SELECTED GUIDELINE APPLICATION DECISIONS FOR THE TENTH CIRCUIT

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Tenth Circuit
Case Law Highlights

§1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) – *U.S. v. Torres-Aquino*, 334 F.3d 939 (10th Cir. 2003) (affirmed the district court's denial of a retroactive application of Amendment 632 under 18 U.S.C. §3582(c)(2) to reduce a defendant's previously imposed sentence), p. 5.

§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic)– *U.S. v. Plotts*, 347 F.3d 873 (10th Cir. 2003) (the district court did not err in construing USSG §2G2.2(b)(4) to require a mandatory, rather than discretionary, five-level enhancement), p. 15.

§2L1.2 (Unlawfully Entering or Remaining in the United States)–*U.S. v. Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003) (the district court erred when it imposed an eight-level enhancement under §2L1.2), p. 20; ***U.S. v. Munguia-Sanchez*, 365 F.3d 877 (10th Cir. 2004)** (affirmed the district court's holding that a sexual assault of a child constitutes a crime of violence under §2L1.2(b)(1)(A)(ii) regardless of consent), p. 22.

§2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce)–*U.S. v. Dillon*, 351 F.3d 1315 (10th Cir. 2003) (affirmed the district court's nine-level enhancement under USSG §2Q1.2(b)(2) and a four-level enhancement under USSG §2Q1.2(b)(4)), p. 24.

§2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity)–*U.S. v. Adargas*, 366 F.3d 879 (10th Cir. 2004) (affirmed the district court's two level enhancement pursuant to §2S1.1(b)(2)(B)), p. 25.

§3B1.4 (Using a Minor to Commit a Crime)–*U.S. v. Kravchuk*, 335 F.3d 1147 (10th Cir. 2003) (affirmed the district court's finding that, under §3B1.4, an enhancement can be applied for the use of a minor to defendants between the ages of 18 and 21; case was remanded for resentencing on other grounds), p. 30.

§4A1.3 (Adequacy of Criminal History Category)–*U.S. v. Hurlich*, 348 F.3d 1219 (10th Cir. 2003) (affirmed the methodology employed by the district court in determining the degree of upward departure), p. 36.

§4B1.2 (Definitions of Terms Used in Section 4B1.1)–*U.S. v. Rice*, 358 F.3d 1268 (10th Cir. 2004) (the district court erroneously double counted when it used the same prior conduct of producing child pornography in Mississippi to both increase defendant's base offense level and his criminal history category), p. 37; ***U.S. v. Vigil*, 334 F.3d 1215 (10th Cir. 2003)** (affirmed the district court's determination that defendant's prior state conviction for aggravated incest constituted a prior conviction for a "crime of violence" within the meaning of §4B1.2 resulting in a base offense level of 20 under §2K2.1(a)(4)(A)), p. 39.

§5K2.0 (Grounds for Departure)–*U.S. v. Nunemacher*, 362 F.3d 682 (10th Cir. 2004) (reversed the district court's downward departure of eight-levels because the district court had failed to provide an acceptable rational for the extent of its departure), p. 47 .

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

CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

United States v. Battle, 289 F.3d 661 (10th Cir.), *cert. denied*, 537 U.S. 856 (2002). The district court did not violate the Double Jeopardy Clause when it sentenced the defendant to consecutive sentences under 18 U.S.C. § 924 (c) and (j) for conduct that is also punishable under the Hobbs Act. The court held that in enacting section 924 (c) and (j), "Congress clearly intended 'to provide multiple punishments to defendants who commit violent crimes while using or carrying a firearm.'" *Id*. at 669 (*citing United States v. Pearson*, 203 F.3d 1243, 1268 (10th Cir.), *cert. denied*, 530 U.S. 1268 (2000)).

Part B General Application Principles

§1B1.3 Relevant Conduct

United States v. Bolden, 132 F.3d 1353 (10th Cir. 1997), *cert. denied*, 523 U.S. 1111 (1998). The defendant's accomplice's possession of a firearm in an attempted bank robbery could be attributed to the defendant, despite the fact that the accomplice was actually a government informant, where it could be demonstrated that the defendant intended that the accomplice use the firearm during the robbery and encouraged such use.

See United States v. Boyd, 289 F.3d 1254 (10th Cir. 2002), §2D1.1, p. 10.

See United States v. Holbert, 285 F.3d 1257 (10th Cir. 2002), §3A1.3, p. 28.

United States v. Keifer, 198 F.3d 798 (10th Cir. 1999). The district court erred in including the Pennsylvania state charges as relevant conduct to calculate the loss without any evidentiary support for inclusion. The district court did not err in including the Virginia state prior conviction in the criminal history calculations under USSG §4A1.2(a)(1). The defendant was convicted of six counts of bank fraud and one count of using a false social security number. At sentencing the district court counted the prior Virginia conviction as criminal history rather than relevant conduct. In calculating the loss the district court relied upon $130,238.80 associated with pending Pennsylvania fraud and forgery charges. The defendant objected, arguing that that amount was speculative because he had not been convicted of the Pennsylvania charges and was unaware of the evidentiary support for them. He also objected to the imposition of two criminal history points based on his Virginia conviction for forging a public document. Both objections were overruled. On appeal, the Tenth Circuit agreed and held that on remand for resentencing the government could introduce new evidence regarding the pending

Pennsylvania charges in determining the relevant loss conduct. It also held that "[b]ecause the conviction for fraudulently obtaining a driver's license did not involve the same type of monetary harm as the defendant's other conduct, it is properly considered as part of his criminal history." *Id*. at 802. *See also United States v. Keeling*, 235 F.3d 533, 535 (10th Cir. 2000), *cert. denied*, 533 U.S. 940 (2001) (held that it remains true after *Apprendi* that it is for the sentencing court, not the jury, to determine relevant conduct, provided that an enhanced penalty based upon additional relevant conduct quantity does not exceed the statutory range authorized by the count of conviction).

United States v. Lacy, 17 Fed. Appx. 745 (10th Cir. 2001). The district court did not err in finding that the defendant was responsible not only for the cocaine base he possessed individually but also for the cocaine base possessed by the codefendant as a part of the common scheme to possess and distribute cocaine base. On appeal, the defendant challenged the inclusion of the cocaine base found in the codefendant's radio because the government failed to show that he exercised any actual or constructive control over those drugs. The record reflected that both defendants, who were brothers, were involved in a common scheme to possess and distribute cocaine base. They bought tickets together, traveled together, and shared a room. The Tenth Circuit held that the district court had ample evidence to find that the drug quantity the codefendant possessed, in addition to what the defendant individually possessed, was a part of a common scheme.

United States v. Melton, 131 F.3d 1400 (10th Cir. 1997). Acts of co-conspirators in a drug conspiracy that occurred after the defendant's arrest, including conduct associated with a government reverse sting operation, could not be attributed to the defendant under the sentencing guidelines. Because the defendant's participation in the conspiracy ended with his arrest, the scope of criminal activity which he had agreed to undertake did not include activities which post-dated his arrest.

United States v. Mendez-Zamora, 296 F.3d 1013 (10th Cir.), *cert. denied*, 537 U.S. 1063 (2002). The defendants were convicted of conspiracy to distribute and to possess with the intent to distribute at least one kilogram of methamphetamine. The Tenth Circuit, citing *United States v. Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993), *cert. denied*, 533 U.S. 960 (2001), concluded that "[d]rug quantities associated with illegal conduct for which a defendant was not convicted are to be accounted for in sentencing, if they are part of the same conduct for which the defendant was convicted."

United States v. Morales, 108 F.3d 1213 (10th Cir. 1997). On appeal by the government, the appellate court found no error in sentencing the defendant pursuant to the money laundering guideline range. The government argued that 21 U.S.C. §§ 841(b)(1)(A) and 846 (1994) required the court to sentence Morales to the mandatory minimum sentence of ten years in prison for his conviction of conspiracy. The statute provides for a mandatory minimum sentence of ten years for any defendant convicted of a conspiracy to distribute at least five kilograms of cocaine or at least 1,000 kilograms of marijuana. Under §1B1.3(a), relevant conduct for sentencing purposes is assessed on the basis of all acts and omissions committed, aided, and abetted by the defendant and in the case of jointly undertaken criminal activity, all reasonably foreseeable acts and omissions of others in furtherance of

the jointly undertaken criminal activity. The district court determined that the defendant was involved in the laundering of drug profits in the amount of $831,514. However, the court determined the mandatory minimum sentence under the statute was inapplicable because the defendant's conduct did not establish a quantity of narcotics reasonably foreseeable to him. The government argued that the court erroneously applied the reasonably foreseeable standard and that the trial court erred by failing to determine that the defendant was directly involved with at least five kilograms of cocaine. The appellate court disagreed, and held that where a sentencing court determines a defendant was directly involved in the distribution of a quantity of drugs sufficient to invoke a mandatory minimum sentence, the quantity of drugs reasonably foreseeable to the defendant was irrelevant. Moreover, in the instant case, there was no evidence that the defendant was ever present at the scene of any illicit drug transaction. The government's evidence at trial simply establishes that the defendant was involved in the drug organization as a money launderer. Additionally, the appellate court noted that a trial court is not obligated to convert the total amount of money the defendant laundered from drug profits into its value in cocaine especially since the government did not allege that the defendant had any knowledge of the occurrence of a single drug transaction.

United States v. Osborne, 332 F.3d 1307 (10th Cir. 2003). On appeal, the three defendants, who were involved in a check-counterfeiting scheme, argued that the district court erred in calculating the amount of loss for the purpose of determining relevant conduct. One of the defendants waived his right to appeal this issue by failing to raise it during sentencing. With respect to the other two defendants, the court of appeals affirmed the amount of loss calculated by the district court. In determining relevant conduct for defendant Osborne, the sentencing court held him accountable for the losses intended by the entire organization, rejecting Osborne's argument that the amount of loss should be limited to the amount generated by his individual cell, that is, by the three participants that he personally employed. This decision was based on the trial court's conclusion that the entire scheme was within the scope of Osborne's agreement because each cell shared a common source of counterfeit checks, common *modus operandi*, common purpose, and common victims. Furthermore, the trial court found, and the court of appeals agreed, that the entire counterfeiting scheme was foreseeable to Osborne. Defendant, Reese, argued that the district court erred in utilizing the face value of the seized checks to determine the intended loss of the entire scheme. The court of appeals stated that calculating the amount of loss for purposes of determining relevant conduct under §2B1.1, the district court need only make a reasonable estimate of loss. The court of appeals concluded that given that the defendant who ran the counterfeiting scheme testified that any check with an account number could potentially be negotiated, that all of the seized checks had account numbers on them, and the uncontroverted fact that a single stolen check would be counterfeited multiple times for increased amounts, the district court was not clearly erroneous in using the face value of the seized checks to estimate the intended loss.

United States v. Tran, 285 F.3d 934 (10th Cir. 2002). The district court did not err in finding that the defendant was engaged in a common scheme with his codefendants and therefore should be held responsible for their criminal conduct as well as his own. Looking to the record of facts from the district court, the court held on appeal "the acts of [the defendant's] codefendants were performed in

furtherance of jointly undertaken criminal activity that was both reasonably foreseeable to him and within the scope of his agreement" and thus the guideline was appropriate. *Id*. at 938.

United States v. Williams, 292 F.3d 681 (10th Cir. 2002). The district court did not err in treating the defendant's unpaid debt to Mr. Stockton, a creditor, as relevant conduct under the sentencing guidelines. The defendant's efforts to defraud his creditors exhibited multiple common factors and similarities. He obtained the loan from his creditor by falsely professing unencumbered ownership of the Jaguar and providing a car title which was unlawfully in his possession. The defendant obtained loans secured by the Jaguar from Zions First National Bank and Salt Lake City Credit Union using a fraudulently obtained duplicate title. In obtaining the bank and credit union loans, the defendant again falsely professed unencumbered ownership of the Jaguar. Although the government did not indict the defendant for his behavior in obtaining the loan from his creditor, "[i]t is well established that sentencing calculations can include as relevant conduct actions that do not lead to separate convictions." *Id*. at 686. Under these circumstances the Tenth Circuit concluded that the district court did not commit clear error in finding the debt to defendant's creditor was relevant conduct for purposes of calculating loss under the guidelines.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. Chavez-Salais, 337 F.3d 1170 (10th Cir. 2003). The defendant pled guilty to illegally reentering the United States after deportation in violation 8 U.S.C. § 1326. Subsequently, he filed a motion seeking to reduce his sentence due to Guideline amendments, citing 18 U.S.C. § 3582. The district court denied the defendant's motion, upholding the original sentence of 57 months' imprisonment. On appeal, the prosecution argued that the plea agreement constituted a waiver as to the motion, which deprived the court of jurisdiction. The Tenth Circuit disagreed with the prosecution, holding that a motion based on subsequent amendments to the guidelines did not constitute a prohibited collateral attack. However, the Tenth Circuit affirmed the district court's decision on the merits concluding that the guideline amendment does not have retroactive effect because it is not listed in USSG §1B1.10(c), *citing United States v. Torres-Aquino*, 334 F. 3d 939 (10th Cir. 2003).

United States v. Dorrough, 84 F.3d 1309 (10th Cir.), *cert. denied*, 519 U.S. 987 (1996). The court did not err in refusing to apply retroactively the amended definition of "mixture" as provided by Amendment 484 to USSG §2D1.1 commentary. The amendment reflected a change in the calculation of drug amounts for sentencing purposes based upon "the entire weight of any mixture or substance containing a detectable amount of the controlled substance" to a calculation based upon a definition of "mixture" which "does not include materials that must be separated from the controlled substance before the substance can be used." USSG §2D1.1(c)(A), comment. (n.1). The court upheld the defendant's sentence because the retroactive application of amendment 484 is within the discretion of the court upon consideration of the following factors: 1) the nature of the offense and the characteristics of the defendant, 2) the need for the sentence imposed, 3) the kinds of sentences available, 4) the applicable guidelines sentencing range, 5) any relevant Sentencing Commission policy statement, 6) the need to avoid sentencing disparity among defendants, and 7) the need to provide

restitution to victims. The court deferred to the sentencing court's findings that the guidelines take into account a percentage of waste in PCP as evidenced by a sizeable decrease in the drug equivalency ratios and that using alternative sentencing under USSG §2D1.1 would result in the same offense level in finding that the sentencing court did not abuse its discretion in imposing the sentence.

United States v. Torres-Aquino, 334 F.3d 939 (10th Cir. 2003). The appellate court affirmed the district court's denial of a retroactive application of Amendment 632 under 18 U.S.C. § 3582(c)(2) to reduce a defendant's previously imposed sentence. The defendant pled guilty to reentering the United States illegally as a deported alien previously convicted of an aggravated felony. At the sentencing, the district court determined the defendant's sentence by applying the then-existing version of §2L1.2(b)(1)(A), which called for a 16-level increase for a defendant previously convicted of an aggravated felony. On November 1, 2001, Amendment 632 was enacted and provided that §2L1.2(b)'s aggravated-felony enhancement become an increase of eight to 16 levels according to the seriousness of the earlier aggravated felony. On appeal, the defendant argued that Amendment 632 had lowered the authorized term of imprisonment. The Tenth Circuit noted that, under 18 U.S.C. § 3582(c)(2), a court may reduce a previously imposed sentence if the Sentencing Commission has lowered the applicable sentencing range and that such a reduction is consistent with applicable policy statements issued by the Commission. The relevant policy statement, §1B1.10(a), states that if none of the amendments listed in subsection (c) are applicable, a reduction in defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized. The court held that since Amendment 632 was not listed in §1B1.10(c), the defendant was not entitled to relief under §1B1.10. Therefore, the district court's judgement was affirmed.

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

United States v. Heredia-Cruz, 328 F.3d 1283 (10th Cir. 2003). The district court did not violate the *ex post facto* clause by applying the aggravated felony enhancement, because alien smuggling was an aggravated felony at the time of the defendant's reentry, and the illegal reentry was the basis for the sentence. The defendant was convicted of illegally re-entering the country after previously being convicted of an aggravated felony in violation of 8 U.S.C. §§ 1326(a)(1) and (2) and 8 U.S.C. § 1324. On appeal, the defendant argued that the district court violated the *ex post facto* clause by enhancing his base offense level for a 1987 alien smuggling conviction that was not considered an "aggravated felony" at the time. Effective November 1, 1997, the Sentencing Commission amended USSG §2L1.2(b) by deleting the definition of "aggravated felony" and directing the user to the definition at 8 U.S.C. § 1101(a)(43). USSG App. C, Amend. 562 at 411-13 (1997). That section defines "aggravated felony" to include offenses related to alien smuggling. *See* 8 U.S.C. § 1101(a)(43)(N). Relying on *United States v. Cabrera-Sosa*, 81 F.3d 998, 1001 (10th Cir.), *cert. denied*, 519 U.S. 885 (1996), and *United States v. Aranda-Hernandez,* 95 F.3d 977, 983 (10th Cir. 1996), *cert. denied*, 520 U.S. 1144 (1997), the Tenth Circuit "held that the sentencing enhancement in §2L1.2 does not unconstitutionally punish a defendant for a felony conviction that occurred before enactment of §2L1.2 or its relevant amendments because the defendant is being

punished for the illegal re-entry, not the underlying aggravated felony." *Heredia-Cruz*, 328 F.3d at 1290.

United States v. Sullivan, 242 F.3d 1248 (10th Cir. 2001), *cert. denied*, 534 U.S. 1166 (2002). The district court erred when it applied USSG §1B1.11(b)(3) to the pre-amendment conduct because it violated the *ex post facto* clause. The defendant was convicted of three counts of willful failure to file a tax return in violation of 26 U.S.C. § 7203. The defendant was sentenced pursuant to the sentencing guidelines in effect at the time of sentencing although the applicable tax offense guidelines had been amended after the defendant had committed two of the three counts of willful failure to file a tax return. On appeal the defendant argued that the application of the post-amendment guidelines to all three counts violated the *ex post facto* clause because it resulted in a higher guideline range than would the application of the pre-amendment guidelines to all three counts, or the pre-amendment guidelines to the pre-amendment counts and the post-amendment guidelines to the post-amendment count. Under the pre-amendment guidelines the defendant's total offense level was 15 but under the post-amendment guidelines it was 19, thereby subjecting the defendant to a higher sentencing range. Relying on the Third[1] and Ninth[2] Circuits, the court held that the application of USSG §1B1.11(b)(3) to the first two of the defendant's willful failure to file tax counts violated the clause and was plain error. The defendant's sentence was vacated and remanded for resentencing.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.1 First Degree Murder[3]

See United States v. Hanson, 264 F.3d 988 (10th Cir. 2001), §5K2.0, p. 46.

§2A1.2 Second Degree Murder

See United States v. Hanson, 264 F.3d 988 (10th Cir. 2001), §5K2.0, p. 46.

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[1] *United States v. Bertoli*, 40 F.3d 1384, 1407 (3d Cir. 1994) (when *ex post facto* concerns arise, the sentencing court can apply the one-book rule without violating the *ex post facto* clause by applying the pre-amendment guidelines to all counts).

[2] *United States v. Ortland*, 109 F.3d 539, 550 (9th Cir.), *cert. denied*, 522 U.S. 851 (1997) (the district court must apply the pre-amendment guidelines to the counts involving conduct occurring prior to the amendment, and the post-amendment guidelines to conduct occurring after the amendment because the application of USSG §1B1.11(b)(3) to sentence all of defendant's counts under the amended guideline would violate the *ex post facto* clause).

[3] An amendment to become effective November 1, 2004, revises Commentary in §2A1.1(First Degree Murder) to clarify that a downward departure from a mandatory statutory sentence of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, pursuant to 18 U.S.C. § 3553(e); and deletes outdated language.

§2A2.2 Aggravated Assault

United States v. Sherwin, 271 F.3d 1231 (10th Cir. 2001). The district court did not err in calculating a defendant's sentence under USSG §2A2.2 when that defendant used a car door as a dangerous weapon against a police officer. The defendant became "enraged" and "violently kicked the car door to harm" the officer who arrested him after a high-speed chase. The defendant argued that he should have been sentenced under USSG §2A2.4 for obstructing or impeding officers, rather than under USSG §2A2.2 for aggravated assault, because the car door should not have been characterized as a "dangerous weapon." The term "dangerous weapon" is defined in USSG §2A2.2 as "an instrument capable of inflicting death or serious bodily injury." The Tenth Circuit held that the district court correctly characterized the door as a "dangerous weapon" under USSG §2A2.2 because the car door was undoubtedly an "instrument" used by the defendant to physically assault the officer and that its weight, size, and force were capable of causing bodily injury to the officer.

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

United States v. Cryar, 232 F.3d 1318 (10th Cir. 2000), *cert. denied*, 532 U.S. 951 (2001). The district court did not err when it calculated the defendant's offense level under USSG §2A3.1 instead of USSG §2X1.1 for Attempts. The defendant pled guilty to transporting child pornography and was convicted of attempted sexual abuse. On appeal the defendant challenged the application of USSG §2A3.1(b) and argued that the applicable guideline should be USSG §2X1.1. The defendant stated that 18 U.S.C. § 2241(c) criminalizes behavior at the point in time of the crossing of the state line and, at the time he crossed, he made no attempt to engage in a sexual act with a child. The Tenth Circuit, however, held that the defendant was not convicted of crossing state lines while holding impure thoughts, but rather he was convicted of the crossing of state lines with the intent to engage or attempt to engage in a sexual act with a person under the age of 12.

Part B Offenses Involving Property

§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[4]

See United States v. Osborne, 332 F.3d 1307 (10th Cir. 2003), §1B1.3, p. 3.

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[4] An amendment to become effective November 1, 2004, references the new offense, 18 U.S.C. § 1037 (Fraud and Related Activity in Connection with Electronic Mail) to §2B1.1 (Theft, Fraud, or Property Destruction) in Appendix A; adds an enhancement if a defendant is convicted under 18 U.S.C. § 1037 and the offense involved obtaining electronic mail addressed through "improper means;"define "improper means"; and provides instruction in the Commentary to apply the "mass marketing" enhancement in any case in which the defendant either is convicted under 18 U.S.C. § 1037 or committed an offense that involves conduct described in 18 U.S.C. § 1037.

§2B3.1 Robbery

United States v. Arevalo, 242 F.3d 925 (10th Cir. 2001). The district court did not err in imposing a two-level enhancement under USSG §2B3.1(b)(2)(F) for making a death threat. The defendant pled guilty to two counts of bank robbery. In calculating the defendant's sentence, the district court determined that the notes the defendant handed to the tellers constituted "threats of death" and included a two-level enhancement in the defendant's base offense level under USSG §2B3.1(b)(2)(F). On appeal the court found that the defendant's two statements "I have a gun" and "If you do what I say, you will live" inferred that failure to comply with the defendant's instructions would result in death and held that the note containing these statements justified the sentence enhancement under USSG §2B3.1(b)(2)(F). *See also United States v. Pearson*, 211 F.3d 524, 527 (10th Cir.), *cert. denied*, 531 U.S. 899 (2000) (held that no impermissable double counting occurred because the two-level enhancements for use of a firearm under USSG §2B3.1(b)(2)(B) and for physical restraint with a gun during a robbery under §2B3.1(b)(4)(B) involved two distinct acts and punished two distinct harms).

United States v. Farrow, 277 F.3d 1260 (10th Cir. 2002). The district court did not err in applying an enhancement for a weapon under USSG §2B3.1(b)(2)(E) to a defendant who pretended to have a gun in his pocket during a bank robbery. The defendant received the enhancement for possession of a dangerous weapon. Section 2B3.1(b)(2)(E) was amended to clarify the definition of dangerous weapon. Amendment 601 relates to application instructions in the commentary of USSG §1B1.1 and of USSG §2B3.1(b)(2)(E) and states that dangerous weapon means "the defendant used the object in such a manner that created the impression that
the object was such an instrument (*e.g.*, a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun)." The defendant argued that the new guideline was substantively changed and should not have applied to him because his crime took place the day before the guideline was enacted, and that such application violated the *ex post facto* clause of the Constitution. The Tenth Circuit held that the amendment did not change the text of the guideline and merely changed the accompanying commentary. Thus, the Tenth Circuit classified the change as clarifying, rather than substantive. The defendant also argued that the district court erred in applying the enhancement under USSG §2B3.1(b)(2) based upon the defendant placing his hand in his pocket to create the impression that he possessed a dangerous weapon during the robbery. The Tenth Circuit cited several cases on the subject.[6] Consistent with the Third and Fourth Circuits, the Tenth Circuit held that the defendant's actions and language at the scene and his admission to FBI investigators that "he did not have a gun, but did have his hand in his pockets as if he had one," was sufficient evidence to trigger the application of the dangerous enhancement.

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[6] *United States v. Souther*, 221 F.3d 626, 629 (4th Cir. 2000), *cert. denied*, 531 U.S. 1099 (2001) (court held that "a concealed hand may serve as an object that appears to be a dangerous weapon"); *United States v. Dixon*, 982 F.2d 116, 122 (3d Cir. 1992), *cert. denied*, 508 U.S. 921 (1993) (court affirmed enhancement where the robber's accomplice had a towel over her hand in a manner perceived by bank tellers to be concealing a gun).

United States v. Metzger, 233 F.3d 1226 (10th Cir. 2000). The district court did not err in applying the bodily injury enhancement under USSG §2B3.1(b)(3)(B) to increase a defendant's sentence where the relevant injury was inflicted by a police officer. The defendant was convicted of robbery of a credit union during which a police officer shot a driver in the parking lot whom he believed to be the perpetrator, but who was later determined not to be the perpetrator. On appeal, the defendant argued that the four-level enhancement under USSG §2B3.1(b)(3)(B) for the injury to the victim was improper because the injury was not a reasonably foreseeable result of the defendant's criminal conduct. The Tenth Circuit disagreed, and found that under USSG §1B1.3(a)(1)(A) and (a)(3), the victim's injury was attributable to the defendant's conduct because the harm that resulted from the acts and omissions were committed, induced, and willfully caused by the defendant. *Id*. at 1227. The court found that the victim's injury was a reasonably foreseeable result of the defendant's conduct because the defendant robbed a police credit union. The court held that it was reasonably foreseeable that a police officer conducting personal business at the bank might pursue the defendant and that the officer might act on reports from witnesses without taking the time to verify the information. *Id*. at 1228. *See United States v. Malone*, 222 F.3d 1286, 1296 (10th Cir.), *cert. denied*, 531 U.S. 1028 (2000) (held that the district court's decision to apply the four-level enhancement under USSG §2B3.1(b)(4)(A) based on the defendant's abduction of the victim in order to facilitate the commission of the carjacking was not plain error).

§2B3.2 Extortion by Force or Threat of Injury or Serious Damage

United States v. Bruce, 78 F.3d 1506 (10th Cir.), *cert. denied*, 519 U.S. 854 (1996). In considering an issue of first impression, the circuit court held that application of a five-level enhancement under USSG §2B3.2(b)(3)(A)(iii) was warranted where defendant possessed weapons at home when he mailed an extortion letter threatening their use. With no guidance as to the meaning of "possession" in the USSG §2B3.2 context, the district court enhanced defendant's sentence based on the fact that the weapons were in defendant's possession when he mailed the threatening notes. The defendant contended that the enhancement was intended to apply only when the victim believes the extortionist has a weapon or when there is a risk, due to potential use of a weapon, to law enforcement personnel. The facts show that defendant admitted to possessing the weapons prior to his arrest and the police found weapons in defendant's home upon searching it. Noting the district court's finding that the defendant possessed weapons at the time he wrote the letters, the circuit court held that this case "demonstrates why such an enhancement is warranted." *Id*. at 1510. The circuit court went on to state that the defendant's weapons possession demonstrated that defendant was prepared to follow through with his threats if his monetary demands were not met.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses). Attempt or Conspiracy[7]

United States v. Asch, 207 F.3d 1238 (10th Cir. 2000). Drugs possessed for personal consumption cannot be considered when determining the sentencing guidelines range or the statutory sentencing range.

United States v. Boyd, 289 F.3d 1254 (10th Cir. 2002). The district court erred in not calculating the amount of drugs attributable to the defendant by a preponderance of the evidence, as required by the guideline. The court held that there was no evidence in the record supporting the district court's finding of the quantity relied upon for sentencing. The court vacated and remanded the sentence after finding that the district court looked outside the record for a factual basis of drug quantity.

United States v. Decker, 55 F.3d 1509 (10th Cir. 1995). The district court did not err in treating 100 percent pure d,1-methamphetamine as "methamphetamine (actual)" under the sentencing guidelines. The defendant was convicted for manufacturing a substance consisting of both d,1-methamphetamine and d-methamphetamine. Both substances are isomers of each other, with d,1-methamphetamine having a relatively lower potency. The defendant argued on appeal that his sentence, which was identical to one that he would have received for manufacturing pure d-methamphetamine instead of a mixture, was erroneously calculated and was contrary to the Sentencing Commission's intent to punish more severely those who manufacture either more drugs or more potent drugs. The circuit court ruled that the district court correctly treated pure d,1-methamphetamine as "methamphetamine (actual)" for sentencing purposes. The circuit court discussed the rulings of the Eleventh and Third Circuits on this issue. In *United States v. Carroll*, 6 F.3d 735 (11th Cir. 1993), *cert. denied*, 510 U.S. 1183 (1994), the Eleventh Circuit held that the term "methamphetamine (actual)" refers to the relative purity of the methamphetamine and does not refer to a particular form of the methamphetamine. In *United States v. Bogusz*, 43 F.3d 82 (3d Cir. 1994), *cert. denied*, 514 U.S. 1090 (1995), the Third Circuit agreed that the term "methamphetamine (actual)" refers to the amount of pure illegal product, but disagreed slightly and held that references to

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[7] An amendment to become effective November 1, 2004, adds a new enhancement to §2D1.1 for distribution of a controlled substance, and the like, through the use of an interactive computer service; provides a definition of "interactive computer service"; increases penalties for GHB and GBL in the Drug Equivalency Tables by setting threshold amounts for triggering the five-year term for GHB at three gallons and a ten-year sentence for GHB at 30 gallons; adds to Commentary a reference to controlled substance analogues and the extent to which potency can be taken into account in determining the appropriate sentence; clarifies that Note 12 applies to a defendant-buyer in a reverse sting operation; provides a special instruction requiring application of the vulnerable victim adjustment under §3A1.1(b)(1) if the defendant distributes a controlled substance to another individual during the commission of a sexual offense; and repeals the current "mitigating role cap" at §2D1.1(a)(3) to replace it with an alternative approach which would provide net reductions that correspond with designated base offense levels.

"methamphetamine" and "methamphetamine (actual)" in the drug quantity table of USSG §2D1.1(c) refer solely to pure quantities of d-methamphetamine and that in order to calculate a base offense level for d,1-methamphetamine, the substances in question must be converted into its marijuana equivalency. The circuit court recognized the different methods of manufacturing methamphetamine and ruled that the district court correctly calculated the defendant's sentence. Paragraph five in the Application Notes following USSG §2D1.1 directs the court to include all salts, isomers and all salts of isomers in calculating the weight of any given controlled substances thereby precluding the defendant's argument that "methamphetamine (actual)" refers only to pure d-methamphetamine. Furthermore, the guidelines instruct courts to assign the weight of the entire mixture of substance to the controlled substance that results in the greater offense level when the mixture consists of more than one controlled substance, thereby precluding the defendant's claim that his base offense level should have been determined by combining the calculated marijuana equivalents of the amounts of d,1-methamphetamine and d-methamphetamine in the substance.

United States v. Higgins, 282 F.3d 1261 (10th Cir. 2002). The district court erred in calculating the defendants' sentences on the basis of a faulty estimate of methamphetamine. The defendants were convicted of crimes related to the manufacturing, possession, and distribution of methamphetamine. The sentencing court determined the amount of methamphetamine attributed to the defendants based on testimony regarding two quantities of a chemical used to manufacture the drug. The Tenth Circuit stated that while a court's determination of drug quantity attributed to defendants may be an approximation, the estimate used to establish the offense level under the guidelines must have "some basis of support in the facts of the particular case" and must have "sufficient indicia of reliability." *United States v. Wacker*, 72 F.3d 1453, 1477 (10th Cir. 1995), *cert. denied*, 523 U.S. 1053 (1998), *quoting United States v. Garcia*, 994 F.2d 1499, 1508 (10th Cir. 1993)). The Tenth Circuit held that the estimates of methamphetamine attributable to the defendants did not have an indicia of reliability. The government's main evidence was a DEA chemist's testimony that the chemical may have yielded a certain amount of methamphetamine based on numbers that had been provided to her. The Tenth Circuit concluded that such an estimate was "only guesswork" for the quantity of methamphetamine that could have been produced. The case was remanded for sentencing.

United States v. Pompey, 264 F.3d 1176 (10th Cir. 2001), *cert. denied*, 534 U.S. 1117 (2002). The district court did not err in enhancing the defendant's sentence by two levels for possession of a firearm during the course of a drug conspiracy. The Tenth Circuit held that the government showed sufficient relationship between the firearm and the drug conspiracy. The court pointed out that the guideline states that the weapon enhancement should be applied unless it is clearly improbable that the weapon was connected to the offense, and that the government must merely show a temporal and spatial relationship among the weapon, the defendant, and the drug trafficking. Furthermore, once the government has satisfied its initial burden, the burden will shift to the defendant to prove that it is clearly improbable that the weapon was connected with the offense. The defendant argues that because no weapon was seized from him directly, the enhancement should not apply. The Tenth Circuit disagreed, and held that if sufficient alternative evidence was presented that connects the defendant, the weapon and the conspiracy, actual seizure from the defendant is not necessary.

United States v. Richards, 87 F.3d 1152 (10th Cir.), *cert. denied*, 519 U.S. 1003 (1996). The Tenth Circuit, *en banc*, reversed the decision of the district court. On the government's appeal, the court held that the Sentencing Commission's amendment to USSG §2D1.1, comment. (n.1), defining "mixture or substance" to exclude materials such as liquid by-products which must be separated from a controlled substance before it is used, did not alter the definition of "mixture or substance" for purposes of applying the statutory minimum sentence under 21 U.S.C. § 841. The Supreme Court's decision in *Chapman v. United States*, 500 U.S. 453 (1991) controls. That decision held that the words "mixture or substance" had to be given their plain meaning for purposes of 21 U.S.C. § 841. "Applying the plain meaning of `mixture,' the methamphetamine and liquid by-products the defendant possessed constitute 'two substances blended together so that the particles of one are diffused among the particles of the other.'" *Chapman*, 500 U.S. at 462 (citing 9 Oxford English Dictionary 921 (2d ed. 1989)). The defendant must be sentenced based upon the 32 kilogram weight of the methamphetamine and its liquid by-products, rather than the 28 kilograms of pure methamphetamine.

United States v. Silvers, 84 F.3d 1317 (10th Cir. 1996), *cert. denied*, 519 U.S. 1079 (1997). The district court did not err in sentencing the defendant, who pled guilty to possession with the intent to distribute marijuana, to a mandatory minimum sentence under 21 U.S.C. § 841 based on the number of marijuana plants as opposed to the weight of the marijuana. The circuit court rejected the defendant's first argument that he should not be sentenced based on the number of marijuana plants unless the government proved by a preponderance of the evidence that the defendant was the grower of the marijuana. In addition to the fact that the statutory language of 21 U.S.C. § 841 is unambiguous, the court finds that the legislative purpose behind the statute, which is to punish growers more harshly, "does not mandate [ ] that the government must prove the defendant was a grower before that equivalency can be applied." *Id*. at 1323. If Congress had so intended, it could have inserted such language into the text of the statute. Further, the sentencing guidelines do not seem to require anything beyond the proof of the quantity of marijuana. The circuit court rejected the defendant's second argument that in order to impose the mandatory minimum sentence the government must not only meet the definition of plant as an "organism having leaves and a readily observable root formation," but also show that the plant in question is alive. *Id*. at 1326. The court found nothing in the language or legislative history of 21 U.S.C. § 841 to support such a requirement. To the contrary, the legislative history of that statute indicates an intent "to simplify, not to complicate, the method of determining the high end or low end mandatory sentences." *Id*. Therefore, to add requirements to the plain meaning of the statute would undermine the legislative intent. The circuit court rejected the defendant's third argument that the district court erred in attributing 1000 marijuana plants to him for sentencing purposes. Giving deference to the district court's credibility determinations, the circuit court found no clear error in the finding of factual support for the existence of 1,000 plants.

United States v. Smith, 264 F.3d 1012 (10th Cir. 2001). The district court did not err in applying USSG §2D1.1 to determine the defendant's sentence. The defendant pled guilty to possession of pseudophedrine, one of the key ingredients for manufacture of methamphetamine. The relevant sentencing guideline for possession of pseudophedrine is USSG §2D1.11; however USSG §2D1.11 provides for a cross-reference to USSG §2D1.1 if the defendant is determined to have been manufacturing methamphetamine. The defendant argued that he was not attempting to manufacture

methamphetamine and therefore the cross-reference was inappropriate. The Tenth Circuit held that it is not necessary for the defendant to possess a full working lab to be convicted of attempting to manufacture methamphetamine. The defendant had most of the equipment for a full working lab, and furthermore he had already begun the first step of the manufacturing process. Finally, the Tenth Circuit held that it is not necessary for the defendant to possess all the necessary precursor chemicals to be considered to have taken a substantial step toward manufacture.

§2D1.6 Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy

United States v. McGee, 291 F.3d 1224 (10th Cir. 2002). The district court erred in sentencing the defendant to seven counts for each telephone call, rather than only one. The court held on appeal that the PSI incorrectly assessed the seven violations as seven separate offenses and thus the sentences were remanded for resentencing as one conviction under the statute.

§2D1.11 Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy

See United States v. Smith, 264 F.3d 1012 (10th Cir. 2001), §2D1.1, p. 12.

Part F Offenses Involving Fraud or Deceit[8]

§2F1.1 Fraud and Deceit[9]

United States v. Banta, 127 F.3d 982 (10th Cir. 1997). The defendant was properly held responsible for the value of vehicles obtained through bank fraud despite the fact that the vehicles were ultimately recovered. The defendant's conduct in furnishing to the bank a false address and telephone number and his failure to make even one payment were reasonably seen by the district court as evidence of the defendant's intent to permanently deprive the bank of the vehicles.

United States v. Lewis, 240 F.3d 866 (10th Cir. 2001). The district court did not err in its calculation of loss under USSG §2F1.1 by including the value of the elk intended to be killed, along with the value of the other elk actually killed. The defendant was convicted of violating the Lacy Act, in connection with a commercial elk hunting venture that he ran from his 320-acre tract of property located adjacent to wildlife refuge. The defendant lured the elk on to his tract of land to make the elk available for elk hunting. He advertised in a local newspaper, guaranteeing 6x6 bulls guaranteed for $7,500. A hunter who responded to the ad shot one of the defendant's elk and returned home with the

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[8] Effective November 1, 2001, §2F1.1 (Fraud) was deleted by consolidation with §2B1.1, USSG App. C, Amendment 617.

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

elk's carcass. At sentencing, the defendant challenged the calculation of loss that was based on the death of the one elk actually killed and another elk intended to be killed because there was no evidence that the defendant entered or intended to enter into an agreement with the undercover Fish and Wildlife agent to kill the second elk. On appeal the court, relying on the testimony of the Fish and Wildlife agent, found that the district court reasonably concluded that the defendant intended to cause the killing of the second elk and as such its value should be included in the calculation of loss in the defendant's case. *See United States v. Nichols*, 229 F.3d 975, 982 (10th Cir. 2000) (entire amount of bad checks written on an account acquired by using a false social security number can be considered in calculating the loss, even though the bank recovered some of the losses).

United States v. Janusz, 135 F.3d 1319 (10th Cir. 1998). The district court properly refused to give the defendant credit against loss calculation for sums victims ultimately recouped from third parties. Because the defendant did nothing to aid these recoupments by the victims, the sums recovered from the third parties could not reduce the defendant's culpability.

United States v. Knox, 124 F.3d 1360 (10th Cir. 1997). The amount of pecuniary loss attributable to a defendant in a mail fraud scheme is the totality of actual losses caused by the scheme. The fact that the defendant did not actually receive an amount of money equivalent to the loss caused by the scheme did not preclude such sums from being attributable to him as long as they were caused by the reasonably foreseeable acts of his co-conspirators.

United States v. Moore, 55 F.3d 1500 (10th Cir. 1995). The defendant was convicted of aiding and abetting credit card fraud. The government sought a five-level enhancement under the fraud guideline, §2F1.1, based on the amount of loss involved. The $40,000 loss amount included the market value of two abandoned rental cars and the rented truck driven at the time of apprehension. The district court based the loss amount on USSG §2F1.1, comment. (n.7), which states that if the intended loss was greater than the actual loss inflicted, the intended amount should be used. The commentary refers to the calculation of loss under the larceny guideline, at §2B1.1, and at §2B1.1, comment. (n.2), the commentary explains that where "a defendant is apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately." The appellate court found "the district court's reliance upon the commentary to §2B1.1 inconsistent with our cases interpreting §2F1.1." *Id*. at 1502. Because "the government presented no evidence of actual losses sustained by the owners of the rented vehicles," the district court on remand must make additional findings and determine whether the defendant "intended to inflict a loss that included the entire fair market value of each of the rented vehicles." *Id*. at 1503.

Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic[10]

United States v. Kimler, 335 F.3d 1132 (10th Cir.), *cert. denied*, 124 S. Ct. 945 (2003). The defendant was convicted of receiving or distributing, by computer, images of minors engaged in sexually explicit conduct; possession of the images; and distribution of the images. On appeal, the defendant claimed that the district court erred (1) by imposing the enhancement under §2G2.2(b)(1) for possession of images of prepubescent children; and (2) by imposing the enhancement for sadistic conduct under §2G2.2(b)(3). The defendant argued that expert testimony was required to prove that the minors in the images were prepubescent. The court of appeals stated that a case by case determination must be made as to whether a lay jury can determine on its own, without the assistance of expert testimony, the age of a child in a pornographic image. In this case, the court found that the images so obviously depicted prepubescent children that no expert testimony was required. Next, the defendant argued that the district court erred by enhancing his sentence by four levels for possessing sadistic images under §2G2.2(b)(3). The defendant claimed that the statutory definitions for the offense of conviction fully covered the conduct portrayed in the pictures and therefore, the enhancement resulted in double counting. The court of appeals affirmed the enhancement, concluding that the district court applied the enhancement because it found that "some of the images depict anal or vaginal penetration of prepubescent children by adults causing pain and humiliation." *Id.* at 1143. It found that this conduct was not covered in the statutory definitions of the offense of conviction. Furthermore, the court of appeals held that expert testimony is not required to justify an enhancement under §2G2.2(b)(3).

United States v. Plotts, 347 F.3d 873 (10th Cir. 2003*).* The defendant pled guilty to one count of receiving child pornography over the Internet in violation of 18 U.S.C. § 2252(a)(2), and one count of criminal forfeiture in violation of 18 U.S.C. § 2253(a)(3). The district court sentenced him to 87 months of prison followed by 5 years of supervised release. The defendant challenged his sentence,

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[10] An amendment to become effective November 1, 2004, consolidates §§2G2.2 and 2G2.4 to avoid confusion in the application of these guidelines; provide alternative base offense levels, if the defendant was convicted of 18 U.S.C. § 2252(a)(4), 2252A(a)(5) (possession offenses) or § 1466 (solicitation offense), and a separate offense level for all other offenses; add a number of enhancements related to trafficking and receipt of child pornography; broaden the computer enhancement to include "interactive computer " as defined in 47 U.S.C. § 230 (f)(2) and to apply to offenses in which the computer (or an interactive computer service) was used for possession of pornographic material; add Commentary to §2G2.2 which counts each video, video-clip, movie, or similar recording as having 75 images; make several other minor changes to §2G2.2, Commentary, such as providing the definitions of "computer" and "image"; clarify existing definitions of "minor" and "distribution"; and clarify that a defendant does not need to intend to possess, receive, or distribute sadistic or masochistic images for application of this enhancement.

arguing that the five-level sentence enhancement contained in USSG §2G2.2(b)(4) should be read as discretionary as opposed to mandatory. The Tenth Circuit disagreed, holding that the language of the guideline is unambiguous and requires a five-level enhancement.

§2G2.4 Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct[11]

United States v. Thompson, 281 F.3d 1088 (10th Cir.), *cert. denied*, 537 U.S. 875 (2002). The district court did not err when applying a two-level enhancement under USSG §2G2.4(b)(2) to the sentences of two defendants convicted of violating section 2252(a)(5)(B), child pornography possession. Section 2G2.4(b)(2) permits a two-level enhancement when a defendant is in possession of ten or more "items" containing visual depiction involving the sexual exploitation of a minor. Both defendants had hundreds of such depictions on less than ten computer disks and argued that the district court erred in interpreting "items" to include computer files, rather than the disks themselves. The Tenth Circuit, in supporting its position, cited *United States v. Perreault*, 195 F.3d 1133, 1134-35 (9th Cir. 1999), and *United States v. Harper*, 218 F.3d 1285, 1287 (11th Cir. 2000), in which the courts considered convictions under section 2252(a)(5)(B) that determined that the term "items" in USSG §2G2.4(b)(2) meant computer files, not the entire disks. The defendant further argued that the context of "other items" in the guideline makes it clear that it refers to containers beyond those specifically listed in USSG §2G2.4(b)(2), and that each of the containers listed can contain multiple images, just as computer disks can. The Tenth Circuit held that while this is true, a file is a different kind of container that may be transported electronically far more easily than the listed items and thus should be sufficient to trigger the enhancement under USSG §2G2.4(b)(2).

Part J Offenses Involving the Administration of Justice

§2J1.3 Perjury or Subornation of Perjury

United States v. Sinclair, 109 F.3d 1527 (10th Cir. 1997). The district court did not err in assessing a three-level upward adjustment of the defendant's offense level pursuant to USSG §2J1.3(b)(2) for substantial interference with the administration of justice. The guideline establishes a base offense level of 12 for convictions for perjury or subornation of perjury. The defendant argued that the government failed to establish that his perjured testimony caused an unnecessary expenditure of substantial government or court resources. The Tenth Circuit, having not yet construed the meaning of the phrase "unnecessary expenditure of substantial government or court resources," relied on decisions by other circuits for guidance. The circuit court noted that expenses associated with the underlying perjury offense should not form the basis for an upward adjustment. *United States v. Duran*, 41 F.3d 540, 546 (9th Cir. 1994). Additionally, the Eleventh Circuit has held that pre-perjury investigative efforts should not be used as a basis of enhancement because the waste of resources did not result from the offense. The court initially found that the reasoning of the presentence report and the court's time

[11] *See* USSG App. C, Amendment 649.

and resources in trying the defendant on that offense could not be used to support a USSG §2J3.1(b)(2) upward adjustment. However, the court ultimately relied on the Seventh Circuit decision in *United States v. Jones*, 900 F.2d 512, 522 (2d Cir.), *cert. denied*, 498 U.S. 846 (1990), where the court concluded that substantial interference with the administration of justice may be inferred if the defendant concealed information of which he is the only known source. In the instant case, the district court had made a specific finding that the perjured testimony offered by the defendant at the trial was the cornerstone of the defense and lead to additional false testimony.

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition[12]

United States v. Bayles, 310 F.3d 1302 (10th Cir. 2002). The district court erred when it concluded that the defendant's ignorance of 18 U.S.C. § 922(g)(8) removed his conduct from the heartland and was therefore a permissible ground for a downward departure. Section 922(g)(8) prohibits the possession of a firearm following the issuance of a state court protective order. USSG §2K2.1(b)(2) states that a decrease in an offense level is permissible if the defendant "possessed all ammunition and firearms solely for lawful sporting purposes or collection and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition." However, the Tenth Circuit noted that §2K2.1 did not address the defendant's awareness that the possession of the firearm was illegal. Based on §2K2.1 and consistent with sister circuits construing section 922(g)(8), the court held that "a defendant's ignorance of § 922(g)(8) does not remove his or her conduct from the heartland and is therefore not a permissible basis for departure." *Id.* at 1313.

United States v. Blackwell, 323 F.3d 1256 (10th Cir. 2003). On appeal, the defendant objected to the application of a four-level enhancement under §2K2.1(b)(5) on the theory that the defendant possessed the weapon in connection with the state crime of felony menacing. During a gathering at a truck stop, police officers aided a private security guard in dispersing a large crowd of young people that congregated there after local nightclubs had closed. The record reflected that three of the four officers that reported to the scene personally saw a red laser-like beam that passed over their bodies that the security guard later confirmed was coming from the driver's seat of the vehicle

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[12] An amendment to become effective November 1, 2004, increases the enhancement for the offense involving a destructive device if the destructive device was a man-portable air defense systems (MANPADS), portable rocket, missile, or device used for launching a portable rocket of missile; provides an upward departure for non-MANPADS destructive devices where the two-level enhancement for such devices did not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk of public welfare, and the risk of death or serious bodily injury that the destructive device created; adopts the statutory definition of "destructive devices" provided in 26 U.S.C. § 5845(f) as the guideline definition and similarly substituted statutory definitions for the definitions of "ammunition" and "firearm"; and increases guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive devices.

where defendant was seated. The Tenth Circuit concluded that sufficient evidence supported the finding that the defendant pointed the gun at the officers or that the officers were in fear of imminent bodily threat. *See also United States v. Norris*, 319 F.3d 1278, 1284-85 (10th Cir. 2003) (imposition of upward sentencing enhancement for use or possession of firearm in connection with another felony offense was warranted).

United States v. Collins, 313 F.3d 1251 (10th Cir. 2002). The district court erred in determining that application of §2K2.1(b)(2) was precluded by two instances of lawful, non-sporting use. The defendant appealed, arguing that the district court erred in refusing to apply a reduction in the base offense level under §2K2.1(b)(2). The government argued that the defendant was not entitled to a reduction in his base offense level because, by using his rifle as collateral in two isolated instances to secure repairs to his automobile, the defendant had used his firearm in a manner inconsistent with possession "solely for lawful sporting purposes." *See* USSG §2K2.1(b)(2). The Tenth Circuit disagreed with the government's argument. Relying on *United States v. Mojica*, 214 F.3d 1169 (10th Cir. 2000), the court held that "§2K2.1(b)(2) should be read broadly to encompass circumstances that are consistent with the provision's intent to provide a lesser punishment for possession of a firearm that is more benign." *Collins*, 313 F.3d at 1255. In other words, the district court must examine "the totality of the circumstances, including the specific circumstances of possession and actual use, rather than relying on a single factor to preclude application of the guideline." *Id.* (*quoting Mojica*, 214 F.3d at 1172).

United States v. Constantine, 263 F.3d 1122 (10th Cir. 2001). The district court did not err in enhancing the defendant's sentence because he possessed a firearm for use in connection with a felony. The defendant pled guilty to possession of an unregistered firearm. He was in possession of the firearm during the burglary of a home. In addition to the .22 caliber handgun, the defendant was also found in possession of a homemade silencer, extra ammunition, a knife, and an expandable baton. The defendant argued that his possession of the weaponry was not in fact "connected with" the burglary but was actually just over-preparation due to his obsessive compulsive disorder. The Tenth Circuit followed its own precedent in holding that a weapon is connected with the felony and the enhancement was appropriate when "the weapon facilitated or had the potential to facilitate the underlying felony." *Id*. at 1126. The Tenth Circuit held that a silencer would provide sufficient potential protection during a residential burglary that its possession should be considered as potentially facilitating the burglary. Thus, the district court was correct in applying the enhancement.

United States v. Eaton, 260 F.3d 1232 (10th Cir. 2001). The district court did not err in enhancing the defendant's sentence based on his possession of a firearm with the knowledge or intent that it will be used in connection with another felony offense. The defendant argued that since there is no other possible purpose for a pipe bomb, an enhancement is inappropriate. The Tenth Circuit stated that if it were to accept the defendant's argument, the enhancement would never be appropriate in any crime involving a destructive device. Therefore, the Tenth Circuit held that the fact that a destructive device "has the potential to facilitate a felony" does not make it exempt from the enhancement. *Id*. at 1238. The defendant also claimed that imposition of the enhancement qualifies as impermissible double counting. He argued that USSG §§2K2.1(b)(3) and 2K2,1(b)(5) enhanced his sentence because the

offense involved a destructive device and because of its potential use in connection with a felony. The Tenth Circuit held, however, that the two provisions serve distinct purposes and therefore enhancement under both provisions does not constitute double counting. The district court did not err in enhancing the defendant's sentence for his knowledge that the pipe bombs would be used in connection with another felony even though the government agent was the individual who informed the defendant of the potential subsequent felony. The defendant argued that the government agent informed him of the pipe bombs' potential use, that he did so merely to provide an opportunity for a sentencing enhancement, and that such conduct was outrageous. The Tenth Circuit held that the alleged conduct did not rise to the level of conduct that is so shocking, outrageous, and intolerable as to violate a universal sense of justice. Therefore, the charge of outrageous government conduct was properly rejected by the district court.

United States v. Walters, 269 F.3d 1207 (10th Cir. 2001). The district court did not err when it applied a four-level enhancement under USSG §2K2.1(b)(5) to a defendant for possession of a firearm in connection with another felony offense. The Tenth Circuit held that the district court correctly applied the enhancement after finding that the defendant possessed the stolen gun in connection with the felony of unlawfully possessing a stolen truck. Section 2K2.1(b)(5)'s "in connection with" requirement is analogous to the "in relation to" requirement of 18 U.S.C. § 924(c)(1), which is "satisfied if the government shows that the weapon facilitates or has the potential to facilitate the . . . offense, but is not satisfied if the weapon's possession is coincidental or entirely unrelated to the offense." *United States v. Gomez-Arrellano*, 5 F.3d 464, 466-67 (10th Cir. 1993). In this case, the defendant admitted that he possessed the gun while driving the truck and likely used the gun as a means of keeping the truck. Therefore, the gun had the potential to facilitate the unlawful possession of the stolen truck and the court committed no error in its application of the guideline.

§2K2.4 Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

United States v. Battle, 289 F.3d 661 (10th Cir.), *cert. denied*, 537 U.S. 856 (2002). The district court did not err in choosing to sentence the defendant to consecutive sentences for separate crimes under 18 U.S.C. § 924. The court held section 924(c)(1) "mandates a consecutive sentence for the use of a firearm in the commission of a violent crime." *Id*. at 667; *see also United States v. Blocker*, 802 F.2d 1102, 1105 (9th Cir. 1986). The court also recognized that the prohibition against concurrent sentences in section 924(c)(1)(D)(ii) "merely emphasizes and reiterates the requirement that consecutive sentences be imposed if the defendant has used a firearm in the commission of a violent crime." *Battle*, 289 F.3d at 668. The court held that section 924(c) mandates a consecutive sentence in addition to the sentence for use of a firearm used in the commission of a violent crime where the evidence supports the aggravating factors outlined in section 924(j). *Id*. at 669.

United States v. Wheeler, 230 F.3d 1194 (10th Cir. 2000). The district court did not err in sentencing the defendant in excess of the 84-month mandatory minimum. The district court did err in the method used to determine the sentence imposed beyond the mandatory minimum. The defendant pled guilty to brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) but not

to the underlying offense of robbery. At sentencing the district court calculated the defendant's guideline range to be 46 to 57 months. An additional 22 months were added to the seven-year minimum mandatory sentence to arrive at the defendant's 106-month sentence. On appeal, the defendant argued that the district court erred when it sentenced him to a term of imprisonment in excess of the 84-month mandatory minimum. The Tenth Circuit disagreed and found that, according to the court's earlier decision in *United States v. Bazile*, 209 F.3d 1205, 1207 (10th Cir. 2000), "a sentencing court has the power to impose a sentence greater than the statutory mandatory minimum required by section 924(c) if the 'defendant's criminal history category and offense level indicates a term higher than the minimum under the statute.'" *Id*. at 1195-96. The court held that the defendant can be sentenced to a term in excess of 84 months but the methodology used by the district court was erroneous because the 22 months in excess of the seven-year mandatory minium was not determined based on the defendant's offense level and criminal history as required by *Bazile*. The defendant's sentence was vacated and remanded for resentencing.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

See United States v. Jose-Gonzalez, 291 F.3d 697 (10th Cir. 2002), §5K2.0, p. 46.

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

United States v. Castro-Rocha, 323 F.3d 846 (10th Cir. 2003). The district court did not err in concluding that a state felony conviction for simple possession of a controlled substance is an "aggravated felony" for purposes of the 2001 version of USSG §2L1.2(b)(1)(C). The amended application notes to §2L1.2 contained a new definition of "drug trafficking offense" which did not include simple possession crimes. However, the amended application notes continued to define the term "aggravated felony" by reference to 8 U.S.C. § 1101(a)(43). The defendant alleged that the amendments to §2L1.2, effective November 1, 2001, changed the definition of "aggravated felony" to exclude state simple possession felony convictions. The defendant argued that by singling out drug crimes that have a trafficking element for special treatment under the guidelines, the Sentencing Commission intended to treat simple possession convictions as ordinary felonies. The Tenth Circuit disagreed with this argument and adopted the holding of the Ninth Circuit in *United States v. Soberanes*, 318 F.3d 959 (9th Cir. 2003). In sum, the Commission's "decision to carry forward the term "aggravated felony," while retaining the provision of the application notes defining that key term by reference to 8 U.S.C. § 1101(a)(43), makes clear the Sentencing Commission intended that state felony convictions for simple possession qualify for the eight-level enhancement set out in section 2L1.2(b)(1)(C)." *Castro-Rocha*, 323 F.3d at 851.

United States v. Lucio-Lucio, 347 F.3d 1202 (10th Cir. 2003). The district court erred when it imposed an eight-level enhancement under §2L1.2. The defendant pled guilty to one count of illegally reentering the United States. The defendant had a prior conviction for driving while intoxicated, which had been charged and sentenced as a felony because of earlier DWI offenses. The defendant's

offense level was subject to some degree of enhancement under §2L1.2(b)(1). At sentencing, the district court applied an eight-level enhancement reserved for aggravated felonies. The district court relied on *Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001), and held that driving while intoxicated was a "crime of violence," and therefore an aggravated felony. On appeal, the Tenth Circuit noted that Application Note 2 of §2L1.2 refers to Section 16 of Title 18 for a definition of "crime of violence." First, the court noted that a DWI did not satisfy the definition under section 16(a). Therefore, the issue was whether driving while intoxicated was an offense that, by its nature, involved a substantial risk that physical force against the person or property of another may be used in the course of committing the offense under section16(b). The Tenth Circuit noted that every circuit that had considered the issue directly had determined that driving while intoxicated, by itself, was not a "crime of violence." The court stated that although it had, on deferential review, upheld the Board of Immigration Appeals's (BIA) determination that DWI was a crime of violence, *see Tapia Garcia*, the BIA had since bowed to the weight of contrary circuit authority and overruled its previous determination. The court concluded that because the risk in the DWI context was not that the injury would occur through the commission of acts of force, it could not be described as posing a substantial risk that physical force may be used in the course of committing the offense. If the court were to conclude that section 16(b) reached DWI offenses merely because they involved a significant risk of harm to the person or property of others, the distinction between section 16(a) and (b) would no longer exist. Since DWI was not within the ambit of section 16(b), the district court's sentence was vacated.

United States v. Martinez-Candejas, 847 F.3d 853 (10th Cir. 2003). The defendant pled guilty to illegally reentering the United States after deportation in violation 8 U.S.C. § 1326. The district court sentenced him to 46 months, relying on a presentence report describing a 1993 conviction for conspiracy to transport and harbor illegal aliens. The district court determined that the offense had been committed "for profit," thereby triggering a 16-level enhancement under USSG §2L1.2(b)(1)(A). The Tenth Circuit examined 1) whether the prior conspiracy offense constituted an "alien smuggling offense" under this section of the guidelines and 2) whether a court may look beyond the elements of this prior offense to determine it was "committed for profit." In terms of the first issue, the Tenth Circuit determined that the phrase "alien smuggling offense" should be construed broadly, concurring with the Fifth Circuit. Regarding the second issue, the Tenth Circuit concluded that the "category" of the prior offenses does not *per se* control the analysis of potential enhancements, disagreeing with the Eleventh Circuit in the process. According to the Tenth Circuit, the proper analysis requires the court to explore the underlying facts of the prior offense.

United States v. Miranda-Ramirez, 309 F.3d 1255 (10th Cir. 2002), *cert. denied*, 537 U.S. 1244 (2003). The district court did not err when it determined that it lacked authority to depart downward based upon the circumstances surrounding the defendant's reliance on Form I-294. In general, "a sentencing court may depart from the applicable Sentencing Guidelines if it finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." *Id.* at 1260 (*quoting United States v. Hanson*, 264 F.3d 988, 993 (10th Cir. 2001)). If the Commission has not adequately considered a particular circumstance, "the court must determine whether reliance on the factor is consistent with the goals of the sentencing guidelines." *Id.* (*quoting United States v. Gomez-*

Villa, 59 F.3d 1199, 1202 (11th Cir. 1995), *cert. denied*, 516 U.S. 1050 (1996)). The Tenth Circuit joined its sister circuits in concluding that the "Commission did not take into consideration the situation surrounding the issuance of Form I-294 to deported aliens when formulating the guidelines." *Id.* The court held that "a departure based upon Form I-294 is inconsistent with the goals of the sentencing guidelines." *See also Gomez-Villa*, 59 F.3d at 1202-03; *United States v. Smith*, 14 F.3d 662, 666 (1st Cir. 1994).

United States v. Munguia-Sanchez, 365 F.3d 877 (10th Cir. 2004). The appellate court affirmed the district court's holding that a sexual assault of a child constitutes a crime of violence under §2L1.2(b)(1)(A)(ii) regardless of consent. The defendant appealed his sentence for unlawfully reentering the United States after deportation for conviction of an aggravated felony, a violation of 8 U.S.C. § 1326(a) and (b)(2). He argued that his prior Colorado state court conviction for sexual assault of a child did not constitute a crime of violence under §2L1.2(b)(1)(A)(ii). The defendant admitted that when he was twenty years old he had engaged in a sexual relationship with a 12-year-old girl. On appeal, the defendant argued that because his sexual assault conviction involved consensual conduct, the district court erred in applying the 16-level enhancement under §2L1.2. The Tenth Circuit noted that the defendant's argument had been rejected by sister circuits. The court was not persuaded by the defendant's arguments and agreed with the decisions of other circuits holding that a conviction for sexual assault on a child constitutes a crime of violence regardless of the victim's alleged consent. *See United States v. Pereira-Salmeron*, 337 F.3d 1148, 1154-54 (9th Cir. 2003); *United States v. Vargas-Garnica*, 332 F.3d 471, 473-74 (7th Cir. 2003); *United States v. Rayo-Valdez*, 302 F.3d 314, 315-20 (5th Cir. 2002); *United States v. Gomez-Hernandez*, 300 F.3d 974, 978-80 (8th Cir. 2002). Accordingly, the defendant's sentence was affirmed.

United States v. Ruiz-Gea, 340 F.3d 1181 (10th Cir. 2003). The defendant pled guilty to illegally reentering the United States after deportation in violation 8 U.S.C. § 1326. The district court sentenced him to 57 months of imprisonment to be followed by 36 months of supervised release. In arriving at this sentence, the district court applied USSG §2L1.2(b)(1)(A)(i), concluding that the defendant had a prior "drug trafficking offense for which the sentence imposed exceeded 13 months." The defendant appealed, arguing, *inter alia*, his prior sentence did not exceed 13 months because the initial term was suspended but for 90 days. The Tenth Circuit noted that the defendant's probation had been revoked subsequently. In affirming the district court, the Tenth Circuit concurred with other circuits holding that this guideline provision does not require a formalistic examination of the sentence and can include a sentence imposed on revocation.

United States v. Saenz-Mendoza, 287 F.3d 1011 (10th Cir.), *cert. denied*, 537 U.S. 923 (2002). The district court did not err in finding that a state misdemeanor qualified as an "aggravated felony" for purposes of an enhancement under the guideline. The Tenth Circuit held, as have other circuits, that "an offense need not be classified as a felony to qualify as an 'aggravated felony' as that term is statutorily defined in [the Immigration and Nationality Act]." *Id.* at 1013; *see United States v. Urias-Escobar*, 281 F.3d 165, 167-168 (5th Cir.), *cert. denied*, 536 U.S. 913 (2002); *United States v. Gonzales-Vela*, 276 F.3d 763, 766-768 (6th Cir. 2001). For example, the Ninth Circuit has stated, in dicta, "an offense classified by state law as a misdemeanor can be an 'aggravated felony'

triggering a sentence enhancement under USSG §2L1.2 if the offense otherwise conforms to the federal definition of 'aggravated felony'" found

in the statute. *Saenz-Mendoza*, 287 F.3d at 1014, *citing United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002). The court looked to the plain language of the statute and held that the definition of "aggravated felony" "does not require the offense actually be a felony as that term traditionally has been defined." *Id*. at 1014.

United States v. Salas-Mendoza, 237 F.3d 1246 (10th Cir. 2001). The district court did not err in identifying the crime of transporting aliens as an "aggravated felony" for the purposes of a sentencing enhancement under USSG §2L1.2(b)(1)(A). The defendant was convicted of reentry of a removed alien. At sentencing the district court increased the base offense level by 16 levels under USSG §2L1.2(b)(1)(A) due to the defendant's prior conviction for illegally transporting aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). The defendant argued that the illegal transportation of aliens did not relate to transporting aliens within the United States but only to transporting aliens across the border between Mexico and the United States. On appeal, the Tenth Circuit disagreed and found that a plain reading of 8 U.S.C. § 1103(a)(43)(N) indicates that transportation of aliens is clearly "related to" alien smuggling. The court found that each enumerated offense in section 1324(a) involved the transportation, movement, and hiding of aliens whether crossing into or within the United States. The court held that it could not be inferred that section 1101(a)(43)(N) excluded the crime of illegally transporting aliens from the definition of "aggravated felony" for the purpose of an increase in the base offense level under USSG §2L1.2(b)(1)(A).

United States v. Valdez, 103 F.3d 95 (10th Cir. 1996). The appellate court affirmed the district court's consideration of the defendant's prior conviction for an aggravated felony in enhancing his sentence for unlawful re-entry after deportation by 12 levels. The defendant, relying on the Ninth Circuit's interpretation of USSG §2L1.2 in *United States v. Campos- Martinez*, 976 F.2d 589, 592 (9th Cir. 1992), contended that 8 U.S.C. § 1326(b) states a separate offense, requiring a prior conviction for an aggravated felony to be pled in the indictment and proved at trial. The defendant argued that because the government had amended to omit references to his 1994 conviction, the district court erred in sentencing him under that subsection. The circuit court disagreed, and held that a prior conviction for an aggravated felony under the statute was a condition triggering an enhanced penalty, rather than a new offense and, therefore, the district court's calculation of the defendant's sentence was valid despite the fact that the conviction did not become final until after the defendant was deported.

United States v. Vasquez-Flores, 265 F.3d 1122 (10th Cir. 2001), *cert. denied*, 534 U.S. 1165 (2002). The district court did not err in imposing a sentencing enhancement for defendant's prior conviction of attempted receiving or transferring a stolen motor vehicle. The commentary to USSG §2L1.2 defines aggravated felony by reference to 8 U.S.C. § 1101(a)(43). Aggravated felony is there defined as "a theft offense (including receipt of stolen property) . . ." *Vasquez-Flores*, 265 F.3d at 1123. The defendant argued that in order for his prior conviction to meet the requirements of this definition, it would have to meet the elements of theft under the state law. He argued that his conviction was actually just a lesser included offense and therefore not a "theft offense" and does not qualify as an "aggravated felony." The Tenth Circuit held, based on its own precedent, that whether a crime is an aggravated felony for sentencing purposes does not depend on its characterization under state law. Furthermore, the court held that "theft offense" includes more than just "theft" itself. The Tenth Circuit

ultimately adopts the interpretation of "theft offense (including receipt of stolen property)" adopted by the Seventh Circuit. The definition given by the Seventh Circuit and herein adopted by the Tenth Circuit is that a "theft offense" is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Id*. at 1125 (*quoting Hernandez-Mancilla v. INS*, 246 F.3d 1002, 1009 (7th Cir. 2001)). The Tenth Circuit held that since the defendant pled guilty to attempting to knowingly receive or transfer a stolen motor vehicle, such conviction was knowing and thereby qualifies as an aggravated felony under the definition adopted by the court. The enhancement was therefore appropriate and the district court did not err.

Part Q Offenses Involving the Environment

§2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

United States v. Dillon, 351 F.3d 1315 (10th Cir. 2003). The appellate court affirmed the district court's nine-level enhancement under USSG §2Q1.2(b)(2) and a four-level enhancement under USSG §2Q1.2(b)(4). The defendant pled guilty to a charge of knowingly storing hazardous waste without a permit in violation of 42 U.S.C. 6928(d)(2)(A) and 18 U.S.C. § 2. At the sentencing, the district court applied a nine-level enhancement because the offense resulted in a substantial likelihood of death or serious bodily injury, USSG §2Q1.2(b)(2); the district court also applied a four-level enhancement because the offense involved storage without a permit, USSG §2Q1.2(b)(4). The defendant appealed these enhancements; the defendant argued that because USSG 2Q1.2(a) sets a base offense level for a conviction under 42 U.S.C. 6928(d)(2)(A) for storing hazardous waste without a permit, the district court's application of USSG 2Q1.2(b)(4) enhancement for storing without a permit constituted impermissible double counting. The Tenth Circuit found that the district court did not err when it found that storing ignitable hazardous waste at the ESP facility created a substantial risk of serious injury, and consequently correctly imposed a nine-level increase. Regarding the second issue on appeal, the court stated that it had previously rejected a claim of impermissible double counting where a guideline's base offense level covered a broader category of offenses than that covered by an enhancement under the same guideline. Thus, it was possible to be sentenced under 2Q1.2(a) without having committed the offense of storing environmental waste without a permit. In the instant case, the offense required that the 2Q1.2(b)(4) enhancement for storing without a permit be applied in order to capture the full extent of the offense's wrongfulness. Accordingly, the district court did not engage in impermissible double counting when it applied the upward adjustment pursuant to USSG 2Q1.2(b)(4).

United States v. Overholt, 307 F.3d 1231 (10th Cir. 2002). The district court did not err when it enhanced the defendant's offense level pursuant to USSG §2Q1.2(b)(1)(A) for unlawfully injecting liquid waste into Class II disposal wells. On appeal, the defendant argued that his sentence enhancement was improper under the guidelines because "(1) he did not discharge anything into the 'environment,' and (2) the enhancement cannot apply unless the environment was actually contaminated." *Id.* at 1256. The defendant relied on *United States v. Ferrin*, 994 F.2d 658, 663

(9th Cir. 1993), where the court concluded that §2Q1.2(b)(1)(A) applies only when the environment is contaminated. The Tenth Circuit joined the majority view and concluded that proof of actual contamination of the environment is not necessary to trigger §2Q1.2(b)(1)(A). *See, e.g., United States v. Liebman*, 40 F.3d 544, 550-51 (2d Cir. 1994) (proof of actual contamination of environment unnecessary); *United States v. Goldfaden*, 959 F.2d 1324, 1331 (5th Cir. 1992) (same); *United States v. Bogas*, 920 F.2d 363, 367-68 (6th Cir. 1990) (same); *United States v. Cunningham*, 194 F.3d 1186, 1201-02 (11th Cir. 1999), *cert. denied*, 531 U.S. 831 (2000) (same).

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity[13]

United States v. Adargas, 366 F.3d 879 (10th Cir. 2004). The appellate court affirmed the district court's two-level enhancement pursuant to §2S1.1(b)(2)(B). The defendant entered a guilty plea to a charge of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). At sentencing, the district court applied a two-level enhancement pursuant to USSG §2S1.1(b)(2)(B). The defendant appealed his sentence. The Tenth Circuit noted that Application Note 3 (C) of the commentary on §2S1.1 directs a sentencing court not apply to the two-level increase if (1) the defendant was convicted of a conspiracy under 18 U.S.C. § 1956(h), and (2) the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. The defendant argued that the language, "the sole object of that conspiracy," should be interpreted to mean what defendant understood to be the object of the conspiracy. The defendant suggested that the stipulated facts do not state that defendant himself had the required *mens rea* to commit the offenses described in 18 U.S.C. § 1956(a)(1)(A)(I) and (B)(1), and that therefore §2S1.1 cannot apply to him. The court noted that it had found no federal cases specifically addressing the interpretation of §2S1.1 Application Note 3(C). The court noted that the phrase "that conspiracy" plainly referred back to the conspiracy of which "the defendant was convicted . . . under 18 U.S.C. § 1956(h)." The court noted that it was undisputed that defendant, by pleading guilty to Count Two of the indictment, was convicted of conspiring to commit the offenses defined in 18 U.S.C. § 1956(a)(1)(A)(I) and (B)(I). The court concluded that the sentencing court correctly applied §2S1.1(b)(2)(B) by increasing the defendant's offense level by two levels.

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[13] Effective November 1, 2001, the Commission consolidated §§2S1.1 and 2S1.2 into a single new guideline, §2S1.1, which resulted in increased penalties for defendants who laundered funds derived from more serious underlying criminal conduct, and decreased penalties for defendants whose laundered funds derived from less serious underlying conduct. *See* USSG App. C, Amendment 634.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

United States v. Martinez, 342 F.3d 1203 (10th Cir. 2003). The defendant pled guilty to being an accessory after the fact to an attempted armed robbery in violation 18 U.S.C. § 3. The district court sentenced him to 57 months of imprisonment. The defendant appealed, arguing: 1) the general provisions for attempted crimes, USSG §2X1.1, should apply, as opposed to proceeding directly to USSG § 2B3.1, and 2) the district court erred when enhancing his sentence based on specific offense characteristics. The Tenth Circuit disagreed with the district court's refusal to apply USSG § 2X1.1, holding that "where a defendant is convicted of an attempt crime not itself covered by a specific offense guideline, calculation of a defendant's sentence must be pursuant to §2X1.1." *Id.* at 1205. In this analysis, the Tenth Circuit disagreed with the First, Ninth, and Eleventh Circuits, which hold that "where an attempt crime is included as a substantive offense in a statue covered by a specific offense guideline, that offense guideline, regardless of whether it expressly refers to attempts, should be used instead of USSG §2X1.1." *Id.* at 1207. However, the Tenth Circuit agreed with dicta below wherein the district court held that the defendant would not have been entitled to USSG §2X1.1 reduction because all necessary acts for completion of the underlying offense were present. Furthermore, the Tenth Circuit affirmed the district court's enhancement of the sentence based on specific offense characteristics.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Caballero, 277 F.3d 1235 (10th Cir. 2002). The district court did not err in applying a two-level enhancement for exploitation of vulnerable victims and an additional two-level enhancement for the large number of vulnerable victims involved. The defendants were convicted of charges related to a conspiracy involving a scheme to defraud immigrants seeking legal permanent residence. The defendants contended that the district court looked only to the victims' status as immigrants and applied the enhancements without the mandatory specified findings of vulnerability pertaining to the individual victims. The defendants relied on *United States v. Creech*, 913 F.2d 780 (10th Cir. 1990), where the court reversed a vulnerable-victim enhancement after determining that it had been applied only because of the victim's status as a newlywed. The Tenth Circuit distinguished this case from *Creech*. While in *Creech*, the defendant pled guilty and the court did not hear from the victim, in this case, 16 witnesses testified and illustrated their language problems, unfamiliarity with the laws of the United States, and illegal status, which the court used to dub them as "vulnerable." *Caballero*, 277 F.3d at 1251. The district court also stated that the district court did not merely apply a class-based enhancement to the group of illegal aliens because the victims differed in the type of vulnerabilities from which they suffered.

See United States v. Holbert, 285 F.3d 1257 (10th Cir. 2002), §3A1.3, p. 28.

United States v. Proffit, 304 F.3d 1001 (10th Cir. 2002). The district court erred when it enhanced the defendant's offense level based on the victim's vulnerability. The defendant visited the victim with the alleged intent of purchasing the victim's ranch. During his visit, the defendant made false representations regarding his trading abilities in cattle futures and defrauded the victim of $50,000. Under the guidelines, the concept of "victim vulnerability" is "reserved for exceptional cases in which the victim is unusually vulnerable or particularly susceptible to the crime committed." *Id.* at 1007. Although the victim had recently learned that he had cancer and might only have a few months to live, the victim was a sophisticated and successful businessman. The Tenth Circuit noted that the link between the victim's illness and the defendant's success in defrauding him was indirect. Furthermore, the court stated that "allowing a vulnerable victim enhancement based on illness alone would suggest that sick individuals as a group qualify as 'vulnerable victims.'" *Id.* at 1008. This approach would go against its prior holding in *United States v. Tissnolthtos*, 115 F.3d 759, 761-62 (10th Cir. 1997) (membership in a class of individuals considered more vulnerable than the average individual is insufficient standing alone to qualify for vulnerable victim enhancement).

§3A1.2 Official Victim[14]

United States v. Blackwell, 323 F.3d 1256 (10th Cir. 2003). The district court erred in enhancing the defendant's sentence under USSG §3A1.2(a). On appeal, defendant argued that §3A1.2 was inapplicable because his offense of conviction was possession of a weapon by a felon, a charge that does not encompass menacing a police officer. The Tenth Circuit agreed. Relying on *United States v. Holbert*, 285 F.3d 1257 (10th Cir. 2002), the court held that §3A1.2(a) "applies only to the offense of conviction, not to that offense accompanied by relevant conduct." *Blackwell*, 323 F.3d at 1260. In other words, in the instant case, the offense of conviction was possession of a firearm by a felon; "[n]othing about the status of the officers in any way motivated the commission of that offense, nor were the officers victims of that offense." *Id.* at 1262. In accord with sister circuits, the court determined that application of §3A1.2(a) requires the offense of conviction to be motivated by the status of an "official victim." *See also United States v. Goolsby*, 209 F.3d 1079, 1081-82 (8th Cir. 2000) (holding where offenses of conviction were conspiracy to distribute cocaine base and possession with intent to distribute, defendant's assault of officer during escape from custody not subject to official victim enhancement of §3A1.2); *United States v. Drapeau*, 121 F.3d 344, 349 (8th Cir. 1997) (§3A1.2(a) provides that enhancement is only proper where government official is victim of the defendant's offense of conviction).

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[14] An amendment to become effective November 1, 2004, restructures §3A1.2 (Official Victim) and provides a two-tiered adjustment with a three-level adjustment for offenses motivated by the status of the official victim and a six-level adjustment if the defendant's offense guideline was from Chapter Two, Part A (Offenses Against a Person).

§**3A1.3** Restraint of Victim

United States v. Holbert, 285 F.3d 1257 (10th Cir. 2002). The district court did not err in applying the enhancement for events that occurred "in the course of the offense," which was held to include conduct for which the defendant was accountable under USSG §1B1.3. Although the event occurred more than six weeks prior to the offense for which he pled guilty, the language of the guideline allows relevant conduct through its wording "in the course of the offense," and not just "in the course of the *offense of conviction*." *Id*. at 1260; *see* USSG §3A1.3. The court also relied on the language of the relevant conduct guideline, §1B1.3, and held "this section creates a presumption that, unless USSG §3A1.3 otherwise specifies, we will consider relevant conduct in its application." *Id*. Also looking to the wording of USSG §3A1.1, which specifically restricts the application to *offense of conviction*, the court held that the absence of such language in USSG §3A1.3 suggests that the guideline authors deliberately chose for the guideline to include relevant conduct.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Vanmeter, 278 F.3d 1156 (10th Cir. 2002). The district court did not err in applying a two-level enhancement to a defendant who supervised another participant in a criminal scheme. The defendant argued that the accomplice he supervised was not a "participant" within the meaning of the guideline because the accomplice was not legally responsible for the commission of 18 U.S.C. § 666, for which the defendant was convicted. The Tenth Circuit held that the defendant's argument failed because the court considers all relevant conduct under USSG §1B1.3 when determining the application of the USSG §3B1.1 enhancement. The Tenth Circuit stated that the USSG §3B1.1 enhancement was applied based on the defendant's supervision of the accomplice's participation in other relevant crimes. The district court found the defendant's accomplice was criminally responsible for violating 18 U.S.C. §§ 1035 and 1347. Therefore, it was irrelevant that the accomplice was not responsible for the 18 U.S.C. § 666 violation. The guideline was correctly applied.

§3B1.2 Mitigating Role

United States v. Jeppeson, 333 F.3d 1180 (10th Cir.), *cert. denied*, 124 S. Ct. 490 (2003). This is a case of first impression. The appellant was charged with conspiracy to traffic in methamphetamine and possession with intent to distribute methamphetamine. Pursuant to a plea agreement, the defendant pled guilty to count one, and the government dismissed count two. In light of the defendant's status as a career offender under USSG §4B1.1, the presentence report calculated the guideline range for his offense to be 188-235 months. Accordingly, the district court sentenced the defendant to 188 months of imprisonment followed by a four-year term of supervised release. In so doing, the district court denied the defendant's request for a role in offense reduction under USSG §3B1.2, holding that such a reduction is unavailable to a defendant who qualifies as a career offender under USSG §4B1.1. On appeal, the defendant argued, *inter alia*, that the district court erred by

refusing to reduce his offense level under USSG §3B1.2. The Tenth Circuit has not previously considered the question of whether a defendant designated as a career offender under USSG §4B1.1 is eligible to receive a downward adjustment for his or her role in the offense under USSG § 3B1.2. However, the court noted that every other federal appellate court that has addressed the question has concluded that a defendant is not entitled to a downward adjustment under USSG §3B1.2 following a career offender adjustment under USSG §4B1.1. The defendant argued that because the career offender guideline "never expressly states that a district court is precluded from applying the mitigating role adjustment found in §3B1.2," and because the Sentencing Commission has determined "that a participant's role in the offense must be considered when applying the sentencing guidelines," the district court erred in refusing to consider whether he was entitled to a role in offense reduction. The appellate court first noted that upon determining that a defendant qualifies as a career offender, the court must compare the offense level listed in the table to the offense level that would apply in the absence of a career offender adjustment. If the career offender offense level is greater than the "otherwise applicable" level, the sentencing court must employ the career offender offense level and a criminal history category of VI in determining the defendant's guideline range. Affirming the district court's decision, the circuit court noted that, given the sequencing of provisions provided for under USSG §1B1.1, career offender adjustments under USSG §4B1.1 are intended to be made at the end of the calculation. The court held that "the career offender guideline trumps all other offense level adjustments, with the exception of reductions for the acceptance of responsibility." *United States v. Beltran*, 122 F.3d 1156, 1160 (8th Cir. 1997).

§3B1.3 Abuse of Position of Trust

United States v. Edwards, 325 F.3d 1184 (10th Cir. 2003). The defendant objected to the district court's application of the adjustment under §3B1.3 for abusing a position of trust, arguing that she did not occupy the type of position for which §3B1.3 was designed: a position "characterized by professional or managerial discretion." The Tenth Circuit agreed with the defendant and ruled that the defendant's tasks were solely ministerial as the defendant had no authority to grant credits and no authority to exercise discretionary judgment with respect to any part of her job. Although the Tenth Circuit agreed with the district court's finding that job titles themselves do not control whether §3B1.3 is applied, it concluded that the evidence did not support the district court's suggestion that the defendant had discretionary authority or any other authority to make substantial discretionary judgments regarding company revenues or expenses.

United States v. Haber, 251 F.3d 881 (10th Cir.), *cert. denied*, 534 U.S. 915 (2001). The district court did not err in applying the enhancement to defendant under USSG §3B1.3 for misrepresenting himself as a manager of an investment firm. The defendant was convicted of mail and wire fraud. The defendant represented himself as the operating partner and manager of an investment firm and was entrusted with the supervision and management of the investment funds of his investors in Israeli operations, which he later converted for his personal use. By his own admission the defendant acknowledged that he was the "key man" in the purported business and that no one else had the connections he had with anyone in Israel or knew how to conduct the business. On appeal the defendant challenged the application of the enhancement under USSG §3B1.3 for abuse of position of

trust, but the Tenth Circuit disagreed and affirmed the district court's decision, stating that from its review of the evidence the defendant possessed a significant degree of specialized knowledge and was in a fiduciary or personal trust relationship with the investors. *See also United States v. Ma*, 240 F.3d 895 (10th Cir. 2001) (holding that the district court did not err in applying the sentence enhancement provision of USSG §3B1.3 to the defendant who was a postal employee convicted of theft of undelivered United States mail while working in that position).

United States v. Lacey, 86 F.3d 956 (10th Cir.), *cert. denied*, 519 U.S. 944 (1996). "Participant" under USSG §3B1.1 can include persons who are acquitted of criminal conduct for purposes of determining the defendant's role in the offense. Section 3B1.1, comment. (n.1) makes it clear that a "participant" in this context need not have been convicted of any offense.

United States v. Yarnell, 129 F.3d 1127 (10th Cir. 1997). Even if there were not five participants in a fraudulent scheme, evidence showed that such scheme was "otherwise extensive" and thus warranted a four-level enhancement under USSG §3B1.1(c) of the sentencing guidelines. Evidence demonstrated that the defendant's role was that of an "organizer or leader"; fraud was perpetrated on an interstate basis, lasted four months, created at least 40 victims, and involved considerable planning and complex execution.

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

United States v. Kravchuk, 335 F.3d 1147 (10th Cir. 2003). The appellate court affirmed the district court's finding that, under §3B1.4, an enhancement can be applied for the use of a minor to the defendants between the ages of 18 and 21. However, this case was remanded for resentencing on other grounds. The defendant was convicted of theft from an automatic teller machine in violation of 18 U.S.C. § 2113(b). At the time of the offense, the defendant was 18 years old and the individuals with whom he committed the crimes were minors. On appeal, the defendant challenged the district court's enhancement under §3B1.4 for the use of a minor. The defendant argued that, pursuant to the directive of the congressional statute, no defendant under the age of 21 should have his sentence enhanced for use of a minor during the commission of a crime. The Violent Crime Control and Law Enforcement Act of 1994 directed the Sentencing Commission to promulgate sentence enhancements for a "defendant 21 years of age or older . . . if the defendant involved a minor [less than 18 years old] in the commission of the offense." Pub. L. 103-322, § 1400008, 108 Stat. 1796 (1994). But USSG §3B1.4 makes no mention of what age a defendant needs to be for the guideline to apply. The Tenth Circuit noted a split among the circuits as to whether the sentencing enhancement under §3B1.4 for use of a minor should be applied to defendants aged 18 to 20. However, the court noted that Congress had 180 days to review guidelines before they went into effect and choose not to modify or disapprove the amendment extending liability for the use of minors to defendants under the age of 21. *See United States v. Ramsey*, 237 F.3d 853, 856-57 (7th Cir. 2001). The court followed the reasoning of the Fourth and Seventh Circuits in holding that §3B1.4 was valid as applied to defendants aged 18 to 20 and upheld the district court's application of the guideline.

United States v. Tran, 285 F.3d 934 (10th Cir. 2002). The district court did not err in applying the enhancement without regard to whether the minor was knowingly solicited to participate in the offense. The defendant asserted that the legislative history of the guidelines "focuse[d] on the corrupting effect of an adult offender on a pliable minor." *Id*. at 937. Thus, he contended, the enhancement should not apply if the adult does not notify the minor that he has been recruited to participate in criminal conduct. Not only did the court find that there was no case law to support this contention, it held that the language of the guideline is clear and unambiguous and therefore must be followed.

Part C Obstruction

§3C1.1 Obstruction of Justice

United States v. Chavez, 229 F.3d 946 (10th Cir. 2000). The district court did not err by imposing a two-level enhancement for obstruction based on the defendant 's perjury during her trial testimony. The defendant was convicted of conspiracy to distribute a controlled substance and aiding and abetting. On appeal the defendant argued that her testimony did not rise to the level of perjury merely because the jury and the court did not believe her. The Tenth Circuit disagreed and held that the defendant's story was "inherently unbelievable" because there was ample evidence in the record from the tape recordings referenced that the defendant expected a drug delivery at night and went out to meet the courier, a determination that completely contradicted the defendant's explanations at trial.

United States v. Gacnik, 50 F.3d 848 (10th Cir. 1995). The district court erred in applying the provisions of USSG §3C1.1 to obstructive conduct which occurred prior to the commencement of an official investigation of the offense of conviction. The defendant conspired to illegally manufacture explosives, and his co-conspirators hid the explosives following an unrelated shooting incident. At the time they hid the explosives, the defendant was aware that the police were investigating the shooting, but he did not know that the police had received an anonymous tip about the explosives. The appellate court ruled that the clear language of USSG §3C1.1 requires that the obstructive conduct must be undertaken during the investigation, prosecution or sentencing of the offense of conviction. In so holding, the court disagreed with the Eighth Circuit's broader reading of USSG §3C1.1 in *United States v. Dortch*, 923 F.2d 629 (8th Cir. 1991). In *Dortch*, the Eighth Circuit ruled that although the offense of conviction may not be what initially attracts police attention, "a defendant obstructing justice with knowledge of an investigation wholly unrelated to the offense of conviction could be found deserving of an adjustment." *Gacnik*, 50 F.3d at 852. The sentence was remanded for resentencing.

United States v. Guzman, 318 F.3d 1191, 1198 (10th Cir. 2003). The district court's adoption of the presentence report to support its finding regarding the disputed enhancement for obstruction of justice under §3C1.1 was in error. Such finding shifted the burden of proof to the defendant regarding the enhancement rather than to the government where it belongs.

United States v. Tran, 285 F.3d 934 (10th Cir. 2002). The district court did not err in enhancing the defendant's sentence after he failed to give his proper name to a magistrate judge. The

court found that the type of conduct to which this guideline applies includes "providing materially false information to a judge or magistrate." *Id*. at 939 (*citing* USSG §3C1.1, comment. (n.4(f)). In addition, the Tenth Circuit has previously held that withholding one's identity is material within the meaning of the guideline. *See United States v. Gardiner*, 931 F.2d 33, 35 (10th Cir. 1991). While the court did note that providing such false information alone does not normally warrant the adjustment, it went on to hold "[the defendant's] continued failure to identify himself properly at his subsequent court hearings is more than sufficient to allow us to conclude that an adjustment was warranted." *Tran*, 285 F.3d at 940.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts[15]

United States v. Battle, 289 F.3d 661 (10th Cir.), *cert. denied*, 537 U.S. 856 (2002). The district court committed harmless error when it grouped Chapter Two, Part A offenses under the guideline, rather than determining the combined offense level under USSG §3D1.4. Section 3D1.2 specifically states that offenses to which Chapter Two, Part A applies cannot be grouped. *Id*. at 670-671 (*citing* USSG §3D1.2). However, the error was harmless because the calculation resulted in a lower offense level for the defendant.

United States v. Jose-Gonzalez, 291 F.3d 697 (10th Cir. 2002). The district court did not err in treating the transportation of each victim killed and each seriously injured passenger as a separate pseudo-count, and thus a separate group, for offense level determination under the guideline. The defendant argued that the departure he received was unreasonable because his sentence, as calculated, is more than he would have received if he had been charged separately for each alien killed or injured. However, when the court calculated the offense level as the defendant suggested, "the highest offense level for any count, and thus the offense level for the group, would be . . . the same level from which the district court departed." *Id*. at 706. Because the calculation of the offense level and grouping was determined to be reasonable, the court held that the departure was reasonable and within the discretion of the district court.

United States v. Malone, 222 F.3d 1286 (10th Cir.), *cert. denied*, 531 U.S. 1028 (2000). The district court did not err in failing to group the U.S. Express robbery and the carjacking under USSG §3D1.2(c). On appeal the defendant argued that because the carjacking was a specific offense characteristic of robbery under USSG §2B3.1(b)(5), the court was required to group the offenses. The Tenth Circuit disagreed and held that the harm caused by the U.S. Express robbery was not the same as the harm caused by the carjacking. The two offenses posed threats to distinct and separate societal interests-those of the U.S. Express and those of the victim.

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[15] An amendment to become effective November 1, 2004, adds §2G3.1 to the list of guidelines at §3D1.2(d) since these offenses typically are continuous and ongoing in nature; and adds §2X6.1 to list of offenses specifically excluded from being grouped under §3D1.2(d)).

United States v. Peterson, 312 F.3d 1300 (10th Cir. 2002). The Tenth Circuit ruled that mail fraud and tax evasion were properly not grouped together. The court's reasoning was that mail fraud and tax evasion convictions are based on different elements, affected different victims, and involved different criminal conduct. Furthermore, to commit these crimes, the defendant had to make separate decisions to violate different laws. These differences, as well as the different harms, demonstrate the convictions are not "closely related" for purposes of §3D1.2.

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

United States v. Evans, 318 F.3d 1011 (10th Cir.), *cert. denied*, 539 U.S. 922 (2003). The Tenth Circuit affirmed the district court's application of the grouping rules under §3D1.3(b) in a case involving five counts relating to the manufacture of methamphetamine. The selection of the guideline that produces the highest offense level is not dictated by the offense with the highest statutory maximum.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[16]

United States v. Brown, 316 F.3d 1151 (10th Cir. 2003). The district court erred when it concluded that USSG §3E1.1(a) allowed a compromise one-level downward adjustment for acceptance of responsibility. Section 3E1.1 states that "if the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels." Relying on *United States v. Maurer*, 76 F. Supp. 2d 353 (S.D.N.Y. 1999), *aff'd*, 226 F.3d 150 (2d Cir. 2000), and on Application Note 4 to the Commentary to §3E1.1, the government argued that the district court should have greater flexibility in situations involving both obstruction and acceptance and that §3E1.1(a) permits a one-level adjustment. The Tenth Circuit disagreed with the government's argument and joined its sister circuits. The court held "that USSG §3E1.1(a) must be interpreted in a binary fashion: either the defendant qualifies for the full two-level acceptance of responsibility adjustment or the defendant gains no acceptance of responsibility adjustment at all." *Brown*, 316 F.3d at 1158; *United States v. Valencia*, 957 F.2d 153, 156 (5th Cir. 1992) ("USSG §3E1.1 does not contemplate either a defendant's mere partial acceptance of responsibility or a district court's being halfway convinced that a defendant accepted responsibility"); *United States v. Jeter*, 236 F.3d 1032, 1034-35 (9th Cir. 2001) (same); *United States v. Atlas*, 94 F.3d 447, 451-52 (8th Cir. 1996), *cert. denied*, 520 U.S. 1130 (1997) (same); *United States v. Carroll*, 6 F.3d 735, 740-41 (11th Cir. 1993), *cert. denied*, 510 U.S. 1183 (1994) (same).

United States v. Eaton, 260 F.3d 1232 (10th Cir. 2001). The district court did not err in refusing to apply a two-level reduction to the defendant's sentence for acceptance of responsibility.

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[16] Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended this guideline by amending the criteria for the additional one level and incorporating language requiring a government motion.

Although the district court was correct that assertion of an entrapment offense does not bar the defendant from receiving the reduction, the defendant also did not show any reason that he should receive the reduction. The defendant claimed that he should receive the reduction simply because he testified truthfully at trial. The Tenth Circuit held, however, that the district court's finding that the defendant never engaged in any conduct indicating that he accepted responsibility was not clearly erroneous. Because the inquiry into acceptance of responsibility is heavily fact-based, the Tenth Circuit deferred to the judgment of the district court.

United States v. Marquez, 337 F.3d 1203 (10th Cir. 2003*).* The defendant entered a conditional guilty plea to possession of marijuana with the intent to distribute, 18 U.S.C. § 841, pending the resolution of his appeal on a motion to suppress evidence. The district court sentenced him to a 41-month term of imprisonment to be followed by three years of supervised release. On appeal, the defendant challenged the district court's refusal to grant a third level reduction under USSG §3E1.1(b), claiming that he had demonstrated "acceptance of responsibility" that satisfied one or both of the relevant sub-criteria. Regarding the first, USSG §3E1.1(b)(1), the Tenth Circuit affirmed the district court, concluding that the record adequately substantiated the finding that the defendant had not provided "complete information to the government of his own involvement." However, on the second issue, USSG §3E1.1(b)(2), the Tenth Circuit reversed the district court, concluding that the defendant was entitled to pursue a motion to suppress evidence prior to notifying "authorities of his intention to plead guilty." Concurring with the First and Ninth Circuits, the Tenth Circuit held that a result to the contrary would in effect penalize a defendant for the exercise of his/her constitutional rights.

United States v. Prince, 204 F.3d 1021 (10th Cir.), *cert. denied*, 529 U.S. 1121 (2000). The district court did not err in considering reports of the defendant's criminal conduct in prison while awaiting sentencing when determining whether acceptance of responsibility applied. The defendant pled guilty to bank robbery and in the plea agreement the government agreed that it would not oppose a three-level reduction for acceptance of responsibility. The district court declined to apply the three-level reduction for acceptance of responsibility. On appeal, the defendant argued that the government breached the plea agreement by providing the probation department with FBI reports of his criminal conduct while he was in custody awaiting sentencing. He further argued that the district court erred in not granting the three-level acceptance reduction based on the FBI reports that the defendant stabbed a fellow prisoner because that criminal activity was unrelated to the criminal conduct for which he was convicted. The Tenth Circuit disagreed on both accounts and held that the government did not violate the plea agreement by supplying the probation department with the reports of the defendant's post-plea agreement conduct. The court further held that the guidelines do not prohibit a sentencing court from considering, in its discretion, criminal conduct unrelated to the offense of conviction in determining whether a defendant qualifies for an adjustment for acceptance of responsibility under USSG §3E1.1. *See also United States v. Archuletta*, 231 F.3d 682, 686 (10th Cir. 2000) (holding that two-level reduction for acceptance of responsibility was precluded because the defendant obstructed justice by fleeing before her original sentencing hearing); *United States v. Saffo*, 227 F.3d 1260, 1271 (10th Cir. 2000), *cert. denied*, 532 U.S. 974 (2001) (holding that acceptance of responsibility reduction does not apply to a defendant who did not deny that she committed the acts that occurred but never admitted any culpability for those acts); *United States v. Patron-Montano*, 223 F.3d 1184, 1190 (10th Cir.

2000) (holding that the court can properly consider a defendant's lie about relevant conduct in evaluating the defendant's eligibility for a USSG §3E1.1 acceptance of responsibility reduction).

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Holbert, 285 F.3d 1257 (10th Cir. 2002). The district court did not err in adding two points under the guideline for a prior sentence of 90 days, even though only 45 days were actually served. The court held that "a 'sentence of imprisonment' is a sentence of incarceration and refers to the maximum sentence imposed." *Id*. at 1263; USSG §4A1.1. In addition, the court stated that criminal history points given under the guideline correspond to the sentence pronounced, not the length of time the defendant may have actually served. *Id*.

United States v. Rosales-Garay, 283 F.3d 1200 (10th Cir.), *cert. denied*, 536 U.S. 934 (2002). The district court did not err in applying an enhancement under USSG §4A1.1 for an alien defendant who unlawfully re-entered the United States, violating 8 U.S.C. § 1326(a). The defendant was deported in 1995, after a committing a felony drug offense. He was arrested for illegal entry in the United States in 2000. Because the defendant was on probation for Driving While Ability Impaired (DWAI) at the time of arrest, the district court added two criminal history points under USSG §4A1.1, which permits the enhancement "if the defendant committed the instant offense while under any criminal justice sentence, including probation." The defendant claimed that the enhancement was wrongly applied because his section 1326(a) offense was a "status" offense, occurring before his DWAI and because the two-level enhancement to a defendant "found in" the United States unfairly depends on the timing of when immigration officials "find" that defendant for purposes of section 1326(a). The Tenth Circuit rejected these arguments by citing other circuit courts that have addressed the exact arguments made by the defendant on similar facts. *See United States v. Coeur*, 196 F.3d 1344 (11th Cir. 1999); *United States v. Cuevas*, 75 F.3d 778 (1st Cir. 1996). "The plain language of §1326(a) establishes that a previously deported alien who illegally enters and remains in the United States can violate the statute at three different points in time, when the defendant (1) enters, (2) attempts to enter, or (3) is at any time "found" in the United States." *United States v. Bencomo-Castillo*, 176 F.3d 1300, 1303 (10th Cir. 1999). Thus, the defendant was indicted and pled guilty to the offense of being "found in" the United States. Despite the fact that the defendant reentered the United States on a date prior to his DWAI state conviction and sentence, he committed the section 1326(a) offense charged in the indictment when he was found. At the time the defendant was found, he was undeniably serving a criminal probation sentence for his DWAI conviction. Therefore, the district court correctly applied the enhancement under USSG §4A1.1

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

United States v. Perez de Dios, 237 F.3d 1192 (10th Cir. 2001). The district court did not err by including a prior misdemeanor conviction for driving without proof of insurance in the calculation of the defendant's criminal history. The defendant was convicted of possession with intent to distribute and attempted possession with intent to distribute cocaine. A prior misdemeanor conviction for driving without proof of insurance was counted in the calculation of the defendant's criminal history. On appeal, the defendant argued, as he did at sentencing, that this prior misdemeanor conviction was similar to a minor traffic infraction, like speeding, and thus should be excluded for criminal history purposes under USSG §4A1.2(c)(2). On appeal the court applied to the defendant's prior misdemeanor conviction the "essential-characteristics-of-the-crime" test which compares the underlying conduct of the offenses involved. The court found, in applying this test, that the defendant's prior misdemeanor conviction did not qualify for exclusion under USSG §4A1.2(c)(1) and thus was properly included in the defendant's criminal history calculation. The court also found that, under USSG §4A1.2(c)(2), the superficial similarity that both offenses involve driving a car was overshadowed by the significant difference between speeding and driving without proof of insurance. Unlike the former, which is concerned with actually operating an automobile, the latter is concerned with failing to abide by regulations designed to assure that unsafe drivers are not on the road at all.

§4A1.3 Adequacy of Criminal History Category

See United States v. Alvarez-Pineda, 258 F.3d 1230 (10th Cir. 2001), §5K2.0, p. 44.

United States v. Hannah, 268 F.3d 937 (10th Cir. 2001). The district court did not err in departing upward from the defendant's criminal history category of VI, however, the district court gave an insufficient explanation for the degree of departure applied. The defendant argued that the district court should have delineated its precise reasons for each step it moved down the sentencing table. The Tenth Circuit held that the district court's decision to depart upward was warranted in this case and its explanation of the reasons for upward departure was sufficient. However, the Tenth Circuit went on to find that the district court did not provide sufficient explanation for the degree of departure. The Tenth Circuit held that the district court must "articulate reasons for the degree of departure using any reasonable methodology hitched to the Sentencing Guidelines" *Hannah*, 268 F.3d at 941. In this case, the district court relied on the recommendation of departure articulated in the PSR. The Tenth Circuit held that such reliance was insufficient explanation.

United States v. Hurlich, 348 F.3d 1219 (10th Cir. 2003). The appellate court affirmed the methodology employed by the district court in determining the degree of upward departure. At sentencing, the defendant's adjusted offense level was properly determined to be eleven and his criminal history points thirty-nine. Criminal History Category VI is the highest level of criminal history, reserved for those with criminal history points of 13 or more. However, because the defendant's 39 criminal history points were substantially greater than the 13 or more contemplated by category VI, the district court concluded that the criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant would commit other crimes. In determining the degree of upward departure, the district court hypothesized that the defendant's criminal history score of 39 would place him in a theoretical criminal history category of XIV. It

equated an eight-step increase in criminal history to eight offense levels, yielding a sentencing range of 63 to 78 months. The court imposed the maximum sentence of 78 months. The sole issue on appeal was the propriety of the methodology employed by the district court in determining the degree of upward departure. The Tenth Circuit noted that, consistent with the structure and purpose of the guidelines, the district court could reasonably analogize to higher criminal history categories provided it translated that analogy into higher offense levels, which it did–finding a guideline range appropriate to the case by increasing eight offense levels. The court held that the methodology adopted by the district court was reasonable and the judge succinctly, but adequately, explained the reasons for the degree of departure from the guidelines. Accordingly, the district court's sentence was affirmed.

United States v. Lowe, 106 F.3d 1498 (10th Cir.), *cert. denied*, 521 U.S. 1110 (1997). The district court did not err in departing above Criminal History Category VI in sentencing the defendant. Although such action should rarely be undertaken, it is within the judge's discretion to make such a departure. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider the nature of the prior offenses, rather than simply their number, as more indicative of the seriousness of the defendant's criminal record. Because the purpose of the career offender provision is to sentence defendants at or near the statutory maximum, it is permissible to depart upward from Criminal History Category VI when the defendant is also a career offender. In this particular case, the court departed upward based on three considerations independent of the defendant's status as a career offender, including: 1) offenses that were not included in his characterization as a career offender because they were outside of the applicable time period; 2) prior violent offenses that were not counted because they were consolidated for sentencing; and 3) the similarity between the defendant's "criminal past" and the instant offense.

United States v. Rice, 358 F.3d 1268 (10th Cir. 2004). The district court erroneously double counted when it used the same prior conduct of producing child pornography in Mississippi to both increase defendant's base offense level and his criminal history category. The defendant was charged with one count of producing child pornography, one count of transporting child pornography in interstate commerce, and two counts of possession of child pornography. On appeal, the defendant argued the district court erroneously double counted when it used the same prior conduct (producing child pornography in Mississippi) to both increase his base offense level on count two and to increase his criminal history category. The Tenth Circuit noted that the district court properly used the defendant's prior uncharged conduct in Mississippi as relevant conduct for purposes of applying the cross-reference in §2G2.2(c) and increasing his base offense level for count two. However, the court stated that, as §4A1.2 makes clear, had the defendant been convicted and sentenced for that conduct, the district court could not have used that prior sentence to increase his criminal history category. In other words, if the district court took the prior sentence into account as relevant conduct in calculating the offense level, then it was clear that to prevent double counting the court could not use that same sentence in its criminal history calculation. In the instant case, the district court used uncharged Mississippi conduct to depart upward under §4A1.3 form the criminal history category calculated under §4A1.2. While §4A1.3 contemplates upward departures for prior similar adult criminal conduct not resulting in a criminal convictions as well as for prior sentences, it seems anomalous, if not logically inconsistent, no to allow upward departures for relevant conduct resulting in a conviction and sentence,

but to allow upward departures for relevant conduct not resulting in a conviction. The court noted that if the district court could not use a prior sentence involving relevant conduct both to increase the defendant's base offense level and to increase his criminal history category under §4A1.3, it saw no reason to permit such double use when the conduct at issue was uncharged and did not result in a sentence. It was improper for the district court to do so. Accordingly, the case was remanded for resentencing.

United States v. Walker, 284 F.3d 1169 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2289 (2003). The district court did not err in departing upward upon deciding that Criminal History Category VI did not adequately reflect the seriousness of the defendant's 34 total criminal history points. Looking to a recent similar decision, the Tenth Circuit again concluded "given the record and the district court's special competence in assessing the uniqueness of a particular defendant's history, we conclude that the district court did not abuse its discretion in finding [the defendant's] criminal history sufficiently exceptional to warrant an upward departure." *Id*. at 1172 (*citing United States v. Akers*, 215 F.3d 1089, 1105 (10th Cir.), *cert. denied*, 531 U.S. 1023 (2000)). The basis for the departure was also based on the similarity of the defendant's past crimes and his likelihood of recidivism. However, the district court did err in relying solely on the number of criminal history points exceeding the requirement of Criminal History Category VI for the degree of departure. The district court departed one offense level for each additional conviction that was in excess of the number required to place the defendant in Criminal History Category VI. The Tenth Circuit held "the explanation does nothing more than restate the justification for upward departure and 'does not fulfill the separate requirement of stating the reasons for imposing the particular sentence.'" *Id*. at 1173 (*citing United States v. Yates*, 22 F.3d 981, 990 (10th Cir. 1994)); *see also United States v. Flinn*, 987 F.2d 1497, 1502 (10th Cir. 1993). The court also found "nothing in the Guidelines supports a degree of upward departure based solely on the number of prior convictions in excess of the 13 points required for classification in Criminal History Category VI." *Walker*, 284 F.3d 1169 at 1173.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Gay, 240 F.3d 1222 (10th Cir.), *cert. denied*, 533 U.S. 939 (2001). The district court did not err in applying the "otherwise applicable" offense level under USSG §2D1.1 and the specified USSG §4B1.1 Criminal History Category VI because the offense level under the USSG §2D1.1 was greater than the defendant's career criminal offense level. On appeal the defendant argued that the USSG §4B1.1's '"career offender provision must be applied in toto, or not at all'." *Id*. at 1230. He further argued that the district court may only apply the specified USSG §4B1.1 Criminal History Category VI if that court also uses the listed career offender offense level. The Tenth Circuit disagreed and held that the reference under USSG §4B1.1 to the application of Criminal History Category VI to "every case" should be interpreted to mean that the sentencing court must employ category VI regardless of which offense level is applied. *Id*. at 1232.

See United States v. Hannah, 268 F.3d 937 (10th Cir. 2001), §4A1.3, p. 36.

United States v. Moyer, 282 F.3d 1311 (10th Cir. 2002). The district court did not err in sentencing the defendant as an armed career offender under USSG §4B1.4. The defendant was convicted of three counts of Third Degree Sexual Assault in violation of Wyoming state law. The defendant argued that his convictions were not "violent felonies" required for the enhancement under USSG §4B1.4 to apply. The defendant contended that under Wyoming law, third degree sexual assault is not classified as a violent crime. The Tenth Circuit held that sexual assault involving child victims and an adult offender constitutes the definition of violent felony found in 18 U.S.C. § 924(e)(2)(B)(ii), as activity that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *See United States v. Coronado-Cervantes*, 154 F.3d 1242 (10th Cir. 1998). The Tenth Circuit reached this conclusion in *Coronado-Cervantes* despite the government's concession that the state statute violated by the defendant did not have an element of the use, attempted use, or threatened use of physical force and that the record contained no evidence that the defendant used or threatened to use force against the victim. Like the victim in *Coronado-Cervantes*, the three victims in Moyers' offenses were children under the age of 12. The Tenth Circuit stated that *Coronado-Cervantes* controls the issue and that the enhancement under USSG §4B1.4 was correctly applied to the defendant.

See United States v. Turner, 285 F.3d 909 (10th Cir.), *cert. denied*, 537 U.S. 895 (2002), §4B1.2, p. 39.

§4B1.2 Definitions for Criminal Offender

See United States v. Hannah, 268 F.3d 937 (10th Cir. 2001), §4A1.3, p. 36.

United States v. Turner, 285 F.3d 909 (10th Cir.), *cert. denied*, 537 U.S. 895 (2002). The district court did not err in enhancing the defendant's sentence for an aggravated escape on the determination that the conviction was a "crime of violence." The Tenth Circuit has previously determined "an escape always constitutes conduct that presents a serious potential risk of physical injury to another, for the purposes of the . . . career offender provisions of the sentencing guidelines." *Id*. at 915-16 (*citing United States v. Springfield*, 196 F.3d 1180, 1185 (10th Cir. 1999), *cert. denied*, 529 U.S. 1029 (2000). While the initial circumstances of the escape may be non-violent, as the defendant here contends in that he failed to return to a halfway house from work release, the court went on to hold "there is no way to predict what an escapee will do when encountered by the authorities . . . [e]very escape is 'a powder keg,' which may or may not explode into violence." *Turner*, 285 F.3d 909 at 916 (*citing United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)).

United States v. Vigil, 334 F.3d 1215 (10th Cir.), *cert. denied*, 124 S. Ct. 592 (2003). For purposes of determining the defendant's sentence, the trial court found that defendant's conviction of aggravated incest was a crime of violence for purposes of §4B1.2. The defendant appealed the district court's determination that aggravated incest constituted a crime of violence under §4B1.2. The court affirmed the trial court's decision. The court concluded that the power asymmetry implicit in aggravated incest permitted the inference of a threat of force. Thus, aggravated incest constituted a crime of

violence. The court held that aggravated incest involved conduct that presented a serious potential risk of physical injury to another under §4B1.2(a)(2). The possibility of the child-victim's sincere consent to aggravated incest was irrelevant.

§4B1.4 Armed Career Criminal

United States v. McMahon, 91 F.3d 1394 (10th Cir.), *cert. denied*, 519 U.S. 1018 (1996), and *cert. denied*, 528 U.S. 1023 (1999). In an issue of first impression for the appellate courts, the district court did not err in enhancing the defendant's sentence under 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA). The defendant claimed that his 1981 state conviction for distributing eight ounces of marijuana is not a "serious drug offense" for purposes of serving as a predicate offense for the ACCA enhancement. For a state law conviction to qualify as a "serious drug offense" under 924(e), it must carry a maximum term of imprisonment of ten years or more. The Oklahoma statute the defendant was convicted of violating carries a maximum of ten years imprisonment. The defendant asserts, however, that to ensure equality in sentencing under the ACCA, his state offense should be treated the same as the most analogous federal offense, in this case 21 U.S.C. § 841(b)(1)(D), which carries a five-year maximum sentence for the same offense. The circuit court noted that the categorical approach to determine predicate offenses, which looks to the statutory definition of the offense, has been endorsed by the Supreme Court in *Taylor v. United States*, 495 U.S. 575, 588-92 (1990), *cert. denied*, 502 U.S. 888 (1991). Because the Oklahoma statute satisfies the requirement of carrying a maximum of ten-year prison sentence or more, the district court's use of the state sentence as a predicate offense was affirmed.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.1 Safety Valve

United States v. Saffo, 227 F.3d 1260, 1273 (10th Cir. 2000), *cert. denied*, 532 U.S. 974 (2001). The appellate court held that a sentence under USSG §§2D1.11 and 2S1.1 does not make the defendant eligible for the safety valve reduction under USSG §2D1.1.

Part D Supervised Release

§5D1.2 Imposition of a Term of Supervised Release

United States v. Garfinkle, 261 F.3d 1030 (10th Cir. 2001). The district court did not err in imposing a term of supervised release following a term of imprisonment imposed by the court for a violation of probation. The Tenth Circuit held that the defendant's argument that probation and supervised release are functionally equivalent was incorrect. Furthermore, the defendant relied on improper authority in his statement that the district court was prohibited from imposing a term of supervised release following a revocation of probation. The Tenth Circuit held that because the

defendant appealed under improper grounds regarding revocation of supervised release rather than revocation of probation (for which he was actually sentenced), his appeal lacked merit.

§5D1.3 Condition of Supervised Release

United States v. Walser, 275 F.3d 981 (10th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). The district court did not err in imposing a special condition of supervised release barring a defendant convicted of child pornography from using the Internet without prior permission. The Tenth Circuit acknowledged that it has previously overturned a special condition of probation mandating that the defendant "shall not possess a computer with Internet access throughout his period of supervised release" in *United States v. White*, 244 F.3d 1199, 1201 (10th Cir. 2001). The Tenth Circuit distinguished the condition of release at hand, stating that it was not as ill-tailored as the one at issue in *White*. In *White*, the special condition was greater than necessary because it prevented the defendant from using the Internet for legitimate means, including research, reading periodicals, and obtaining weather reports. *Id*. at 1206. In the instant case, the defendant was not completely banned from using the Internet; he was required to obtain permission from the probation office to use it. Consequently, the condition "more readily accomplishes the goal of restricting use of the Internet and more delicately balances the protection of the public with the goals of sentencing."

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Guthrie, 64 F.3d 1510 (10th Cir. 1995). The district court erred in its calculation of restitution. The defendant pled guilty to providing prohibited kickbacks from the proceeds of a government contract. He was sentenced to five years probation, including six months home confinement and 250 hours of community service, $27,600 in restitution and a $50 special assessment. On appeal, the defendant argued that he was entitled to offset the amount of restitution by the value of services he allegedly performed under the government contract. The circuit court ruled that the district court applied the wrong standard for determining the amount of restitution by ordering restitution without determining the losses sustained by the victim and agreed with the defendant's argument that the determination of the amount of loss must account for any benefit received by the victim. The circuit court further held that the district court had erred in including in the amount of restitution losses stemming from counts of the indictment to which the defendant did not plead guilty.

Part G Implementing the Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

See United States v. Bailey, 286 F.3d 1219 (10th Cir.), *cert. denied*, 537 U.S. 877 (2002), Post- *Apprendi*, p. 51.

See United States v. Battle, 289 F.3d 661 (10th Cir.), *cert. denied*, 537 U.S. 856 (2002), §§1A1.0, 2K2.4, 3D1.2 , pp. 1, 19, 32.

United States v. Price, 265 F.3d 1097 (10th Cir. 2001), *cert. denied*, 535 U.S. 1099 (2002). The appellate court held that USSG §5G1.2(d) is a mandatory provision so sentences imposed under the guidelines must be imposed consecutively when necessary to reach the total guideline punishment.

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

United States v. McCary, 58 F.3d 521 (10th Cir. 1995). The case was remanded for resentencing a second time, in order for the district court to impose the 17-month enhancement portion of the subsequent 63-month Oklahoma federal sentence to run consecutively to the 211-month Texas federal sentence. The government, on cross-appeal, asserted that the 17-month portion of the sentence, which was designated as an enhancement to sanction the conduct for occurring while the defendant was released on bond, should have been imposed to run consecutively because it was governed by 18 U.S.C. § 3147. The appellate court agreed and held that "the more general provisions of USSG §5G1.3(b), even if otherwise applicable, must be limited in the circumstances of this case by the more specific provisions of 18 U.S.C. § 3147 and USSG §2J1.7." *Id*. at 523.

United States v. Moyer, 282 F.3d 1311 (10th Cir. 2002). The district court did not err in sentencing the defendant to consecutive, rather than concurrent, sentences under USSG §5G1.3. The defendant contended that the district court was required to give him concurrent sentences under USSG §5G1.3(b). The Tenth Circuit disagreed, holding that the district court had the discretion to sentence the defendant under USSG §5G1.3(c) because neither USSG §5G1.3(a) nor USSG §5G1.3(b) applied to the defendant.

United States v. Yates, 58 F.3d 542 (10th Cir. 1995). The appellate court upheld the district court's determination that the court may use the "real or effective" state imprisonment term, rather than the nominal term of imprisonment imposed, in applying USSG §5G1.3 to achieve a reasonable incremental increase in punishment. However, the district court committed clear error in making an assumption of what the effective state sentence would be, without an evidentiary basis. The court applied USSG §5G1.3(c), and imposed a consecutive sentence, based on its opinion that the defendant would serve 12 years of an 18-year state sentence. Although the defense counsel suggested that the actual time served may be 9 to 12 years of an 18-year sentence, the defendant did not stipulate to this fact, nor did he concede that such would be the case, nor did the government obtain evidence from any state sources. On remand for resentencing, the district court may hold a hearing to obtain the evidence. The appellate court also noted that "under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, the guidelines must control over the wishes expressed in the order of the state court judge" that the sentence be served concurrently with the federal sentence. *Id*. at 550.

Part H Specific Offender Characteristics

§5H1.2 Education and Vocational Skills

See United States v. Alvarez-Pineda, 258 F.3d 1230 (10th Cir. 2001), §5K2.0, p. 44.

§5H1.5 Employment Record

See United States v. Alvarez-Pineda, 258 F.3d 1230 (10th Cir. 2001), §5K2.0, p. 44.

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)[17]

United States v. McClatchey, 316 F.3d 1122, 1132-36 (10th Cir. 2003). The Tenth Circuit held that the defendant was not entitled to a downward departure for extraordinary family circumstances based on the defendant's care of his severely disabled 22-year-old son and the good character references for community service submitted on his behalf. The court further held that the defendant was also not entitled to an aberrant behavior downward departure based on the defendant's prior law-abiding life. Relying on *United States v. Archuleta*, 128 F.3d 146 (10th Cir. 1997), the court held that a downward departure based on family circumstances was not appropriate "absent evidence that the defendant was the **only** individual able to provide the assistance a family member needs." *McClatchey*, 316 F.3d at 1131 (emphasis added).

United States v. Reyes-Rodriquez, 344 F.3d 1071 (10th Cir. 2003). The defendant pled guilty to illegally reentering the United States after deportation in violation 8 U.S.C. § 1326. The defendant's offense level was originally calculated at 21 with a criminal history category of V, equaling a sentence range of 70-87 months. The district court departed downward eight levels, citing extraordinary family circumstances and sentencing the defendant to 30 months' imprisonment followed by two years of unsupervised release. According to the facts adduced at the district court, the defendant was a central figure in the support of ailing parents. The government appealed, challenging the downward departure. The Tenth Circuit noted that departures based on family circumstances require "exceptional" conditions, citing USSG §5H1.6. While the appellate court conceded that the defendant's support could be "important and significant," the Tenth Circuit reversed the district court and held that the defendant would have to have been the "'only individual able to provide the assistance a family member needs,'" quoting *United States v. McClatchey*, 316 F.3d 1122, 1131 (10th Cir. 2003), to qualify for this type of departure.

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[17] Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, amended this departure factor by adding language that prohibits this departure in child crimes and sexual offenses.

United States v. Fuentes, 341 F.3d 1216 (10th Cir. 2003). The defendant pled guilty to illegally reentering the United States after deportation subsequent to an aggravated felony conviction. The district court refused to accept the plea agreement, which provided an offense level of 17 with a sentence range of 37-46 months, and the court departed downward, imposing a sentence of 30 months. The government appealed, arguing 1) the court erred because it did not give notice of the intent to depart; and 2) the court abused its discretion by departing without making a finding of exceptional circumstances, stating reasons for the departure, and justifying the departure's relationship to the guidelines. In terms of notice, the Tenth Circuit concurred with six other circuits holding that *United States v. Burns*, 501 U.S. 129 (1991), *cert. denied*, 526 U.S. 843 (1999), requires notice of intent to depart, vacating and remanding the lower court decision. Furthermore, the Tenth Circuit instructed that any subsequent refusal to accept a plea agreement would need to address the second set of issues set forth by the government on appeal.

§5K2.0 Grounds for Departure (Policy Statement)[18]

United States v. Alvarez-Pineda, 258 F.3d 1230 (10th Cir. 2001). The district court erred in granting a downward departure based on aberrant behavior. The Tenth Circuit held that the district court relied upon improper factors in departing downward and in fact held that none of the factors taken separately or together were a sufficient basis for departure. The factors applied by the court were "(1) no history of transporting marijuana, (2) no prior criminal history, (3) limited education, and (4) stable employment." *Alvarez-Pineda*, 258 F.3d at 1238. The Tenth Circuit held that the factor of no history of transporting marijuana does not qualify because such a factor could allow the court to drop below Criminal History Category I which is inappropriate. The Tenth Circuit followed the same rationale to disallow a departure based on the defendant's lack of prior criminal history. The third and fourth factors are both discouraged factors under USSG §§5H1.2, 5H1.5. Because the defendant's position of having a limited education and a job are not especially distinguishing, the Tenth Circuit found that a departure on the basis of either factor constituted an abuse of discretion. The Tenth Circuit finally found that the district court was clearly unhappy with the calculated guideline range and was searching for a way to impose its impression of a fair sentence; such manipulation is an improper basis for departure.

United States v. Armenta-Castro, 227 F.3d 1255 (10th Cir. 2000). The district court did not err in rejecting the defendant's request for a downward departure based on sentencing disparity. The defendant pled guilty to illegally reentering after a prior deportation. As part of the plea agreement

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[18] Effective April 30, 2003, the Commission, in response to a congressional directive under the Child Protect Act, Pub. L. 108-21, added language to reflect the limitations on downward departures for crimes involving children or sexual offenses to grounds that are specifically listed in the guidelines. The appellate standard of review also has been amended effective April 30, 2003, by the PROTECT Act, 18 U.S.C. § 3472(e). *See* USSG App. C, Amendment 649.

the defendant admitted his prior deportation was subsequent to an aggravated felony conviction and that he was subject to enhanced penalties set out in section 1326(b)(2)(B). The defendant requested a downward departure based on sentencing disparity that existed among federal districts with respect to illegal reentry cases. On appeal, the court, consistent with *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 978 (9th Cir. 2000) (en banc), held that a district court may not grant a downward departure from an otherwise applicable guideline sentencing range on the ground that, had the defendant been prosecuted in another federal district, the defendant may have benefitted from the charging or plea-bargaining policies of the United States Attorney in that district.

United States v. Constantine, 263 F.3d 1122 (10th Cir. 2001). The district court did not err in denying the defendant a downward departure for aberrant behavior. The Tenth Circuit held that an aberrant behavior departure must be based on something more than the fact that the particular offense is a first offense. Although the court recognized that spontaneity is not required for an aberrant behavior departure, the court also stated that there must be some exceptional circumstance or evidence that the act was outside the course of a defendant's normal behavior.

United States v. Contreras, 108 F.3d 1255 (10th Cir.), *cert. denied*, 522 U.S. 839 (1997), *and cert. denied*, 528 U.S. 904 (1999). The district court erred departing downward to avoid an unwarranted disparity of sentences with her codefendant. The government appealed, asserting that the defendant was not "similarly situated" with her codefendant and, therefore, did not warrant similar sentences. Noting a previous circuit court decision, the court stated that "while similar offenders engaged in similar conduct should be sentenced equivalently, disparate sentences are allowed where the disparity is explicable by the facts on the record." *Id*. at 1271 *quoting United States v. Goddard*, 929 F.2d 546, 550 (10th Cir. 1991). In the present case, the codefendants are not similarly situated and, therefore, the district court abused its discretion in finding an "unwarranted disparity." The defendant was convicted of conspiracy to possess with intent to distribute, investment of illicit drug profits, and two counts of money laundering; and her codefendant pled guilty to possession with intent to distribute marijuana and accepted responsibility for her criminal conduct. The defendant asserted that she was willing to plead guilty, but, she was not offered a plea agreement. The circuit court rejected this line of reasoning, stating that a sentence may not be reduced merely because a codefendant engaging in similar conduct received a shorter sentence by means of a plea agreement. To do so would undermine the prosecutorial discretion of United States attorneys and could cause the government to limit its use of plea bargains in multiple defendant cases in the future. Consequently, the circuit court held that the departure was in error.

United States v. Fortier, 242 F.3d 1224 (10th Cir.), *cert. denied*, 534 U.S. 979 (2001). The district court did not err in imposing a 13-level upward departure[19] for the harm resulting from the

[19] *Id*. at 1227. The defendant's upward departures were based on several Sentencing Guidelines sections: §5K2.1 (multiple deaths); §5K2.2 (significant physical injury); §5K2.3 (extreme psychological injury); §5K2.5 (property damage); §5K2.7 (disruption of governmental functions); and §5K2.14 (endangerment of public health and safety). Another factor taking the case out of the 1994 Guidelines heartland was the absence of the current terrorism guideline, §3A1.4, from the 1994 version of the Guidelines applicable to the defendant's case.

bombings under various provisions of the guidelines, based on the defendant's knowledge of the possible consequences of his actions, even though the defendant was not a bombing co-conspirator. The defendant pled guilty to several offenses resulting from his involvement with codefendants prior to the Oklahoma City bombing of 1995. The defendant appealed his original sentence, and the court vacated and remanded for resentencing. On remand, the defendant was sentenced to an identical prison term and a reduced fine. On appeal, the defendant argued that the district court judge's imposition of the second sentence was vindictive and that the district court erred in applying an upward departure. On appeal, the Tenth Circuit made no finding of vindictiveness and found that there was a sufficient nexus between the defendant's admitted wrongdoing and the Oklahoma City bombing to permit an upward departure even though the defendant was not charged as a co-conspirator. The court held that the defendant bore sufficient legal responsibility for the bombing to support an upward departure. *See United States v. Benally*, 215 F.3d 1068, 1078 (10th Cir. 2000), *cert. denied*, 534 U.S. 1034 (2001) (combining the legally impermissible and factually inappropriate grounds for departure cannot make a case one of the extremely rare cases contemplated by USSG §5K2.0 enough to warrant a downward departure).

United States v. Hanson, 264 F.3d 988 (10th Cir. 2001). The district court did not err in refusing to depart upward based on the grounds that the defendant's crime was premeditated. The defendant pled guilty to second degree murder and the government sought an upward departure on the grounds that the murder was premeditated. The Tenth Circuit held that the issue of premeditation was already taken into account by the guidelines based on the separate guidelines for first and second degree murder. Because the guidelines had already accounted for the issue of premeditation, the district court was correct in its finding that premeditation would be an inappropriate basis for an upward departure.

United States v. Jose-Gonzalez, 291 F.3d 697 (10th Cir. 2002). The district court did not err in relying on the number of deaths and injuries as a basis for an upward departure even though death and bodily injury are considered under USSG §2L1.1. The district court noted "[p]ursuant to USSG §5K2.0, the court finds and concludes that an upward departure is appropriate because the applicable guideline in this case, USSG §2L1.1, does not account for the circumstances of multiple injuries or deaths." *Id*. at 701. While the Tenth Circuit recognized that USSG §2L1.1 does take into account both injury and death, they went on to hold "the offense-level increases for multiple aliens were not intended as a means of dealing with multiple deaths or injuries." *Id*. at 702. Because the applicable guideline does not foreclose consideration of a departure on these grounds, the court found the case to be outside the heartland. Because the circumstances have not been adequately considered by the Commission, a departure was not in error.

United States v. Maden, 114 F.3d 155 (10th Cir.), *cert. denied*, 522 U.S. 889 (1997), *and cert. denied*, 528 U.S. 853 (1999). The district court could not appropriately depart downward from the defendant's guideline range based on the length of the sentence previously approved for the

codefendant. The codefendant had entered a plea to a lesser charge, his criminal history was much less extensive than the defendant's, and the defendant was more highly placed in drug distributorship than was the codefendant. Thus, disparity in sentences of the defendant and codefendant was explicable by facts before the court. The Tenth Circuit did not categorically state here that disparate sentences among codefendants could never constitute a basis for downward departure.

United States v. Miranda-Ramirez, 309 F.3d 1255, 1261 (10th Cir. 2002), *cert. denied*, 537 U.S. 1244 (2003). The Tenth Circuit ruled that the district court did not have the authority to depart downward based on a confusing Immigration and Naturalization Service (INS) form. It concluded further that those circuits considering this issue have concluded that a departure based upon Form I-294 is inconsistent with the goals of the sentencing guidelines.

United States v. Nunemacher, 362 F.3d 682 (10th Cir. 2004). The appellate court reversed the district court's downward departure of eight-levels because the district court had failed to provide an acceptable rationale for the extent of its departure. The defendant pled guilty pursuant to a written plea agreement to possession of child pornography. The defendant possessed and distributed child pornography on his computer for a few weeks, but he removed and destroyed the software voluntarily. At sentencing, the district court departed downward of eight levels based on the limited duration of the offense, voluntary termination of illegal activities, diminished capacity, and post-offense rehabilitation. On appeal, the government argued that the district court erred in finding valid grounds for departing downward. The Tenth Circuit noted that the defendant's atypical conduct could be considered sufficiently exceptional to warrant a departure. The court then stated that post-offense rehabilitation is accounted for in the context of the acceptance of responsibility adjustment under §3E1.1 and therefore may not serve as a basis for departure unless it is present to an exceptional degree. In the instant case, the court noted that the defendant's lack of motivation for treatment and guarded prognosis are at odds with the district court's determination that rehabilitative efforts have been exceptional. Consequently, departing downward based on this factor was impermissible. The court then stated that the district court had used diminished capacity as a ground for departure. The court stated that §5K2.13 required significant impairment specific to the offense itself which was not present in this case; the district court's downward departure based on diminished capacity was impermissible. The court concluded by stating that the district court relied on some permissible considerations which may have removed defendant from the heartland of §2G2.4, however the district court failed to provide any acceptable rationale for the extent of its departure. The district court's sentence was reversed and remanded.

§5K2.8 Extreme Conduct

United States v. Hanson, 264 F.3d 988 (10th Cir. 2001). The district court erred in refusing to upwardly depart based on the defendant's extreme conduct. The district court ruled that the departure would be inappropriate because the heinous conduct occurred after the victim died. The Tenth Circuit held that an upward departure for extreme conduct may be imposed even when the victim is dead or unconscious when the conduct occurs.

§5K2.9 Criminal Purpose

United States v. Hanson, 264 F.3d 988 (10th Cir. 2001). The district court did not err in refusing to grant an upward departure based on the defendant's commission of a robbery in the course of a murder. The defendant pled guilty to second degree murder. The government argued for an upward departure based on an assertion that the guideline for second degree murder does not take into consideration an accompanying robbery. The Tenth Circuit held that robbery is one of the issues that distinguishes first and second degree murder under the guidelines. Because of this finding, the Tenth Circuit also held that an upward departure based on a factor that distinguishes the crime in such a fashion is inappropriate. The district court's refusal to upwardly depart based on an accompanying robbery was proper.

§5K2.13 Diminished Capacity

United States v. Constantine, 263 F.3d 1122 (10th Cir. 2001). The district court did not err in refusing to grant the defendant a downward departure based on his obsessive compulsive disorder. The defendant pled guilty to possession of an unregistered firearm. He was in possession of the firearm during the burglary of a home. In addition to the .22 caliber handgun, the defendant was also found in possession of a homemade silencer, extra ammunition, a knife, and an expandable baton. The defendant argued that his possession of the weaponry was just over-preparation due to his obsessive compulsive disorder. However, the district court recognized that the departure for diminished capacity under USSG §5K2.13 is not applicable to crimes involving actual violence or a serious threat of violence. The defendant was convicted of a firearm offense, and the Tenth Circuit held that there is a serious threat of violence inherent in such an offense. Therefore, the district court was correct in its holding that the defendant was ineligible for a downward departure based on diminished capacity.

United States v. Mitchell, 113 F.3d 1528 (10th Cir. 1997), *cert. denied*, 522 U.S. 1063 (1998). The district court could not appropriately depart downward when it had found as a fact that the defendant's incarceration was necessary to protect the public. Downward departures for diminished capacity under USSG §5K2.13 are permitted only if the defendant's "criminal history does not indicate a need for incarceration to protect the public." Because the court had made a factual finding that the defendant constituted a threat to the public, departure under USSG §5K2.13 was foreclosed. Thus, the sentence of 210 months' incarceration was upheld.

United States v. Webb, 49 F.3d 636 (10th Cir.), *cert. denied*, 516 U.S. 839 (1995), and *cert. denied*, 519 U.S. 1156 (1997). The district court erred in granting the defendant a downward departure based on the defendant's psychiatric condition, his family circumstances, and the unsophisticated nature of his crime. It was improper to depart downward based on the defendant's psychiatric condition because the defendant's psychiatric reports did not address or conclude that the defendant suffered from "significantly reduced mental capacity" as required by USSG §5K2.13. In addition, the defendant's role as sole caretaker of his child is not extraordinary; therefore, this factor cannot justify a departure under USSG §5H1.6. Lastly, although the defendant's silencer was composed of a toilet paper tube loaded with stuffed animals, the unsophisticated nature of the silencer cannot justify a downward departure. The departure was reversed and the case was remanded for resentencing within the guideline range.

§5K2.20 Aberrant Behavior[20]

See United States v. Alvarez-Pineda, 258 F.3d 1230 (10th Cir. 2001) (holding that USSG §5K2.20 was not available to the defendant at the time of his sentencing), §5K2.0, p. 44.

See United States v. McClatchey, 316 F.3d 1122, 1132-36 (10th Cir. 2003), §5H1.6, p. 43.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors

United States v. Espinoza, 338 F.3d 1140 (10th Cir. 2003*), cert. denied*, 124 S. Ct. 1688 (2004). The defendant was found guilty of armed bank robbery in violation of 18 U.S.C. §§ 2 & 2113. The district court sentenced him to 200 months of imprisonment. On appeal, the defendant challenged an upward adjustment for obstruction of justice pursuant to USSG §3C1.1. The probation officer recommended the adjustment because he determined that the defendant had conspired with a codefendant to provide false testimony. Specifically, the probation officer noted in the presentence report that an undisclosed FBI report documented that the defendant had called the codefendant's girlfriend to arrange for his false testimony. The defendant objected at the sentencing hearing, claiming a right to cross-examine the FBI informant on his motives and credibility. The Tenth Circuit observed that USSG §6A1.3 permits the consideration of reliable hearsay with "sufficient corroboration." In affirming the lower court determination, the Tenth Circuit concluded that there was sufficient corroboration as to the particulars of the informant's report in the record to justify reliance, which did not rise to the level of "clear error."

United States v. Jones, 80 F.3d 436 (10th Cir.), *cert. denied*, 519 U.S. 849 (1996). The district court did not err in its adoption of the sentencing guideline calculations recommended in the presentence report. The defendant waived the statutory minimum period for review of the report when he failed to object at the sentencing hearing. The defendant maintained that he should be resentenced because the district court failed to allow him ample time prior to the hearing to properly review the presentence report with his attorney. Under Rule 32(b)(6)(A) of the Federal Rules of Criminal Procedure, a defendant is given no less than 35 days in which the probation officer must furnish the presentence report to the defendant and the defendant's counsel for review. The appellate court joined

[20] Effective April 30, 2003, the Commission, in response to a congressional directive in the Child Protect Act, Pub. L. 108-21, added language prohibiting departures for aberrant behavior in crimes involving child crimes and sexual offenses. *See* USSG App. C, Amendment 649.

the Fifth, Seventh, and Ninth Circuits in concluding that by participating in a sentencing hearing without objection, the minimum period provided by Rule 32(b)(6)(A) was automatically waived.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release

United States v. Urcino-Sotello, 269 F.3d 1195 (10th Cir. 2001). The district court did not err in imposing consecutive sentences upon revocation of the defendant's supervised release. The defendant acknowledged that his reentry into the United States was a violation of the terms of his supervised release, but requested that the court impose concurrent rather than consecutive sentences for the violation of supervised release and the substantive offense. The district court recognized after some discussion that it had the authority to impose either concurrent or consecutive sentences and chose to impose consecutive sentences. The Tenth Circuit held that although the district court was incorrect in its characterization of its power to impose concurrent sentences as "very limited," because the court knew that it had some authority, the error was harmless. Furthermore, the Tenth Circuit held that although USSG §7B1.3 is a policy statement calling for consecutive sentences, the district court was not free to disregard the guideline all together. Rather, the court held, the district court must consider factors set out in 18 U.S.C. § 3553(a) before deciding whether to impose a consecutive or concurrent sentence. The defendant then has the burden to come forward with a reason for the court to choose a concurrent sentence rather than a consecutive sentence. *Urcino-Sotello*, 269 F.3d at 1197.

§7B1.4 Term of Imprisonment

United States v. Burdex, 100 F.3d 882 (10th Cir. 1996), *cert. denied*, 520 U.S. 1133 (1997). In an issue of first impression, the Tenth Circuit joined the Third, Fourth, Fifth and Eleventh Circuits in holding that the sentencing court need not give notice before departing upward from a sentencing range recommended by the policy statements of Chapter Seven. *See United States v. Blackston*, 940 F.2d 877, 893 (3d Cir.) (stating that when dealing with policy statements, the court need not find an aggravating factor warranting an upward departure in order to sentence out of the prescribed range), *cert. denied*, 502 U.S. 992 (1991); *United States v. Mathena*, 23 F.3d 87, 93 n.13 (5th Cir. 1994) (stating that diverging from "advisory policy statements is not a departure such that a court has to provide notice"); *United States v. Davis*, 53 F.3d 638, 642 n.15 (4th Cir. 1995) (quoting *Mathena* for proposition that deviating from Chapter Seven is not equivalent to departure warranting notice); *United States v. Hofierka*, 83 F.3d 357 (11th Cir. 1996), *cert. denied*, 519 U.S. 1071 (1997) ("[E]xceeding [the Chapter Seven] range does not constitute a `departure"'). Upon violating the terms of his supervised release, the defendant was sentenced pursuant to Chapter Seven. While the presentence report calculated the range of imprisonment at 8-14 months under the Chapter Seven policy statements, the sentencing court found that the recommended range did not adequately address the "gravity of the defendant's past criminal conduct," and departed upward to a 24-month sentence. The defendant asserted that the sentencing court erred in failing to notify defendant of its

intent to depart upward from the policy statements in Chapter Seven. The defendant relied upon the general proposition that defendants are entitled to reasonable notice of the court's intent to depart from the guideline range based upon a "ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government." *Burns v. United States*, 501 U.S. 129, 137 (1991). The circuit court adopted the position of the Third, Fourth, Fifth and Eleventh Circuits that those policy statements are not binding on the sentencing court, thus, a departure from a Chapter Seven range is not a "departure" from a binding guideline.

United States v. Hurst, 78 F.3d 482 (10th Cir. 1996). The district court did not err in imposing a sentence in excess of the range recommended in USSG §7B1.4. After violating a condition of his supervised release, the defendant was sentenced to the statutory maximum of 24 months' imprisonment rather than the recommended range under USSG §7B1.4 of between four to ten months. The defendant argued that in light of the Supreme Court's decisions in *Stinson v. United States*, 508 U.S. 36 (1993), *cert. denied*, 519 U.S. 1137 (1997); and *Williams v. United States*, 503 U.S. 193 (1992), policy statements are authoritative and binding. The circuit court noted that every circuit court that has considered the impact of *Stinson* and *Williams* on USSG §7B1.4 has concluded that it is only advisory and not binding. In *Stinson*, the Supreme Court held that a policy statement "that interprets or explains a guideline is authoritative." 508 U.S. at 38. However, all of the circuit courts that have considered the impact of *Stinson* and *Williams* have concluded that the "policy statements of Chapter Seven do not interpret or explain a guideline." 78 F.3d at 484. *See United States v. Davis*, 53 F.3d 638 (4th Cir. 1995); *United States v. Hill*, 48 F.3d 228 (7th Cir. 1995); *United States v. Anderson*, 15 F.3d 278 (2d Cir. 1994); *United States v. Sparks*,19 F.3d 1099 (6th Cir. 1994); *United States v. Milano*, 32 F.3d 1499 (11th Cir. 1994); *United States v. O'Neil*, 11 F.3d 292 (1st Cir. 1993); *United States v. Levi*, 2 F.3d 842 (8th Cir. 1993); *United States v. Hooker*, 993 F.2d 898 (D.C. Cir. 1993). In addition, unlike the policy statement at issue in *Williams*, the policy statements regarding revocation of supervised release are advisory rather than mandatory in nature. The court held that if a district court imposes a sentence in excess of that recommended in Chapter Seven, it will only be reversed if its decision was not reasoned and reasonable.

OTHER STATUTORY CONSIDERATIONS

28 U.S.C. §2255

See United States v. Garfinkle, 261 F.3d 1030 (10th Cir. 2001), §5D1.2, p. 40.

POST-*APPRENDI* (*Apprendi v. New Jersey*, 530 U.S. 466 (2000))

United States v. Bailey, 286 F.3d 1219 (10th Cir.), *cert. denied*, 537 U.S. 877 (2002). The defendant may not obtain collateral relief for an *Apprendi* claim when he fails to demonstrate “cause” excusing his procedural default of not objecting to or directly appealing the issue, as well as failing to show “actual prejudice” that may have resulted from any error. Though the district court did not submit the amount of drugs to the jury, the defendant did not

object to the jury instructions on that basis. On collateral appeal, the court found that the defendant would have received the same sentence regardless of the error. Thus, while the court did find error, it went on to hold "the trial court's *Apprendi* error would not constitute reversible plain error because appellant's substantial rights were not affected." *Id*. at 1222. Thus, there was also no actual prejudice, which is required for collateral relief.

United States v. Eaton, 260 F.3d 1232 (10th Cir. 2001). The district court did not err under *Apprendi* in imposing the defendant's sentence. The Tenth Circuit held that because the defendant's sentence did not exceed the statutory maximum term for the crime of conviction, *Apprendi* was not implicated.

United States v. Higgins, 282 F.3d 1261 (10th Cir. 2002) (no *Apprendi* violation occurred when the jury did not determine the quantity of drugs involved in the offense and the defendants' original sentences were not in excess of the statutory maximum applicable to a quantity of methamphetamine either indeterminate or less than five grams).

United States v. Jackson, 240 F.3d 1245 (10th Cir.), *cert. denied*, 534 U.S. 847 (2001). The district court erred by imposing a term of imprisonment appropriate for offenses involving at least 50 grams of cocaine base, even though the defendant had been indicted and convicted for committing distinct offenses involving an unspecified quantity of cocaine base. The indictment failed to allege the quantity of cocaine base supporting any of the section 841(a) distribution and possession counts thus the maximum sentence that the defendant could receive under section 841(b)(1)(C) for distribution and possession with intent to distribute an unspecified quantity of crack cocaine was 20 years. The defendant was sentenced to 30 years, in excess of the 20-year maximum. On appeal, the defendant argued that *Apprendi* was violated because: 1) the sentence imposed exceeded the statutory maximum for the offense alleged in the indictment; 2) the district court refused the defendant's proposed jury instruction and special verdict form relating to drug type and quantity; and 3) the four-level role enhancement in the Guidelines was overruled by *Apprendi*. The court, citing *United States v. Jones*, 235 F.3d 1231 (10th Cir. 2000), found that *Jones* controlled the defendant's case and required that her sentence be reversed and remanded for resentencing because her sentence of 30 years exceeded the 20-year maximum. It further found that because the defendant stipulated to a quantity of crack cocaine at trial sufficient to support a sentence of up to 40 years under 21 U.S.C. § 841(b)(1)(B), the drug type and quantity were no longer facts required to be determined by the jury. Finally the court found that *Apprendi* did not overrule the federal sentencing guidelines because the U.S. Supreme Court specifically stated in *Apprendi* that "the guidelines are, of course, not before the court. We therefore express no view on the subject beyond what this court has already held." *Jackson*, 240 F.3d at 1249.

United States v. Jones, 235 F.3d 1231 (10th Cir. 2000), *cert. denied*. 124 S. Ct. 1115 (2004). The defendant was convicted of two counts of distribution of crack cocaine on two occasions in violation of 21 U.S.C. § 841(b). The drug quantity was not alleged in the indictment and the authorized statutory maximum was 20 years. At sentencing the court concluded that defendant's drug quantity was 165.6 grams of crack cocaine which would require defendant to be sentenced under 21 U.S.C. § 841(b)(1)(A), authorizing a maximum term of life imprisonment. The defendant's sentence

was 360 months on both counts to be served concurrently, followed by five years of supervised release. In this second appeal by the defendant,[21] the defendant challenged the legitimacy of his sentence in light of *Apprendi* and argued that the quantity of drugs attributed to him should have been alleged in the indictment. The U.S. Supreme Court remanded the case for resentencing in light of *Apprendi*. The Tenth Circuit held that a district court may not impose a sentence in excess of the maximum set forth in 21 U.S.C. § 841(b)(1)(C) unless the benchmark quantity of cocaine base for an enhanced penalty is alleged in the indictment in addition to being submitted to the jury and proven beyond a reasonable doubt. *See also United States v. Heckard*, 238 F.3d 1222 (10th Cir. 2001) (holding that the district court did not err in considering drug amount as an aggravating or mitigating factor in establishing the defendant's offense level under the sentencing guidelines because the drug quantity finding only increased the defendant's offense level and not the maximum sentence). *See also United States v. Hishaw*, 235 F.3d 565, 576 (10th Cir. 2000) (holding that, under the *Apprendi* standard, the district court did not err in considering drug quantities beyond the offense of conviction as long as the defendant's sentence falls within the maximum established by statute), *cert. denied*, 533 U.S. 908 (2001); *United States v. Keeling*, 235 F.3d 533, 539 (10th Cir. 2000) (where the jury has not found quantity beyond a reasonable doubt and quantity is integral to punishment, a defendant can demonstrate prejudice if the evidence suggests a reasonable doubt on quantity), *cert. denied*, 533 U.S. 940 (2001).

United States v. Lujan, 268 F.3d 965 (10th Cir. 2001). The district court did not err in sentencing the defendant to the statutory minimum sentence for his offense even though the sentence was higher than it was calculated under the guidelines. The defendant asks the court to extend the rule of *Apprendi* by applying it to statutory minimums in addition to maximums. The quantity of methamphetamine alleged in the defendant's indictment was more than 50 grams, a quantity that subjected him to a sentence of life imprisonment. A ten-year sentence is well within that range. Furthermore the 10-year sentence is well within the 20-year maximum for unspecified quantities of methamphetamine. The defendant argues that if the quantity of drugs involved increases the minimum sentence to which he is subject, that quantity must be pled in the indictment and submitted to the jury. The defendant also argues that the statute under which he was indicted is ambiguous and could be construed such that his mandatory minimum sentence would be five years rather than ten. The Tenth Circuit held that the statute is not ambiguous and the mandatory minimum sentence imposed by the district court was proper under the statute. As such, *Apprendi* is not implicated by the defendant's sentence.

United States v. Price, 265 F.3d 1097 (10th Cir. 2001), *cert. denied*, 535 U.S. 1099 (2002). The district court did err under the rule of *Apprendi* in sentencing the defendant to a life

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[21] *See Jones v. United States*, 194 F.3d 1178, 1183-86 (10th Cir. 1999) (the court opined that the Supreme Court's holding in *Jones v. United States*, 526 U.S. 227 (1999) (the carjacking case which held that death and serious bodily injury are not sentencing factors but are elements of the offense), merely suggested rather than established a constitutional requirement to submit to the jury any factor that increases the maximum statutory penalty).

sentence rather than the maximum sentence of 20 years for each of his convictions. The Tenth Circuit held that the error was harmless, however, because under USSG §5G1.2 the district court would have been required to impose the defendant's 27-year sentences and run those sentences consecutively along with his other convictions. All together these sentences would result in a total sentence of over 200 years. Thus, the Tenth Circuit determined that the defendant's substantial rights were not violated by imposition of a life sentence and the error was harmless.

United States v. Thompson, 237 F.3d 1258 (10th Cir.), *cert. denied*, 532 U.S. 987 (2001). The defendant was convicted of distribution of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(C) and sentenced to 121 months' imprisonment and 60 months' supervised release. The defendant challenged his sentence on the grounds that the indictment was insufficient in failing to state a specific drug quantity and the supervised release term imposed exceeded the minimum statutory range. The court found that the indictment was legally sufficient and that the defendant's sentence fell within the minimum statutory range set forth in 21 U.S.C. § 841(b)(1)(C). Further the court held that the imposition of a five-year term of supervised release was not in violation of *Apprendi* because it fell within the minimum term of supervised release under section 841(b)(1)(C) and within the sentencing guidelines authorizing a term of supervised release within a range of three to five years under USSG §5D1.2.