Bueno*, 443 F.3d 1017 (8th Cir. 2006). “After *Booker*, a sentencing judge must still determine the proper guidelines range and determine whether a traditional departure is appropriate under the guidelines. These considerations result in a guidelines sentence. Once this guidelines sentence is determined, the district court must then consider all of the factors enumerated in 18 U.S.C. § 3553(a) to determine whether to impose the sentence under the guidelines or a non-guidelines sentence.” (Internal citations omitted).

*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 checked box on the Statement of Reasons makes it appear the district court did not consider the guidelines at all, the transcript of the sentencing hearing reveals that the district court did consider 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 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. . . . As we will explain, this 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, 128 S. Ct. 586 (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*, 511 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, however, 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). The court held that in addition to determining the “fact of a prior conviction,” the 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. The court explained that the sentencing court could have gone above the guideline range before *Booker*. As a result, the court reasoned, 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 considerations and the variance analysis can be harmless error where the ultimate sentence is not unreasonable.

*United States v. Berni*, 439 F.3d 990 (8th Cir. 2006). The court rejected the government’s characterization of the defendant’s appeal as an impermissible challenge to the extent of the sentencing court’s discretionary downward departure under §5K1.1 and explained that “the fact that an advisory [g]uidelines determination involves a section 5K1.1 departure does not shield the overall sentence from our review for reasonableness.”

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

*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). The court recognized that fast-track programs create sentence disparity, but explained that the policymaking branches of government can determine that certain disparities are warranted. As a result, the court reasoned, courts need not avoid the disparity created by fast-track programs. Thus, the court determined that the defendant's sentence was not unreasonable on this basis.

##### **2. Co-defendants**

*United States v. Crumley*, 528 F.3d 1053 (8th Cir. 2008). The court stated that 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 Eighth Circuit 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**

*United States v. McMannus*, 496 F.3d 846 (8th Cir. 2007). The court held that a district court may not give weight to a defendant's post-sentencing rehabilitation when resentencing the defendant. A district court that does so, the Eighth Circuit held, relies on an irrelevant factor, and a sentence imposed in reliance on such a factor is unreasonable. *See also United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009) (evidence of "post-sentence rehabilitation is not relevant and will not be permitted at resentencing because the district court could not have considered that evidence at the time of the original sentencing.") (internal quotations omitted).

#### **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.’”

#### **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.), *cert. denied*, 128 S. Ct. 2493 (2008). The court explained its post-*Gall* procedure for reviewing sentences for reasonableness. The court stated that its 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.” *Quoting Gall v. United States*, 128 S. Ct. 586, 587 (2007). Then, the court must “consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” The court recognized that when the sentence is within the Guidelines range, it is “permitted, but not required, to apply a presumption of reasonableness.” According to the court, “[w]hen 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 also “urge[d] district courts to continue to engage in the three-step process of first ascertaining the applicable Guidelines range, then considering any permissible departures within the Guidelines’ structure, and finally, deciding whether a non-Guidelines sentence would be more appropriate under the circumstances pursuant to § 3553(a).”

*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) permitted the sentence to be reduced below the statutory minimum. The court held that section 3553(e) permitted a court to sentence below a mandatory minimum “only ‘so as to reflect a defendant’s substantial assistance.’” It also held that, because the *Booker* court had not held mandatory minimums unconstitutional and had not excised section 3553(e), “the remedial holding of *Booker* does not impact the pre-existing limitations embodied

in § 3553(e).” 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.”) *cert. denied*, 130 S. Ct. 765 (2009).

*United States v. Portillo*, 458 F.3d 828 (8th Cir. 2006). At sentencing, the district court varied from the guideline range because it “determined that some testimony regarding drug quantity was dubious.” On appeal, the Eighth Circuit held that “if credibility is necessary to calculate the advisory Guidelines range, the district court cannot consider credibility as part of its § 3553(a) analysis.”

*United States v. Haack*, 403 F.3d 997 (8th Cir. 2005). “A discretionary sentencing ruling . . . may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.”

#### **B. Procedural Reasonableness**

*United States v. Barker*, 556 F.3d 682 (8th Cir. 2009). The district court committed significant procedural error by using the wrong guideline manual at sentencing. As tax evasion is a continuing offense, the court erred in using the manual from when the original tax payment was due rather than the manual applicable to the last act of evasion. Rather than review the sentence for reasonableness, the case was remanded for resentencing.

*United States v. Kane*, 552 F.3d 748 (8th Cir. 2009). On remand from the Supreme Court following its decision in *Gall*, the Eighth Circuit again reversed the district court’s downward variance to 120 months in prison. The defendant in *Kane* was a mother who had “repeatedly restrained and compelled her nine-year-old daughter to submit to the sexual gratification of a pedophile in exchange for [the defendant’s] receipt of \$20. This sexual abuse occurred approximately twice a week for more than 200 molestations.” The court held that the sentence was not procedurally reasonable because: (1) the district court made several findings that were clearly erroneous; (2) the district court improperly considered the defendant’s post-sentencing rehabilitation; and (3) failed to adequately explain the chosen sentence and failed to support the degree of variance with sufficient justifications.

*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 Sentencing Guidelines are presumed reasonable here in the Eighth Circuit court of Appeals.” Judges are presumed to know the law and the court here merely indicated that the guidelines are presumed reasonable on appeal. But the district court committed *Gall* error when it stated 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. *See also United States v. Weston*, No. 09-1604, 2009 WL 4894274 (8th Cir. Dec. 21, 2009) (unpublished) (district court's statement that it intended to apply a guidelines range sentence "unless there's a reasonable ground to go above or below" was not error).

*United States v. Brandon*, 521 F.3d 1019 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 314 (2008). The court vacated the defendant's sentence, finding that the district court plainly erred by imposing a non-mandatory, concurrent life sentence on the defendant. The court did not calculate the guideline range or reference the § 3553(a) factors. Finding that allowing "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 resentencing.

*United States v. Greene*, 513 F.3d 904 (8th Cir. 2008). The Eighth Circuit held that the district court erroneously applied a presumption of reasonableness to the applicable guideline range. The court noted that the district court recognized that it had limited discretion under Eighth Circuit precedent at the time. "The [district] court made clear, however, if it had the opportunity it would have imposed a lower sentence based on *United States v. Booker*." Because the "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 Guidelines range," the court concluded that the error was not harmless and remanded for resentencing. *See also United States v. Huff*, 514 F.3d 818 (8th Cir. 2008) (same); *United States v. Aguilera*, 523 F.3d 876 (8th Cir. 2008) (remanding because the district court plainly erred by applying a presumption of reasonableness to the guideline sentence); *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. Robinson*, 516 F.3d 716 (8th Cir. 2008) (determining that the district court did not apply a presumption of reasonableness by stating that the defendant's case "was not 'special' enough to emerge from the 'primordial soup' of initial sentencing considerations represented by the Guidelines"); *United States v. Henson*, 550 F.3d 739 (8th Cir. 2008) (holding that the district court's presumption at sentencing that the guideline range was reasonable was harmless error, specifically because the district court stated that it would not do anything differently if it had not taken the presumption of reasonableness into account), *cert. denied*, 129 S. Ct. 2736 (2009).

*United States v. Desantiago-Esquivel*, 526 F.3d 398 (8th Cir. 2008). The defendant, an illegal alien, pleaded guilty to conspiring to distribute methamphetamine. The district court imposed a sentence of 36 months in prison 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 Eighth Circuit reversed and remanded, holding that the district court's procedure—imposing alternative sentences—constitutes a significant error that requires reversal.

*United States v. Guarino*, 517 F.3d 1067 (8th Cir.), *cert. denied*, 129 S. Ct. 233 (2008). The Eighth Circuit found that the district court committed procedural error by failing to “set forth enough reasons to satisfy the appellate court that it has considered the parties’ arguments and has an articulate basis for exercising its own discretionary authority.” In this case, the court did not make any reference to the § 3553(a) factors, resulting in plain error. Because the error did not affect the defendant’s substantial rights, however, the court affirmed the defendant’s sentence.

*United States v. Hill*, 513 F.3d 894 (8th Cir. 2008). The court held that the district court’s sentence of 84 months in prison, despite a guideline range of 33-41 months, ‘ was both 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. *See also United States v. Washington*, 515 F.3d 861 (8th Cir.), *cert. denied*, 128 S. Ct. 2493 (2008) (affirming the district court’s above-guideline sentence, despite the fact that the district court was unclear about whether it was departing or varying upward, but urging district courts to continue to engage in the three-step process).

*United States v. Leon-Alvarez*, 532 F.3d 815 (8th Cir. 2008). The court held that 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 Guidelines are correctly calculated should the district court decide whether to impose a sentence outside the range suggested by the Guidelines.”

*United States v. Phelps*, 536 F.3d 862 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 1390 (2009). The defendant argued that the district court relied on a presumption of reasonableness when it sentenced the defendant. Although the district court referred to the “presumed guideline provision,” the Eighth Circuit held that this was not enough to overcome the presumption given the district court—that the district court knew that *Rita* prohibited a presumption of reasonableness by sentencing courts.

*United States v. Shy*, 538 F.3d 933 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1689 (2009). The defendant received a sentence of three years of probation, a downward variance from a guideline range of 37-46 months in prison. The court held that the district court committed procedural error by failing to “adequately explain [the defendant’s] sentence with sufficient justifications for the downward variance.” The court found 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 “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. Kiderlen*, 569 F.3d 358, (8th Cir.), *cert. denied*, 130 S. Ct. 654 (2009). The Eighth Circuit rejected defendant's argument that the sentence was substantively unreasonable because it was "the product of congressional directions in the PROTECT Act . . . rather than the Sentencing Commission's application of empirical data and national experience." The Court stated:

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.), *cert. denied*, 130 S. Ct. 480 (2009). Defendant claimed the district court abused its discretion and imposed a substantively unreasonable sentence by considering and 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." (citing *United States v. Barron*, 557 F.3d 866, 871 (8th Cir. 2009)).

*United States v. Austad*, 519 F.3d 431 (8th Cir. 2008). The court held that, after the Supreme Court's decision in *Gall*, the defendant's argument that his sentence of 84 months (up from a guideline range of 36-46 months) must be justified by extraordinary circumstances is no longer valid. The court found that 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 the district court's upward variance from the guideline range of 15-21 months to a sentence of 51 months in prison, and stating that (1) 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 that (2) the district court's disagreement with the

guidelines was well within the court's discretion following the Supreme Court's decision in *Kimbrough v. United States*, 552 U.S. 85 (2007)).

*United States v. Bueno*, 549 F.3d 1176 (8th Cir. 2008). The court affirmed the district court's downward departure (based on §5H1.6) from a guideline range of 108-135 months to a sentence of 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. The court stated that:

*Gall* told us in unmistakably clear language that once it has been determined that the district court committed no significant procedural error in calculating the applicable Guidelines range, the appellate court's sole remaining role is to consider the substantive reasonableness of the sentence under an abuse-of-discretion standard, one that eliminates from the process of appellate review the appellate court's own view of what sentence would have been appropriate.

See also, e.g., *United States v. Lehmann*, 513 F.3d 805 (8th Cir. 2008). The court affirmed a below-guidelines sentence down to probation in a case in which 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 the Court's decision in *Gall v. United States*, 552 U.S. 38 (2007), the Eighth Circuit affirmed the district court's sentence of 30 months in prison where the guideline range was 57-71 months in prison. The court stated that *Gall* makes it quite clear "that the fact that [the appeals court] may have weighed some facts differently, . . . would not have imposed the same 30-month sentence . . . , 'is insufficient to justify reversal of the district court.'"

*United States v. Krutsinger*, 449 F.3d 827 (8th Cir. 2006). The court affirmed two below-guidelines sentences where the district court sought to avoid sentence disparity between co-conspirators and the co-conspirators committed the same crimes.

#### **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). The court held that 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. Pirani*, 406 F.3d 543 (8th Cir. 2005). The court held that when the appellants failed to preserve the question of whether the district court committed *Booker* error in construing the guidelines as mandatory, the court of appeals will review for plain error. The court further held that the appellant must demonstrate a reasonable probability that he would have received a more favorable sentence under an advisory sentencing scheme to show plain error; the prejudice inquiry focuses on what sentence would have been imposed absent the error.

*United States v. Rodriguez-Ceballos*, 407 F.3d 937 (8th Cir. 2005). The defendant satisfied his burden by establishing a reasonable probability that the district court would have imposed a more favorable sentence when he demonstrated that the district 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 Eighth Circuit declined deciding whether defendant had requisite prior crime of violence conviction for career offender status as 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.” 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). The court held that 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. Garcia*, 406 F.3d 527 (8th Cir. 2005). The court decided that the government did not meet its burden when the district court imposed a sentence at the bottom of the guidelines range and no evidence existed to suggest that the sentence would be the same under an advisory guidelines regime.

*United States v. Haidley*, 400 F.3d 642 (8th Cir. 2005). The court of appeals applied the harmless error standard because the appellant had challenged the constitutionality of the guidelines in the district court.

*United States v. Marcussen*, 403 F.3d 982 (8th Cir. 2005). The court found harmless error where the district court indicated that it would have imposed the same sentence if the guidelines were found to be unconstitutional.

*United States v. Mooney*, 425 F.3d 1093 (8th Cir. 2005) (*en banc*). “Only those arguments which particularly and unmistakably invoke the defendant’s constitutional rights are preserved as a *Booker* claim.”

*United States v. Turnbough*, 425 F.3d 1112 (8th Cir. 2005). “[G]ranteeing 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. Burling*, 420 F.3d 745 (8th Cir. 2005). The court held that although a *Booker* argument is a logical extension of an *Apprendi* argument, a waiver that addresses *Apprendi* does not waive a *Booker* argument if the plea agreement does not address the latter.

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

*United States v. Reeves*, 410 F.3d 1031 (8th Cir. 2005). The court held that *Booker* did not render the defendant’s plea involuntary or unintelligent.

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

*United States v. Rogers*, 423 F.3d 823 (8th Cir. 2005). The court decided that the defendant waived his *Blakely* argument by agreeing to have his sentence “determined and imposed pursuant to those [s]entencing [g]uidelines” and to have provisions increasing or decreasing his sentence “determined by the Court.”

## VII. Revocation

*United States v. Perkins*, 526 F.3d 1107 (8th Cir. 2008). The court held that the district court did not commit plain error when, at the revocation sentencing hearing, the district court stated that “the record speaks for itself.” The same court that imposed the defendant’s initial sentence presided over the revocation hearing, so the Eighth Circuit 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.’”

*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).”

## 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.

## IX. Crack Cases

*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 the district court sentenced him based on an erroneous belief that it was bound by congressional policies. The Eighth Circuit 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.”

*United States v. King*, 518 F.3d 571 (8th Cir. 2008). The Eighth Circuit held that, because the defendant had not raised the issue of the disparity created by the crack-cocaine ratio prior to his appeal, a remand to consider the applicability of *Kimbrough* is inappropriate. The

court noted that the defendant is free to move for a modification of his sentence based on Amendment 706 to the guidelines.

*United States v. Lee*, 521 F.3d 911 (8th Cir. 2008). The defendant was convicted of conspiracy to distribute and possess with intent to distribute cocaine base. Following its decision in *United States v. Kimbrough*, the Supreme Court vacated and remanded the Eighth Circuit's decision affirming the defendant's conviction. The defendant had addressed the issue of crack-cocaine disparity in the district court and on appeal. On remand, the Eighth Circuit held that it must remand the case to the district court to give the district court an opportunity to indicate whether it would have imposed the same sentence if it had known it had the discretion to deviate from the 100:1 crack-cocaine ratio. The Eighth Circuit stated that:

The statements made by the district court demonstrate that although it was very concerned about the crack/powder sentencing disparity, it did not feel that it could vary from the Guidelines on that basis in such a case where nothing "unusual, or different, or strange" brought it outside of the general heartland of cases. However, the Supreme Court in *Kimbrough* made clear that sentencing courts can consider the crack/powder disparity "even in a mine-run case." While the information before this panel is insufficient to demonstrate for certain that the district court would have varied outside of the Guidelines if it knew it could give weight to its concerns about the crack/powder disparity, it is clear that the district court may have done so. Thus, remand to the district court for resentencing is appropriate.

*United States v. Roberson*, 517 F.3d 990 (8th Cir. 2008). At sentencing, "[t]he district court ignored [the defendants'] arguments for lighter sentences based on the 100:1 disparity between crack and powder cocaine under the guidelines." The court made it clear that a court does not act unreasonably if it does not consider the crack/powder disparity. The court held, however, that "[w]hen a district court does not consider an argument because it is unaware of its power to do so, . . . a remand is appropriate. The court noted that the district court said nothing in response to the defendants' arguments. The court vacated the defendants' sentences and remanded to the district court "so that it may reconsider the sentences in light of *Kimbrough*." See also *United States v. Thomas*, 524 F.3d 855 (8th Cir. 2008) (vacating the defendant's sentence following a *Kimbrough* remand because the district court did not "specifically comment[] on the [defendant's] request for a downward variance" based on the crack-powder disparity, and because the court could not "tell from the sentencing record . . . whether the district court would have granted [the defendant's] request . . . if the district court had known it could do so"). Cf. *United States v. Boyce*, 564 F.3d 911 (8th Cir. 2009) ("Both Boyce and the government commented on the district court's discretion to consider this disparity, and we may presume the district court was aware of this policy guidance. The district court need not respond to every argument advanced by a defendant, and the extent of explanation required varies according to the circumstances of the case . . . . Less extensive explanation is necessary when a guideline sentence is imposed."), *cert. denied*, No. 09-7942, 2010 WL 58747 (U.S. Jan. 11, 2010).

## **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 in prison. The circuit court held that *Booker* did not restore a district court's authority to suspend terms of sentences, therefore, 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 gain access to three banks and 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. This does not mean that “whenever a defendant's total criminal conduct includes some act 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. 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), *cert. denied*, 129 S. Ct. 1658 (2009). The Eighth Circuit 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. Harvey*, 413 F.3d 850 (8th Cir. 2005). The court noted that when defendants act in "clear concert" to achieve a criminal result that both intend, both can be held responsible under relevant conduct principles of §1B1.3 for the loss attributable to the counterfeit check each passed individually.

*United States v. Anderson*, 243 F.3d 478 (8th Cir. 2001). The defendant was convicted of conspiring to distribute cocaine and cocaine base and received a sentence of 360 months. He appealed his sentence, arguing that the district court erred by including as relevant conduct three uncharged incidents of buying or selling drugs that occurred several years before the offense of conviction. The court found that the defendant had a long career of dealing cocaine, and that despite the temporal separation of the prior incidents, they were related to the charged conduct in their similarity and their regularity.

*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, “merely 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) (holding that use of acquitted conduct is proper when deciding whether to apply a cross reference).

*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 Eighth Circuit affirmed.

**§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 the 100:1 ration disparately impacted African Americans and this was not intended or considered by Congress or the Commission. On appeal, the Eighth Circuit 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 modification under 18 U.S.C. § 3852(c)(2), and the district court again imposed a sentence of 240 months. The Eighth Circuit held 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. Therefore, the district court lacked authority to impose a sentence below the amended guideline range.

*United States v. Clark*, 563 F.3d 771 (8th Cir.), *cert. denied*, 130 S. Ct. 282 (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) (modification proceedings under 18 U.S.C. § 3582(c)(2) are “not a do-over of an original sentencing proceeding” and “all 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.), *cert. denied*, 130 S. Ct. 813 (2009). The defendant appealed the district court’s denial of his 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’ imprisonment. While serving his sentence, Gamble was charged and convicted on a marijuana offense, to be served consecutively to the crack sentence. While Gamble discharged on his crack sentence in April 2006, he was still serving time on the marijuana conviction when he filed his motion for reduction of sentence. The Eighth Circuit 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.), *cert. denied*, 129 S. Ct. 2746 (2009). The court held the Supreme Court’s decision in *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.) *cert. denied*, 130 S. Ct. 318 (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 Eighth Circuit 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.) (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), *cert. denied*, 130 S.Ct. 738 (2009); *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 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 Eighth Circuit, stating that "[w]hen an amendment to the guidelines becomes retroactive during the appellate proceedings on a case, it may be remanded to the district court for determination of whether the amendment warrants a sentence reduction," remanded defendant's case for consideration on whether his sentence should be modified in light of the retroactive amendment. The court so held, 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. Consequently, when considering whether to reduce the defendant's sentence pursuant to an amendment to the guidelines, 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 § 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 then moved for a reduction of his sentence, arguing that he should have been sentenced under the November 1991 felon in possession provision, which would yield a sentence of 27 to 33 months. Upon resentencing, the district court sentenced the defendant to 108 months' imprisonment by utilizing



a later version of the guidelines with stiffer felon in possession penalties. 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 district court’s application of the 1991 version of the 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.

### **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*, No. 09-1420, 2010 WL 323351 (8th Cir. Jan. 29, 2010). The court upheld the district court’s imposition of a four-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. In this case, defendant had authority over the victim as her stepfather in residence, he took her 1,100 miles from home, and the victim was totally dependant 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), *cert. denied*, 129 S. Ct. 997 (2009). The court held that 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. The defendant appealed a four-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 alone cannot establish the use of force under §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.” The court distinguished *Sharpfish* from *Crow* (summarized below) because the defendant “weigh[ed] 235 to 240 and [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.

#### **§2A4.1**      Kidnapping, Abduction, Unlawful Restraint

*United States v. Coyle*, 309 F.3d 1071 (8th Cir. 2002). The defendant pled guilty to carjacking and kidnapping charges, arguing on appeal that the district court erred as a matter of law by enhancing counts I and II under §2A4.1(b)(3) for using a dangerous weapon because he merely brandished or displayed the knife. The court concluded that the defendant’s act of holding a knife against the mother’s leg to facilitate her cooperation with the carjacking and the defendant’s subsequent act of 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 four-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 one-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

*United States v. Humphreys*, 352 F.3d 1175 (8th Cir. 2003). The district court did not commit clear error in denying the defendant a four-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 Eighth Circuit 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.” 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. 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.

The Eighth Circuit 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 in the district court. 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 itself must involve mass-marketing in order for the enhancement under §2B1.1(b)(2)(A)(ii) to apply, and here defendant's only 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 one count of wire fraud based on fraudulent submission of 1,762 reimbursement claims for life insurance health examinations never performed. The insurance company investigated, and confirmed as fraudulent, 50 submissions. A testing laboratory involved in the claims confirmed 253 submissions as fraudulent, and the FBI confirmed as fraudulent 20 submissions before indictment and 100 submissions following defendant's guilty plea. Defendant argued she was responsible for only the 20 submissions on which the indictment was based. 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

established 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.), *cert. denied*, 129 S. Ct. 612 (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 four-level enhancement under §2B1.1(b)(1)(C) and the two-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 are appropriately included in loss calculations.

*United States v. Hartstein*, 500 F.3d 790 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 939 (2008). While the sentencing judge is free to make reasonable estimates as to loss, the government must prove loss amounts if the presentation of such evidence is not waived by the defendant. It is not the defendant's "burden to disprove the final loss amount." The government must also meet its burden of proof "regarding the defendant's intent as to any particular victim or group of victims" before it can be proved 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), *cert. denied*, 128 S. Ct. 343 (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 in this case that he was entitled to credit under §2B1.1, comment 3(e)(I),

for services he rendered to the victims in a fraudulent scheme where he solicited investors to buy ATM (automated teller) machines. While the defendant did provide some return to the victims, when money or other value 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), (noting, 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”).

*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 employer convicted of not withholding 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 declined to follow this reasoning regarding any fringe benefits paid as these items were not the taxes or benefit payments that were the subject of the fraud and the court reasoned that these benefits were paid in part to “entice [the victims] to accept cash checks and thus 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.

### **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 of the fraudulent loans went into default causing losses in excess of \$2 million. 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 the fact from lenders 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.” The scheme also “involved submitting numerous loan applications to lenders containing forged signatures, forged notary stamps, and falsified or altered tax returns, pay stubs, gift letters, bank statements, and bank notes.”

*United States v. Vega-Itrrino*, 565 F.3d 430 (8th Cir. 2009). Defendant objected to a two-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 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 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)(10)(B)(I))**

*United States v. Salem*, 587 F.3d 868 (8th Cir. 2009). The district court erroneously increased defendant’s base offense level by two levels by finding his offense involved the production of an unauthorized access device under §2B1.1(b)(10)(B)(I). Defendant placed a fraudulent bar code label reflecting a much lower price on expensive items. The Eighth Circuit 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.

#### **Financial Institution (§2B1.1(b)(14)(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)(14)(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. “Stated differently, the fact that a mechanism exists to potentially reimburse the financial institution in the event of loss does not necessarily preclude the applicability of the enhancement.” “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 base offense level was properly enhanced two levels under §2B3.1(b)(1) for robbing a “financial institution or a post office.” The circuit court rejected the defendant’s argument that the enhancement was unconstitutionally lacking a rational basis, holding that it “reflects both the seriousness of the offense and past practices.”

### **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 all 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, that she 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 followed by a three-year term of supervised release. On appeal, the defendant asserted that the district court erroneously imposed a five-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))**

*United States v. Lee*, 570 F.3d 979 (8th Cir. 2009). The district court did not err by assessing a two 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 being tied, bound, or locked up" which includes conduct in which "the defendant creates circumstances allowing 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." *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," two level enhancement properly applied. "Stevens' 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."), *cert. denied*, No. 09-7898, 2010 WL 58735 (U.S. Jan. 11, 2010).

*United States v. Spears*, 235 F.3d 1150 (8th Cir. 2001). The defendant was convicted of bank robbery, and his sentence was enhanced by four levels pursuant to §2B3.1(b)(4)(A) for the codefendant's abduction of the security guard during the course of the robbery. On appeal, the defendant argued against application of the enhancement because he did not agree to, plan for, or commit the abduction and was not present when it was committed. The court concluded that it was reasonably foreseeable to the defendant that the employee security guard would be forced to accompany the robbers to the place they planned to leave the truck and thus upheld application of the enhancement.

### **Cross Reference (§2B3.1(c))**

*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 district court sentenced the defendant 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." The defendant

argued that application of 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 of Representatives, the defendant received two \$5,000 checks from an individual the defendant had recommended to be a lobbyist for the construction industry. 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**

### **§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 Guidelines range . . . .” In affirming the sentence, the Eighth Circuit 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 on appeal was whether the government proved that the methamphetamine quantities the defendant admitted he helped manufacture were “actual” methamphetamine quantities, rather than mixture quantities. In the defendant’s objections to the presentence report, he denied “any involvement with the substance” and denied “that this mixture

could have made methamphetamine.” 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. No expert testified as to the typical purity of methamphetamine manufactured in these quantities, by this method, and in these conditions. 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, to calculate for sentencing purposes the quantity of the “actual” methamphetamine manufactured by the defendant, the district 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. Gonzalez-Rodriguez*, 239 F.3d 948 (8th Cir. 2001). The defendant was convicted of possession with intent to distribute methamphetamine and possession with intent to distribute methamphetamine within 1,000 feet of a school based on the quantity of methamphetamine recovered from the defendant’s bedroom and bathroom. On appeal, the defendant challenged the quantity of drugs attributed to him. Drug quantity determinations are reviewed for clear error. Where a sentencing judge presided over a trial, the court may rely on the evidence submitted at trial to make this determination. The court of appeals affirmed the sentence, finding that the lower court had conducted a careful assessment of the testimony at trial and determined that it was credible when arriving at its drug quantity determination.

*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 district 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 and was sentenced to 151 months' imprisonment. On appeal, the defendant argued that the district 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 record 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. Clarke*, 564 F.3d 949 (8th Cir.), *cert. denied*, 130 S.Ct. 651 (2009). Law enforcement officers seized a mason jar containing a biphasic liquid, consistent with one of the middle steps in the methamphetamine manufacturing process. The court held the total weight of the biphasic 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. Kuentler*, 325 F.3d 1015 (8th Cir. 2003) (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) (the court held 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), *cert. denied*, 128 S. Ct. 1097 (2008). 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 distinguished between this case involving attempted possession with intent to distribute and its previous decisions involving conspiracy to distribute, noting that in conspiracy to distribute cases, quantities for personal use are relevant. The court then 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 the opinion testimony of a DEA agent regarding the 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), *cert. denied*, 130 S. Ct. 237 (2009).

*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 was involved in a large scale marijuana growing and distribution scheme and was convicted of conspiracy to manufacture and distribute marijuana and aiding and abetting possession with intent to distribute marijuana. 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. The circuit court held that where the evidence demonstrates that "an offender was involved in the planting, cultivation, and harvesting of marijuana plants, the application of the plant count to drug weight conversion of §2D1.1(c) is appropriate."

## **Dangerous Weapon (§2D1.1(b))**

*United States v. Peroceski*, 520 F.3d 886 (8th Cir.), *cert. denied*, 129 S. Ct. 259 (2008). The district court did not err by applying a two-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 his 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."

*United States v. Harris*, 493 F.3d 928 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 1263 (2008). 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 two-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 appellate court found that the presence of these articles supported the conclusion that at least some of the defendant's 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 dangerous 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 two-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 two-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 conspiring to distribute methamphetamine and using a communications facility to facilitate the distribution of drugs. At the sentencing, the district court applied a two-level sentencing enhancement pursuant to §2D1.1(b)(1) for possessing a dangerous weapon in connection with the conspiracy. On appeal, the defendant challenged the firearm enhancement. At the time of the traffic stop during which the weapon was recovered, defendant possessed the key to room 108 of the Hawkeye Motel, where police discovered large quantities of methamphetamine. Consequently, at the time of the stop, defendant had constructive possession of both the drugs and the weapon. In addition, a canine search of the defendant's vehicle indicated that drugs had been stored there. Accordingly, the court affirmed application of the firearm enhancement.

*Brown v. United States*, 169 F.3d 531 (8th Cir. 1999). Two defendants appealed their sentences, challenging the application of the firearm enhancement. The court of appeals held that the district court did not err in enhancing the first defendant's offense level for possession of a dangerous weapon for firearms found in a clubhouse where police executed a search warrant. Although the defendant argued that the firearms were for club security and unrelated to the drug trafficking, the number, type, 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 supported application of the enhancement. 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 the defendant kept in his home 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 two-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. The 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)(11))**

*United States v. Barrera*, 562 F.3d 899 (8th Cir. 2009). Defendant appealed arguing *Booker* made the assessment of criminal history points advisory and the district court could use its discretion to reduce his criminal history score to meet the requirements of the safety valve for a sentence below the mandatory minimum. However, the court held that *Booker* did not give the district courts the 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) (not more than 1 criminal history point as determined under the guidelines).

*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 government 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. *See also United States v. Marshall*, 411 F.3d 891 (8th Cir. 2005) (stating that 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 to and from California. The court determined that the district court could properly find that the defendant’s involvement in other drug activity during the same time period as his drug sales was part of the same course of conduct or part of a common scheme.

### **§2D1.1 Application Note 12**

*United States v. Searcy*, 284 F.3d 938 (8th Cir. 2002). The defendant, a powder cocaine dealer, sold crack cocaine to a police informant after being asked repeatedly over a four-week period. At sentencing, the district court granted a downward departure based on a theory of sentencing entrapment. The government appealed. The court held that the test for sentencing



entrapment inquires into the predisposition of the defendant and considers the nature of the government's behavior only insofar as it provided inducement, and the defendant bears the burden of proving lack of predisposition. The evidence established that, although the defendant had never sold crack, he had been present while it was manufactured, used it, and distributed it as gifts. Moreover, transcripts of recorded conversations between the defendant and the informant contained no evidence of pressure or coercion from the informant. The Eighth Circuit thus held that the defendant was predisposed to sell crack and reversed the district court's factual finding to the contrary. *See also United States v. Torres*, 563 F.3d 731 (8th Cir. 2009) (the court rejected claim of sentencing entrapment or manipulation where 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 drug deeper into the distribution hierarchy, and to 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 and attempting to manufacture methamphetamine and endangering human life while doing so. The presentence report grouped the counts and determined the offense level on the basis of 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 three levels to the offense level established by the drug quantity table in §2D1.1. The defendant appealed. The circuit court held that the base offense level was correctly calculated under §2D1.10. The court reversed the sentence and remanded for resentencing, 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 [Deleted]**

**§2F1.1**      Fraud and Deceit<sup>1</sup>

*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.

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<sup>1</sup>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* App. C, Amendment 617.

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 when a defendant has concealed assets to perpetrate bankruptcy fraud, the intended loss 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 Eighth Circuit 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 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. The defendant argued that he did not intend any loss to the universities. The Eighth Circuit 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 was sufficient that the defendants knew of the safety risk they created in falsifying truck driver logs to conceal violations of regulations 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 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 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. In a case involving diversion of government program benefits, the loss is the value of the benefits diverted from the intended recipients or uses.

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

### **§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. Starr*, 533 F.3d 985 (8th Cir.) *cert. denied*, 129 S. Ct. 746 (2008). The defendant was convicted of sexual exploitation of a child, receipt of child pornography, and possession of child pornography, and the district court sentenced him to 720 months in prison. Among other things, the district court accepted the PSR recommendations that the court (1) apply the cross-reference for a defendant who caused the manufacture of child pornography; (2) apply as four-level enhancement because the child pornography involved sadistic or masochistic conduct; (3) apply a two-level enhancement for a vulnerable victim; and (4) apply a two-level enhancement for misrepresentation of identity. The court upheld the application of the cross-reference to §2G2.1 and all four enhancements. Specifically, the court found that (1) the evidence was sufficient to show that the defendant caused the production of child pornography; (2) self-penetration by a foreign object qualifies as violence, even where the victim is 17 and there is no evidence of pain or injury suffered by the victim; (3) the undisputed evidence that the defendant was aware of one of the victim’s problem with self-mutilation is enough to apply the vulnerable victim enhancement; and (4) there was plenty of evidence in the record showing that the defendant’s misrepresentation regarding his age “was instrumental in getting the victims to engage in sexually explicit conduct.”

#### **Distribution (§2G2.2(b)(3))**

*United States v. Clawson*, 392 F.3d 324 (8th Cir. 2004), *vacated on other grounds and replaced by* 408 F.3d 556 (8th Cir. 2005). The district court applied the five-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. Stulock*, 308 F.3d 922 (8th Cir. 2002). The circuit 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. *See also United States v. Belflower*, 390 F.3d 560 (8th Cir. 2004) (holding that the sentence imposed on the defendant convicted of transporting visual depictions of minors engaged in sexually explicit conduct, and possession of such depictions, was properly enhanced on basis of

the images' portrayal of sadistic or masochistic conduct or other depictions of violence where the images underlying the possession charge were sadistic or violent, and it was proper to use those images to enhance the sentence imposed in the trafficking offense).

### **Pattern of Activity (§2G2.2(b)(5))**

*United States v. Pharis*, 176 F.3d 434 (8th Cir. 1999). The district court properly found inapplicable the five-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. Evidence indicated that 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 computed the base offense level under §2H1.1(a)(4) as six. The government appealed, challenged the base offense level, arguing that the district court should have set the base level at ten for use of force during the offense. Although the Eighth Circuit 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 standard for construing "use of force" under §2H1.1(a)(3)(A), and remanded to the district court 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; in the instant appeal, the government challenged this decision. The Eighth Circuit concluded 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 on appeal that his conduct was not serious enough to warrant the eight-level enhancement. Agreeing with other circuits, the court found no “seriousness” requirement existed in §2J1.2(b)(1) beyond the fact of a violent threat. Accordingly, the court upheld application of the enhancement.

## **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. Williams*, 537 F.3d 969 (8th Cir. 2008). The district court applied the enhancement in §2K2.1(a)(2) to increase the defendant’s base offense level because it found that the defendant had committed two prior felonies that qualified as crimes of violence—auto theft and auto tampering. In light of the Supreme Court’s decision in *Begay*, the Eighth Circuit reversed its prior precedent, and 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.”

*United States v. Appleby*, 380 F.3d 365 (8th Cir. 2004). The base offense level for making a false written statement regarding the lawfulness of the sale in connection with the acquisition or attempted acquisition of a firearm would be 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 concluding 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 any evidence that he stored or used the guns in a manner that reflected collection purposes and where 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." Therefore, his sentence, imposed upon his conviction for possessing an unregistered firearm, was properly enhanced on the basis that the firearm possessed was a destructive device. The shotgun was not particularly suitable for sporting purposes.

*United States v. Lee*, 351 F.3d 350 (8th Cir. 2003). The two-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. Accordingly, 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 two-level increase because the firearm was stolen. Defendant objected to the increase, denying he stole the firearm and arguing that it was unclear whether the firearm was actually stolen or simply lost by Ellis at a restaurant. The Eighth Circuit 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 "conclude[d] that 'stolen' as used in §2K2.1(b)(4) includes all felonious or wrongful takings with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." The court then upheld the adjustment stating "whoever came into possession of Ellis's gun, whether in the bathroom of the Starlight Lounge or elsewhere, took the gun with the intent to deprive the owner of the rights and benefits of ownership, thereby stealing the gun within the meaning of §2K2.1(b)(4). Contrary to the childhood adage 'finders keepers, losers weepers,' retention of lost or mislaid property can be a wrongful taking when there are readily available means to ascertain and locate the rightful owner."

*United States v. Cole*, 525 F.3d 656 (8th Cir.), *cert. denied*, 129 S. Ct. 309 (2008). The defendant, who was convicted of failing to register a "sawed-off" shotgun, challenged the district court's application of a two-level enhancement for possessing a stolen firearm. She admitted that one of the firearms found when she was arrested was stolen, but she argued that the connection between the stolen handgun and the crime of possessing a stolen firearm was "too attenuated" for the enhancement to apply. The circuit court 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 the 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, that is, stealing the same firearm. On appeal, the defendant argued that he possessed the firearm as a consequence of stealing it, and therefore 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. Accordingly, the district court’s application of both enhancements did not amount to impermissible double-counting. *See also United States v. Kenney*, 283 F.3d 934 (8th Cir. 2002).

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

*United States v. Hill*, 583 F.3d 1075 (8th Cir. 2009). The district court did not err when it applied a four-level enhancement under §2K2.1(b)(6) for use of a firearm in connection with a felony offense (felony resisting arrest) and a six-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 squared his body to the officer and attempted to retrieve a gun from his waistband. Reaching for a gun creates a substantial risk of serious physical injury or death even though the defendant did not draw, point, or fire his 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 Eighth Circuit 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 must be applied 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.), *cert. denied*, 129 S. Ct. 589 (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 four-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 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. Amburn*, 412 F.3d 909 (8th Cir. 2005). It was reasonable for the district court to conclude that a gun found under the bed of the defendant, along with a spoon which tested positive for methamphetamine, in a residence where the defendant admitted he made, sold, and used methamphetamine over the last eleven years was possessed "in connection with" his methamphetamine activity.

*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 two-level specific-offense enhancement under §2K2.1(b)(4) because one of the two firearms was stolen, and a four-level specific-offense enhancement under §2K2.1(b)(5) because the firearms were used in connection with another felony offense. The defendant argued on appeal that the (b)(5) enhancement was not warranted in his case because the government did not demonstrate that the firearms at issue were used or possessed in connection with any other felony. The Eighth Circuit agreed. In the plea agreement, the government stipulated that it did "not have any evidence that the 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." There was nothing in the record to establish that the stolen property in the defendant's possession at the time of his arrest exceeded Missouri's statutory felony threshold, and therefore, the government failed to demonstrate that the defendant possessed the firearm in connection with another felony. The court reversed the imposition of the four-level enhancement under §2K2.1(b)(5), and remanded to the district court for resentencing.

*United States v. Scolaro*, 299 F.3d 956 (8th Cir. 2002). The defendant assaulted an acquaintance, tied the person up, repeatedly threatened to kill him, and placed him in a closet. Shortly thereafter, the defendant, with the help of others, broke into the victim's gun closet and stole at least 13 firearms. The district court applied the four-level enhancement under §2K2.1(b)(5), reasoning that the stolen firearms were possessed in connection with the assault. The circuit court affirmed the district court's interpretation of "in connection with," reasoning that the assault made possible 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 four-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). Imposition of a sentence for being a felon in possession of a firearm based on a change in the law that increased the defendant's sentence did not violate the *ex post facto* clause, even though two of the defendant's offenses were committed prior to the change in the law. Because the third offense was committed after the change in the law, the defendant had fair warning of the total penalty that the additional criminal conduct would entail, and the offenses were grouped together for sentencing.

## **Part L Offenses Involving Immigration, Naturalization, and Passports**

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

*United States v. Shan Wei Yu*, 484 F.3d 979 (8th Cir. 2007). The evidence at trial showed that the defendant was engaged 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 a total of at least 6,000 workers over the period alleged in the indictment. The court held it was not clearly erroneous for the sentencing judge to apply an upward departure based on the defendant transporting substantially more than 100 illegal aliens by assuming at least 77 of the remaining 6000 workers were illegal aliens.

*United States v. Flores-Flores*, 356 F.3d 861 (8th Cir. 2004). The defendant was hired to transport eleven illegal aliens from Arizona to Michigan. Eight of the aliens sat on the floor of the van. During the trip, the defendant asked one of the passengers to drive for him. The passenger fell asleep at the wheel, causing an accident, and two of the aliens seated on the van's floor died at the scene. At the sentencing, the district court increased the defendant's offense level by two under §2L1.1(b)(5) (providing for two-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) (providing for 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 Eighth Circuit stated that the death of the two passengers seated in an open area in the van's rear 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).

*United States v. Ortiz*, 242 F.3d 1078 (8th Cir. 2001). The district court did not err in applying an enhancement for intentionally or recklessly creating a substantial risk of death or serious bodily injury where defendant was carrying 23 illegal aliens in a van equipped with seatbelts for only 14.

## **§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 qualifies as a "drug trafficking offense" even though the California statute in question included acts that do not meet the sentencing guidelines' definition of "drug trafficking offense." The criminal information from the California conviction, to which the defendant pleaded guilty, set forth that the defendant did meet the elements of drug trafficking, and therefor the enhancement was properly based on the documents produced by the government regarding the California offense.

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

*United States v. Lopez-Zepeda*, 466 F.3d 651 (8th Cir. 2006). The circuit court held that a district court is permitted to 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) of the Sentencing Guidelines. *See also United States v. Medina-Valencia*, 538 F.3d 831 (8th Cir.) (holding that the defendant's prior conviction under Texas law for "indecent with a child" constituted a crime of violence under the categorical approach, and that the district court did not err by referring to the indictment and plea papers to determine whether the defendant admitted facts that fit the generic description of sexual abuse of a minor), *cert. denied*, 129 S. Ct. 749 (2009); *but see United States v. Reyes-Solano*, 543 F.3d 474 (8th Cir. 2008) (vacating and remanding for resentencing a case in which 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 determined that the defendant's prior conviction for "lewd and lascivious behavior" with respect to a 15-year-old child under California law amounted to a "crime of violence" that appropriately 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 criminal 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 purposes of 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 qualifies as an “aggravated felony.” The court stated that the definition of “aggravated felony” includes “an offense relating to . . . forgery.” 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 eight-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. Thus, there was no *ex post facto* violation.

*United States v. Tejada-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 1 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,” 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 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. Blevins*, 542 F.3d 1200 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1024 (2009). The Eighth Circuit affirmed the district court’s determination of tax loss under §2T1.1. The defendant urged the court to adopt the Second Circuit’s holding that the determination of tax loss under §2T1.1(c)(1) must take into account a taxpayer’s unclaimed deductions or losses. The

Eighth Circuit instead sided with the Seventh, Fourth, Fifth, and Tenth Circuits, holding that, in this case, the investors' offsetting capital losses cannot be taken into account in determining tax loss. The court, however, did not rule out the possibility that in some rare case, 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 two-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 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 court found that the child's vulnerability was of a degree not adequately taken into consideration by the Sentencing Commission, because as a young 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.

*United States v. Hernandez-Orozco*, 151 F.3d 866 (8th Cir. 1998). The district court did not err in enhancing the defendant's sentence for a vulnerable victim. The defendant was convicted of kidnaping his sister-in-law from a small village in Mexico and transporting her to

Nebraska. The victim was 15 years old on the day of the kidnaping, had never traveled more than a four-hour drive from her village, and did not speak English, which made her more vulnerable in the United States.

*United States v. McDermott*, 29 F.3d 404 (8th Cir. 1994). The district court did not err by enhancing the defendants' sentences for conspiracy to violate civil rights pursuant to §3A1.1. The trial evidence established that the victims were racially isolated and were thus particularly susceptible to threats of racial violence, their young ages made them particularly vulnerable, and one child was in a wheelchair.

### **§3A1.2**      Official Victim

*United States v. Hampton*, 346 F.3d 813 (8th Cir. 2003). The §3A1.2 (Official Victim) sentencing enhancement was not supported by the record where the officer was struck by the defendant's vehicle after the defendant lost control during a car chase. Section 3A1.2 does not apply to reckless behavior, but rather requires that the defendant's action be akin to aggravated assault, when the actual and intended victim was a law enforcement officer.

*United States v. Goolsby*, 209 F.3d 1079 (8th Cir. 2000). The defendant was convicted of conspiracy to distribute cocaine base 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 on the ground that 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 after the enhancement was removed.

### **§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. 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. Placensia*, 352 F.3d 1157 (8th Cir. 2003). The district court correctly applied a two-level enhancement for the defendant's aggravated role in the offense where the defendant recruited accomplices and directed their activities.

*United States v. Austin*, 255 F.3d 593 (8th Cir. 2001). The district court did not err in applying a two-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 two-level enhancement for the defendant's role.

*United States v. Womack*, 191 F.3d 879 (8th Cir. 1999). The district court enhanced the defendant's sentence upon a finding that the defendant was an organizer or leader of the conspiracy. The evidence established that five people were involved in the conspiracy, at least four of whom assisted the defendant in obtaining drugs from different sources. The defendant set the price for the cocaine base, tried to control and create territories for the sale of drugs in another city, and attempted to recruit new members into the conspiracy. This evidence supported the district court's finding that the defendant was a leader in the conspiracy.

### **§3B1.2**      Mitigating 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 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 two-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 Eighth Circuit 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. *See also United States v. Ramirez*, 181 F.3d 955 (8th Cir. 1999) (stating that because the government agreed to hold the defendant accountable only for the amount of drugs found in his car from the single episode of his arrest, the defendant was not substantially less culpable than any other defendant for that amount of drugs); *United States v. Carpenter*, 487 F.3d 623 (8th Cir. 2007) (“[T]his court has consistently rejected the argument that a distributor of controlled substances deserves a minor-role reduction simply because of the presence of a larger-scale upstream distributor.”).

*United States v. Yirkovsky*, 338 F.3d 936 (8th Cir. 2003). The district court erred in granting the defendant a four-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 two-level minor role reduction because the presentence report recommended it and the government did not object to it.

*United States v. Nambo-Barajas*, 338 F.3d 956 (8th Cir. 2003). The appellate court affirmed the district court's denial of a four-level minimal-role reduction to a defendant who was an integral part of the conspiracy because the defendant supplied the drugs for delivery.

*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 Eighth Circuit 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 triggered the enhancement



existed 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 two-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. Christmann*, 193 F.3d 1023 (8th Cir. 1999). The district court did not err in denying the defendant a reduction in his sentence for his minor role because although the defendant was less culpable than the actual robber, he was more culpable than a third participant.

*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).

*United States v. Casares-Cardenas*, 14 F.3d 1283 (8th Cir. 1994). The defendant was not entitled to role reduction where the defendant's role as transporter was integral in the advancement of the conspiracy.

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

#### **Abuse of Position of Trust**

*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 Eighth Circuit 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 \$2 million. 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-relation 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 appealed a two-level upward adjustment for abusing a position of private trust. The court noted that defendant sold many of his victims annuities offered by insurance companies and living or family trusts, transactions that acquainted him with their investable 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. Under these circumstances, the district 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. The Eighth Circuit remanded for resentencing, holding the abuse of trust enhancement only applies “where the defendant has abused discretionary authority entrusted to the defendant by the victim; arm’s length business relationships are not available for the application of this enhancement.” Because the victim of the defendant’s offense was the United States and the defendant was not in a position of trust *vis-à-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 two-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.

*United States v. Johns*, 15 F.3d 740 (8th Cir. 1994). The district court enhanced the defendant's sentence for abuse of a position of trust. The defendant practiced the spiritual traditions of the Ojibwa Indians and assumed the role of father and spiritual leader of his live-in girlfriend's daughter. For seven years, the defendant sexually abused the daughter, using his position as a spiritual leader to justify time alone with the victim, who was his primary assistant in performing ceremonies, and his role as a parent to justify his abusive behavior. The court of appeals concluded that the abuse of position of trust enhancement was proper based on these facts.

### **Use of Special Skill**

*United States v. Bush*, 252 F.3d 959 (8th Cir. 2001). The district court did not err in applying a two-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 district court determined that the defendant had used his special skills and experience as an accountant to effectuate the money laundering scheme, that he had prepared an amortization schedule, a loan agreement, and other loan-related financial documentation, and that he had used multiple bank accounts in order to carry out the scheme. The Eighth Circuit 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 instructed 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 two-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 Eighth Circuit held that §3B1.4 uses the term "use" to include "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.” (Internal citation omitted).

## **Part C Obstruction**

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

*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. Furthermore, defendant's claimed motivation of revenge, rather than of a desire to affect his case, is immaterial.

*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.”) *cert. denied*, 129 S. Ct. 997 (2009).

*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. The testimony of the co-conspirator corroborated with the co-conspirator’s changed demeanor and later method of transacting business.

*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 guidelines when assessing a two-level enhancement when the defendant failed to appear in court for jury selection when 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 two-level enhancement for obstruction of justice, where the initial hearing had been scheduled on short notice, the defendant had contacted her attorney prior to the hearing and informed him that she would not be able to make it, 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). The defendant, an investment advisor who embezzled his clients’ funds and provided them with fraudulent account statements over a period of 26 years, pled 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 Eighth Circuit stated that an obstruction adjustment was unavailable in the present circumstances because no official investigation relating to the

defendant's offenses was underway when he directed that the computer files be deleted. 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 Eighth Circuit 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 Eighth Circuit 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. *See also United States v. Martinez*, 234 F.3d 1047 (8th Cir. 2000) (holding that the district court did not err in applying the obstruction of justice enhancement where the defendant absconded from a halfway house prior to a bond-revocation hearing and failed to appear for the hearing).

*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 two-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 two-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. To apply the adjustment based on statements of the defendant, a district court "must review the evidence and

make independent findings necessary to establish a willful impediment to, or obstruction of, justice.” Accordingly, the court of appeals reversed and remanded.

*United States v. Honken*, 184 F.3d 961 (8th Cir. 1999). The district court determined that the defendant’s case was an “extraordinary” case justifying a downward adjustment for acceptance of responsibility as well as an adjustment for obstruction of justice. The district court concluded that because the defendant’s obstruction occurred prior to pleading guilty and he committed no further obstruction of justice between the plea and sentence, the case must be considered extraordinary. The appellate court held that whether a case is extraordinary must be determined based on the totality of the circumstances, “including the nature of the obstructive conduct and the degree of appellee’s acceptance of responsibility.” Here, the appellate court found the defendant’s acceptance of responsibility was minimal, and the defendant denied the conduct alleged to support the enhancement for obstruction of justice. What the appellate court found extraordinary about this case was the “extensive evidence gathered and presented concerning the defendant’s continuing efforts to obstruct justice,” including attempts to kill witnesses, to escape, and to conceal evidence. Accordingly, the appellate court reversed and remanded for resentencing.

*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.

*Hall v. United States*, 46 F.3d 855 (8th Cir. 1995). The presentence report stated that the defendant and his brother had confronted a potential witness in a bar and told him that if he testified, “they would get him” and “he would be beaten.” The defendant denied that this occurred. The district court failed to find whether the threat occurred but denied an adjustment for obstruction of justice because “recognizing reservation life in this context for what it is, . . . this type of barroom conversation should [not], when disputed, be elevated to something causing a potential additional 12 months of incarceration.” The government appealed, contending that the district court erred by failing to find whether a threat occurred. The circuit court agreed, noting that §3C1.1 does not limit the enhancement to particular factual contexts, such as the bar room setting, or make exceptions for social circumstances, such as the realities of reservation life. Accordingly, the circuit court remanded the case to the district court to determine whether the defendant threatened the witness, and if so, to apply the obstruction of justice enhancement.

*United States v. Casares-Cardenas*, 14 F.3d 1283 (8th Cir. 1994). The district court properly increased the offense level for obstruction of justice where the court found that the defendant perjured himself 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 their flashing lights in their car and pursued the defendant. The defendant raced down a highway, ran lights, and threw a scale from his car. This conduct established that the defendant recklessly created a substantial risk of death or serious injury while fleeing the police.

*United States v. Goolsby*, 209 F.3d 1079 (8th Cir. 2000). The district court applied an adjustment for reckless endangerment while fleeing a law enforcement officer. The defendant pushed his minor child in his sole care and custody 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 was 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. 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), *cert. denied*, 128 S. Ct. 1446 (2008). 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. In addition, the defendant’s pretrial conduct also was inconsistent with acceptance of responsibility or cooperation with the government. *See also United States v. Speck*, 992 F.2d 860, 863 (8th Cir. 1993) (district court erred in granting adjustment for acceptance of responsibility finding a “defendant who maintains innocence, blames others, and expresses regret only for the consequences of criminal conduct does not accept responsibility within the meaning of §3E1.1”); *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 two-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 one-level reduction pursuant to §3E1.1 but the defendant has honored the agreement, the defendant is entitled to resentencing.

*United States v. Patient Transfer Service, 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 two-level downward adjustment for acceptance of responsibility, instead of the three-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 two-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 later 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. At sentencing, the defendant requested an adjustment for his acceptance of responsibility, but the district court

denied the request. Even though the defendant pled guilty, he failed to complete a court-ordered alcohol treatment program. The district court reasoned that the defendant had not yet appreciated the gravity of his criminal conduct. The circuit court held that this determination was not clearly erroneous.

*United States v. Martinez*, 234 F.3d 1047 (8th Cir. 2000). The district court did not err in denying a reduction for acceptance of responsibility, in light of the defendant's presentence misbehavior. The defendant failed alcohol and drug tests while under court-ordered supervision at a halfway house, absconded from the halfway house prior to bond-revocation hearing, and failed to appear for the hearing.

*United States v. Hipenbecker*, 115 F.3d 581 (8th Cir. 1997). The defendant committed embezzlement while she was free on bond pending her federal sentencing. Based on her continued criminal conduct, the district court declined to grant the request for a two-level reduction under §3E1.1. Evidence of acceptance of responsibility may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility and further criminal conduct.

*United States v. Barris*, 46 F.3d 33 (8th Cir. 1995). The defendant raised an insanity defense at his trial for threatening to kill the President. The insanity defense was rejected by the jury. At sentencing, the defendant requested a two-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. The Eighth Circuit 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. Spikes*, 543 F.3d 1021 (8th Cir. 2008). The Eighth Circuit held that 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. After pleading guilty but before sentencing, he filed motions in state court seeking to modify his state

sentences. Over the government's objection, the district court calculated the defendant's criminal history based on the modified state sentences and found the defendant eligible for the safety valve. The government appealed. The circuit court concluded that, as a matter of federal law, the defendant's step of modifying his sentences after they were served for reasons unrelated to his innocence or errors of law was not a valid basis for not counting the sentences for criminal history purposes. Thus, the court concluded that 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 appellate court considered that the application note to §4A1.1(d) stated 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 pursuant to §4A1.1(c) based upon the defendant's Minnesota conviction for obstructing the legal process. The state court "stayed" the imposition of the sentence for one year, and then dismissed the case. The appellate court reasoned that the "real issue is not whether Johnson's stayed sentence is a 'prior sentence,' but rather whether or not it is a 'countable' sentence under the guidelines." The appellate court held that the prior sentence was countable only if it was one of "probation" for at least one year. 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. 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 require that the conduct be considered 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 is still found to be 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 from public access did not constitute expunction for the purposes of §4A1.2(j), and the district court properly counted the prior conviction in determining defendant’s criminal history category. The defendant’s Iowa 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 exempted from public access 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 the decision in *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 where the defendant did not testify at the sentencing hearing.

*United States v. Lincoln*, 408 F.3d 522 (8th Cir. 2005). The district court did not err by including a conviction that was “expunged” from the defendant’s record per Iowa law since the offense was not expunged “due to constitutional invalidity, innocence, or mistake of law” as required by the guidelines to be considered expunged for criminal history purposes.

*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 possessing crack and powder cocaine with intent to distribute. 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 his sentence, asserting that the two 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 with the defendant and held that §4A1.2 includes the additional word “single,” indicating that it should be construed narrowly. Furthermore, 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 Federal Rule of Crim. Proc. 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).<sup>2</sup>

*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 district court should have considered two prior convictions for possession of methamphetamine as relevant conduct to the charged conspiracy rather than in her criminal history calculation. The court held that a prior conviction is not relevant conduct when it is severable and distinct from the charged offense. After examining the facts underlying the prior conviction, the court concluded that the district court properly considered the prior convictions under §4A1.2 because the prior convictions took place before the charged conspiracy; were not in preparation or furtherance of the charged conspiracy; and were not linked by a common victim or plan.

*United States v. Holland*, 195 F.3d 415 (8th Cir. 1999). The defendant pled guilty to possession with intent to distribute cocaine and crack cocaine. He was sentenced under the career offender guideline based on two prior controlled substance convictions in state court. The defendant objected to the use of one of the prior convictions because the offense was committed while 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.

*United States v. Lloyd*, 43 F.3d 1183 (8th Cir. 1994). The defendant alleged that the district court erred in assessing one criminal history point based on his prior Illinois state misdemeanor conviction for which he received a sentence of “conditional discharge” with “18 months inactive supervision” for the offense. The appellate court held that the lower court properly assessed the criminal history point because a sentence to “conditional probation” is the functional equivalent of unsupervised probation.

*United States v. Porter*, 14 F.3d 18 (8th Cir. 1994). The district court properly included an uncounseled misdemeanor conviction in the calculation of the defendant’s criminal history because the record supported a conclusion that the defendant knowingly and voluntarily waived his right to counsel.

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<sup>2</sup>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).

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

*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 district court sentenced the defendant to a total term of 180 months' imprisonment. The district court's sentence was based on an upward departure from criminal history category I to category VI. The district court stated that it was taking into account the defendant's "past long and detailed history of violence, including the use of dangerous weapons, knives, forks, and other things, biting people." The Eighth Circuit held that the district court abused its discretion, and remanded. The court stated that the district court erred by not attempting "to assign hypothetical criminal history points to the conduct that did not result in convictions," and by not discussing "intermediary categories II, III, IV, or V before deciding on category VI." In this case, the court held, where the defendant only had one prior relatively 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), *cert. denied*, 128 S. Ct. 928 (2008). 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, concluding that the defendant's criminal acts significantly disrupted a Rock Creek governmental function and that the defendant's criminal history category significantly under-represented his past criminal conduct. On appeal, the Eighth Circuit 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. One of the defendant's arson counts was dismissed. Moreover, during a presentence investigation interview, the defendant admitted to—among other things—selling marijuana, abusing inhalants, alcohol, amphetamines, and marijuana, and stealing approximately \$1,000 per week. Accordingly, the district court's sentence was affirmed.

*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 knowingly possessing six firearms. The defendant had a lengthy criminal record (20 convictions which began in 1958), many of which were not included in the defendant's criminal history calculation because they were too old to be counted. 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 Eighth Circuit rejected the defendant's argument and affirmed the departure. The court noted that the presentence report indicated that defendant was a recidivist criminal. Furthermore, the defendant's criminal history score failed to reflect his actual criminal conduct over the years. Finally, the court 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. Among other things, the court noted more than 25 arrests on criminal charges. The district court also noted 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 Eighth Circuit 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. Gonzales-Ortega*, 346 F.3d 800 (8th Cir. 2003). The district court departed upward five offense levels under §4A1.3 because the defendant's criminal history level of VI did not adequately reflect the defendant's criminal history and the likelihood that he would commit future crimes. On appeal, the defendant challenged the district court's upward departure and the method used to calculate the extent of the departure. The defendant had more than 30 prior adult convictions of record, many of which were not included in his criminal history score. The defendant's habit of being deported, returning to the United States, and being deported again—usually after committing another crime—was particularly troublesome. Finally, the circuit court noted defendant's sentence was well below the statutory maximum of 20 years for the offense of which he stood convicted. The court also held that “[s]o long as district courts do not impose an upward departure that is unreasonable in its extent, we think they should be free to use whatever method they choose in determining the extent of the departure, provided the method chosen is not inconsistent with the Guidelines.” Accordingly, the district court's sentence was affirmed.

*United States v. Levi*, 229 F.3d 677 (8th Cir. 2000). The defendant was convicted of mail fraud, wire fraud, and conspiracy to commit mail and wire fraud. The district court departed upward on the grounds that the defendant's criminal history calculation did not adequately reflect his prior foreign convictions nor his potential for recidivism. The circuit court determined that the departure was reasonable and not an abuse of discretion, 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. 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), *cert. denied*, 128 S. Ct. 928 (2008). 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' imprisonment. The government appealed, arguing that the defendant should have been sentenced under the career offender guideline based on prior state convictions for third-degree assault and first-degree burglary. The defendant argued that the burglary charge did not constitute 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. Essentially, the defendant argued that the crime charged first should be the one scored. 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. 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 Eighth Circuit 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. *Begay* did not limit the term violent felony to offenses in which violence was actually used or threatened, but to crimes that involve the "possibility of . . . closely related, active violence." 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. In fact, it found the risk to children could be created by, and this code section is routinely applied to, “very passive behavior.”

*United States v. Hudson*, 577 F.3d 883 (8th Cir. 2009), *cert. denied*, No. 09-8183, 2010 WL 251493 (U.S. Jan. 25, 2010). 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 twenty under §2K2.1(a)(4) based on the defendant’s prior resisting arrest conviction. On appeal, the defendant acknowledged that prior Eighth Circuit precedent concluded that resisting arrest was a crime of violence, however, argued that after *Begay* and *Chambers*, it no longer should be considered as such. 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*, 129 S. Ct. 687 (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 Eighth 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 “The 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 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. Childs*, 403 F.3d 970 (8th Cir. 2005). The district court properly found that the defendant’s prior conviction for possession of a short-barreled shotgun was a violent crime for the purposes of 18 U.S.C. §924(e)(2)(B).

*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. Painter*, 400 F.3d 1111 (8th Cir. 2005). The district court properly applied the Armed Career Criminal Act enhancement after finding that a California burglary was a violent felony for the purposes of 18 U.S.C. §924(e)(2)(B) unless the plea agreement or plea colloquy establishes that the defendant pled guilty to an offense that was not generic burglary.

*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 also United States v. Newton*, 259 F.3d 964, 968 (8th Cir. 2001) (holding that prior conviction of involuntary manslaughter is a crime of violence for purposes of §4B1.2.); *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 sections 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)).

*United States v. Baker*, 16 F.3d 854 (8th Cir. 1994). The defendant's conviction for managing a residence for the purpose of distributing or using cocaine was not a "controlled substance offense" and the defendant was erroneously sentenced as a career offender.

#### **§4B1.4**      Armed Career Criminal

*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.), *cert. denied*, 128 S. Ct. 682 (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. Jackson*, 552 F.3d 908 (8th Cir. 2009). Joining a majority of the circuits, the Eighth Circuit 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 government 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. *See also United States v. Marshall*, 411 F.3d 891 (8th Cir. 2005) (stating that the defendant has the burden of demonstrating he is entitled to a more lenient sentence).

*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. Suratt*, 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 three-level reduction for acceptance of responsibility, safety valve relief is “even available to defendants who put the government to the expense and burden of 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. 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. 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. *See also United States v. Johnston*, 973 F.2d 611 (8th Cir. 1992) (despite claim of indigency, fine affirmed where defendant would have ability to pay a fine from prison wages and earnings after being released from prison).

*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. Because the guidelines make no distinction based on when dependents are acquired, the district court erred in ignoring this mandatory sentencing factor, and the circuit court remanded for further proceedings.

## **§5E1.4**      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. 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.

*United States v. Diaz*, 296 F.3d 680 (8th Cir. 2002). When a defendant has been convicted of multiple counts, §5G1.2(D) requires that if the maximum sentence allowed under any one count does not reach the total punishment as calculated under the guidelines, the court must impose consecutive sentences on the multiple counts until it reaches a sentence equal to the total punishment calculation under the guidelines.

### **§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 two-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. The Eighth Circuit 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 "judges 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. Although the applicable 1987 version of §5G1.3 did not allow for credit in expired sentences, the court of appeals, applying the *Koon* departure analysis, found that the Sentencing Commission did not prohibit the departure. The court concluded that the expired state sentence was an unmentioned or perhaps an encouraged factor, and the district court thus had authority to depart.

*United States v. French*, 46 F.3d 710 (8th Cir. 1995). The district court did not err when it credited the defendant for time served in connection with a state perjury conviction because he

was serving “an undischarged term of imprisonment” within the meaning of §5G1.3(b) at the time of his federal sentencing. The appellate court also upheld the district court’s finding that the defendant’s state court perjury conviction was part of the same relevant conduct as the charged conduct for which the defendant was sentenced. Finally, the appellate court rejected the government’s contention that the state perjury conviction should be included in defendant’s criminal history calculation. *See also United States v. Marsanico*, 61 F.3d 666 (8th Cir. 1995) (vacating the defendant’s sentence because the district court did not comply with §5G1.3(c) by considering a reasonable incremental penalty for the instant offense that approximates the total punishment that would have been imposed under §5G1.2 had all of the offenses been sentenced at the same time).

*United States v. Murphy*, 69 F.3d 237 (8th Cir. 1995). The district court did not err in its determination that the defendant, who was on parole at the time he committed the federal offense, was serving an undischarged term of imprisonment, thereby triggering §5G1.3(a). The court properly applied this section when requiring that the federal sentence be served consecutively to the state sentence.

## **Part H Specific Offender Characteristics**

### **§5H1.1      Age (Policy Statement)**

*United States v. Goff*, 20 F.3d 918 (8th Cir. 1994). The district court erred in granting a downward departure to the defendant based on the absence of prior convictions, the “relatively minor nature of the offense,” the defendant’s advanced age, and the defendant’s family responsibilities. These factors have already been taken into consideration by the Sentencing Commission in formulating the guidelines and the circuit court determined that in this case none of these factors “whether viewed singly or in combination” were so extraordinary as to warrant a departure.

*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) (holding that 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.

*United States v. Simpson*, 7 F.3d 813 (8th Cir. 1993). A downward departure could not be based on the defendant's efforts to become drug free. Alcohol or drug dependency does not provide a basis for departure.

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

*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.

*See United States v. Goff*, 20 F.3d 918 (8th Cir. 1994), discussed in §5H1.1.

*United States v. Bieri*, 21 F.3d 811 (8th Cir. 1993). The district court's refusal to depart may only be reviewed if there is evidence that the district court believed that it had no authority to depart. The district court did not err in refusing to depart because the defendants were the parents of young children. Under §5H1.6, family ties and responsibilities are not relevant in determining whether a departure should be granted unless they are extraordinary and fall outside the "heartland" of cases taken into consideration by the guidelines.

**§5H1.11**      Military Service (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. In so holding, 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. Therefore, the district court did not abuse its discretion by denying the defendant’s motion to compel. *See also United States v. Fremont*, 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. Moeller*, 383 F.3d 710 (8th Cir. 2004) (same).

*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. 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 substantial assistance motion decision for each mandatory minimum sentence to which the 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)

### **Upward Departure**

*United States v. Cole*, 357 F.3d 780 (8th Cir. 2004). 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 Eighth Circuit 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 ten-level upward departure based on extreme barbaric circumstances in the murder of defendant's parents.

*United States v. Sample*, 213 F.3d 1029 (8th Cir. 2000). The court upheld an upward departure based on extreme degree of psychological injury to the victims of identity theft when the defendant was properly notified of the potential for departure.

*United States v. Lewis*, 235 F.3d 394 (8th Cir. 2000). The court affirmed an upward departure based on the 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 was an attorney and partner at a prominent law firm who was convicted of embezzling large sums of money from the law 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 consisting 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 committed embezzlement 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 two-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 section 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 one-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 Eighth Circuit 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. *See also United States v. Sera*, 267 F.3d 872 (8th Cir. 2001) (holding that counsel’s failure to move for downward departure based on defendant’s deportable-alien status or his willingness to waive objection to deportation did not establish an ineffective assistance of counsel claim). *Cf. United States v. Cardoso-Rodriguez*, 241 F.3d 613 (8th Cir. 2001) (holding that deportable-alien status can not 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. Newlon*, 212 F.3d 423 (8th Cir. 2000). The defendant pled guilty to being a felon in possession of a firearm. Prior to arrest, the defendant had, at his own request, attended a program aimed at treating his alcohol and drug addictions. The district court departed downwards because of the extraordinary rehabilitative effort the defendant had made considering his environmental circumstances and IQ. On appeal, the government argued that IQ and environmental circumstances are discouraged departure factors under the guidelines. The court determined that the district court's downward departure was actually based on the defendant's rehabilitative effort, rather than on discouraged factors. Thus, the district court did not abuse its discretion.

*United States v. Webb*, 218 F.3d 877 (8th Cir. 2000). The defendant pled guilty to one count of conspiracy to possess with intent to distribute marijuana. The defendant's criminal history placed him in Criminal History Category III. The district court found that level III overstated the seriousness of the defendant's past criminal conduct and departed downward to place the defendant in Criminal History Category I. After the departure, the defendant requested application of the safety valve under §5C1.2 but the district court refused to apply it. On appeal, the defendant argued that the district court erred in tallying his criminal history points when it considered him ineligible for safety valve relief. The court held that nothing in §4A1.3, "the provision under which the district court shifted [the defendant] into a lower criminal history category, indicates that a category change under this provision deletes previously assessed criminal history points for the purposes of the [safety valve] analysis." Therefore, the district court correctly concluded that the defendant was not eligible for safety valve relief.

*See United States v. Otto*, 176 F.3d 416 (8th Cir. 1999), *see* §5G1.3.

*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. Rodriguez-Ochoa*, 169 F.3d 529 (8th Cir. 1999). The district court properly denied the defendants' request for a downward departure based on their mistaken belief that they were transporting marijuana rather than methamphetamine. The nature of a controlled substance is relevant only as a sentencing factor, and the guidelines manual already takes into account a drug "defendant's mistake of fact on his or her sentencing accountability."

*United States v. Colbert*, 172 F.3d 594 (8th Cir. 1999). The district court did not err in denying the defendant's request for a downward departure based on susceptibility to abuse in prison, victim provocation, and family circumstances. The defendant, a police officer, was convicted of a civil rights violation under color of law for assaulting a prisoner. Although in *Koon v. United States*, 518 U.S. 81 (1996), the Supreme Court upheld a departure based on susceptibility to abuse in prison and victim provocation, the facts of that case are distinguishable. Unlike the instant case, the Rodney King incident involved a "torrent of national publicity" and the victim had "physically threatened" the defendant. In addition, the impact of the defendant's incarceration on his family is not out of the ordinary.

*United States v. Decora*, 177 F.3d 676 (8th Cir. 1999). The district court did not exceed its discretion in granting a downward departure based on aberrant behavior and other mitigating circumstances, including the defendant's "great promise as a community leader and role model." At the time of the offense (assault with a deadly weapon), the defendant was a semester away from receiving a college degree and had shown "remarkable resilience" despite the adversity faced on the reservation. Although the court relied on some factors the guidelines list as not ordinarily relevant in determining whether a departure is warranted (education, employment record, family and community responsibility), the court found that these factors were present in an unusual degree not adequately taken into consideration by the Sentencing Commission. The extent of the departure from the applicable guideline range of 37 to 46 months to probation was not excessive.

*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, 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."

*See United States v. O'Hagan*, 139 F.3d 641 (8th Cir. 1998), *see* §5G1.3.

*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 Sentencing 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. Reviewing this decision under the abuse of discretion standard, 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 circuit court found that the record was inadequate to show how the defendant struggled, so it remanded for a "refined assessment" of the issue. The circuit 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 and returned to stab the victim; this conduct was not a single act of aberrant behavior.

*United States v. Bieri*, 21 F.3d 811 (8th Cir. 1993). The district court's refusal to depart may only be reviewed if there is evidence that the district court believed that it had no authority to depart. The district court did not err in refusing to depart because the defendants were the parents of young children. Under §5H1.6, family ties and responsibilities are not relevant in determining whether a departure should be granted unless they are extraordinary and fall outside the "heartland" of cases taken into consideration by the guidelines. Finally, the defendant mother's first-time offender status did not justify a downward departure based on "aberrant behavior." The structure of the sentencing table accounts for the absence of a criminal record. *See also United States v. Simpson*, 7 F.3d 813 (8th Cir. 1993) (departure based solely on first time offender status is improper).

#### **§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.

*United States v. Yellow*, 18 F.3d 1438 (8th Cir. 1994). The district court did not err in departing upward for extreme psychological injury where the defendant was convicted of raping his younger brother, who suffered from cerebral palsy, and younger sister, given the expert testimony regarding the severity and likely duration of psychological harm suffered by the victims. The district court’s 72-month upward departure was reasonable for the severe psychological injury the defendant inflicted on his victims.

**§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 Eighth Circuit 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. The 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. Gillmore*, 497 F.3d 853 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 921 (2008). A sentence that varies upward over 100% above the guideline range, but is firmly based on the district court’s own evaluation of the threat the defendant presents to the public based on her personal characteristics and the brutal nature of her crime is not in error.

*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.

*United States v. Clark*, 45 F.3d 1247 (8th Cir. 1995). The district court did not err in imposing a 24-month upward departure for extreme conduct based on its finding that the defendant degraded and terrorized his victim during the commission of a carjacking. The defendant had stuck a gun to the victim’s head, traveled around with the victim still in the car,

robbed him, and repeatedly told him that he was going to die. The defendant argued on appeal that the factors on which the district court relied—abduction of the victim and use of a firearm—had already been taken into account in the carjacking and firearms guidelines under which he was sentenced. The circuit court agreed that these factors had already been taken into account, but concluded that the upward departure was still justified because these factors were present to a degree substantially in excess of that which is ordinarily involved in the offense.

**§5K2.9**      Criminal Purpose (Policy Statement)

*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 Eighth Circuit 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.

*United States v. Premachandra*, 32 F.3d 346 (8th Cir. 1994). The defendant’s bank robbery conviction was not a “nonviolent offense,” so as to permit a departure pursuant to §5K2.13.

#### **§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. The Eighth Circuit 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 sentence: the government bears the burden.”

### **CHAPTER SIX:** *Sentencing Procedures and Plea Agreements*

#### **Part B Plea Agreements**

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

*United States v. Cottier*, No. 09-2546, 2009 WL 4877694 (8th Cir., Dec. 18, 2009) (unpublished). In a plea agreement, the government agreed to recommend a two-level reduction under §3E1.1(a) for acceptance of responsibility but noted that the government would recommend a sentence within the applicable guideline range as determined by the district court. The district 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 ultimate decision was for the court. 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 applicable guideline range. The Eighth Circuit held that the government did not breach the plea agreement, which only required the government to recommend the reduction. Although the government lawyer could have argued more forcefully on behalf of the reduction, 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 that the act was a single act of aberrant behavior prompted by

the husband's infidelity. At the sentencing hearing, the defense called a clinical psychologist to testify 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 in the Eighth Circuit, the appellate 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 is no "black letter list of permitted and not permitted questions" at a sentencing hearing. Thus, the court refused to establish a black letter rule and held ". . . only that in this case 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. 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).

*United States v. Wilson*, 37 F.3d 1342 (8th Cir. 1994). The defendant admitted that he had used marijuana, violating a condition of his supervised release. The court revoked his supervised release pursuant to 18 U.S.C. § 3583(e)(3), and sentenced him to 16 months' imprisonment and an additional term of supervised release equal to "the remainder of term upon completion of 16-month incarceration period." The appellate court held that the sentence was permissible because the total revocation sentence was well within the three-year limit on imprisonment set by 18 U.S.C. § 3583(e)(3).

#### **§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 receive the best 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. Shaw*, 180 F.3d 920 (8th Cir. 1999). The district court did not err in imposing a revocation sentence of 24 months in prison to be followed by three years of supervised release, even though policy statements in Chapter Seven provided for a revocation sentence of three to nine months. Because Chapter Seven policy statements are merely advisory and not binding, the 24-month sentence was not an upward departure and the defendant was not entitled to notice that the sentence would exceed the recommended range. The revocation sentence did not amount to an abuse of discretion because the defendant repeatedly failed to submit to drug tests and needed long-term intensive drug treatment. *See also United States v. Baker*, 491 F.3d 421 (8th Cir. 2007) (stating that 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 Service, Inc.*, 413 F.3d 734 (8th Cir. 2005). The sentencing court must make 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*, 128 S. Ct. 2198 (2008) (holding that Rule 32(h) does not apply to variances).

### Rule 35(b)

*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 Eighth Circuit "has never held that a Rule 35(b) defendant has the right to an opportunity to be heard" and "absent 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). The court reaffirmed that post-*Booker*, guideline facts, which increased 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. . . . As we will explain, this 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*, 558 U.S. 38 (2007).

## **Eighth Amendment**

*United States v. Whiting*, 528 F.3d 595 (8th Cir.), *cert. denied*, 129 S. Ct. 443 (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. The Eighth Circuit 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).

## **OTHER STATUTORY CONSIDERATIONS**

### **18 U.S.C. § 3553(e)**

*United States v. Burns*, 577 F.3d 887 (8th Cir. 2009) (en banc). The Eighth Circuit 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), *cert. denied*, No. 09-7911, 2010 WL 58741 (U.S. Jan. 11, 2010). 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 Guidelines 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 Guidelines 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 Eighth Circuit 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 Eighth Circuit has also “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.”

*United States v. Schaffer*, 110 F.3d 530 (8th Cir. 1997). Section 924(c)’s mandatory minimum sentence of 60 months is the proper departure point for a downward departure granted under an 18 U.S.C. § 3553(e) motion based on substantial assistance.

### **18 U.S.C. § 3583**

*United States v. Engelhorn*, 122 F.3d 508 (8th Cir. 1997). Although 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 term of incarceration plus a term of supervised release – was similar to a punishment the defendant could have faced in a state court.

*United States v. Watkins*, 14 F.3d 414 (8th Cir. 1994). The district court’s imposition of a term of supervised release did not violate the five-year statutory maximum under 18 U.S.C. § 924(c). Section 3583(a) empowers the sentencing court to assess a term of supervised release “as part of the sentence . . . .” This language, as opposed to language providing “as part of the incarceration,” indicates that a term of supervised release may be imposed in addition to any term of incarceration. Although section 924(c) does not explicitly mention supervised release, 18 U.S.C. § 3583 expressly authorizes it. *See also United States v. Postley*, 449 F.3d 831 (8th Cir. 2006) (“[T]he statutory authorization for a term of supervised release is distinct from the authorization for a prison term, so the supervised release term does not have to come out of the maximum prison sentence. . . . Even where the substantive statute describing the crime authorizes only imprisonment, supervised release may nevertheless be authorized by 18 U.S.C. § 3583 in addition to the maximum prison term.”).

## **21 U.S.C. § 841**

*United States v. Foxx*, 544 F.3d 943 (8th Cir. 2008), *cert. denied*, 130 S. Ct. 91 (2009). The court held that, despite the Sentencing 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.

*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 exceeded 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.

*United States v. Ortega*, 150 F.3d 937 (8th Cir. 1998). The district court counted the defendant's prior suspended imposition of sentence as a prior conviction for purposes of the life sentence enhancement for prior drug felony convictions. The defendant argued this was an error because the prior state court case did not result in a conviction under state law. Although he was required to serve three years of supervised probation, he received a suspended imposition of sentence. The court of appeals rejected this argument, concluding that federal law controls the determination of whether a conviction is final and the suspended imposition is a prior felony conviction which has become final for purposes of 21 U.S.C. § 841(b).