SELECTED GUIDELINE APPLICATION DECISIONS FOR THE EIGHTH CIRCUIT

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

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

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.2 Applicable Guidelines

United States v. Casey, 158 F.3d 993 (8th Cir. 1998). The district court erred in choosing the burglary guideline as the applicable guideline for a bank theft conviction. A court may apply an offense guideline other than that applicable to the offense of conviction only when the defendant has stipulated to a more serious offense and when the case is atypical. In this case, the defendant used his inside knowledge as an employee of a property management company to gain access to three banks and break into three ATM machines. The defendant was also convicted of two counts of counterfeiting and one count of access device fraud. Even if there is an "atypical case" exception, this does not mean that "whenever a defendant's total criminal conduct includes some act that would constitute an offense more serious than the offense of conviction, the guideline for the more serious offense may be used." The case was remanded for resentencing because the defendant did not stipulate to a burglary.

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

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

United States v. Alvarez, 168 F.3d 1084 (8th Cir. 1999). The district court did not err in using a preponderance of evidence standard to attribute to defendant as relevant conduct quantities of drugs from dismissed counts, even though quantities were supported by hearsay evidence. The defendant pled guilty to two counts of distributing a total of 56.7 grams of methamphetamine, and two conspiracy counts and two distribution counts were dismissed. At the sentencing hearing, the government presented testimony of law enforcement officers and reports from interviews with a codefendant. Relying on the testimony and interviews, the government and the PSR recommended that the defendant be accountable for more than a kilo of methamphetamine, but the defendant argued that he should only be accountable for the 56.7 grams. The court attributed 933.57 grams to the defendant, and assessed a final sentencing range of 121 to 151 months–a four-fold increase from the 30-month range that would have applied if the defendant were held accountable only for the 56.7 grams. The

Eighth Circuit concluded that the extent to which relevant conduct increased the defendant's offense level was not so extreme as to raise due process concerns that would require a higher standard of proof at sentencing.

United States v. Anderson, 243 F.3d 478 (8th Cir.), *cert. denied*, 534 U.S. 903, and *cert. denied*, 534 U.S. 929 (2001). The defendant was convicted of conspiring to distribute cocaine and cocaine base and received a base offense level of 38 and a sentence of 360 months. He appealed his sentence, arguing that the district court erred by including as relevant conduct three uncharged incidents of buying or selling drugs that occurred several years before the instant offense. *Id*. at 485. The court found that the defendant had a long career of dealing cocaine, and that despite the temporal separation of the prior incidents, they were related to the charged conduct in their similarity and their regularity. *Id*. at 485. Thus, the district court did not err by including them as relevant conduct. The defendant also argued that the district court should have used a heightened standard of proof for the relevant conduct and that failing to do so constituted a violation of due process. *Id*. at 485. The court held that, although the preponderance standard may not comport with due process when the enhancement factor drives the sentence instead of the substantive offense, this case did not present such a problem. *Id*. at 485-86 (citing *United States v. Townley*, 929 F.2d 365, 369 (8th Cir. 1991)). Exclusion of the prior incidents would have reduced the defendant's sentence from a sentencing range of 235 to 293 months. The court held that this differential was not so significant as to require a heightened standard. *Id*. at 486 (citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)). Accordingly, the court affirmed the district court's sentence.

United States v. Moore, 212 F.3d 441 (8th Cir. 2000). The district court erred in attributing 31.8 grams of cocaine base to the defendant. The defendant was convicted of possession with intent to distribute cocaine base and being a felon in possession of a firearm. On appeal, the defendant argued that the drug quantity in the seller's possession should not be included in determining his offense level. The circuit court stated, "merely purchasing drugs from someone for resale does not demonstrate that the sale of all drugs remaining in the seller's possession is an activity jointly undertaken between the seller and the buyer." *Id*. at 447. Further, the court found even if the district court had found that the defendant lived in the apartment with that person, that finding would not warrant a finding that there was a joint activity undertaken, or that the defendant aided and abetted the other person in trying to sell the 31.8 grams. Therefore, the court clearly erred in including that quantity to determine his base offense level. *But see United States v. Madrid*, 224 F.3d 757 (8th Cir. 2000) (district court did not err in relying on the methamphetamine which formed the basis of a possession with intent to distribute count, even though the jury acquitted the defendant on that count; the defendant's involvement with the drugs was proven by a preponderance of the evidence, and even if it was not, the inclusion of the drugs for sentencing purposes was reasonably foreseeable to the defendant, as he was a participant in a jointly undertaken criminal activity.).

§1B1.10 Retroactivity of Amended Guideline Range (Policy Statement)

United States v. Adams, 104 F.3d 1028 (8th Cir. 1997). The district court erred in revisiting an earlier determination when ruling whether to retroactively apply a relevant amendment. By means of a plea agreement, the defendant stipulated that 73 marijuana plants were attributable to him–government agents found 110 plants at the defendant's property. Subsequent to sentencing, Amendment 516 to USSG §2D1.1(c), which is retroactive pursuant to §1B1.10, changed the weight equivalence of marijuana plants for sentencing purposes from one kilogram to 100 grams. The district court rejected two motions by the defendant for resentencing in light of the amendment stating, in pertinent part, that "[h]ad the defendant been held accountable for the entire one hundred ten marijuana plants the statutorily required minimum term of imprisonment would have been five years pursuant to 21 U.S.C. § 841(b)(1)(B)." The circuit court, on three grounds, agreed with the defendant's claim that this is an impermissible re-visitation of a factual finding–the number of plants–in determining the appropriate sentence. First, although not *res judicata*, it is "unusual" for a trial court to revisit a finding of fact. Second, in approving the plea bargain, the trial court had already found that the 73 plants "adequately reflected the seriousness" of the defendant's conduct. Third, in deciding whether to apply an amendment retroactively, USSG §1B1.10(b) implicitly directs the court to "leave previous factual decisions intact." Consequently, it was error for the district court, in examining whether to reduce the defendant's sentence, to take into account the possibility that the defendant may have been accountable for more plants than he had agreed to under the plea bargain.

United States v. Douglas, 64 F.3d 450 (8th Cir. 1995). The district court erred in refusing to apply an amendment retroactively by holding that the change was substantive rather than clarifying. The Eighth Circuit had previously held that a felon in possession of a firearm conviction constituted a crime of violence within the meaning of the career offender provision of the guidelines. The defendant was originally sentenced to 120 months' imprisonment pursuant to this interpretation. Amendment 433, which became effective on November 1, 1991, amended the guidelines commentary to provide that a firearm possession is not a "crime of violence" under §4B1.1 and thus cannot trigger the application of the career offender provision. Amendment 433 also stated that it was a clarifying change rather than a substantive one and was approved by the Sentencing Commission for retroactive use. The Commission also raised the base offense level of the felon in possession guideline such that a firearms offender with the criminal record of this defendant could expect a sentence range partly overlapping that which he had faced under this circuit's erroneous application of the career offender guideline. The defendant moved for a reduction of his sentence, arguing that he should have been sentenced under the November 1991 felon in possession provision, which would yield a sentence of 27 to 33 months. Upon resentencing, the district court applied the higher felon in possession guideline and sentenced the defendant to 108 months' imprisonment. The circuit court ruled that the defendant is entitled to the retroactive application of the guideline. The circuit court noted that amendments promulgated by the Commission are to be taken at face value unless plainly erroneous or inconsistent with the guidelines provision they explain or amend, citing *Stinson v. United States*, 508 U.S. 36, 45 (1993). The government argued that the amendment's retroactivity provision is a substantive change since its application would result in a sentence of less than three years whereas under the previous application of the current felon in possession guideline, the defendant's sentence range is eight to ten years. The

government relied on the Seventh Circuit's ruling in *United States v. Lykes*, 999 F.2d 1144, 1149 (7th Cir. 1993), for the proposition that the Commission's decision to remove felons in possession from the career offender definition while at the same time stiffening the regular felon in possession guideline was meant to insure consistent punishment for offenders like the defendant both before and after the 1991 amendments. The circuit court noted that no other circuit has followed the Seventh Circuit's approach of refusing to honor Commission retroactivity decisions where those decisions conflict with local precedent. *See United States v. Garcia-Cruz*, 40 F.3d 986, 989-90 (9th Cir. 1994); *United States v. Stinson*, 30 F.3d 121, 122 (11th Cir. 1994) (on remand from the Supreme Court); *United States v. Carter*, 981 F.2d 645, 648-49 (2d Cir. 1992), *cert. denied*, 507 U.S. 1023 (1993). The circuit court vacated the sentence and ruled that the defendant is entitled to be resentenced wholly under the guidelines version employed by the original district court, "but in light of a retroactive amendment clarifying that the court applied the wrong provision of that version."

United States v. Mihm, 134 F.3d 1353 (8th Cir. 1998). The district court erred in refusing to consider whether the defendant upon resentencing under 18 U.S.C. § 3582(c)(2) qualified for relief under the safety valve provision in 18 U.S.C. § 3553(f), which was not in effect at the time of the initial sentencing. In 1993, the defendant's offense level for cultivating marijuana plants was determined based on the pre-1995 formula, which required treating each marijuana plant as one kilogram of marijuana. The "safety valve" became effective on September 23, 1994. In November 1995, the Commission amended the equivalency formula by equating one marijuana plant to 100 grams of marijuana and included amendment 516 in the list of retroactive amendments in §1B1.10. The court resentenced the defendant pursuant to a motion under 18 U.S.C. § 3582(c)(2), and found that the safety valve was inapplicable because the original sentence was imposed before September 23, 1994. In modifying a sentence under 18 U.S.C. § 3582(c), a court must first determine what sentence would have been imposed "by substituting only the amended sentencing range for the originally determined sentencing range, and leaving all other previous factual decisions concerning particularized sentencing factors . . . intact." The second determination requires the court to consider the first determination "together with the general sentencing considerations contained in section 3553(a)" to decide whether to modify the original sentence. The safety valve in section 3553(f) is a "general sentencing consideration" like section 3553(e) and therefore must be taken into account upon resentencing even though the original sentence preceded the effective date of the safety valve.

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

United States v. Comstock, 154 F.3d 845 (8th Cir. 1998). The district court erred in applying the 1995 version of USSG §5G1.3(c) for acts that took place between November 1992 and January 1994. The court imposed a 30-month sentence to run consecutively to the defendant's undischarged state sentences and rejected the defendant's request that the sentence run concurrently pursuant to USSG §5G1.3(c). The 1993 version of USSG §5G1.3, in effect when the offense occurred, would have required that at least some of the defendant's federal sentence run concurrently with his undischarged state sentences to achieve a "reasonable incremental penalty" for the instant

offense. (The 1993 version of USSG §5G1.3 required the court to determine the defendant's guideline range that would have applied if the defendant had been sentenced for the state and federal convictions at the same time. The Commission amended USSG §5G1.3 in 1995 to broaden the discretion of a court to determine how to sentence a defendant who is subject to an undischarged term of imprisonment.) Under the 1993 guidelines, the defendant would have faced a maximum total punishment of 37 months' imprisonment, instead of the 54 months' imprisonment he received under the 1995 guidelines. Because the *ex post facto* violation affected defendant's substantial rights, the defendant was entitled to be resentenced under the 1993 guidelines.

United States v. Cooper, 63 F.3d 761 (8th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996). The district court's application of the 1991 version of the sentencing guidelines to offenses the defendant committed prior to their effective date did not violate the *Ex Post Facto* Clause. The appellate court stated that although the 1991 amendments increased the offense levels for the defendant's three firearm offenses, application of the 1991 guidelines was justified because one of the offenses occurred after the effective date of the 1991 amendments. The appellate court reinstated its original opinion at 35 F.3d 1248 (8th Cir. 1994). The Supreme Court had vacated that original judgment, and remanded the case for "further consideration in light of *California Department of Corrections v. Morales*, 115 S. Ct. 1597 (1995)." Upon this consideration, the appellate court held that although the application of the post-November 1, 1991, grouping rules increased Cooper's penalty because his last groupable offense occurred in January 1991, "Cooper had 'fair warning' of the total penalty this additional criminal conduct would entail."

United States v. Frank, 354 F.3d 910 (8th Cir. 2003). The district court did not commit clear error when it used the 2000 *Guidelines Manual* to sentence the defendants when the 2002 *Guidelines Manual* was in effect. USSG §1B1.11 provides that the guidelines manual in effect at the time of sentencing should be used, unless the court determines this would violate the Constitution's *Ex Post Facto* Clause. Amendments to the guidelines may produce a punishment harsher then those in effect at the time the crime was committed. *See United States v. Bell*, 991 F.2d 1445, 1452 (8th Cir. 1993). The court must compare the defendant's potential sentences under the version in effect at the time the crime was committed and at the time of sentencing to determine which produces the harsher punishment. The defendant would have received a base offense level of 24 under the 2002 sentencing guidelines, while the 2000 guidelines produced a base offense level of only 21. The district court properly used the version in effect at the time the crimes of conviction were committed and avoided a violation of the *Ex Post Facto* Clause.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

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

United States v. Blue, 255 F.3d 609 (8th Cir. 2001). The defendant was convicted of sexually abusing a 21-month-old child in Indian country in violation of 18 U.S.C. §§ 1153, 2241(c), and 2246(2)(B). The defendant received a base offense level of 37 and a sentence of 210 months' imprisonment followed by three years of supervised release. The defendant appealed a four-level enhancement under USSG §2A3.1(b)(1) for sexual assault by use of force or threat as set forth in 18 U.S.C. § 2241(a). The court vacated that enhancement because the only factor suggesting use of force was the size differential between the defendant (five feet, eight inches tall and 170 pounds) and the child. The court held that "size alone cannot establish the use of force under §2A3.1(b)(1)." *Id.* at 613.

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

United States v. Crow, 148 F.3d 1048 (8th Cir. 1998). The district court erred in using a base offense level of 16 in sentencing the defendant for abusive sexual contact with a child under the age of 12 within Indian country. Level 16 applies if the defendant used force in the attack. Although the victim testified she did not want the defendant to remove her clothes and that he hurt her, the record lacked evidence regarding the defendant's and victim's relative sizes, whether the victim felt she could not escape, or what she meant when she said the defendant hurt her, that is, whether he hurt her to force her to submit, or whether the sexual contact itself hurt her. The court of appeals remanded for resentencing based on the correct base offense level of 10 under USSG §2A3.4(a)(3).

§2A4.1 Kidnapping, Abduction, Unlawful Restraint[1]

United States v. Coyle, 309 F.3d 1071 (8th Cir. 2002). This is a case of first impression. The defendant pled guilty to carjacking and kidnapping charges. The defendant entered a car armed with a knife and forced a mother to drive from Missouri to Arkansas, with her infant daughter present during the entire incident. The district court reviewed each of the four charges to which the defendant pled guilty and adjusted the base offense levels individually. The court grouped together the charges for kidnapping and carjacking. The other two charges were treated as single-count groups, and additional punishment. The defendant argued on appeal that the district court erred as a matter of law by enhancing counts I and II under §2A4.1(b)(3) for using a dangerous weapon because he merely brandished or displayed the knife. The Eighth Circuit found that to "use" a weapon in this context means to do more than possess, brandish, or display it. The court noted that the mother testified under oath at sentencing that when the defendant entered her car, he had a knife in his left hand which he placed on her leg and said, "don't say anything, just drive." When they stopped at a gas station and she balked at leaving the car to pump gas, the defendant pointed the knife at her infant daughter and said, "you don't care about her either, you don't care about your daughter"? As a result of this implied

[1]An amendment to become effective November 1, 2004, increases the base offense level for §2A4.1 (Kidnaping, Abduction, Unlawful Restraint) from level 24 to base offense level 32, in response to the PROTECT Act, Public Law 108-21.

threat, she agreed to pump the gas. The district court credited the mother's testimony. The appellate court noted that although there were no cases addressing a §2A4.1(b)(3) enhancement, the enhancement for using a dangerous weapon under §2B3.1(b)(2)(D) is premised on identical conduct. *See* USSG §2A4.1 comment. (n.2); USSG §2B3.1, comment. (n.1). In the context of a §2B3.1(b)(2)(D) enhancement, the Eighth Circuit previously held that placing a knife against a person's throat to facilitate cooperation with a robbery constituted use of a dangerous weapon. *See United States v. Elkins,* 16 F.3d 952, 953-54 (8th Cir. 1994). The court thus concluded that the defendant's holding a knife against the mother's leg to facilitate her cooperation with the carjacking constituted use of a dangerous weapon, as did the defendant's subsequent act of pointing the knife at the baby to secure the mother's cooperation.

United States v. Sickinger, 179 F.3d 1091 (8th Cir. 1999). The district court erred in applying the four-level increase under USSG §2A4.1(b)(2) for permanent bodily injury sustained by the kidnapping victim's friend who was not abducted. The increase is authorized if "the victim" received bodily injury. "Victim" for purposes of the enhancement "plainly refers solely to the victim of the kidnapping, and not to persons suffering collateral injury during the kidnapping . . . ." There is a meaningful distinction between the "any victim" language found in USSG §2B3.1 (robbery) and the "the victim" language of USSG §2A4.1. The "any victim" language would allow increasing the offense level for injuries received by bystanders and individuals other than "the victim"–the person who was robbed. On remand, the injuries sustained by the victim's friend in this case may provide grounds for an upward departure under USSG §5K2.0. The district court did not err in refusing to grant a one-level reduction for release of the victim within 24 hours under USSG §2A4.1(b)(4)(C), even though victim could have escaped within 24 hours because she had been left alone on two occasions. The defendant's "abusive behavior" towards the victim prevented the victim from attempting to escape.

§2A6.1 Threatening or Harassing Communications

United States v. Humphreys, 352 F.3d 1175 (8th Cir. 2003). The district court did not commit clear error in denying the defendant a four-level decrease under USSG §2A6.1(b)(5) (2002). The decrease is authorized in threatening communications offenses where 1) no other §2A6.1 adjustments are applicable, and 2) "the offense involved a single instance evidencing little or no deliberation." Within the meaning of "single instance," the Eighth Circuit determined a temporal relationship existed, suggesting application only to "defendants whose threats are the product of a single impulse, or are a single thoughtless response to a particular event." *United States v. Sanders*, 41 F.3d 480, 484 (9th Cir. 1994), *cert. denied*, 514 U.S. 1132 (1995). The defendant threatened to pour a flammable material on President Bush and set him alight, a violation of 18 U.S.C. § 871(a), then communicated the threat to an Internet chat room, faxed it to the White House, and communicated it to three other people on different occasions. The single purpose of burning the President was communicated on different occasions which fails to satisfy the temporal requirements necessary to trigger the four-level decrease under §2A6.1(b)(5).

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[2]

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

§2B3.1 Robbery

United States v. Bartolotta, 153 F.3d 875 (1998), *cert. denied*, 525 U.S. 1093 (8th Cir. 1999). The district court did not err in concluding that mace is a dangerous weapon under USSG §2B3.1(b)(2)(D). A dangerous weapon is one "capable of inflicting death or serious bodily injury." A serious bodily injury involves "extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." §1B1.1. The defendant's victim testified that she developed chemical pneumonia as a result of being sprayed with the mace, that she missed two weeks of work, and had to take steroid injections daily for four months and steroid pills for one year to cleanse the mace from her system. Thus, the government establishes that the defendant used mace as a dangerous weapon. The court distinguishes the case from *United States v. Harris*, 44 F.3d 1206 (3d Cir.), *cert. denied*, 514 U.S. 1088 (1995), in which the Third Circuit had held that mace was not a dangerous weapon. In *Harris*, there was no victim testimony about any significant effects from the mace spraying.

United States v. Bear, 356 F.3d 839 (8th Cir. 2004). The district court did not err in sentencing the defendant for first degree murder under the USSG robbery cross reference.
The defendant pled guilty to robbery and second degree murder in Indian Country, in violation of 18 U.S.C. §§ 1153, 1111(a), and 2111. USSG §2B3.1(c)(1) (Robbery) provides that when a murder

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[2]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.

under 18 U.S.C. § 1111 occurs during a federal robbery, the guideline for first degree murder should be applied. The robbery guideline cross reference applies "[if] a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such a killing taken place within the territorial or maritime jurisdiction of the United States." The defendant argued application of the cross reference converted his second degree murder plea into a *de facto* conviction for first degree murder and the court used his factual proffer to determine a premeditated murder without the defendant's express permission to use the proffer in such a way. The defendant further argued the cross reference applies only where the victim is killed outside the territorial jurisdiction of the United States. The court held the guideline followed the felony murder rule of 18 U.S.C. § 1111(a) which states any killing occurring during a robbery is first degree murder and calls for sentencing under the first degree murder guideline. Section 1111(b) addresses the sentencing of first degree murder as defined in section 1111(a) and the killing is committed within federal territorial jurisdiction. The defendant committed a robbery and killed his victim within federal jurisdiction and comes within the scope of 18 U.S.C. § 1111 and USSG §2B3.1(c)(1). The district court did not err in its determination.

United States v. McNeely, 20 F.3d 886 (8th Cir.), *cert. denied*, 513 U.S. 860 (1994). The defendant's base offense level was properly enhanced two levels under USSG §2B3.1(b)(1) for robbing a bank and a post office. The circuit court rejected the defendant's argument that the enhancement was unconstitutionally lacking a rational basis, holding that this is a reasonable enhancement because it "reflects both the seriousness of the offense and past practices."

United States v. Roberts, 253 F.3d 1131 (8th Cir. 2001). The defendant was convicted of bank robbery and was sentenced to 112 months' imprisonment followed by a three-year term of supervised release. On appeal, the defendant asserted that the district court erroneously imposed a five-level enhancement under USSG §2B3.1(b)(2)(C), which had been recommended in the PSR, for brandishing or possessing a firearm during the commission of the robbery. *Id*. at 1135. At sentencing, both the defendant and the Government opposed the enhancement because the evidence indicated that the co-conspirator's gun was in the glove compartment of the car and was not brought into the bank. *Id*. at 1136-37. The Government recommended only a two-level enhancement under USSG §2B1.3(b)(2)(F) based on threats that the co-conspirator made to a teller. On appeal, the Government reversed its position, arguing that the five-level enhancement was justified because there was constructive possession of the gun during the escape, that the escape was an integral part of the offense, and, therefore, the possession was reasonably foreseeable to the defendant. *Id*. at 1137. The court agreed with the Government's original position that the co-conspirator's threat to the teller was relevant conduct under USSG §1B1.3 and warranted the two-level enhancement. *Id*. at 1137. However, the court rejected the five-level weapons enhancement because the district court did not make any findings as to whether the co-conspirator possessed the gun in furtherance of the conspiracy for purposes of imputing that conduct to the defendant. *Id*. at 1137. The defendant's sentence was vacated and remanded for resentencing.

United States v. Spears, 235 F.3d 1150 (8th Cir. 2001). The district court did not err in applying an enhancement for abduction of a security guard because it was a reasonably foreseeable act in furtherance of the bank robbery. The defendant was convicted of bank robbery, and his sentence was enhanced by four levels pursuant to USSG §2B3.1(b)(4)(A) for the codefendant's abduction of the security guard during the course of the robbery. One codefendant was the driver of an armored truck. The defendant was not involved in the robbery, but he met his codefendants at his house after the robbery and hid the money in his basement. On appeal, the defendant argued that he did not agree to, plan for, or commit the abduction and was not present when it was committed and therefore the enhancement did not apply to him. The court found that the defendant knew his codefendant driver would not be the only employee in the truck, he knew one of his partners was planning to rob the truck at gunpoint, and he knew the truck would be brought to a deserted location. The court concluded that it was reasonably foreseeable that the employee security guard would be forced to accompany the robbers to the place they planned to leave the truck.

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

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right[3]

United States v. Griffin, 154 F.3d 762 (8th Cir. 1998). The district court did not err in applying USSG §2C1.1 (bribes) rather than USSG §2C1.2 (gratuities) in sentencing the defendant who pled guilty to bribery under 18 U.S.C. § 666(a)(1)(B) and mail fraud under 18 U.S.C. § 1341. The defendant, while Speaker of the House of Representatives, received two $5,000 checks from an individual the defendant had recommended to be a lobbyist for the construction industry. The defendant argued that the payments were gratuities rather than bribes because he received the payments after making the recommendation, and that USSG §2C1.2 was therefore the applicable guideline. "The distinction between a bribe and an illegal gratuity is the corrupt intent of the person giving the bribe to receive a *quid pro quo*, something that the recipient would not otherwise have done." Here the defendant admitted that he made the recommendation knowing that he would be paid for his efforts. The background notes to USSG §2C1.1. state that the guideline "applies to a person

[3]An amendment to become effective November 1, 2004, consolidates §§2C1.1 and 2C1.7 as the new bribery and extortion guideline at §2C1.1 and consolidates §§2C1.2 and 2C1.6 as the new gratuity guideline at §2C1.2; adds two separate offense characteristics for "loss" and "status" and adds other enhancements if the offense involved an "elected public official"or a "public official" in a high-level decision-making or sensitive position or the offender is a public official whose position involves the security of the borders of the United States; and adds to commentary a clarification of the meaning of "high-level decision-making or sensitive position."

who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions, or to a public official who solicits or accepts such a bribe."

§2C1.2 Gratuity

United States v. Patel, 32 F.3d 340 (8th Cir. 1994). The defendant was convicted of giving a gratuity to a government official in violation of 18 U.S.C. § 201(c)(1)(A). The district court correctly used the table in USSG §2F1.1, which ordinarily is used to measure the amount of loss caused by a defendant's fraudulent conduct. However, in the context of USSG §2C1.2 it is not used to measure the loss caused by defendant's illegal gratuity but rather the numbers on the table are "borrowed" by USSG §2C1.1 and the only relevant inquiry is the value of the gratuity.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy[4]

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

United States v. Brown, 169 F.3d 531 (8th Cir. 1999). Two defendants appealed the application of USSG §2D1.1(b)(1) and the quantity for which each defendant was held accountable. *Gun Enhancement:* The district court did not err in enhancing the defendant's offense level for possession of a dangerous weapon under USSG §2D1.1(b)(1) for firearms found in clubhouse where police executed a search warrant. The defendant argued that the firearms were for club security and unrelated to the drug trafficking. "[T]he use or intended use of firearms for one purpose, even if lawful, does not preclude the use of the firearm for the prohibited purpose of facilitating the drug trade, and therefore does not automatically remove the firearm from the purview of §2D1.1(b)(1)." The court did not clearly err in applying the firearms enhancement based on the number, type, state of readiness of the firearms, in addition to intercepted conversations that "suggested" that the defendant was willing to use the firearms to defend the drug operations. The district court did not err in enhancing a second

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[4]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.

defendant's offense level under USSG §2D1.1(b)(1) for a 26-piece firearm collection, consisting mostly of long guns and collector's items the defendant kept in his home locked in a safe. The defendant made cocaine sales from his house, and during a search, agents found in the safe with the guns $3,500, including four $20 marked bills from controlled buys. Close proximity of firearms to drug proceeds "can give rise to an inference that the firearms are present to protect the money and drugs, which is a nexus sufficient to support an enhancement under 2D1.1(b)(1)." The defendant failed to prove that it was "clearly improbable" that any of the firearms were related to the drug activities. *Drug quantity*: The district court did not err in holding defendants accountable for drug quantities from negotiated deal that was never consummated, because there was an actual agreement to supply the drugs and the defendants were reasonably capable of providing the agreed-upon quantity. *See* USSG §2D1.1, comment. (n.12). The defendants unsuccessfully argued that the supplier had backed out of the deal and that a government search of the conspirators recovered an insufficient quantity of drugs to make the deal. The government successfully argued that statements of the defendants indicated both intent and ability to complete the transaction. The district court did not err in holding one defendant accountable for methamphetamine found at a co-conspirators house. The defendant's claim that he was merely a "cola guy" (cocaine supplier), was inconsistent with the defendant's guilty plea to conspiracy to distribute cocaine and methamphetamine, with his stipulation that he was aware that the conspiracy dealt with both substances, and with traces of both drugs found in defendant's residence.

United States v. Campbell, 150 F.3d 964 (8th Cir. 1998). The district court erred in attributing to the defendant two kilograms of cocaine sold to a witness's friend. The witness testified only that the defendant had been present at the garage where his friend made the purchase on the day of the purchase. There was no testimony that the defendant was involved in the sale, or even present at the time of the sale.

United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir.), *cert. denied*, 513 U.S. 849 (1994). The defendants were convicted of drug trafficking. Defendant Casares-Cardenas challenged the inclusion of drugs found in the possession of his co-conspirators during a vehicle stop which occurred while he was incarcerated. The district court found that, from jail, Casares-Cardenas helped to procure the car in which the narcotics were being transported, and the activities of his co-conspirators were in furtherance of the conspiracy and were known to or reasonably foreseeable by him. The circuit court affirmed, finding that a defendant may be guilty of conspiracy even if he was incarcerated at the time it was effected. *See United States v. Lee*, 886 F.2d 998, 1003 (8th Cir. 1989). Defendant Casares-Cardenas next argued the district court incorrectly increased his sentence for obstruction of justice. The circuit court affirmed based on the district court finding that the defendant perjured himself on the witness stand at trial. Finally, defendant Osorio argues he had only a minor role and challenges the district court's failure to reduce his sentence on this basis. The circuit court affirmed based on the district court's finding that the defendant's role as a "transporter" of narcotics was an integral role in the advancement of the conspiracy.

United States v. Davidson, 195 F.3d 402 (8th Cir. 1999), *cert. denied*, 529 U.S. 1180, and *cert. denied*, 529 U.S. 1093 (2000). The defendant was found guilty of conspiracy to manufacture methamphetamine and was sentenced to 151 months' imprisonment. On appeal, the defendant argued that the district court erred by not making a specific finding that it was reasonably foreseeable to her that the methamphetamine related to a particular lab. *Id*. at 409-10. Evidence indicated that the defendant had ordered and delivered precursor chemicals to the lab, and that those chemicals could have been used to produce 2,500 grams of methamphetamine. *Id*. at 10. The court affirmed the sentence, holding that there was sufficient evidence to establish that the lab was within the scope of the conspiracy and was reasonably foreseeable to the defendant.

United States v. Fraser, 243 F.3d 473 (8th Cir. 2001). The Eighth Circuit held that drug quantities intended for personal use should not be included in base offense level for possession, or attempted possession, with intent to distribute. The defendant was convicted of attempted possession with intent to distribute methamphetamine and was sentenced to 60 months' imprisonment followed by five years of supervised release. On appeal, the defendant argued that the majority of the 453.6 grams of methamphetamine that she attempted to purchase was intended for personal use and that the district court erred by not excluding that portion when calculating her base offense level. *Id*. at 474. The Eighth Circuit joined the Seventh and Ninth Circuits in holding that drug quantities intended for one's own use are not part of a common scheme or plan for distribution and cannot be considered relevant conduct. *Id.* at 475. The court vacated the sentence and remanded for a hearing to determine what portion of the total drug quantity was intended for distribution.[5]

United States v. Gonzalez-Rodriguez, 239 F.3d 948 (8th Cir. 2001). The district court did not err in finding there was sufficient evidence to attribute a large quantity of drugs to the defendant in support of his violation of 21 U.S.C. § 841(a)(1). The defendant was convicted of possession with intent to distribute methamphetamine and possession with intent to distribute methamphetamine within 1,000 feet of a school based on the quantity of methamphetamine recovered from the defendant's bedroom and bathroom. On appeal, the defendant argued that there was insufficient evidence to support his section 841 conviction. The court disagreed and held that there was sufficient circumstantial evidence to support the finding that the defendant constructively possessed the methamphetamine. The court concluded that the quantity of methamphetamine found in the bathroom of the house in which the defendant lived was attributable to the defendant because the drugs in the bathroom had the same appearance, consistency, and purity as the drugs found in the bedroom. Further, the drugs in the bedroom were found next to the same type of black tape and packaging material which were found next to the drugs in the bathroom.

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[5]The court drew a distinction between this case involving attempted possession with intent to distribute and its previous decisions involving conspiracy to distribute, noting that in conspiracy to distribute cases, quantities for personal use are relevant. *Id*. at 474-75. For conspiracy to distribute, USSG §1B1.3(a)(1)(B) instructs the court to consider all reasonably foreseeable drug quantities. *Id*. at 475.

United States v. Houston, 338 F.3d 876 (8th Cir. 2003). The defendant sought review of his sentence arguing that the district court clearly erred in finding that he was accountable for more than 50 but less than 150 grams of actual methamphetamine, which resulted in a base offense level of 32. In this case of first impression, the issue on appeal was whether the government proved that the methamphetamine quantities the defendant admitted he helped manufacture were "actual" methamphetamine quantities, rather than mixture quantities. In the defendant's objections to the presentence report, he denied "any involvement with the substance" and denied "that this mixture could have made methamphetamine." At sentencing, the government offered no proof regarding what was recovered in the search of the defendant's home. None of the methamphetamine manufactured by the co-conspirators was recovered and tested for purity. No expert testified as to the typical purity of methamphetamine manufactured in these quantities, by this method, and in these conditions. The court held that it could only conclude that the district court, like the author of the PSR, simply assumed that the quantities the defendant admitted to the police were actual methamphetamine quantities. The court held this assumption unwarranted and that the finding that it was actual methamphetamine was clearly erroneous. The court noted that note (B) of the Drug Quantity Table defines actual methamphetamine as "the weight of the controlled substance, itself, contained in the mixture." The court noted that Congress and the Sentencing Commission have mandated alternative methods for determining total quantities of methamphetamine, PCP, and amphetamine. The court concluded that the record was devoid of any evidence to justify a finding of at least 50 grams of actual methamphetamine, or 500 grams of a methamphetamine mixture, the minimum alternative quantities necessary to place the defendant's offense in base offense level 32. Therefore, the court found that it could not uphold the district court's base offense level finding by this alternative method. The court reversed and remanded the case for resentencing.

United States v. Hulett, 22 F.3d 779 (8th Cir.), *cert. denied,* 513 U.S. 882 (1994). The district court did not err when it calculated the defendant's sentence based on the amount of cocaine he actually purchased from undercover government agents. The defendant argued that he was entrapped as a matter of law and that the district court should have based his sentence on the amount of cocaine he could have purchased with the same amount of money at the market rate rather than the artificially low price of one-half the market rate used by the government. Under USSG §2D1.1, comment. (n.17), enacted subsequent to the defendant's sentencing, a court may depart downward if, "in a reverse sting operation, the government sets a price substantially below the market price that leads a defendant to purchase significantly more drugs than his resources would otherwise have allowed him to do." The circuit court found that in this case the defendant was not entrapped and the government did not drive up the sentencing range by setting a price so low that it induced the defendant to buy more cocaine.

United States v. Hunt, 171 F.3d 1192 (8th Cir. 1999). The district court did not err in determining the offense level for conspiracy to manufacture methamphetamine based on the opinion testimony of a DEA agent regarding the production capacity of the defendant's laboratory and on the defendant's statement of his intent to manufacture 100 grams on the day he was arrested. Application

Note 12 to §2D1.1 states that in determining the base offense level the court may consider the "size or capability of any laboratory involved."

United States v. Johnson, 28 F.3d 1487 (8th Cir. 1994), *cert. denied,* 513 U.S. 1098 (1995). The district court did not err in applying USSG §2D1.1 or 21 U.S.C. § 841. The defendants argued that the application of these provisions violated the equal protection clause because of the resulting disparate impact upon African Americans in the prosecution and sentencing of crack offenses. They did not argue that the Commission and Congress had a discriminatory purpose at the time of enacting USSG §2D1.1 and section 841; rather, the defendants averred that the reaffirmation of the statute and the guideline evidenced a discriminatory purpose. The circuit court disagreed and refused to infer a discriminatory purpose in the maintenance of the penalties.

United States v. Lewis, 249 F.3d 793 (8th Cir. 2001). The defendant pled guilty to one count of being a felon in possession of a firearm and one count of making a false statement in an attempt to obtain a firearm. The firearm in question was an heirloom, which the defendant inherited from his father. The defendant knew that he could not legally own the gun because of his prior felony convictions and so gave the gun to his son. Facing financial difficulties, the defendant obtained the gun from his son and sold it to a pawn shop in order to have enough money to pay off his utility bill. Several days later, the defendant returned to the pawn shop to retrieve the family heirloom. On the required ATF form 4473, which must be completed before acquiring a firearm from a licensed dealer, the defendant falsely denied previous felony convictions, though all other information on the form was correct. After running the form through the ATF's National Instant Check System, the defendant was denied clearance to reclaim the gun. Soon after, the defendant was indicted for being a felon in possession and making a false statement in an attempt to obtain a firearm. He pled guilty to both counts. After receiving a three-level downward adjustment for acceptance of responsibility, the defendant's guideline sentencing range was 77 to 96 months' imprisonment. The defendant filed a motion for a USSG §5K2.11 departure for lesser harms, claiming that his possession off the firearm and false statement on the ATF form were not the kinds of harms that Congress envisioned in enacting the laws proscribing those offenses. *Id*. at 794. The district court denied the motion, sentencing the defendant to two concurrent 77-month terms of imprisonment, and three years of supervised release. On appeal, the defendant argues that while the district court acknowledged that it had the authority to depart on the felon in possession count, it did not believe it had the same authority to depart on the false statement count. *Id*. As a matter of first impression, the Court determined that the "'lesser harms' rationale of USSG §5K2.11 permits a sentencing court to depart for violations of 18 U.S.C. § 922(a)(6), making a false statement in connection with the acquisition of a firearm." *Id*. at 195.

United States v. Marsalla, 164 F.3d 1178 (8th Cir. 1999). The district court did not err in relying solely on lay witness testimony of a codefendant that the substance distributed was crack cocaine. The witness testified that she supplied defendant with the substance from a known supplier who made crack cocaine and that she had "no doubt" that the substance was crack. The defense called a chemist who challenged the codefendant's ability to identify crack, but the court found that the

codefendant's experience with crack as a "maker, buyer, handler, observer, and seller" was sufficient to support a finding that the substance distributed was crack cocaine. In addition, there was no evidence that the defendant ever complained that the substance was not crack. In dissenting, Judge Heaney stated that relying solely on a witness who is testifying pursuant to a plea agreement and who admitted she had no "direct experience" with the substance involved provided an insufficient foundation for the witness's opinion.

United States v. Maxwell, 25 F.3d 1389 (8th Cir.), *cert. denied*, 513 U.S. 1031 (1994). The district court did not err in concluding that defendants Maxwell, Davis, and Lewis were responsible for distributing cocaine base. The defendants argued that they should not be accountable for cocaine base because defendants Maxwell and Majied sometimes distributed the cocaine in a powder form. The circuit court held that the district court did not clearly err in holding the conspirators liable for cocaine base because Maxwell and Majied knew the people to whom they were distributing were converting the powder into cocaine base, and Majied even supplied some of his co-conspirators with directions for converting the powder into cocaine base. Further, Lewis and Davis sold the cocaine in cocaine base form.

United States v. Maza, 93 F.3d 1390 (8th Cir. 1996), *cert. denied*, 519 U.S. 1138 (1997). On the government's cross-appeal, the appellate court held that the district court committed clear error in finding that the government did not prove by a preponderance of the evidence that the drug distributed by the defendant was d- rather than l-methamphetamine. The defendant was sentenced to the statutory mandatory sentence of 120 months' imprisonment for distribution of l-methamphetamine, a sentence lower than the guidelines range for such an amount of d-methamphetamine. The circuit court found that the evidence presented by the government did establish that the drugs involved were d-methamphetamine. After commenting upon various aspects of the evidence which convinced the appellate court that the government had sustained the burden of proof by a preponderance, the court vacated the sentence and remanded for resentencing.[6]

United States v. McMurray, 34 F.3d 1405 (8th Cir. 1994), *cert. denied,* 513 U.S. 1179 (1995). The district court did not err in rejecting the defendant's argument that the 100 to 1 ratio for cocaine base or "crack" violated the equal protection clause. Furthermore, this ratio is not a factor the Commission failed to consider in drafting the guidelines, and thus a downward departure was not warranted. Lastly, the district court did not err in treating as cocaine base the powder cocaine the defendant was convicted of distributing. The court found that the defendants sold crack and that the powder cocaine discovered had simply not yet been converted into crack.

United States v. Newton, 184 F.3d 955 (8th Cir. 1999). The district court did not err in applying a two-level enhancement under USSG §2D1.1(b)(1) for a weapon used as collateral for the

[6]The Commission amended the Commentary to §2D1.1 by deleting the distinction between d- and l-methamphetamine in the Drug Equivalency Tables. *See* USSG §2D1.1, Amendment 555.

purchase of a truck. During a three-month FBI sting operation, an undercover agent arranged to purchase drugs from the defendant who would deliver the drugs to a confidential informant. The defendant entered into an agreement with the agent to obtain a loan to buy a replacement for the vehicle he had wrecked while distributing drugs. The defendant posted guns as collateral and agreed to repay the loan with drugs. After purchasing a new truck, the defendant continued to deliver drugs to the informant and the agent. The enhancement in USSG §2D1.1(b)(1) requires the government to show that a "weapon was present and that it was at least probable that the weapon had a nexus with the criminal activity." Here, the loan agreement was part of the ongoing drug trafficking and the guns "directly facilitated the continuing drug transactions."

United States v. Palacios-Suarez, 149 F.3d 770 (8th Cir. 1998). The defendant was properly sentenced based on the amount of cocaine and amphetamine in his car, despite the defendant's belief that he was transporting only marijuana. The defendant argued that it was not foreseeable to him that the person for whom he was delivering the drugs would have him carry cocaine instead of marijuana, but the court of appeals held that reasonable foreseeability is relevant in sentencing determinations only with respect to the conduct of those with whom a defendant has conspired or jointly acted. The defendant was sentenced based on the drugs in his car, not on drugs in the possession of a co-conspirator.

United States v. Perez-Guerrero, 334 F.3d 778 (8th Cir. 2003). The appellate court affirmed the district court's application of a two-level sentencing enhancement pursuant to §2D1.1(b)(1). The defendant was convicted of conspiring to distribute methamphetamine and using communications facility to facilitate the distribution of drugs. At the sentencing, the district court applied a two-level sentencing enhancement pursuant to §2D1.1(b)(1) for possessing a dangerous weapon in connection with the conspiracy. On appeal, the defendant argued that he should not have been held responsible for the loaded .45-caliber semiautomatic pistol found underneath the backseat of his vehicle during the 1996 traffic stop. The Eighth Circuit noted that generally the weapon enhancement is applicable if the gun is found in the same location where drugs or drug paraphernalia were stored, or where part of the conspiracy took place. In the instant case, at the time of the traffic stop during which the weapon was recovered, defendant possessed the key to room 108 of the Hawkeye Motel. A subsequent search of that room uncovered large quantities of methamphetamine. Consequently, at the time of the stop, defendant had constructive possession of both the drugs and the weapon. In addition, a canine search focused on the rear taillight area of the defendant's vehicle, indicating that drugs had been stored there previously. Accordingly, the court affirmed the district court's enhancement pursuant to §2D1.1(b)(1).

United States v. Raines, 243 F.3d 419 (8th Cir.), *cert. denied*, 532 U.S. 1073 (2001). The defendant was convicted of cultivating marijuana plants in violation of 21 U.S.C. § 841(a)(1). The Government appealed the sentence, asserting that the district court erred in finding that the defendant had cultivated fewer than 1000 plants. *Id*. at 422. At sentencing, a law enforcement officer testified that he had sampled one out of every ten similarly sized plants and counted only those that had

identifiable root hairs, which establishes that the marijuana cutting is a separate plant for the purposes of the guidelines. *Id*. at 423 (citing *United States v. Bechtol*, 939 F.2d 603, 604-05 (8th Cir. 1991)) Based on this sample, the officer extrapolated that the defendant had produced 1,051 plants. The district court found that the estimate was not sufficiently reliable to prove by a preponderance of the evidence that at least 1,000 plants had identifiable root hairs. *Id*. at 423. The court affirmed the sentence, holding that the district court did not err by rejecting the Government's sampling technique and holding the defendant responsible for fewer than 1,000 plants.

United States v. Rogers, 150 F.3d 851 (8th Cir. 1998), *cert. denied*, 525 U.S. 1113 (1999). The district court did not err in applying the firearm enhancement under USSG §2D1.1(b)(1). The defendant argued that the weapon was used like cash, in exchange for drugs, rather than as a weapon. The court of appeals rejected the argument, noting that an analogous issue was addressed by the Supreme Court in *Smith v. United States*, 508 U.S. 223 (1993), where the Court held that trading a firearm for drugs constituted using a firearm for purposes of 18 U.S.C. § 24(c). Applying the same analysis, the court of appeals held that a drugs-for-guns trade is sufficient to warrant an enhancement under USSG §2D1.1(b)(1).

United States v. Searcy, 284 F.3d 938 (8th Cir. 2002). The Eighth Circuit held that the proper analysis for a claim of sentencing entrapment examines the defendant's predisposition, and not whether the Government's conduct was outrageous. The defendant, a powder cocaine dealer, sold crack cocaine to a police informant after being asked repeatedly over a four-week period. The defendant pled guilty to possession with intent to distribute crack cocaine and was sentenced under USSG §2D1.1 to 110 months' imprisonment followed by a four-year term of supervised release. At sentencing, the defendant sought a downward departure, which was denied, based on a theory of sentencing entrapment. On appeal, he argued that the district court applied the wrong evidentiary standard in its determination that he was not a victim of sentence entrapment. The court held that the test for sentencing entrapment inquires into the predisposition of the defendant and considers the nature of the Government's behavior only insofar as it provided inducement. *Id.* at 1101. Application Note 15 recognizes sentencing entrapment as a basis for departure where, in a reverse sting operation, the Government enables the defendant to buy greater quantities of the drug by manipulating the price. The court reasoned that coaxing the defendant to sell crack cocaine, exposing him to a significantly longer sentence, was analogous to enabling him to buy a larger quantity of drugs. *Id.* at 1101. The court remanded for a new hearing. *See also United States v. Berg*, 178 F.3d 976, 981 (8th Cir. 1999) ("Sentencing entrapment occurs when official [government] conduct leads a defendant predisposed to deal only in small quantities of drugs to deal in larger quantities, leading to an increased sentence."). On appeal from the remand, the Eighth Circuit held that the defendant was in fact predisposed to sell crack and reversed the district court's factual finding to the contrary.

United States v. Wilson, 49 F.3d 406 (8th Cir.), *cert. denied*, 516 U.S. 945 (1995). The district court did not err in its application of the guidelines by using the plant count to weight conversion estimates of USSG §2D1.1(c) instead of the harvested drug weight to determine the defendant's base

offense level. The defendant was involved in a large scale marijuana growing and distribution scheme and was convicted of conspiracy to manufacture and distribute marijuana and aiding and abetting possession with intent to distribute marijuana. The defendant claimed that application of the plant count conversion in his case would "drastically extend the scope of the conversion principle" because the marijuana attributed to him was harvested, shucked, packaged and sold months before law enforcement officials intervened. The circuit court held that where the evidence demonstrates that "an offender was involved in the planting, cultivation, and harvesting of marijuana plants, the application of the plant count to drug weight conversion of §2D1.1(c) is appropriate."

§2D1.10 Endangering Human Life While Illegally Manufacturing a Controlled Substance

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000). The district court erred in applying USSG §2D1.1(b)(5) in determining the defendant's offense level. The defendant was convicted of manufacturing and attempting to manufacture methamphetamine and endangering human life while doing so, and was sentenced to two concurrent terms of 240 months' imprisonment. The presentence report grouped the counts and determined the offense level on the basis of the endangering life count because it was the most serious count, thereby applying USSG §2D1.10. The circuit court found that the base offense level was correctly calculated under USSG §2D1.10, but held that the environmental harm enhancement found in USSG §2D1.1(b)(5) should not have been applied because USSG §2D1.10(a)(1) directs only that the drug quantity table be used and does not refer to the rest of USSG §2D1.1. The court reversed the sentence and remanded for resentencing.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit[7]

United States v. Akbani, 151 F.3d 774 (8th Cir. 1998). The district court did not err in its calculation of the loss caused by the defendant's check-kiting scheme. The calculation was not limited to the amount of the "float" at the time of discovery, as the defendant suggested. The full amount of loss is properly determined when all of the checks in the scheme have been presented for payment, thereby revealing the extent of the overdraft.

United States v. Anderson, 68 F.3d 1050 (8th Cir. 1995). The district court did not err in calculating the amount of loss under USSG §2F1.1. The district court had determined that the intended loss the defendant had attempted to inflict was larger than the actual loss, and used the intended loss as the estimated loss for purposes of determining the defendant's base offense level under USSG §2F1.1. The defendant contended that the court did not make a reasonable estimate of intended loss because he intended no loss to his creditor. The defendant unsuccessfully argued that the court erred by failing to deduct the payments that he intended his creditors to receive in calculating intended loss, and by defining intended loss as potential loss. The circuit court concluded that the district court's calculation of intended loss as the difference between the maximum potential loss based on undisclosed assets and the amount the defendant actually repaid in settlements to creditors who did not know the true extent of his assets was not clearly erroneous. *See Kok v. United States*, 17 F.3d 247, 250 (8th Cir. 1994).

United States v. Coon, 187 F.3d 888 (8th Cir. 1999), *cert. denied*, 529 U.S. 1017 (2000). The district court did not err in failing to exclude from the loss calculation money repaid to the victims of the insurance fraud after closing the account used to perpetrate the fraud. The amount of fraud is "the

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[7] *See* USSG, App. C, Amendment 617.

greater of the loss defendants intended to inflict at the time of the fraud, or the actual loss," so later repayments do not necessarily affect the loss determination under USSG §2F1.1.

United States v. McCord, Inc., 143 F.3d 1095 (8th Cir. 1998). The district court did not err in enhancing the defendant's fraud sentence for "conscious or reckless risk of serious bodily injury," under USSG §2F1.1(b)(4)(1). The court of appeals noted that some fraudulent schemes involve such obvious risks of serious bodily injury that the criminal recklessness of their perpetrators will be self-evident, such as intentionally causing car accidents to commit insurance fraud. For most frauds, where the risk of bodily injury is less direct or obvious, the government must prove not only that the fraudulent conduct created a risk of serious bodily injury, but also that the defendant was in fact aware of and consciously or recklessly disregarded that risk. In this case, the evidence was sufficient that the defendants knew of the safety risk they created in falsifying truck driver logs to conceal violations of regulations.

United States v. Peters, 59 F.3d 732 (8th Cir. 1995), *cert. denied*, 522 U.S. 860 (1997). The district court did not err in its calculation of loss pursuant to USSG §2F1.1. The defendant owned and operated an architectural and engineering firm which was hired to assist a school district in obtaining federal funds for an asbestos removal project. Upon discovering that the funds provided were substantially in excess of what was needed for the asbestos project, the defendant developed and implemented a scheme to submit false claims to the federal government in order to use additional money for other renovation projects in the school district which were unrelated to asbestos removal. The defendant was convicted of various counts of conspiracy to defraud the United States, causing false and fraudulent claims to be filed against the United States and theft of property belonging to the United States. The district court determined the amount of loss to be $153,476–the full amount of the false claims the defendant had submitted. The defendant argued on appeal that because the program was partially a loan program, the district court should have included the amount that the United States was unlikely to recover instead of the full amount of the claims submitted, pursuant to note 7(b) of the commentary to USSG §2F1.1. The circuit court ruled that even if a portion of the $153,476 could be characterized as a loan, it is still an interest free loan and therefore best characterized as a government benefit. The circuit court noted that the commentary accompanying USSG §2F1.1 specifically provides that the loss is the value of the benefits diverted from intended recipients or uses when the case involves diversion of government program benefits, which in this case was correctly determined to be $153,476 by the district court.

United States v. Piggie, 303 F.3d 923 (8th Cir. 2002), *cert. denied*, 538 U.S. 1049 (2003). The defendant created and pursued a secret scheme to pay talented high school athletes to play basketball for his "amateur" summer team; such amateur status was required for college athletes by the National Collegiate Athletic Association (NCAA) rules. As a part of the scheme, the high school athletes falsely certified that they had not previously received payments to play basketball. As a result of this false certification, the universities and one high school had to pay NCAA penalties and lose their scholarships, as well as conduct costly investigations. On appeal, the defendant argued that the district

court incorrectly calculated the amount of loss attributable to him in enhancing his base offense level under §2F1.1(b)(1). The defendant further argued that he did not intend any loss to the universities because if the scheme had gone as planned, the payments to the players would never have been discovered and the universities would not have incurred a loss. The Eighth Circuit found that the district court did not err when it determined the greater loss for consideration under the guidelines was the intended loss to the universities, including forfeited scholarships, investigation costs, and fines because all of the losses to the high school and the universities were the natural and probable consequences of the defendant's actions.

United States v. Shevi, 345 F.3d 675 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1182 (2004). The defendant pled guilty to mail fraud, structuring cash transactions, and five counts of filing false tax returns. At sentencing, the district court found the mail fraud loss to be $ 305,133.38 under §2F1.1. The defendant appealed. The Eighth Circuit concluded that the district court's fraud loss calculation was inconsistent with the supervening decision in *United States v. Wheeldon*, 313 F.3d 1070 (8th Cir. 2002).[8] The defendant argued on appeal that the district court erred in calculating the portion of the total mail fraud loss attributable to his bankruptcy fraud. The government conceded that the actual loss attributable to the boat loan was the secured lender's net loss after sale of the collateral, $110,973, not the total debt of $256,000 that was discharged in bankruptcy. *See* §2F1.1, comment. (n.7(b)). This adjustment reduced the actual loss resulting from the bankruptcy fraud from $278,320 to $133,293. With the lower loss amount, the defendant's combined offense level would reduce his guidelines sentencing range to 33-41 months, below the 42-month sentence imposed by the district court. The court held that the government's assertion that the revised bankruptcy fraud loss was at least $133,293 could not be upheld. The appellate court noted that when a defendant has concealed assets to perpetrate bankruptcy fraud, the intended loss normally may not exceed the value of the liabilities the debtor hoped to discharge or otherwise avoid. *See United States v. Dolan*, 120 F.3d 856, 870 (8th Cir. 1997); *United States v. Edgar*, 971 F.2d 89, 95 (8th Cir. 1992). In *Wheeldon*, the Court noted, the debtor was clearly insolvent, and the concealed assets were worth far less than his scheduled debts. In the instant case, the net debts discharged in the defendant's fraudulent bankruptcy, taking into account what the secured creditor realized in foreclosing on the boat, totaled $133,293. As in *Wheeldon*, 313 F.3d at 1073, the circuit court held that the district court was free to accept and consider further evidence regarding the value of the defendant's concealed assets. Therefore, the Eighth Circuit held that it could not accept the government's assertion that the fraud loss, at a minimum, totaled $133,293, and remanded for redetermination of the mail fraud loss.

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

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[8]In *Wheeldon*, the court held defendant's intended loss was the value of assets that defendant concealed from the bankruptcy court, rather than the amount of the total debt defendant sought to discharge in bankruptcy.

held that a PSR to which the defendant has objected may not be evidence at sentencing. The district court could have relied on other evidence to make its finding, but not on the disputed PSR.

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

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[9]

United States v. Pharis, 176 F.3d 434 (8th Cir. 1999). The district court properly found inapplicable the five-level enhancement in USSG §2G2.2(b)(4) because the defendant's prior misdemeanor offenses did not constitute a "pattern of activity involving the sexual abuse or exploitation of a minor." The defendant's state convictions involved obscene phone calls to young girls and indecent exposure. Conduct constituting "sexual abuse or exploitation" must involve either physical sexual contact with children or the creation of child pornography neither of which existed in defendant's case. USSG §2G2.2, comment. (n.1).

United States v. Stulock, 308 F.3d 922 (8th Cir. 2002). Defendant was convicted of knowingly receiving a child pornography videotape, which he received in the mail after he responded to an e-mail set up by law enforcement. Defendant's sentence was enhanced under §§2G2.2(b)(3) and (b)(5) for use of a computer in connection with the transmission or advertisement of child pornography and defendant's possession of other pictures showing violent child pornography. The defendant argued, *inter alia*, that the enhancement under §2G2.2(b)(5) was improper because his use of a computer was peripheral to his receipt of a video in the mail. Relying on *United States v. Richardson*, 238 F.3d 837 (7th Cir.), *cert. denied*, 532 U.S. 1057 (2001), the court concluded that §2G2.2(b)(5) applied to a defendant who receives child pornography for which he received a notice or

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[9]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.

advertisement through the use of his computer. Only the final payment and delivery were, of necessity, accomplished through the postal service. The court, therefore, found no error in the district court's findings of fact or its application of §2G2.2(b)(5). The circuit court also ruled as proper the application of the enhancement under §2G2.2(b)(3) based on files recovered from defendant's computer portraying a minor female in bondage with a nude male possessing a whip.

Part H Offenses Involving Individual Rights

§2H1.1 Offenses Involving Individual Rights

United States v. Webb, 214 F.3d 962 (8th Cir. 2001). The defendant, a county sheriff, was convicted of violating the civil rights of a victim by sexually assaulting her and soliciting sexual favors. Evidence indicated that the defendant, a 370-pound man, pushed the victim down on the couch and laid on top of her. The defendant's base offense level under USSG §2H1.1(a)(4) was six with an additional six-level enhancement because the offense was committed by a public official. The court imposed a ten-month split sentence. The Government argued on appeal that the district court should have set the base level at ten under USSG §2H1.1(a)(3)(A) for use of force during the offense. *Id*. at 965-66. No case had previously interpreted the term "use of force" under USSG §2H1.1(a)(3)(A), so the court looked to similar language in other contexts. The court had previously held in *United States v. Allery* that "force sufficient to prevent the victim from escaping the sexual contact satisfies the force element." 139 F.3d 609, 611 (8th Cir.), *cert denied*, 524 U.S. 962 (1998) (construing the "force" element of 18 U.S.C. §§ 2241(a)(1) and 2244(a)(1)). The court adopted the *Allery* standard as the appropriate standard for construing "use of force" under USSG §2H1.1(a)(3)(A). The court remanded to the lower court with instructions to reconsider the base offense level in light of the proper standard and the disparity in size between the defendant and the victim.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

United States v. Plumley, 207 F.3d 1086 (8th Cir. 2000). The district court did not err in enhancing the defendant's sentence due to his threats against his cohorts. The defendant's base offense level was increased by eight levels pursuant to USSG §2J1.2(b)(1) because the court found the defendant had threatened his cohorts with physical violence if they testified against him. The defendant told them to keep their mouths shut because if they cooperated with the police, he would physically assault them. The defendant argued on appeal that his conduct was not serious enough to warrant the eight-level enhancement. Agreeing with other circuits, the court found no "seriousness" requirement existed in USSG §2J1.2(b)(1) beyond the fact of a violent threat. *See United States v. Versaglio*, 85 F.3d 943, 949 (2d Cir 1996); *United States v. Sidhu*, 130 F.3d 644, 652 (5th Cir. 1997); *United States v. Moody*, 977 F.2d 1420, 1425 (11th Cir. 1992).

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition[10]

United States v. Cooper, 63 F.3d 761 (8th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996). The district court did not err in failing to find that the November 1, 1991, amendment to USSG §2K2.1 was promulgated in violation of the enabling legislation in 28 U.S.C. § 991(b)(1)(B) and congressional intent. The defendant argued that the amendment was invalid because it violated section 991(b)(1)(B)'s directive that unwarranted sentencing disparities are to be avoided in sentencing defendants with similar records who have been found guilty of similar criminal conduct. The circuit court rejected this argument, explaining that the existence of some disparity in sentencing between defendants with similar records who commit certain firearms offenses prior to the amendment's effective date and those who commit similar offenses after the effective date does not violate congressional intent. Rather, the enabling legislation contains express directives to the Commission to periodically review and revise the guidelines. The circuit court concluded that reading the legislation in its entirety reveals that Congress authorized and envisioned that such periodic revisions could result in either the increase or decrease of a defendant's sentence. Additionally, the Commission's explanation for why it promulgated the amendment was sufficient to satisfy the requirement in 28 U.S.C. § 994(p) to provide Congress with a statement of reasons for its promulgation.

United States v. Hedger, 354 F.3d 792 (8th Cir. 2004). The district court's application of §2K2.1(b)(4) and (b)(5) enhancements did not amount to impermissible double-counting. The defendant was indicted for being a felon in possession of a firearm. After pleading guilty to the charge, the defendant was sentenced to 33 months' imprisonment. At the sentencing, the district court imposed a §2K2.1(b)(4) enhancement because the firearm was stolen, and a §2K2.1(b)(5) enhancement because the firearm was possessed in connection with another felony offense, stealing the same firearm. On appeal, the defendant argued that he possessed the firearm as a consequence of stealing it, and therefore assessing both enhancements constituted impermissible double counting. Furthermore, defendant noted that he did not use the gun in committing the theft, and after leaving the gun shop with the revolver, he did not use the firearm to commit other offenses. The defendant argued that there should be some distinction between the theft of the firearm and possession of the same stolen firearm; these two offenses committed contemporaneously should not warrant application of the (b)(5) enhancement. Relying on *United States v. Kenney,* 283 F.3d 934 (8th Cir.), *cert. denied,* 537 U.S.

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[10]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 system (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 substitutes 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.

867 (2002), and *United States v. English,* 329 F.3d 615 (8th Cir. 2003), the court stated that the (b)(4) enhancement accounts only for the stolen nature of the possessed firearm, not the act of stealing it. Conversely, subsection (b)(5) addresses conduct surrounding the possession of firearms. More specifically, subsection (b)(5) dealt with whether possession occurred in connection with another felony offense. The court also noted that the Commission intended both subsections (b)(4) and (b)(5) to be applied to firearms possession offenses involving an additional felony offense other than possession of explosives, possession of firearms, or trafficking. The court acknowledged a split among the circuits regarding whether the (b)(5) enhancement applied in similar cases. *Compare United States v. Fenton,* 309 F.3d 825 (3d Cir. 2002); *United States v. Szakacs,* 212 F.3d 344 (7th Cir. 2000); *United States v. Sanders,* 162 F.3d 396 (6th Cir. 1998), *with United States v. Luna,* 165 F.3d 316 (5th Cir. 1999). The court concluded that given its prior decisions in *Kenney* and *English,* there was no need to dwell on the issue. Accordingly, the district court's application of the (b)(4) and (b)(5) enhancements did not amount to impermissible double-counting.

United States v. James, 172 F.3d 588 (8th Cir. 1999). The district court properly enhanced the defendant's sentence pursuant to USSG §2K2.1(b)(5) after finding that the defendant transferred firearms with knowledge, intent, or reason to believe that the firearms would be used or possessed in connection with another offense. The defendant was convicted of making unlicensed transfers of firearms across state lines to a unlicensed transferees. The court applied the four-level enhancement based on the defendant's admission that he was a member of a gang; that 43 of the recovered firearms were traced to criminal activity; that two of the transferees were gang members involved in drug and firearm offenses; and that firearms were used to protect drugs.

United States v. Kenny, 283 F.3d 934 (8th Cir.), *cert. denied*, 537 U.S. 867 (2002). The district court did not err is assessing enhancements under both USSG §§2K2.1(b)(4) and (b)(5). The defendant received a four-level enhancement under USSG §2K2.2(b)(5) for his participation in the burglary of firearms, and a two-level enhancement under USSG §2K2.1(b)(4) because the firearms were stolen property. The defendant argued on appeal that the application of both enhancements constituted impermissible double-counting because the first enhancement necessarily accounted for the conduct that instigated the second enhancement. On *de novo* review, the Court held that the Commission intended both subsections (b)(4) and (b)5) to be applied to firearms possessions offenses involving an additional felony offense other than possession of explosives, possession of firearms, or trafficking. *Id.* at 938. The Court also determined that the two enhancements were conceptually distinct and therefore did not constitute double-counting.

United States v. Lee, 351 F.3d 350 (8th Cir. 2003). The appellate court affirmed the district court's two-level enhancement pursuant to §2K2.1(b)(3) for possession of a destructive device; this enhancement was not double counting. On appeal, the defendant argued that imposition of the "destructive device" enhancement constituted impermissible double counting in violation of the Double Jeopardy Clause. More specifically, defendant argued that possession of a short-barreled shotgun was precisely the harm targeted in the "destructive device" enhancement and was fully accounted for in §2K2.1(a)(5) which established a base offense level of 18. The Eighth Circuit noted in *United States v. Rohwedder*, 243 F.3d 423 (8th Cir. 2001), that double counting occurred when one part of the

guidelines was applied to increase a defendant's punishment on account of a kind of harm that had already been fully accounted for by application of another part of the guidelines. The court also noted that the Sentencing Commission intended both subsections 2K2.1(a) and (b) to apply to defendants whose offense involved a destructive device because both subsections were conceptually separate, with part (a) setting forth the base offense level for certain firearms crimes, and part (b) setting forth specific offense characteristics enhancing the base offense level. Furthermore, commentary Note 11 of §2K2.1 stated that defendants whose offense involved a destructive device received both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a), and a two-level enhancement under subsection (b)(3). Accordingly, application of the two-level enhancement was not impermissible double counting in violation of the Double Jeopardy Clause.

United States v. Martinez, 339 F.3d 759 (8th Cir. 2003). The defendant pled guilty to being an unlawful user of a controlled substance and a felon in possession of firearms. The defendant was sentenced to 100 months in prison. The district court imposed a two-level specific-offense enhancement under §2K2.1(b)(4) because one of the two firearms was stolen, and a four-level specific-offense enhancement under §2K2.1(b)(5) because the firearms were used in connection with another felony offense. USSG §2K2.1(b)(5) provides for a four-level enhancement if the defendant used or possessed any firearm "in connection with another felony offense." The defendant argued that the enhancement was not warranted in his case because the government did not demonstrate that the firearms at issue, the .22 caliber and 9 millimeter pistols, were used or possessed in connection with any other felony. The Eighth Circuit agreed that the government failed to meet its burden on this issue. In the plea agreement, the government stipulated that it did "not have any evidence that the defendant was committing another felony offense at the time of his apprehension on October 18, 2001, during which he possessed the firearms in question other than receipt/possession of stolen property." The government argued that the defendant's possession of stolen credit cards (which were in an abandoned bag along with the defendant's identification papers) and other stolen items on his person and in his truck at the time of his arrest satisfies the "other felony" requirement of §2K2.1(b)(5). The Court of Appeals noted that under Missouri law, however, possession of stolen property is a class A misdemeanor unless the property involved has a value of $150 or more, in which case it is a class C felony. The government reasoned that because Missouri makes it a felony to steal a credit card, the court could conclude that it is a felony to possess a stolen credit card despite the statute's omission of language to that effect. The appellate court declined to read language into Missouri's criminal code that was not clearly intended by its legislature. The court found that although the theft statute, like the possession statute, includes a $150 felony threshold, the theft statute, in addition, enumerates more than a dozen specific items, the theft of which merits felony status regardless of value–including the theft of any credit card; any "horse, mule, ass, cattle, swine, sheep, or goat"; any United States national flag; or any "pleading, notice judgment or any other [judicial] record." The court held that there are many reasons why the legislature may have determined that theft of these items should be punished more severely than others, and those reasons do not necessarily apply where all that is at issue is possession of the stolen items. The court held that the use of a stolen credit card to obtain services or property is a class A misdemeanor unless the value of the property or services at issue exceeds $150. The court determined that for imposition of USSG §2K2.1(b)(5), the government was required to demonstrate that the defendant possessed the firearms charged in Count I in connection with another felony offense. Here, the alleged other felony offense was possession of stolen property. There was nothing in the

record to establish that the stolen property in the defendant's possession exceeded Missouri's statutory felony threshold, and thus the four-level enhancement should not have been imposed. The court affirmed the district court's imposition of the two-level enhancement under §2K2.1(b)(4), and reversed with regard to imposition of the four-level enhancement under §2K2.1(b)(5), and remanded to the district court for resentencing without the §2K2.1(b)(5) four-level enhancement.

United States v. Oetken, 241 F.3d 1057 (8th Cir. 2001). The district court did not err in holding that only a conviction which occurred prior to the commission of the offense at issue qualifies as a "prior felony conviction" under the firearms provision found at USSG §2K2.1(a)(4)(A). The defendant was convicted of being a felon in possession of a firearm, and the government appealed, maintaining that his base offense level should have been increased from 14 to 20 to reflect a burglary conviction that came after he had committed the firearms offense. In this matter of first impression for the Eighth Circuit, it noted that other circuits addressing the issue have not reached a consensus. Some courts have excluded the post-offense convictions from the sentencing determination. *See United States v. Pedragh*, 225 F.3d 240, 245 (2d Cir. 2000); and *United States v. Barton*, 100 F.3d 43, 46 (6th Cir. 1996). Others have included them. *See United States v. Pugh*, 158 F.3d 1308, 1311 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1125 (1999); *United States v. Gooden*, 116 F.3d 721, 724-25 (5th Cir.), *cert. denied*, 522 U.S. 938 (1997); *United States v. Laihben*, 167 F.3d 1364, 1366 (11th Cir.), *cert. denied*, 527 U.S. 1029 (1999).

United States v. Scolaro, 299 F.3d 956 (8th Cir. 2002), *cert. denied*, 123 S. Ct. 1774 (2003). The Court affirmed defendant's four-level enhancement for possession of stolen firearms in connection with the felony offense of aggravated assault with intent to inflict serious bodily injury. The defendant assaulted an acquaintance, tied the person up, repeatedly threatened to kill him, and placed him in a closet. Shortly thereafter, the defendant, with the help of others, broke into the victim's gun closet and stole at least 13 firearms. The district court determined that the defendant had a criminal history category of IV, and applied the four-level enhancement under USSG §2K2.1(b)(5), reasoning that the stolen firearms were possessed in connection with the assault. While the majority affirmed the district court's interpretation of "in connection with," the dissent asserts that this interpretation is contrary to Eighth Circuit precedent and acknowledges a circuit split on the issue of whether a sentence may be enhanced for possession of firearms "in connection with another felony offense" where the "other" offense is the theft of those same firearms. *Id.* at *10, Bright, J., dissenting (citing *United States v. Sanders*, 162 F.3d 396 (6th Cir. 1998); *United States v. Armstead*, 114 F.3d 504 (5th Cir.), *cert. denied*, 522 U.S. 922 (1997)).

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Flores-Flores, 356 F.3d 861 (8th Cir. 2004). The appellate court affirmed the district court's application of §2L1.1(b)(6). The defendant was hired to transport eleven illegal aliens from Arizona to Michigan. Because there were only four seats in the van, eight of the aliens sat on the floor of the van. During the trip, the defendant asked one of the passengers to drive for him.

The passenger fell asleep at the wheel and caused an accident. Two of the aliens seated on the van's floor died at the scene of the accident. At the sentencing, the district court increased the defendant's offense level by two under §2L1.1(b)(5) (providing for two-level increase if the offense involved recklessly creating a substantial risk of serious bodily injury to another) and by eight under §2L1.1(b)(6) (providing for increase if any person dies). On appeal, the defendant argued that the §2L1.1(b)(6) increase should not apply to him because the driver's negligent operation of the vehicle, rather than his conduct, proximately caused the deaths. The Eighth Circuit noted that the Tenth Circuit held the causation requirement of §2L1.1(b)(6) was satisfied when a smuggler of aliens arranged for their transport in a substantially overloaded van and the aliens were injured or killed in a van accident resulting from a tire blow-out, even though the smuggler was not driving. *United States v. Mares-Martinez,* 329 F.3d 1204 (10th Cir. 2003). In the instant case, the court noted that the defendant voluntarily elected to smuggle eleven individuals for money in an overloaded van on a nonstop two thousand mile trip over instate highways without the benefit of seats or seatbelts for eight of the passengers. The defendant also selected one of the unlawful aliens to drive during part of the trip and failed to ensure that he stay awake. The court stated that the death of the two passengers seated in an open area in the van's rear were causally connected to the dangerous conditions created by defendant's unlawful conduct. The negligence of driving passenger was not an intervening cause relieving defendant of responsibility for the aliens' deaths. Thus, the district court correctly applied §2L1.1(b)(6).

§2L1.2 Unlawfully Entering or Remaining in the United States[11]

United States v. Estrada-Quijas, 183 F.3d 758 (8th Cir. 1999). The district court properly treated as an "aggravated felony" the defendant's 1987 conviction for corporal injury on a spouse, even though the prior conviction was not designated an aggravated felony at the time the defendant reentered the country in 1991. (The Commission amended the definition of aggravated felony in 1997 to incorporate congressional expansion of what offenses qualify as aggravated felonies.) A violation of 8 U.S.C. § 1326 (illegal reentry) is a continuing offense that continues until the individual is discovered. The defendant was "found" in this country in 1997, thus there was no *ex post facto* violation.

United States v. Gomez-Hernandez, 300 F.3d 974 (8th Cir. 2002), *cert. denied*, 537 U.S. 1138 (2003). The defendants pled guilty to illegal reentry in violation of 8 U.S.C. § 1326(a); both had been convicted of prior aggravated felonies, warranting imposition of an eight-level enhancement under USSG §2L1.2(b)(1)(C). However, the district court determined that each prior felony was a crime of violence and imposed the 16-level enhancement in USSG §2L1.2(b)(1)(A). The court upheld the imposition of the 16-level enhancement for both defendants, concluding that a conviction for unlawful intercourse with a minor under the age of 16 constituted a crime of violence, and concluding that a conviction for "going armed with intent also constituted a crime of violence.

United States v. Gonzalez-Lopez, 335 F.3d 793 (8th Cir. 2003). The appellate court affirmed the district court's determination that the defendant's automobile homicide was a crime of

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[11] *See* USSG App. C, Amendment 658.

violence under USSG §2L1.2(b)(1)(A)(ii) and increased the defendant's offense level by 16 levels. The defendant was convicted of illegally reentering the United States following his deportation. At sentencing, the district court determined that automobile homicide was a crime of violence and increased the defendant's offense level by 16 levels pursuant to §2L1.2(b)(1)(A)(ii). On appeal, the defendant argued that his prior state court conviction for automobile homicide was not a "crime of violence" for purposes of the guidelines, and that the district court erred in imposing a 16-level enhancement. The defendant also raised the issue of the district court's denial to grant a downward departure. The Eighth Circuit noted that the Sentencing Commission had amended §2L1.2 in 2001, and it now provided a sliding scale of enhancements from 8 to 16 levels based on the seriousness of the prior aggravated felony. The defendant limited his appeal to the issue of whether the use of force must be intentional under the guideline. Having considered the issue, the court held that the definition of crime of violence contained in §2L1.2(b)(1) did not contain a volitional element and the Utah criminal offense of automobile homicide contained, as an element, the use of physical force against another. Consequently, the district court was correct in considering the defendant's prior state court conviction for Automobile Homicide as a "crime of violence" under §2L1.2(b)(1)(A)(ii). Finally, the court noted that the district court's refusal to grant a downward departure was unreviewable on appeal, unless the district court had an unconstitutional motive or erroneously believed that it was without authority to grant a departure. In the instant case, the district court recognized its authority to depart. Accordingly the district court's sentence was affirmed.

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

United States v. Tejeda-Perez, 199 F.3d 981 (8th Cir. 1999). The defendant was convicted of illegally reentering the United States in violation of 8 U.S.C. § 1326(a). The Government sought a 16-level enhancement under USSG §2L1.2(b)(1)(A), asserting that the defendant had been deported after being convicted of an "aggravated felony." The district court found that the conviction in question, second-degree felony theft, did not constitute an aggravated felony because the defendant's sentence of one to 15 years had been suspended. On appeal by the Government, the court noted that Application Note 1 adopts the definition for "aggravated felony" in 8 U.S.C. §1101(a)(43), which includes in its definition "a theft offense . . . for which the term of imprisonment [is] at least one year." *Id.* at 982. It further defined "term of imprisonment" as the sentence imposed by the judge without regard to suspension or execution of that sentence. *Id.* at 982. The court concluded that the district court erred and remanded for resentencing.

Part N Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws

§2N1.1 Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury

United States v. Courtney, 362 F.3d 497 (8th Cir. 2004). The appellate court affirmed the district court's upward departure. The defendant, a pharmacist, diluted several chemotherapy drugs before distributing them for administration to cancer patients. At sentencing, the district court departed upward by three offense levels to level 40. The district court justified its upward departure on four grounds: the grouping rules disregarded the defendant's significant number of additional offenses; the defendant significantly endangered public health; the defendant's conduct caused extreme psychological injury to his victims; and the guidelines calculations did not take into account the defendant's uncharged criminal conduct. The defendant appealed the district court's upward departure. First the Eighth Circuit noted that the district court correctly cited the provision of the guidelines that specifically authorizes a departure when the flat five-level increase disregards a significant number of units, inasmuch as the maximum increase provided in the guideline was five levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than five units. *See* §3D1.4. The court had no difficulty in concluding that the defendant's offenses of conviction, combined with his other admitted relevant conduct offenses, resulted in significantly more than five units. Nor did the court have any difficulty in concluding that the need to provide incremental punishment for these additional units, viewed alone or in conjunction with the other basis for departure, fully justified the district court's three-level departure. The court then discussed the other reason the district court departed upward, accounting for the extreme psychological harm caused by the defendant's conduct. The court noted that the district court correctly enhanced the defendant's offense level pursuant to §2N1.1(b)(1)(A) for causing life-threatening bodily injury, such that it would not be double-counting to depart upward on the basis of extreme psychological injury. The court was satisfied that this ground for departure, viewed alone or in conjunction with the other basis for departure, justified the full extent of the district court's three-level departure. Accordingly, the district court's sentence was affirmed.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity[12]

United States v. Hildebrand, 152 F.3d 756 (8th Cir.), *cert. denied*, 525 U.S. 1033 (1998). The district court did not err in basing the offense level for the value of the illegal proceeds laundered on the jury's money laundering forfeiture verdicts against each defendant. The government argued that these determinations understated the value of money laundered by each defendant. The government proposed that the value of money laundered be deemed the same as the loss to the victims of the fraud

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[12]Effective November 1, 2003, the Commission, in response to a congressional directive in the USA PATRIOT Act of 2001, Pub. L. 107-56, amended §2S1.1 by eliminating the six-level enhancement for terrorism because such conduct was adequately accounted for by the terrorism adjustment at §3A1.4 (Terrorism). *See* USSG App. C, Amendment 655.

offenses. The court of appeals rejected this approach: fraud sentences are based on the amount of loss to victims; money laundering sentences are based on the value of money laundered. While both measures address the relative scope of illegal activity, they do not measure the same types of harm. Because the base offense levels for money laundering are much higher than for fraud, it is wrong to assume that the Sentencing Commission intended to equate the amount of fraud loss with the value of money laundering in every fraudulent scheme that includes money laundering (as most frauds do). The court of appeals held that a sentencing court must separately determine the value of laundered proceeds attributable to each defendant. Complicating this task are 1) the need to distinguish between types of money laundering (reinvestment vs. concealment); and 2) determining what was reasonably foreseeable relevant conduct for each money laundering conspirator. Because fraud and money laundering cannot be grouped for purposes of USSG §2S1.1(b)(2), the government must prove reasonable foreseeability specifically as to the money laundering. In the absence of this kind of detailed evidence, the trial court's approach was not clearly erroneous.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Anderson, 349 F.3d 568 (8th Cir. 2003). The district court affirmed in part, but remanded the sentence to determine whether the offense involved a large number of vulnerable victims within the meaning of §3A1.1(b)(2). The defendant was found guilty of mail fraud, money laundering, and engaging in transactions with property derived from unlawful activity. On appeal, the defendant conceded that his conduct warranted a more-than-minimal planning enhancement but argued that the district court clearly erred in imposing the increase for use of sophisticated means. The Eighth Circuit held that, whether or not a "simple" Ponzi scheme would amount to the use of sophisticated means, an issue that did not need to be addressed, the district court's finding that the defendant used sophisticated means to conceal his more elaborate mail fraud was not erroneous. The defendant also argued that a vulnerable victim enhancement should not be upheld absent a finding of "particularized vulnerability." The Eighth Circuit noted that its early decisions applying §3A1.1 supported this contention, repeatedly stating that unless the criminal act was directed against the young, the aged, the handicapped, or unless the victim was chosen because of some unusual personal vulnerability, §3A1.1 could not be applied. In the instant case, the Eighth Circuit decided to remand the case on this issue and to determine whether the offense involved a large number of vulnerable victims within the meaning of §3A1.1(b)(2). Finally, the defendant appealed a two-level upward adjustment for abusing a position of private trust. The court noted that defendant sold many of his victims annuities offered by insurance companies and living or family trusts, transactions that acquainted him with their investable assets. He then persuaded these clients to exchange the annuities and other investments for "private tender offers" in the Premier Group. These fraudulent investments gave him complete discretion over client funds. The defendant commingled those funds, which facilitated both the commission and the concealment of his fraud offenses. Under these circumstances, the district court did not err in imposing the abuse-of-trust enhancement.

United States v. Hernandez-Orozco, 151 F.3d 866 (8th Cir. 1998). The district court did not err in enhancing the defendant's sentence for a vulnerable victim. The defendant was convicted of kidnaping his sister-in-law from a small village in Mexico and transporting her to Nebraska. She was 15 years old on the day of the kidnaping, had never traveled more than a four-hour drive from her village, and did not speak English, which made her more vulnerable in the United States.

United States v. McDermott, 29 F.3d 404 (8th Cir. 1994). The district court did not err by enhancing the defendants' sentences pursuant to USSG §3B1.1. The defendants were convicted of conspiracy to violate civil rights in violation of 18 U.S.C. § 241 and interfere with a federally protected right in violation of 18 U.S.C. § 245. They argued that the vulnerable victim enhancement was duplicative because African Americans were the typical victims of 18 U.S.C. § 241 crime. The circuit court rejected this argument. *See United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1990), *cert. dismissed*, 502 U.S. 922 (1991); *United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989). Trial evidence established that the victims were racially isolated and were "particularly susceptible to threats of racial violence." The victims' young ages made them particularly vulnerable. The fact that one of the children, determined by the district court to be particularly susceptible because she was in a wheelchair, was white, was of no consequence since the defendants targeted her based on her friendship with the African American children.

United States v. Plenty, 335 F.3d 732 (8th Cir. 2003). The appellate court affirmed the district court's two-level enhancement pursuant to §§3A1.1 and 3A1.3, finding that the victim was unusually vulnerable and that she had been physically restrained. The defendant was convicted of first degree burglary in Indian country. The victim was sleeping with her children and was awaken by the defendant hitting her in the face. The defendant dragged her into another room and continued to strike and kick her. At the sentencing hearing, the district court enhanced the defendant's offense level because the victim was unusually vulnerable and she had been physically restrained. On appeal, the defendant challenged the enhancement under §3A1.1(b)(1) and argued that the district court erred in treating a sleeping victim as being unusually vulnerable given that an element of the crime, for which defendant was convicted, was that it occurred "in the nighttime." In other words, the "unusual" criteria was not met because it was not unusual for a victim of a burglary that occurs during the nighttime to be asleep. The Eighth Circuit held that the district court properly imposed the vulnerable victim enhancement. The victim was asleep when the defendant entered her residence and began to assault her. The victim did not have the ability to call law enforcement, to run away, to move the location of the assault away from her children, or to fight back. Consequently, since the defendant knew his victim was sleeping, the court considered the victim to be unusually vulnerable as defined in the sentencing guidelines under Application Note 2 to §3A1.1. Accordingly, the district court's enhancement under §3A1.1 was affirmed.

United States v. Washington, 255 F.3d 483 (8th Cir. 2001). The district court did not err in applying the vulnerable victim enhancement in a prosecution for mail fraud where the defendants analyzed relevant data to choose their victims and gained victims' trust, targeting elderly in need of money. The defendants were involved in a scheme to defraud landowners by clear cutting their land and paying a small fraction of the lumber's true value. Their sentences were increased by two levels

pursuant to USSG §3A1.1. The court found that the defendants had analyzed the state tax rolls to find out-of-state land owners because they would not check on their land frequently. Their scheme was accomplished by one defendant calling each victim and gaining their trust through numerous high pressure conversations. Further, during these conversations, the defendant targeted elderly victims and was able to acquire knowledge about the victims' age, infirmities, and vulnerabilities. Therefore, the court found that the district court did not err in applying the vulnerable victim enhancement.

§3A1.2 Official Victim[13]

United States v. Goolsby, 209 F.3d 1079 (8th Cir. 2000). The district court erred in enhancing defendant's sentence on the ground that he assaulted a corrections officer during his escape from custody while awaiting sentencing, but application of the enhancement was harmless error. The defendant was convicted of conspiracy to distribute cocaine base and possession with intent to distribute cocaine base, and was sentenced to concurrent terms of life imprisonment. In a previous case, the Eighth Circuit had held that the relevant conduct provisions of USSG §1B1.3 are inapplicable to a USSG §3A1.2 enhancement because USSG §3A1.2 otherwise specifies that the enhancement "is proper only where the 'offense of conviction' is motivated by the victim's status" and because the Application Notes clarify that the "government official must be the victim of the offense." *United States v. Drapeau*, 121 F.3d 344 (8th Cir. 1997). The Eighth Circuit reasoned that because the defendant's offenses of conviction were conspiracy and possession to distribute cocaine base which were not targeted at the corrections officer, the enhancement was not proper. However, because the defendant was sentenced to life imprisonment, it was harmless error. *Id.* at 1082.

United States v. Hampton, 346 F.3d 813 (8th Cir. 2003). The appellate court reversed and remanded for resentencing because the §3A1.2 (Official Victim) sentencing enhancement was not supported by the record. police officers used "stop sticks" to disable the fleeing defendant's car, causing it to strike and seriously injure a police officer. The defendant pled guilty to felon in possession of a firearm and received a sentencing enhancement due to the officer's injuries. USSG §3A1.2 applies where, *inter alia*, "in a manner creating a substantial risk of serious bodily injury, the defendant . . . knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom." USSG §3A1.2(b)(1). Application Note 4 to USSG 3A1.2 specifies the guideline's application where the conduct is "tantamount to aggravated assault." The Government's only evidence was the presentence investigation report stating the officer was struck after defendant lost control of the vehicle. The court concluded this was insufficient to prove the defendant intended to hit anyone, including a police officer. It also disagreed with the district court that the crash was a foreseeable result of the pursuit. While the defendant's behavior was reckless and created a substantial risk of harm for others, USSG §3A1.2 does not apply to reckless behavior. Rather the defendant's action must be akin to aggravated assault,

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[13]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).

and the defendant must have reason to believe the actual and intended victim was a law enforcement officer.

§3A1.3 Restraint of Victim

United States v. Plenty, 335 F.3d 732 (8th Cir. 2003). The district court did not err in applying the sentencing enhancement because dragging by the arms is restraint of a victim. The defendant broke into house at night and assaulted and dragged the victim from bed to an adjoining room. The court applied USSG §3A1.3, increasing the offense level by two. The court likened the conduct to "being bound by something" as the defendant physically retained the victim's arms.

United States v. Waugh, 207 F.3d 1098 (8th Cir. 2000). The district court did not err in enhancing the defendant's sentence two levels for restraint. The defendant pled guilty to involuntary manslaughter of one victim and assault with a dangerous weapon of another victim, and was sentenced to 122 months' imprisonment. The defendant taunted the victim, his girlfriend, by encouraging her to try to escape, locking the doors to the residence, and pinning her with her arms behind her back. The circuit court held the application was permissible because restraint is not an element of the assault offense itself.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Austin, 255 F.3d 593 (8th Cir. 2001). The district court did not err in applying a two-level enhancement based on the defendant's leadership role in the offense under USSG §3B1.1(c). The defendant pled guilty to drug offenses, and both the defendant and the government moved for reconsideration of the sentence. After the district court imposed a revised sentence which the court vacated on appeal, the government and the defendant cross appealed. On the second appeal, the defendant argued that the district court erred in determining he had a leadership role in the offense and in imposing an aggravating role. The Eighth Circuit found that two of the defendant's codefendants testified extensively as to the defendant's role, and stated it would not question the district court's assessment of their credibility. Further, the circuit court found that the defendant's only witnesses were properly discounted after they refused to submit to cross-examination. The government contended on appeal that the district court erred in not applying a three- or four-level enhancement for the defendant's leadership role. Relying on precedent, the circuit court found that a district court's only options in cases which involve five or more participants were either a four-level enhancement under USSG §3B1.1(a) or a three-level enhancement under USSG §3B1.1(b). *United States v. Kirkeby*, 11 F.3d 777, 788-89 (8th Cir. 1993). However, although the district court found that the defendant was a supervisor or manager within the meaning of USSG §3B1.1, it did not make a finding that his criminal operation involved more than five other participants or was otherwise extensive. Therefore, the circuit court held that the district court properly applied a two-level enhancement for the defendant's supervisory or managerial role.

United States v. Placensia, 352 F.3d 1157 (8th Cir. 2003). The appellate court affirmed the district court's application of a two-level enhancement for the defendant's aggravated role in the offense. The defendant was convicted of conspiracy to distribute methamphetamine and sentenced to 262 months of imprisonment. On appeal, the defendant argued that he was not the organizer or the leader and therefore the two-level enhancement was inapplicable. The Eighth Circuit noted that the terms "organizer" and "leader" were broadly defined, and a defendant did not have to be *the* organizer or leader of a criminal organization for purposes of §3B1.1, as there could be more than one organizer or leader of a criminal enterprise. *See United States v. Zimmer,* 299 F.3d 710 (8th Cir. 2002). Romo had testified that the defendant approached him about transporting methamphetamine, and although Romo initially declined, he later changed his mind when the defendant promised him $5,000 for the trip. This testimony was significant because the court had previously held that a defendant who recruited accomplices and directed their activities was an organizer and leader of the criminal activity. Consequently, the district court had correctly applied a two-level enhancement pursuant to §3B1.1.

United States v. Reedy, 30 F.3d 1038 (8th Cir. 1994). The district court did not err in adjusting the defendant's offense level by three levels pursuant to USSG §3B1.1(b). The defendant argued that the enhancement was not applicable because it was based on a finding that he managed the "business" of the conspiracy instead of "one or more participants." He relied on an amendment that became effective after he was sentenced which explained that the adjustment did not apply unless there was a finding that the defendant managed one or more participants. The circuit court concluded that because the district court was required under USSG §1B1.11 to apply the *Guidelines Manual* that was in effect at the time of the defendant's sentencing, the amended version of §3B1.3 was inapplicable. Because the Eighth Circuit's pre-amendment interpretation of USSG §3B1.3 encompassed the management of the "business" of the conspiracy, *United States v. Grady*, 972 F.2d 889 (8th Cir. 1992), the adjustment was correct.

United States v. Womack, 191 F.3d 879 (8th Cir. 1999). The district court did not err when it enhanced the defendant's sentence upon a finding that the defendant was an organizer or leader of the conspiracy. The defendant was convicted of conspiracy to distribute 50 or more grams of cocaine base, and was sentenced to 292 months' imprisonment. On appeal, the defendant argued that the district court erred in assessing a four-level increase pursuant to USSG §3B1.1(a) because there was insufficient evidence to support a finding that he was an organizer or leader of a conspiracy involving five or more participants. The Eighth Circuit found the evidence sufficient, and stated that five people were involved in the conspiracy, with at least four who assisted the defendant in obtaining drugs from different sources. The defendant further set the price for the cocaine base and tried to control and create territories for the sale of drugs in another city, and also attempted to recruit new members into the conspiracy. Based on the evidence, the circuit court held the district court's finding that the defendant was a leader in the conspiracy was not clear error. *See also United States v. Lashley*, 251 F.3d 706, 713 (8th Cir. 2001) (district court did not err in applying a four-level enhancement under USSG §3B1.1 where 9 of the 12 participants in the conspiracy testified that the defendant directed where the methamphetamine would be cooked, paid the property owners in return for the use of the property, directed and financed the purchase of ingredients necessary for cooking anhydrous ammonia, and fronted methamphetamine for resale by others); *United States v. Thompson*, 210 F.3d 855, 861

(8th Cir. 2000), *cert. denied*, 532 U.S. 996 (2001) (district court did not err in applying a four-level enhancement based on the defendant's role as a leader or organizer where the defendant played a key role in channeling vast quantities of drugs and distributing those drugs to various dealers, traveled out of state to recruit a supplier, organized the transport of large shipments from out of state, often received and stored these shipments, recruited at least one person to deliver cocaine, and controlled the price of the drugs sold); *United States v. Howard*, 235 F.3d 366, 371 (8th Cir. 2000) (district court did not err in applying an enhancement for the defendant's role in the offense in his conviction for the sale and trade of guaranteed insurance contracts because the defendant had decision making authority and a close link to the scheme; defendant ordered others to give cashier's checks to others involved, provided information on the source of the guaranteed insurance contracts, opened accounts, and directed others to have investors deposit their money into certain accounts); *United States v. Lim*, 235 F.3d 382, 384 (8th Cir. 2000) (district court did not err in finding that the evidence supported a sentence enhancement for being a manager or supervisor; defendant admitted to supervising an agent who ordered and stored some of the jewelry involved in the charge).

§3B1.2 Mitigating Role

United States v. Bush, 352 F.3d 1177 (8th Cir. 2003). Because the district court's initial decision to grant the adjustment and its later decision to deny it were based in part on the effect of the adjustment on the length of the sentence, the case had to be remanded for resentencing. The defendant pled guilty to conspiracy to possess cocaine base with intent to distribute. The defendant raised two issues on appeal. First, she argued that the district court's finding that she did not play a minor role was clearly erroneous. Second, she argued that the district court erred by basing the denial of the adjustment, in part, on its assessment that the sentence resulting from the adjustment would be too lenient. The Eight Circuit rejected the defendant's first argument. The defendant argued that she was less culpable than the other defendants. The court stated that relative culpability of the various conspirators was relevant. However, merely showing that the defendant was less culpable than other participants was not enough to entitle defendant to the adjustment if the defendant was deeply involved in the offense. To prove entitlement to the adjustment, the defendant had to prove that she was a minor participant by comparison with the other participants and by comparison with the offense for which she was held accountable. Consequently, the district court did not err when it determined that the defendant did not play a minor role. The court stated that the second issue, whether the district court erred in basing its decision about the adjustment in part on the length of sentence the adjustment would compel, was more substantial. The court noted that the district court had candidly acknowledged that, both in its initial decision to grant the adjustment and its later decision to deny it, that a factor in its decision was the court's assessment of whether the sentence that would result would be too long or too short to fit the defendant's crime. The court noted that for guidance on how to apply adjustments, one had to look first to the adjustment guidelines themselves. The court then noted that the language of §3B1.2 did not suggest that a court could consider any factors other than the defendant's role in the offense in deciding whether or not to give the adjustment. Finally, the court noted that conspicuously absent from what appeared to be an exhaustive list was permission to consider the length of sentence in deciding whether to make an adjustment. The court concluded by stating that the guidelines required that, in considering enhancements, the district court may exercise its discretion only in finding whether

the facts that triggered the enhancement existed and not in deciding whether application of the enhancement would have a desirable effect on the defendant's punishment. The court held that because the district court's initial decision to grant the adjustment and its later decision to deny it were based in part on the effect of the adjustment on the length of the sentence, the case had to be remanded for resentencing.

United States v. Camacho, 348 F.3d 696 (8th Cir. 2003). The appellate court affirmed the district court's refusal to grant a two-level minor-role reduction, but reversed the district court's finding that defendant was responsible for a loss of $585,559.25. The defendant pled guilty to committing mail fraud in violation of 18 U.S.C. § 1341. At sentencing, the district court declined to give the defendant a two-level reduction for minor participation in the offense pursuant to §3B1.2(b). The district court sentenced the defendant to 18 months' imprisonment and ordered that he pay restitution of $585,559.25. The defendant appealed the district court's findings regarding the loss amount and his level of participation in the offense. The Eighth Circuit held that the district court erred in basing its findings of the loss amount solely on the assertions of fact contained in the PSR without taking additional evidence. Regarding the two-level reduction for minor participation in the offense, the court stated that in applying the guideline, the mere fact that a defendant was less culpable than his codefendants did not entitle the defendant to a minor participant status. Consequently, the court affirmed the district court's refusal to grant a two-level minor-role reduction, but reversed the district court's finding that the defendant was responsible for a loss of $585,559.25.

See United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir.), *cert. denied*, 513 U.S. 849 (1994), §2D1.1, p. 12.

United States v. Christmann, 193 F.3d 1023 (8th Cir. 1999), *cert. denied*, 529 U.S. 1044 (2000). The district court did not err in denying the defendant a reduction in his sentence for his minor role. The defendant was convicted of two counts of aiding and abetting the robbery of a bank, and he appealed his sentence of 78 months. The circuit court found that the defendant's role was to drive a codefendant to and from the bank and the defendant was to share in the proceeds of the robbery. The court stated although the defendant was less culpable than the actual robber, he was more culpable than a third participant. Application Note 3 to the guideline states that a minor participant means "any participant who is less culpable than most other participants. The circuit court found when there are three participants involved and the defendant's culpability ranking in the middle, as a matter of arithmetic, he cannot be said to be less culpable than "most" of the participants. Therefore, the reduction was not applicable. *See also United States v. Spears*, 235 F.3d 1150, 1152 (8th Cir. 2001) (district court did not err in denying a minor participant reduction); *United States v. White*, 241 F.3d 1015, 1024 (8th Cir. 2001) (district court did not err in denying a minor role reduction where the defendant was found to be one of the sources of the methamphetamine and understood the scope of the enterprise and played a central role in the conspiracy); *United States v. Alvarez*, 235 F.3d 1086, 1090 (8th Cir. 2000), *cert. denied*, 532 U.S. 1031 (2001) (district court did not err in denying a downward adjustment in the defendant's offense level for having a minor or minimal role where the defendant was found to be not less culpable than other participants involved in a drug possession crime because he had knowledge of the substantial amount of drugs he was transporting in his car); *United*

States v. O'Dell, 204 F.3d 829 (8th Cir. 2000) (district court did not err in denying a reduction in the defendant's sentence for his purported minimal or minor role in the offense; even though defendant was less culpable than the leader, he was "deeply involved" in the illegal conduct of the organization because he stored the drugs at his house, transported them across state lines, helped manufacture and cut the methamphetamine, arranged for the payment of the drugs, and helped count the drug proceeds).

United States v. Nambo-Barajas, 338 F.3d 956 (8th Cir. 2003). The appellate court affirmed the district court's denial of a four-level minimal-role-in-the-offense downward adjustment. The defendant was convicted of conspiracy to distribute more than 500 grams of a methamphetamine substance. At sentencing, the district court denied defendant's motion for a four-level downward adjustment for his minimal role in the offense. On appeal, the defendant challenged the district court's refusal to apply the four-level minimal-role-in-the-offense reduction. The Eighth Circuit noted that application of the sentencing guidelines was reviewed *de novo*, but factual determinations were reviewed for clear error. Whether the defendant qualified for a role reduction was a question of fact. The court noted that under §3B1.2(a), a four-level reduction for minimal participation applied to defendants who were plainly among the least culpable of those involved in the conduct of a group. *See* USSG §3B1.2, comment. (n.4). The role reduction for minimal participation was intended to be used infrequently, and should be reversed for cases where the defendant did not know or understand the scope of the illegal enterprise or where the defendant's involvement was insignificant. The court also noted that the defendant had the burden of proving the reduction applied. In the instant case, based on the record, it was clear that the defendant was an integral part of the conspiracy. Puente-Ibarra would have been unable to deliver the drugs had the defendant not first supplied them. Accordingly, the district court's findings of fact were not clearly erroneous; the sentence was affirmed.

United States v. Ramirez, 181 F.3d 955 (8th Cir. 1999). The district court properly refused to grant a two-level reduction for minor role to a defendant whose offense level under USSG §2D1.1 was determined based only on the quantity of drugs found in the defendant's car and not the additional quantities of drugs involved in the conspiracy. Although the defendant pled to conspiracy, the government agreed to hold him accountable only for the amount of drugs from the single incident when drugs were found in his car. The defendant was not substantially less culpable than any other defendant for that amount of drugs. USSG §3B1.2, comment. (n.4).

United States v. Snoddy, 139 F.3d 1224 (8th Cir. 1998). The district court erred in concluding that the defendant was ineligible for a minor participant reduction because he was charged with a sole participant possession offense rather than conspiracy to distribute. The defendant presented undisputed evidence that he was not the only participant in the scheme to distribute marijuana and that his role was limited compared with that of others involved. Although the district court stated that he would have recognized that the defendant's participation was minor had he been charged with conspiracy, but because the offense and indictment did not state that the offense was committed in conjunction with others, the court denied the role reduction. The court of appeals vacated and remanded, holding that USSG §3B1.2 directs consideration of the contours of the underlying scheme, not just of the elements of the offense. The section addresses concerted or group activity, not just conspiracies, and refers to participants, not just defendants. The court concluded that a defendant

convicted of a sole participant offense may be eligible for a mitigating role reduction if he can show: (1) that the relevant conduct for which the defendant would otherwise be accountable involved more than one participant and (2) that the defendant's culpability for such conduct was relatively minor compared to that of the other participant(s).

United States v. Speller, 356 F.3d 904 (8th Cir. 2004). The appellate court affirmed the district court's denial of a minor role reduction. The defendant pled guilty to conspiracy to distribute 500 grams or more of cocaine, conspiracy to distribute cocaine and cocaine base within 1,000 feet of a playground, and criminal forfeiture. The district court denied the defendant a two-level minor role reduction, because the defendant was only held responsible for drugs she personally distributed and not for any drugs others distributed. The district court found no legal basis to reduce the defendant's base offense level for the defendant's role in the offense, because the defendant was not being held accountable for drugs other conspirators distributed. On appeal, the Eighth Circuit noted that the propriety of a downward adjustment was determined by comparing the acts of each participant in relation to the relevant conduct for which the participant was held accountable and by measuring each participant's individual acts and relative culpability against the elements of the offense. Reduction for a defendant's role in an offense was not warranted when the defendant was not sentenced upon the entire conspiracy but only upon his own actions. Therefore, the district court did not err in denying the reduction.

United States v. Yirkovsky, 338 F.3d 936 (8th Cir. 2003). The district court erred in granting the defendant a reduction for acceptance of responsibility and a four-level minimal role reduction. However, the court left the defendant with a two-level minor role reduction because the PSR recommended it and the government did not object to it. The defendant was found guilty of being an unlawful user of a controlled substance in possession of a firearm, and possessing an unregistered firearm. The PSR recommended that the defendant should not receive a reduction for acceptance of responsibility because the defendant had put the government to its burden of proof at trial on the element of her possession of the firearms. The PSR recommended that the defendant should receive a two-level reduction for having a minor role in the criminal activity. At sentencing, the district court granted the defendant a two-level acceptance of responsibility reduction. The district court also granted her a four-level reduction for having a minimal role. Finally, the district court granted the defendant's request for a downward departure on the basis that Black had physically abused her during their relationship. The government cross-appealed these three sentencing issues. The Eighth Circuit noted that it had previously held that a defendant challenged his factual guilt if he went to trial on the issue whether he constructively possessed a firearm, making him ineligible for an acceptance of responsibility reduction. Therefore, the district court erred in granting defendant a reduction for acceptance of responsibility. Regarding the minimal-role reduction, the court noted that the defendant had the burden of proving her entitlement to the reduction; she offered no additional evidence at sentencing to show her minimal participation. The court stated that whether a downward adjustment was warranted was determined not only by comparing the acts of each participant in relation to the relevant conduct for which the participant was held accountable, but also by measuring each participant's individual acts and relative culpability against the elements of the offense. The defendant fully satisfied the elements of each offense of which she was convicted, and certain aspects of her

criminal activity exceeded the minimum necessary to be found guilty of the offense. The court left the defendant with a two-level minor role reduction because the PSR recommended it and the government did not object to it. Finally, the court noted that the district court's decisions on whether to grant the defendant a downward departure and how much of a departure to grant made her eligible for probation rather than imprisonment. The court could not say whether, given the correct sentencing range, the district court would have made the same decisions regarding the downward departure. Accordingly, the court left the departure issue open on remand; at re-sentencing, the district court had to consider anew whether the defendant met the stringent standard for a downward departure.

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

United States v. Covey, 232 F.3d 641 (8th Cir. 2000), *cert. denied*, 534 U.S. 814 (2001). The district court did not err in applying a two-level enhancement to the defendant's base offense level pursuant to USSG §3B1.3. The defendant, who used his skills as a certified public accountant, was convicted of conspiracy to commit money laundering and aiding and abetting money laundering. The defendant engaged in a fraudulent loan involving illegal proceeds from drug dealing. The district court determined that the defendant had used his special skills and experience as an accountant to effectuate the money laundering scheme, that he had prepared an amortization schedule, a loan agreement, and other loan-related financial documentation, and that he had used multiple bank accounts in order to carry out the scheme. On appeal, the defendant claimed that members of the general public prepared the documents, and he had used a loan document program. The Eighth Circuit found that the "legal question is not whether the task could be performed by a person without special skills, but whether the defendant's special skills aided him in performing the task." *Id.* at 647. Because the defendant's special skills assisted him in conspiring and in aiding and abetting money laundering, the application of the enhancement was appropriate. *See also United States v. Bush*, 252 F.3d 959, 962 (8th Cir. 2001) (district court did not err in applying a two-level enhancement for a conviction for conspiracy to commit securities fraud, based upon the defendant's use of his special skills, where the defendant was a former investment counselor and manager at a major national brokerage firm, and his extensive experience allowed him to bring victims into the fraud more easily than someone without his skills).

United States v. Johns, 15 F.3d 740 (8th Cir. 1994). The district court did not erroneously enhance the defendant's sentence for abuse of a position of trust under USSG §3B1.3. The defendant practiced the spiritual traditions of the Ojibwa Indians, including doctoring ceremonies. He assumed the role of father and spiritual leader of his live-in girlfriend's daughter. For seven years, the defendant sexually abused the daughter, using his position as a spiritual leader to justify time alone with the victim, who was his primary assistant in performing ceremonies, and his role as a parent to justify his abusive behavior. The court of appeals concluded that the abuse of position of trust enhancement was proper based on these facts.

United States v. Trice, 245 F.3d 1041 (8th Cir. 2001). The district court erred in applying an enhancement for abuse of a position of trust under USSG §3B1.3. The defendant pled guilty to making a fraudulent statement and his sentence was enhanced two levels, pursuant to USSG §3B1.3. The defendant was a president of the board of a non-profit corporation formed to build a housing complex

for handicapped individuals. The defendant falsely stated on a HUD form that he had never been convicted of a felony. The Eighth Circuit agreed with the Second and Eleventh Circuits which had previously held that the abuse of trust enhancement only applies "where the defendant has abused discretionary authority entrusted to the defendant by the victim; arm's length business relationships are not available for the application of this enhancement." *United States v. Garrison*, 133 F.3d 831, 839 (11th Cir.1998) (quoting *United States v. Jolly*, 102 F.3d 46, 48 (2d Cir. 1996)). Because the victim of the defendant's offense was the United States and the defendant was not in a position of trust *vis-á-vis* the United States, the district court erred in applying the enhancement. *See also United States v. Jankowski*, 194 F.3d 878, 884-85 (8th Cir. 1999) (district court erred in finding that the defendant's position as a messenger for an armored car company was a position of trust within the meaning of the guideline; position required defendant to deliver and pick up money at various businesses, and was not characterized by professional or managerial discretion). *But see United States v. Baker*, 200 F.3d 558, 564 (8th Cir. 2000) (district court did not err in applying a two-level upward adjustment on the ground that the defendant abused a position of private trust where the defendant, an insurance agent, persuaded her elderly clients to give her personal control over their premium payments and then misappropriated those funds).

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

United States v. Pharis, 176 F.3d 434 (8th Cir. 1999). The district court properly found inapplicable the two-level adjustment in USSG §3B1.4 because there was no child victimized. The defendant was convicted of interstate distribution of child pornography. The offense involved a sting operation whereby the defendant transferred child pornography over the Internet to a government investigator who represented himself to be a 13-year-old girl. Even though the defendant believed he was dealing with a minor, the language in the enhancement is ambiguous. The defendant argued that the enhancement applies only if an actual minor is involved; the government argued that the defendant's belief that he was dealing with a minor supports the enhancement. Because both interpretations are plausible, the rule of lenity requires resolving the ambiguity in favor of the defendant.

Part C Obstruction

§3C1.1 Obstruction of Justice

United States v. Aguilar-Portillo, 334 F.3d 744 (8th Cir. 2003). The appellate court affirmed the district court's decision not to enhance the defendant's sentence for obstruction of justice, but reversed the district court's decision to depart downward based on defendant's "cultural assimilation." The defendant was convicted of conspiring to distribute, of possession with intent to distribute, and of distributing methamphetamine. The government cross-appealed the district court's decision not to enhance the defendant's sentence for obstruction of justice and its decision to depart downward based on the defendant's "cultural assimilation." At trial, the defendant denied he participated in any conspiracy to distribute methamphetamine and denied several other material matters. After a review of the transcript from the sentencing hearing, the Eighth Circuit noted that the district court refused to find obstruction of justice because there were several contradictions in various

witnesses' testimony; a probable lie by one of the prosecution's witnesses; the jury deliberated for a day and a half; the defendant did not look evasive; and because the defendant merely made unembellished denials. In other words, the district court was of the view that the defendant's "no's" were not perjurious and that the government did not prove by a preponderance of the evidence that the defendant was lying. Finally, the court also noted that although a jury adjudicates guilt, the district court is responsible for making findings relevant to matters of obstruction of justice. If the government did not convince the court that the defendant willfully intended to provide false testimony, an enhancement for obstruction due to false testimony was not warranted. The court, turning to the issue of the downward departure based on cultural assimilation, reviewed the issue *de novo.* The district court, relying on *United States v. Lipman,* 133 F.3d 726, 729-731 (9th Cir. 1998), granted the defendant a one-level departure for "cultural assimilation" because the defendant had lived in the United States since 1987 and had children in the United States. The court held that a departure was not appropriate because a "cultural assimilation" departure is relevant to the character of a defendant insofar as his culpability might be lessened if his motives were familial or cultural rather than economic. Consequently, a downward departure for "cultural assimilation" has no role in sentences for drug crimes.

United States v. Brooks, 174 F.3d 950 (8th Cir. 1999). The district court erred in applying a two-level adjustment for obstruction of justice without making sufficient findings of fact. The government failed to prove that the defendant perjured himself at trial regarding the existence of certain trusts. The defendant at trial referred the government to a trustee to receive more information about the trusts. The government did not subpoena the trustee. At sentencing, the court stated that the obstruction of justice adjustment was warranted "based upon the evidence submitted and the evidence and the testimony during the trial." To apply the adjustment based on statements of the defendant, a district court "must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice." *See United States v. Dunnigan*, 507 U.S. 87 (1993).

See United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir.), *cert. denied*, 513 U.S. 849 (1994), §2D1.1, p. 12.

Hall v. United States, 46 F.3d 855 (8th Cir. 1995). The district court erred in refusing to increase the defendant's sentence for obstruction of justice based on his conduct in allegedly threatening a potential witness at a party held on an Indian reservation. The presentence report stated, and the defendant denied, that the defendant and his brother had confronted the witness in a bar and told him that if he testified, "they would get him" and "he would be beaten." The district court denied an enhancement for obstruction of justice because "recognizing reservation life in this context for what it is, . . . this type of bar room conversation should [not], when disputed, be elevated to something causing a potential additional 12 months of incarceration." The government contended that the district court erred by failing to find, as required by Fed. R. Crim. P. 32(c)(3)(D), whether a threat occurred. The circuit court agreed, noting that USSG §3C1.1 does not limit the enhancement to particular factual contexts, such as the bar room setting, or make exceptions for social circumstances, such as the realities of reservation life. Accordingly, the circuit court remanded the case to the district court to determine whether the defendant threatened the witness, and if so, to apply the obstruction of justice enhancement.

United States v. Honken, 184 F.3d 961 (8th Cir.), *cert. denied*, 528 U.S. 1056 (1999). The district court erred in determining that the defendant's case was an "extraordinary" case justifying a downward adjustment for acceptance of responsibility as well as an enhancement for obstruction of justice. The district court concluded that because the defendant's obstruction occurred prior to pleading guilty and he committed no further obstruction of justice between the plea and sentence, the case must be considered extraordinary enough to warrant an adjustment for acceptance of responsibility. Whether a case is extraordinary must be determined based on the totality of the circumstances, "including the nature of the appellee's obstructive conduct and the degree of appellee's acceptance of responsibility." Here, the appellate court found the defendant's acceptance of responsibility was minimal, and the defendant denied the conduct alleged to support the enhancement for obstruction of justice. What the appellate court found extraordinary about this case was the "extensive evidence gathered and presented concerning the defendant's continuing efforts to obstruct justice." The defendant attempted to kill a number of witnesses, attempted to escape, concealed evidence, and caused the disappearance of an number of witnesses.

United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996). The district court did not err in refusing to enhance defendant's sentence for obstruction of justice under USSG §3C1.1. The defendant, a fee collection officer for the Badlands National Park Service, was convicted of theft and embezzlement of public monies, based on money taken from fees she had collected. The government asserts that the obstruction of justice enhancement is warranted because the defendant committed perjury by claiming that she had been robbed and the fees had been taken. Noting that enhancements should not be imposed if a "reasonable trier of fact could find the testimony true," the circuit court found that the district court properly determined that a reasonable jury could have found the defendant's testimony to be true, despite the fact that both the judge and jury did not believe her. The circuit court also noted that the enhancement is proper only when the district court clearly finds both willfulness and materiality as to the alleged perjurious testimony. As the district court did not make these findings, the enhancement was properly denied.

United States v. Moss, 138 F.3d 742 (8th Cir. 1998), *denial of post-conviction relief affirmed by* 252 F.3d 993 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097 (2002). The district court did not err in enhancing the defendant's sentence for obstruction of justice after he made a cutthroat gesture toward an adverse witness during a recess at trial.

United States v. O'Dell, 204 F.3d 829 (8th Cir. 2000). The district court did not err in enhancing the defendant's offense level for obstruction of justice for giving perjured testimony at a pretrial bond revocation hearing. The defendant was convicted of conspiracy to commit money laundering, money laundering, and conspiracy to distribute controlled substances. The district court found that the defendant committed perjury when he testified before a magistrate judge in a bond revocation hearing which was held after he was apprehended, and later charged with a drug crime while he was out on pretrial release in the case at issue involving the money laundering charges. At that hearing, the defendant testified that he did not know he had drugs on his person. On appeal, the defendant argued that the perjury must be material to the underlying offense to qualify for the enhancement. Relying on its earlier decision in *United States v. Lank*, 108 F.3d 860, 863 (8th Cir.

1997), the Eighth Circuit found that an enhancement under USSG §3C1.1 was appropriate even where the perjurious testimony did not go to the underlying charge, but the issue being decided. The circuit court stated that the issue being determined was whether the defendant's pretrial release should be revoked, and thus, his perjurious testimony had the potential to influence or affect that determination. Therefore, enhancing his offense level was proper. *See also United States v. Martinez*, 234 F.3d 1047, 1048 (8th Cir. 2000) (district court did not err in applying the obstruction of justice enhancement where the defendant absconded from a halfway house prior to a bond-revocation hearing and failed to appear for the hearing); *United States v. Thompson*, 210 F.3d 855, 861-62 (8th Cir. 2000), *cert. denied*, 532 U.S. 996 (2001) (district court did not err in applying obstruction of justice enhancement where the evidence showed the defendant directed acts of intimidation toward two prosecution witnesses).

United States v. Stolba, 357 F.3d 850 (8th Cir. 2004). The appellate court reversed the district court's application of the obstruction of justice enhancement. The defendant, an investment advisor who embezzled his clients' funds and provided them with fraudulent account statements over a period of 26 years, pled guilty to two counts of mail fraud. At sentencing, the district court imposed an upward adjustment pursuant to §3C1.1 which the defendant appealed. The Eighth Circuit stated that an obstruction adjustment was unavailable in the present circumstances because no official investigation relating to the defendant's offenses was underway when he directed that the computer files be deleted. The court noted that §3C1.1 unambiguously required obstructive conduct to have occurred during investigation, prosecution, or sentencing, and at the time that defendant directed to have the files deleted, no governmental entity had started investigating or even become aware of the defendant's fraudulent conduct. The Eighth Circuit stated that it was aware that other courts disagreed with the conclusion it reached, holding that the adjustment may apply even when the relevant obstructive conduct took place before the beginning of an investigation. *See, e.g., United States v. Mills,* 194 F.3d 1108, 1114-15 (10th Cir. 1999); *United States v. Barry,* 938 F.2d 1327, 1335 (D.C. Cir. 1991). The Eighth Circuit concluded that the temporal limitations in §3C1.1 required a holding that the defendant's obstructive conduct fell beyond the reach of that guideline.

United States v. Woods, 346 F.3d 815 (8th Cir. 2003). The defendant's appeal was dismissed because the defendant waived his right to appeal his sentence. The defendant was charged with distribution of more than five grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). The defendant pled guilty pursuant to a plea agreement in which he waived his right to appeal his sentence. Despite the waiver, the defendant filed an appeal claiming that the district court improperly enhanced his sentence under USSG §3C1.1. The Eighth Circuit dismissed the defendant's appeal. The court stated that the defendant knew, and the plea agreement reflected, that the district court might adopt the government's recommendation for an obstruction of justice enhancement. The defendant agreed to have the district court make the final determination. The court also noted that the defendant knowingly and explicitly waived the right to appeal the district court's determination as to the obstruction of justice enhancement. In short, the defendant understood and agreed to the procedure that the district court followed. Accordingly, the defendant's appeal was dismissed.

§3C1.2 Reckless Endangerment During Flight

United States v. Goolsby, 209 F.3d 1079 (8th Cir. 2000). The district court did not err in applying an enhancement for reckless endangerment while fleeing a law enforcement officer. The defendant was convicted of conspiracy to distribute cocaine base and possession of cocaine base. On appeal, the defendant claimed his sentence was improperly enhanced for reckless endangerment pursuant to USSG §3C1.2 because he was not under arrest or otherwise required to submit to the officers when he fled. The Eighth Circuit agreed with the district court that because the application notes state the adjustment is applicable where the conduct occurs in the course of resisting arrest, the defendant's conduct in pushing his minor child in his sole care and custody into the path of an oncoming police car as he fled from law enforcement officers attempting to execute a search warrant on his home qualified him for the enhancement. *See also United States v. Moore*, 242 F.3d 1080, 1082 (8th Cir. 2001) (district court did not err in enhancing defendant's sentence pursuant to USSG §3C1.2 where the police identified themselves as police officers, two were in front of the defendant's car wearing raid vests with the word "POLICE" on them, they turned on their flashing lights in their car as they followed the defendant, and the defendant raced down a highway, ran lights, and threw a scale from his car).

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts[14]

United States v. Brown, 287 F.3d 684 (8th Cir. 2002). The district court did not err in departing upwardly under USSG §3D1.4 because the defendant's case was an unusual circumstance where the sentencing range was too restrictive to compensate for the nature of the disregarded counts. The defendant was convicted of three counts of assault resulting in substantial bodily injury to a child under 16 and one count of assault resulting in serious bodily injury. The appellate court expressly concurred with the lower court in that the operation of USSG §3D1.4 entirely withdrew from the combined offense level computation of three separate counts of assault on a small child. Thus, the district court did not err in departing upwards.

United States v. O'Kane, 155 F.3d 969 (8th Cir. 1998). The district court erred in grouping the defendant's mail fraud and money laundering counts under USSG §3D1.2(b), which allows grouping for counts involving the same victim and connected by a common criminal objective. The court of appeals held that money laundering is among the so-called "victimless crimes" which harms society's interests, so these counts could not be grouped under this section with the fraud counts, in which defendant's employer was the victim. Nor could the counts be grouped under the loss and value grouping of USSG §3D1.2(d), since this argument was foreclosed by the circuit's decision in *United States v. Hildebrand*, 152 F.3d 756 (8th Cir.), *cert. denied*, 525 U.S. 1033 (1998).

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[14]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. Shevi, 345 F.3d 675 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1182 (2004). The court affirmed the abuse of trust enhancement and the decision not to group the mail fraud and tax offenses, however the district court's fraud loss calculation was inconsistent with *United States v. Wheeldon,* 313 F.3d 1070 (8th Cir. 2002). The defendant pled guilty to mail fraud in violation of 18 U.S.C. § 1341, structuring cash transactions in violation of 31 U.S.C. § 5324(a)(3), and five counts of filing false tax returns in violation of 26 U.S.C. § 7206(1). At the sentencing, the district court found the mail fraud loss to be $305,133.38 under USSG §2F1.1; imposed an abuse of trust enhancement under §3B1.3 because the defendant defrauded his niece and nephew of trust funds; and declined to group the mail fraud and tax offenses under §3D1.2. On appeal, the defendant argued that the district court erred in calculating the portion of the total mail fraud loss attributable to the defendant's bankruptcy fraud. The Eighth Circuit noted that the district court made no finding as to the value of the assets the defendant concealed, and the record on appeal did not permit it to determine if they were worth more or less than the debts left unpaid. Therefore, the court could not accept the government's assertion that the fraud loss, at a minimum totaled $133,293. The case had to be remanded for redetermination of the mail fraud loss. Relying on *United States v. Willard,* 230 F.3d 1093, 1097 (9th Cir. 2000), the defendant also argued that an enhancement under §3B1.3 did not apply in a family setting such as this. However, the court noted that in the instant case there was more than a "nonbusiness, purely familial" relationship. The defendant served as trustee of social security benefits received by his minor niece and nephew; this discretion enabled him to embezzle the funds and made the detection of his offense far more difficult. The court held that a relative with this degree of control over finances may occupy a position of private trust. Finally, the defendant argued that the tax fraud counts should have been grouped with his mail fraud counts under §3D1.2(c). The Eighth circuit noted that a number of circuits had declined to group tax and mail fraud counts under §3D1.2(c), therefore the court properly declined to group these counts under §3D1.2(c). The court also noted that these counts could not be grouped under §3D1.2(d). The court stated that when the loss tables for two offenses punished the same amount of loss differently, the offenses were not "of the same general type" for purposes of §3D1.2(d). Therefore the district court correctly declined to group defendant's counts. Accordingly, the case was remanded to the district court for a recalculation of the fraud loss.

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

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000). The district court erred in finding that the most serious of the grouped counts pursuant to USSG §3D1.3 was the count with the greatest available maximum statutory term of imprisonment. The defendant was convicted of manufacturing and attempting to manufacture methamphetamine and endangering human life while doing so, and the court grouped the counts for sentencing. The defendant was sentenced to two concurrent terms of 240 months' imprisonment. On appeal, he argued that the group's offense level should be set by the manufacturing count because it carries the maximum term of imprisonment (life) and not by the endangering-life count (10 years), relying on *United States v. Brinton*, 139 F.3d 718 (9th Cir. 1998). The Eighth Circuit rejected the approach of the district court and Ninth Circuit, stating that those opinions rested on an erroneous understanding of the guidelines. The circuit court held that the most serious count was not the count with the greatest available maximum statutory term of imprisonment. Instead, it was the count with the highest offense level, based on USSG §3D1.3(a).

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[15]

United States v. Barris, 46 F.3d 33 (8th Cir. 1995). The district court erred in holding that the insanity defense is inconsistent with acceptance of responsibility as a matter of law. The defendant raised an insanity defense at his trial for threatening to kill the President of the United States in violation of 18 U.S.C. § 871. The insanity defense was rejected by the jury. At sentencing, the defendant requested a two-level reduction for acceptance of responsibility under USSG §3E1.1. The district court held that the insanity defense is inconsistent with acceptance of responsibility. The appellate court held a "defendant who goes to trial on an insanity defense, thus advancing an issue that does not relate to his factual guilt, may nevertheless qualify for an acceptance-of-responsibility reduction under the sentencing guidelines." The circuit court emphasized that USSG §3E1.1, Application Note 2 states that when a defendant goes to trial to assert and preserve issues that do not relate to factual guilt, "a determination that the defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct."

United States v. Chevre, 146 F.3d 622 (8th Cir. 1998). The district court did not err in declining the defendant's request for a reduction for acceptance of responsibility. The defendant's election to argue an entrapment defense shows that he did not accept responsibility for the crime.

United States v. Colbert, 172 F.3d 594 (8th Cir. 1999). The district court did not err in refusing to grant the defendant a two-level reduction for acceptance of responsibility. The defendant, a police officer, pled guilty and stipulated to assaulting a prisoner under color of state law, then later wrote a letter to the court denying hitting anyone. In refusing to grant the request for credit for acceptance of responsibility, the court stated, "I don't think that the guidelines were intended to allow for a decrease for an individual who kind of blows hot and blows cold."

United States v. Goings, 200 F.3d 539 (8th Cir. 2000). The district court did not err in failing to give a downward adjustment based on the defendant's acceptance of responsibility. The defendant pled guilty to involuntary manslaughter based on driving while under the influence of alcohol after he lost control of the vehicle, killing one passenger and injuring himself and two others. He was sentenced to 41 months. At sentencing, the defendant requested an adjustment for his acceptance of responsibility, but the district court denied the request. The Eighth Circuit found this was not an abuse of discretion even though the defendant pled guilty because the conviction was based on the fact that the defendant drove while under the influence of alcohol and the defendant failed to complete a court-ordered alcohol treatment program. Therefore, the court reasoned that the defendant had not yet appreciated the gravity of his criminal conduct. *See also United States v. Martinez*, 234 F.3d 1047,

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[15]Effective April 30, 2003, the Commission, in response to a congressional directive in the 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.

1048 (8th Cir. 2000) (district court did not err in denying a reduction for acceptance of responsibility, in light of the defendant's presentence misbehavior; presentence report stated that defendant had failed alcohol and drug tests while under court-ordered supervision at a halfway house and defendant absconded from halfway house prior to bond-revocation hearing and failed to appear for the hearing); *United States v. Lim*, 235 F.3d 382, 385 (8th Cir. 2000) (district court did not err in denying reduction for acceptance of responsibility where defendant pled guilty and admitted guilt to all relevant conduct but also firmly refused to assist in any way in the recovery of the stolen jewelry and showed no remorse for his conduct); *United States v. Ortiz*, 242 F.3d 1078, 1079 (8th Cir. 2001) (district court did not err in only granting a two-level acceptance of responsibility reduction where defendant communicated to the government his intention to proceed to trial after petitioning to plead guilty, causing the government to prepare for trial even though he later changed his mind and pled guilty); *United States v. Gonzalez-Rodriguez*, 239 F.3d 948, 954 (8th Cir. 2001) (district court did not err in denying downward departure for acceptance of responsibility where defendant proceeded to trial and denied that most of the methamphetamine found in the house was attributable to him).

See United States v. Hipenbecker, 115 F.3d 581 (8th Cir. 1997), §5K2.0, p. 68.

United States v. Warren, 16 F.3d 247 (8th Cir. 1994). The defendant was convicted for trafficking in cocaine. The circuit court affirmed his sentence, holding that USSG §1B1.1 explicitly prohibits the stacking of downward adjustments for acceptance of responsibility under USSG §3E1.1.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Evans, 285 F.3d 664 (8th Cir. 2002), *cert. denied*, 537 U.S. 1196 (2003). The district court did not err in assessing two criminal history points in accordance with USSG §4A1.1(d). The defendant argued that there was no evidence in the presentence report or elsewhere that he was on probation at the time of the commission of the instant offenses. The government responded that the defendant had received various stayed sentences, and that the defendant had not established that these stayed sentences were not a form of probation. The appellate court determined that if the defendant's prior sentences were stayed, then the enhancement would be appropriate. In reaching its conclusion, the appellate court considered that the application notes to USSG §4A1.1(d) which indicates that the term "instant offense" is to be interpreted broadly. Because the defendant's instant offense was of considerable length and breadth, the appellate court held, on plain error review, that the defendant failed to establish that the instant offense did not occur during the stayed sentences.

United States v. Johnson, 43 F.3d 1211 (8th Cir. 1995). The district court erred in assessing an additional criminal history point pursuant to USSG §4A1.1(c) based upon the defendant's Minnesota conviction for obstructing the legal process. The state court "stayed" the imposition of the sentence for one year, and then dismissed the case. The appellate court reasoned that the "real issue is

not whether Johnson's stayed sentence is a 'prior sentence,' but rather whether or not it is a 'countable' sentence under the guidelines." The appellate court looked to USSG §4A1.1, comment (n.3) and §4A1.2(c)(1), and held that the prior sentence was countable only if it was one of "probation" for at least one year. Because the sentence had been imposed without an accompanying term of probation, it did not constitute a sentence of probation under USSG §4A1.2(c)(1) and should not have been counted.

United States v. Martinez-Cortez, 354 F.3d 830 (8th Cir. 2004). The guidelines required the district court to conclude that the defendant had four criminal history points and therefore was ineligible for the safety valve. The defendant faced a mandatory minimum sentence of ten years in prison unless the safety valve could be applied. The government appealed, asserting that the district court erred in finding the defendant eligible for the safety valve. The Eighth Circuit noted that the district court was required to count the defendant's DWI conviction, regardless of the term of probation. *See* §4A1.1(c); §4A1.2 (n.5). Because the sentence was less than 60 days, the district court was required to assess one criminal history point under §4A1.1(c). The court also noted that the defendant's state convictions were not expunged. The defendant's probationary terms were reduced after the probationary terms were served merely to obtain favorable federal sentencing. The court concluded that, as a matter of federal law, the defendant's lesser step of modifying his sentences after they were served for reasons unrelated to his innocence or errors of law was not a valid basis for not counting the sentences for criminal history purposes. When the defendant committed the federal drug offense he remained under a sentence of probation for the purposes of §4A1.1(d) and the district court was required to assess two criminal history points. For the same reasons, the district court was required to assess one criminal history point for defendant's conviction for leaving the scene of an accident because he served one year of probation for the conviction and changed the probationary term later only to obtain federal sentencing benefits. *See* §4A1.2(c)(1). In sum, the court concluded that the timing and purpose of the defendant's state sentence reductions required the district court to conclude that the defendant had four criminal history points and thus was ineligible for the safety valve. The case was reversed and remanded for imposition of the mandatory minimum sentence.

§4A1.2 <u>Definitions and Instructions for Computing Criminal History</u>

United States v. Berry, 212 F.3d 391 (8th Cir.), *cert. denied*, 531 U.S. 907 (2000). The defendant pled guilty to possessing crack and powder cocaine with intent to distribute in violation of 18 U.S.C. § 841 (a)(1). Based upon two prior state felony convictions for drug offenses, the district court calculated a criminal history category of III and sentencing range of 210-262 months. The defendant appealed his sentence, asserting that the two prior convictions were part of a "single common scheme or plan" and were related for purposes of USSG §4A1.2. *Id*. at 392. This conclusion would have resulted in a criminal history category of II and a sentencing range of 188-235 months. The defendant argued that the court should give the phrase "common scheme or plan" in Application Note 3 to §4A1.2 the same broad interpretation that it is given in Application Note 9 of §1B1.3(a)(2). *Id*. at 393. The court held that a "single common scheme or plan" should be applied narrowly and without regard to USSG §1B1.3 because it includes the additional word "single," indicating that it should be construed narrowly, and because the two guidelines have distinct goals and considerations. *Id*. at 395.

Furthermore, a broad interpretation under USSG §4A1.2 would produce the "illogical result" that a defendant who is repeatedly convicted of the same offense, like the defendant, would not be a multiple offender under the guidelines. *Id.* at 395 (citing *United States v. Mau*, 958 F.2d 234, 236 (8th Cir. 1992)). The court affirmed the defendant's sentence. *Cf. United States v. Charles*, 209 F.3d 1088, 1090 (8th Cir. 2000) (holding that two prior burglary convictions had been consolidated for sentencing and should have been treated as a single prior sentence for purposes of USSG §4A1.2).

United States v. Davidson, 195 F.3d 402 (8th Cir. 1999), *cert. denied*, 528 U.S. 1180 and *cert. denied*, 529 U.S. 1093 (2000). The defendant was found guilty of conspiracy to manufacture methamphetamine and was sentenced to 151 months' imprisonment. On appeal, the defendant argued that the district court should have considered two prior convictions for possession of methamphetamine as relevant conduct to the charged conspiracy rather than in her criminal history calculation. *Id.* at 409. A prior conviction is not relevant conduct when it is severable and distinct from the charged offense. *Id.* at 409 (citing *United States v. Copeland*, 45 F.3d 254, 256 (8th Cir. 1992), *cert. denied*, 124 S. Ct. 807 (2003)). The district court properly considered the prior convictions under USSG §4A1.2 because the prior convictions took place before the charged conspiracy; were not in preparation or furtherance of the charged conspiracy; and were not linked by a common victim or plan. Accordingly, the court affirmed the defendant's sentence.

United States v. Holland, 195 F.3d 415 (8th Cir. 1999), *cert. denied*, 529 U.S. 1077 (2000). The defendant pled guilty to possession with intent to distribute cocaine and crack cocaine. He was sentenced under the career offender guideline, §4B1.1, based on two prior controlled substance convictions in state court. At sentencing and on appeal, the defendant objected to the use of one of the prior convictions because the offense was committed while he was 17 and the sentence had been suspended. The defendant points to the language of USSG §§4A1.2(a)(3) and 4A1.2(d)(2)(B) to support the argument that his suspended sentence can not be used as a predicate conviction for the career offender guideline. *Id.* at 417. Section 4A1.2(a)(3) specifically counts a suspended sentence as a "prior sentence" receiving points under USSG §4A1.1(c), making it available as a predicate conviction under for the career offender guideline. Section 4A1.2(d)(2)(B), dealing with offenses committed prior to the age of 18, is silent on the treatment of suspended sentences. The defendant argued that USSG §4A1.2(d)(2)(B) effectively "trumps" USSG §4A1.2(a)(3). *Id.* at 417. The court disagreed and affirmed the district court's sentence. The court held that the two guidelines should be read together and that a suspended sentence that otherwise meets the criteria of USSG §4A1.2(d)(2)(B) should be counted as a "prior sentence" under USSG §4A1.1(c).

United States v. Lloyd, 43 F.3d 1183 (8th Cir. 1994). The defendant alleged that the district court erred in assessing one criminal history point based on his prior Illinois state misdemeanor conviction. He received a sentence of "conditional discharge" with "18 months inactive supervision" for the offense. The meaning of "probation" in USSG §4A1.1(d) includes a sentence to unsupervised as well as supervised probation. A sentence to "conditional probation" is the functional equivalent of unsupervised probation. The appellate court held that there is no reason why the term probation should be given a different meaning in USSG §4A1.2(c)(1) from that given in USSG §4A1.1. The term

“probation” contained in USSG §4A1.2(c)(1) encompasses a sentence of "conditional discharge" as defined in Illinois law.

United States v. Porter, 14 F.3d 18 (8th Cir. 1994). The district court properly included a 1991 state misdemeanor conviction in the calculation of the defendant's criminal history. The defendant claimed that the conviction was constitutionally invalid because he did not knowingly waive his right to counsel. The court concluded that the district court properly relied on *United States v. Hewitt*, 942 F.2d 1270 (8th Cir. 1991), which held that a defendant must establish that his prior conviction had previously been ruled constitutionally invalid before it is excluded from the criminal history determination. Since the defendant stated at his state plea hearing that he read the pre-printed form and that he understood he was waiving his rights, his uncounseled misdemeanor conviction was facially valid and properly used to increase his criminal history score.

§4A1.3 Adequacy of Criminal History

United States v. Archambault, 344 F.3d 732 (8th Cir. 2003). The appellate court affirmed the district court’s upward departure based on §5K2.7 and §4A1.3. The defendant pled guilty to one count of arson. After a week of drinking and consuming pills, the defendant ignited and burned two vans. The vans belonged to the Bullhead Rock Creek District Community Center. As a result of the arson, the Rock Creek District could not use its vans to transport meals to the elderly, youths to special events, and other Rock Creek District members to community events. At the sentencing, the district court upwardly departed from the sentencing range. Relying on §§4A1.3 and 5K2.7 , the district court concluded that the defendant’s criminal acts significantly disrupted a Rock Creek governmental function and that the defendant’s criminal history category significantly under-represented his past criminal conduct. On appeal, the Eighth Circuit noted that the PROTECT Act had modified the appellate court’s standard of review. The court noted that a factor was a permissible basis for departure if it advanced the objectives set forth in 18 U.S.C. § 3553(a)(2), was authorized under 18 U.S.C. § 3553(b), and was justified by the facts of the case. *See* 18 U.S.C. § 3742(j)(1). The court noted that the factors relied upon by the district court met the first requirements of section 3742(j)(1)–they advanced the objectives set forth in § 3553(a). Furthermore, the factors were authorized under section 3553(b)(1). Section 3553(b)(1) authorized a court to depart based on a fact that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines; the Commission expressly provided for the departures the district court made. *See* USSG §§4A1.3 and 5K2.7. Finally, the court noted that the facts of the case warranted a departure under §§4A1.3 and 5K2.7. The defendant’s criminal history category of I did not adequately reflect the seriousness of his past criminal conduct. During a presentence investigation interview, the defendant admitted to–among other things–selling marijuana, abusing inhalants, alcohol, amphetamines, and marijuana, and stealing approximately $1,000 per week. The defendant did not contest his prior criminal conduct. The upward departure was also justified because the facts showed that the defendant’s arson had significantly interrupted a governmental function because the Standing Rock Sioux Tribe was considered a government entity under §5K2.7. Accordingly, the district court’s sentence was affirmed.

United States v. Chesborough, 333 F.3d 872 (8th Cir. 2003). The appellate court affirmed the district court's upward departure under §§4A1.3 and 5K2.21. The defendant had a high likelihood of recidivism, and his criminal history score failed to reflect his actual and continual criminal conduct over many years. The defendant pled guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); defendant admitted to knowingly possessing six firearms. The defendant had a lengthy criminal record which began in 1958: four prior burglary convictions, two prior convictions involving firearms, seven prior convictions for theft, four prior convictions for offenses involving motor vehicles, two prior convictions for assaultive conduct, and one prior conviction for fraud. The probation officer did not include this criminal history in defendant's criminal history calculation because it was too old to be counted. However, based on these facts, the district court increased the defendant's criminal history level by three levels–from category II to V–pursuant to §§4A1.3(a) and 5K2.21. On appeal, the defendant argued that the district court abused its discretion in departing upward because a Criminal History Category II did not understate the seriousness of his past criminal conduct. The Eighth Circuit rejected the defendant's argument. The court noted that the PSR indicated that defendant was a recidivist criminal. Furthermore, defendant's criminal history score failed to reflect his actual criminal conduct over the years. Finally, the court also noted that convictions excluded from a defendant's criminal history score due to their age may be the basis for an upward departure. *See United States v. Andrews,* 948 F.2d 448, 449 (8th Cir. 1991). Accordingly, the court found no error and affirmed the district court's upward departure.

United States v. Flores, 336 F.3d 760 (8th Cir. 2003). The appellate court affirmed the district court's upward departure pursuant to §4A1.3. The defendant pled guilty to possession with intent to distribute approximately 391 grams of LSD. A state charge of attempted murder was dropped when the defendant agreed that he would plead guilty to a reduced charge of terrorism after his federal sentencing. The district court found that Criminal History Category IV did not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that he would commit future crimes. The district court stated that even though he was only 18 years old at the time of sentencing, the defendant's criminal history, which began at the age of seven, was one of the more extensive and violent. The defendant's PSR revealed that the defendant had been arrested on more than 25 criminal charges. The district court departed upward to Criminal History Category VI. The district court also noted that, if the defendant had been 18 at the time of the drug offense and had pled guilty to the state charge before the sentencing in this case, he would have been considered a career offender under §4B1.1. Therefore, the district court enhanced his offense level which resulted in a 235-month sentence. On appeal, the defendant argued that the district court erred in departing upward and that it imposed an unreasonable sentence. The Eighth Circuit noted that Congress had recently modified the standard of review for departures by enacting the PROTECT Act. Under the new law, whether the district court based a departure on a permissible factor and whether it provided the written statement of reasons required for a departure was to be reviewed *de novo*. However, a district court's factual findings were still reviewable for clear error, and the reasonableness of a permissible departure for abuse of discretion. In the instant case, the court concluded that because the defendant's extensive history of wrongdoing and his inability to reform, despite the leniency frequently afforded him, his criminal history category did not adequately reflect the seriousness of his past criminal conduct, or the likelihood that he would commit other crimes. Therefore, an upward departure was justified by the

facts of this case and the district court did not err. The court also concluded that, based on the record, the district court did not abuse its discretion as to the extent of its departure. The district court's sentence was affirmed.

United States v. Gonzales-Ortega, 346 F.3d 800 (8th Cir. 2003). The appellate court affirmed the district court's upward departure of five offense levels under §4A1.3 because the defendant's criminal history level of VI did not adequately reflect the defendant's criminal history and the likelihood that he would commit future crimes. The defendant pled guilty to illegally reentering the United States. The defendant's base offense level was 21 and his total history score of 31 placed him in Criminal History Category VI. For a defendant to reach category VI, a criminal history score of 13 was needed. Thus, the defendant was 18 criminal history points above the minimum required to place him in category VI. When it structured its departure, the district court departed upward one offense level for every three such criminal history points. The departure placed the defendant in offense level 26 and district court sentenced him at the highest end of the 120- to150-month range. On appeal, the defendant challenged the district court's upward departure which was made pursuant to §4A1.3. The Eighth Circuit noted that, although the defendant was sentenced before the PROTECT Act became law, the Act, because it was procedural in nature, did apply to this pending appeal. The court then reviewed the district court's complete calculation of the defendant's sentence and found no error in the district court's upward departure of five levels. The court noted that §4A1.3 required departures by moving horizontally within the guidelines, from Criminal History Category III to IV, for example. However, when a defendant is within category VI, this was no longer possible and the guidelines instructed that the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it found a guideline range appropriate to the case. In the instant case, the defendant had more than 30 prior adult convictions of record, many of which were not included in his criminal history score. The defendant's habit of being deported, returning to the United States, and being deported again–usually after committing another crime–was particularly troublesome. The defendant was not an illegal alien who had spent years or decades within the United States as a productive member of society. Finally, the defendant's sentence was well below the statutory maximum of 20 years for the offense of which he stood convicted in this case. *See* 8 U.S.C. § 1326(b)(2). Accordingly, the district court's sentence was affirmed.

United States v. Levi, 229 F.3d 677 (8th Cir. 2000). The defendant was convicted of mail fraud, wire fraud, and conspiracy to commit mail and wire fraud. The district court departed upwards on the grounds that the defendant's criminal history calculation did not adequately reflect his prior foreign convictions nor his potential for recidivism. On appeal, the defendant argued this upward departure was unreasonable and that the district court did not adequately state its reasons. *Id.* at 678. The Court determined that the departure was reasonable and not an abuse of discretion.

United States v. Mingo Flores, 336 F.3d 760 (8th Cir. 2003). The district court did not err by departing upward where the defendant's criminal history did not adequately reflect his criminal conduct. The defendant, 18 years old at the time of sentencing, pled guilty to possession with intent to distribute LSD and a reduced charge of terrorism for shooting a man. At sentencing, the court calculated the adjusted offense level at 25 and criminal history category IV, calling for a statutory ten-

year minimum sentence. The probation officer's presentence investigation report revealed the defendant had been arrested on 25 criminal charges, including attempted murder and making homemade bombs. Deciding the criminal history did not adequately reflect the seriousness of past criminal conduct, the district court departed upward to a category VI, resulting in a sentencing range of 110 to 137 months. The court decided this was still inadequate and increased the offense level to 31, making the sentencing range 188 to 235 months. The defendant was sentenced to 235 months. USSG §4A1.3 explicitly allows for an upward departure where "reliable information indicates the defendant's criminal history category substantially under-represents the serious of the defendant's criminal history or the likelihood that the defendant will commit other crimes," USSG §4A1.3(a)(1). The defendant's 25 arrests included many for crimes of violence and, despite lenient treatment, the defendant demonstrated he was not deterred from continuing from committing future crimes. The court's sentence advances the statutory sentencing objective of "affording adequate deterrence to criminal conduct," section 3553(a)(2)(B), and "protecting the public from further crimes of the defendant," section 3553(a)(2)(C).

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Consuegra, 22 F.3d 788 (8th Cir. 1994). The defendant was sentenced as a career offender under USSG §§4B1.1 and 4B1.2 based on two earlier state drug convictions. He challenged his sentence, claiming that the Sentencing Commission exceeded its congressional directive in 28 U.S.C. § 944(h) by including prior state convictions in the definition of career offender under USSG §§4B1.1 and 4B1.2. The defendant argued that Congress only granted authority to include the federal drug crimes listed in the statute. The circuit court upheld the sentence and held that the Sentencing Commission acted within its authority. A "sufficiently reasonable" interpretation of the statute authorizes the definition of career offender to include prior state convictions for conduct that could have been charged under the listed federal statutes.

United States v. Peters, 215 F.3d 861 (8th Cir. 2000). The defendant was convicted of bank robbery and was sentenced to 72 months' imprisonment. The Government appealed, arguing that the defendant should have been sentenced under the career offender guideline, §4B1.1, based on prior state convictions for third-degree assault and first-degree burglary. *Id.* at 862. At sentencing and on appeal, the defendant argued that the burglary charge did not constitute a prior felony for purposes of USSG §4B1.1 because it had been consolidated with a charge of receipt of stolen property and, therefore, would not receive criminal history points under USSG §4A1.1(a), (b), or (c). *Id.* at 863. The circuit court agreed with the defendant that the burglary charge would not necessarily qualify as a prior felony even though circuit precedent has held that burglary is a crime of violence for purposes of USSG §4B1.2. *Id.* at 862 (citing *United States v. Reynolds*, 116 F.3d 328, 329-30 (8th Cir. 1997)). Because the district court made no specific finding on the burglary charge, the court remanded to give the district court the first opportunity to decide the issue.

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

United States v. Allegree, 175 F.3d 648 (8th Cir.), *cert. denied*, 528 U.S. 958 (1999). The district court properly found that the defendant's prior conviction for possession of a sawed-off shot gun was a predicate "crime of violence." Unlike simple possession of a firearm by a convicted felon, possession of a sawed-off shotgun constitutes "conduct that presents a serious potential risk of physical injury to another." USSG §4B1.2(a). "[S]uch weapons are inherently dangerous and lack of usefulness except for violent and criminal purposes."

United States v. Baker, 16 F.3d 854 (8th Cir. 1994). The circuit court remanded the case for resentencing, agreeing with the defendant that his conviction of simple possession of crack cocaine in violation of 21 U.S.C. § 856 was not a "controlled substance offense" for purposes of USSG §4B1.2(2), and that the defendant was erroneously sentenced as a career offender under USSG §4B1.1. Although controlled substance offenses under Part 2D of the guidelines include possession offenses, §4B1.2(2) expressly excludes possession offenses. The government did not charge the defendant as an aider or abettor to others using his residence for distribution of controlled substances, and the circuit court decided in the defendant's favor where the jury verdict was ambiguous as to whether the defendant made his home available for distribution or use.

United States v. Hascall, 76 F.3d 902 (8th Cir.), *cert. denied*, 519 U.S. 948 (1996). The district court did not err in its determination that the defendant was a career offender pursuant to USSG §4B1.1 and properly labeled his two prior convictions as crimes of violence under USSG §4B1.2. The defendant maintained that USSG §4B1.1 was inapplicable because conspiracy to distribute methamphetamine was not a controlled substance offense under the guidelines. The defendant also argued that the court improperly labeled two prior second-degree burglary convictions as crimes of violence under the third requirement of USSG §4B1.1 because the burglaries involved commercial properties. The appellate court rejected the defendant's challenges, and held that drug conspiracies were included in the career offender provisions of the guidelines thus, the offense satisfied the second requirement of USSG §4B1.1. *See United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995). Additionally, the appellate court joined the First Circuit in concluding that second-degree burglary of commercial space qualified as a crime of violence under USSG §4B1.2 because a burglary of a commercial space still poses a potential for substantial episodic violence. *See United States v. Fiore*, 983 F.2d 1, 4 (1st Cir. 1992), *cert. denied*, 507 U.S. 1024 (1993). In contrast, the Tenth Circuit has held that commercial burglary is not a crime of violence because of the narrow scope of the USSG §4B1.2 language which makes specific reference to burglary of a "dwelling," but excludes any reference to unoccupied, commercial structures. *See United States v. Smith*, 10 F.3d 724, 732-33 (10th Cir. 1993).

United States v. Jernigan, 257 F.3d 865 (8th Cir. 2001). The defendant was convicted of manufacturing and possessing with intent to distribute methamphetamine and was sentenced under the career offender guideline, §4B1.1, to a 262-month term of imprisonment followed by five years of supervised release. The defendant appealed the application of §4B1.1, arguing that his prior state conviction for negligent homicide did not constitute a "crime of violence" under that guideline. *Id.* at

866. The court disagreed, holding that for conduct not listed in the definition of "crime of violence" in USSG §4B1.2, the inquiry is "whether the conduct underlying the offense 'presents a serious potential risk of physical injury to another.'" *Id.* at 867 (citing USSG §4B1.2(a)(2)). Finding that drunk driving that resulted in the death of another person creates such a risk, the court affirmed the application of the career offender guideline. *Id.* at 867. *See also United States v. Newton*, 259 F.3d 964, 968 (8th Cir. 2001) (holding that prior conviction of involuntary manslaughter is a crime of violence for purposes of USSG §4B1.2.).

United States v. Nation, 243 F.3d 467 (8th Cir. 2001). The defendant was convicted of being a felon in possession of a firearm and received a base offense level of 20 under USSG §2K1.3(a)(2). The district court did not count the defendant's prior state conviction for second degree escape. On appeal, the Government argued that the defendant should have been sentenced under USSG §2K1.3(a)(1), with a base offense level of 24, because the prior state conviction for escape constituted a "crime of violence" under USSG §4B1.2(a)(2). *Id.* at 471. The court found that the district court had conducted an inquiry into whether the defendant's actual conduct during the escape had created "a serious potential risk of physical injury to another," and found that it did not. *Id.* at 471. The court then reversed, holding that the inquiry should look only to the nature of the conduct charged, not the particular circumstances of the defendant's behavior. The court concluded that escape qualified as a crime of violence under USSG §4B1.2(a)(2) because it always created a risk of physical injury to others since an escapee is likely to possess "a variety of supercharged emotions, and, in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or fellow escapees." *Id.* at 472, quoting *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994). *Cf. United States v. Kind*, 194 F.3d 900 (8th Cir. 1999), *cert. denied*, 528 U.S. 1190 (2000) (holding that, because aggravated harassment can sometimes be committed without violence, the inquiry should be made into whether the actual conduct created a serious risk of injury. The court found that it did and that the enhancement was proper).

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

United States v. Burke, 91 F.3d 1052 (8th Cir. 1996). The district court did not err in concluding that the defendant was not eligible to be sentenced under the safety valve provision of USSG §5C1.2. To qualify for the safety valve, the defendant cannot possess a firearm or other dangerous weapon "in connection with the offense." 18 U.S.C. § 3553(f)(2). The district court denied the defendant's request for application of the safety valve after finding that he possessed the firearm "in connection with" the drug offense. The defendant argued that there was insufficient evidence to prove he possessed the firearm "in connection with" the possession of cocaine conviction. The defendant, however, admitted that his possession of the firearm constituted relevant conduct for purposes of the offense. In addressing an issue of first impression, the appellate court held that the government is not required to show that a firearm was actually used to facilitate a felony offense to deny the "safety valve"

provision. The circuit court held that "in connection with" should be interpreted consistently with identical language in USSG §2K2.1(b)(5), which gives a defendant an enhancement if he used or possessed a firearm "in connection with" another felony offense. In *United States v. Johnson*, 60 F.3d 422, 423 (8th Cir. 1995), the court held that the government was not required to show a firearm was actually used to facilitate a felony offense to support an enhancement under USSG §2K2.1(b)(5). *See also United States v. Condren*, 18 F.3d 1190, 1197 (5th Cir.), *cert. denied*, 513 U.S. 856 (1994) (firearm possessed "in connection with" drug felony under USSG §2K2.1(b)(5) when firearm was merely present in location near drugs where it could be used to protect them). Here, the circuit court concluded the defendant ". . . was not eligible for sentencing under the safety valve provision."

United States v. Koons, 300 F.3d 985 (8th Cir. 2002). The district court did not err in determining that the defendant was not eligible to be sentenced under the safety valve provision of USSG §5C1.2. The defendant pled guilty to possession of methamphetamine with intent to distribute within 1,000 feet of a public playground, in violation of 18 U.S.C. §§ 841(a) and 860(a), and to criminal forfeiture of property related to drug trafficking, under 21 U.S.C. § 853. The Court concurred with the Ninth, Eleventh, and Third Circuits in holding that, as a matter of law, defendants convicted under 18 U.S.C. § 860 are not entitled to a safety valve reduction. *Id.* at *19.

United States v. Long, 77 F.3d 1060 (8th Cir.), *cert. denied*, 519 U.S. 859 (1996). The circuit court affirmed the district court's determination that the defendant did not meet the requirements of USSG §5C1.2 to be eligible for a sentence below the ten-year mandatory minimum sentence because she did not timely provide truthful information to the government. USSG §5C1.2(5). The defendant argued that the district court incorrectly interpreted her prior misstatements to the government regarding the illegal purchase of airline tickets for a co-conspirator as part of "the same course of conduct or common scheme or plan" as her crack cocaine trafficking. The defendant also argued that her subsequent truthful statements at the sentencing hearing allowed her to qualify for the reduction in sentence. The circuit court disagreed, and found that the defendant's misstatements to the government were clearly related to the defendant's participation in the crack cocaine conspiracy offense. The defendant's subsequent truthful statements at the time of sentencing did not "cure" the prior misstatements and therefore, she was ineligible for relief under USSG §5C1.2.

United States v. Suratt, 172 F.3d 559 (8th Cir.), *cert. denied*, 528 U.S. 910 (1999). The district court did not clearly err in finding that the defendant did not satisfy the fifth prong of the safety valve criteria because the defendant failed to provide all information regarding his own complicity in the charged drug offenses. The defendant's proffer included no information about his own guilt, and the court did not find this credible. On appeal, the defendant argued that he had no motive for withholding information. The appellate court stated that the defendant had testified to his innocence at trial and so, to admit his guilt at sentencing would have exposed him to perjury charges. "The fact that he faced this difficult choice is of no concern to us."

United States v. Tournier, 171 F.3d 645 (8th Cir. 1999). The district court did not clearly err in finding that defendant qualified for safety valve relief, even though the defendant was uncooperative with the government until just before the sentencing hearing. Under 18 U.S.C.

§ 3553(f)(5), the defendant must truthfully provide to the Government all information and evidence the defendant has concerning the offense . . . "not later than the time of the sentencing hearing." Unlike the third-level reduction for acceptance of responsibility, safety valve relief is "even available to defendants who put the government to the expense and burden of trial."

Part D Supervised Release

§5D1.2 Term of Supervised Release

United States v. Bongiorno, 139 F.3d 640 (8th Cir.), *cert. denied*, 525 U.S. 865 (1998). The imposition of a six-year term of supervised release following the defendant's drug conviction was not plainly erroneous. Although it exceeds the three-year supervised release maximum for a Class C felony found in 18 U.S.C. § 3583(b)(2), the term was imposed pursuant to 21 U.S.C. § 841(b)(1)(C), which required a minimum three-year term for the defendant. The supervised release terms of the Anti-Drug Abuse Act of 1986 override those in section 3583.

§5D1.3 Conditions of Supervised Release

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

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.2 Restitution, Fines, Assessments, Forfeitures

United States v. Hines, 88 F.3d 661 (8th Cir. 1996). The district court erred in imposing a fine of approximately $300,000 based on the fact that the defendant was to receive $1,550,000 in personal injury payments over the next 35 years. The defendant pled guilty to drug and firearm offenses, and challenged on appeal the amount of the fine, arguing that it was excessive and in violation of the Eighth Amendment. He also argued that its terms left his new wife and stepson with no financial support during his incarceration, and that the court overlooked his legal obligation to take care of them. Because the guidelines make no distinction based on when dependants are acquired, the district court erred in ignoring this mandatory sentencing factor, and the circuit court remanded for further proceedings. In dicta the court further expressed concern that the record did not permit a comparison between the amount of the immediately payable fine and Hine's present ability to pay a fine.

§5E1.4 Forfeiture

United States v. Bieri, 68 F.3d 232 (8th Cir. 1995), *cert. denied*, 517 U.S. 1233 (1996). The circuit court held that forfeiture of the defendants' entire farm is required by 21 U.S.C. § 853(a)(2), and the forfeiture is not an excessive fine in violation of the Eighth Amendment. The district court had ordered criminal forfeiture of some of the defendant's property. The government appealed, contending that the district court failed to follow the instruction of the circuit court's prior opinion to forfeit the whole farm. *United States v. Bieri*, 21 F.3d 819 (8th Cir.), *cert. denied*, 513 U.S. 878 (1994). The circuit court stated that to determine whether property is forfeitable under 21 U.S.C. § 853(a)(2), the district court's only inquiry is whether the defendant used the property "in any manner or part" to commit or to facilitate a drug trafficking offense. If the property was used for a drug trafficking offense, the forfeiture is mandatory, not discretionary. The district court at sentencing found that the defendants used parts of their farm to facilitate their drug trafficking offense, thus, the district court should have ordered the entire farm forfeitable under section 853(a). The circuit court then noted that the Eighth Amendment prohibits the government from imposing excessive fines under the Excessive Fines Clause. *Alexander v. United States*, 113 S. Ct. 2766, 2775-76 (1993). The circuit court stated that, "courts must engage in a fact-intensive analysis under the Eighth Amendment Excessive Fines Clause to ensure that the forfeiture is not an excessive penalty, and courts may forfeit less than what the statute requires if necessary 'to preserve the forfeiture by tailoring it to fit within the broad boundaries of constitutional proportionality.'" *Bieri*, 21 F.3d 819. The circuit court listed a number of factors a district court must consider, including extent and duration of the criminal conduct, gravity of the offense weighed against the severity of the criminal sanction, value of the property forfeited, defendant's motive, and the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct. The circuit court examined a number of factors in concluding that the defendants' culpability far outweighed the intangible value of the property, and that the adverse effect of forfeiture on the children does not render the forfeiture unconstitutionally excessive. The circuit court ruled that the district court's decision not to forfeit the farm was not justified by the district court's finding's of fact or by the Eighth Amendment, and reversed the order of the district court.

Part G Implementing the Total Sentence of Imprisonment

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

United States v. Vong, 171 F.3d 648 (8th Cir. 1999). The court did not err in departing from a sentencing range that exceeded the statutory maximum sentence. The sentencing range was 70-87 months, but the statutory maximum was 60 months. The court granted a downward departure under USSG §5K1.1 and sentenced the defendant to 30 months. The defendant argued that the court should have reduced the guideline sentence to 60 months before departing downward. Under USSG §5G1.1 the statutory maximum becomes the guideline sentence when the guideline range is greater than the statutory maximum. The sentence comported with USSG §5G1.1 because the sentence imposed was less than the statutory maximum of 60 months.

§5G1.2 Sentencing on Multiple Counts of Conviction

See United States v. Diaz, 296 F.3d 680 (8th Cir.), *cert. denied,* 537 U.S. 940 (2002), Post-*Apprendi*, p. 81.

§5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment[16]

United States v. Comstock, 154 F.3d 845 (8th Cir. 1998). It was plain error for the district court to apply the 1995 version of USSG §5G1.3(c), rather than the 1993 version in effect at the time Comstock committed his offenses, when sentencing the defendant who was subject to state sentences for some of the same conduct. Under the 1993 version, the court would have sentenced Comstock as if he were being sentenced on his federal and state convictions at the same time under the guidelines. The court of appeals determined that, because the previous version required that Comstock's federal sentence be at least partially concurrent with his state sentences, sentencing him under the 1995 version meant he would have served 17 more months in prison than under the 1993 guideline. The court vacated and remanded for resentencing.

United States v. French, 46 F.3d 710 (8th Cir. 1995). The district court did not err when it credited the defendant for time served in connection with a state perjury conviction because he was serving "an undischarged term of imprisonment" within the meaning of USSG §5G1.3(b) at the time of his federal sentencing. The appellate court also upheld the district court's finding that the defendant's state court perjury conviction was part of the same relevant conduct as the charged conduct for which the defendant was sentenced. Finally, the appellate court rejected the government's contention that the state perjury conviction should be included in defendant's criminal history calculation.

United States v. Marsanico, 61 F.3d 666 (8th Cir. 1995). The circuit court vacated the defendant's sentence because from the record it was unclear what specific factors the district court relied upon when imposing consecutive sentences. The defendant appealed the district court's decision to run the defendant's sentence consecutively to his undischarged Washington sentence. The circuit court concluded that the district court did not follow USSG §5G1.3(c) which states that the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment that approximates the total punishment that would have been imposed under USSG §5G1.2 had all of the offenses been federal offenses for which sentences were imposed at the same time. The circuit court noted that a court may depart from the guidelines when sufficient justification exists, but the court must provide specific reasons for departing. The circuit court held that the district court did not provide specific reasons for departing upward, and remanded for resentencing.

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[16]Effective November 1, 2003, the Commission amended §5G1.3 to address a number of issues that resolved circuit conflicts regarding the application of §5G1.3. *See* USSG App. C, Amendment 660.

United States v. Murphy, 69 F.3d 237 (8th Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996). The district court did not err in its determination that the defendant, who was on parole at the time he committed the federal offense, was serving an undischarged term of imprisonment, thereby triggering USSG §5G1.3(a). The defendant argued on appeal that he should have been sentenced under USSG §5G1.3(c) instead of USSG §5G1.3(a). The circuit court noted that although the district court did not specify which section of USSG §5G1.3 it relied on to sentence the defendant, it was evident from the district court's findings that USSG §5G1.3(a) was applicable to the case. The circuit court recognized that under the Missouri Parole Statute, an "offender on parole remains in the legal custody of the department and subject to the orders of the board." The court further noted that although USSG §5G1.3 has three subsections, the inquiry ends once subsection (a) is applied. The circuit court ruled that the defendant was serving an undischarged term of imprisonment within the meaning of USSG §5G1.3(a) at the time of the federal offense. The circuit court further noted that the phrase in USSG §5G1.3 which discusses work release, furlough or escape status is inclusive and does not diminish the applicability of USSG §5G1.3(a) to parole. The circuit court rejected the defendant's argument that three prior decisions in the Eighth Circuit support his interpretation of USSG §5G1.3. *See United States v. French*, 46 F.3d 710, 717 (8th Cir. 1995); *United States v. Haney*, 23 F.3d 1413, 1414-16 (8th Cir.), *cert. denied*, 513 U.S. 898 (1994), and *United States v. Gullickson*, 981 F.2d 344, 345-48 (8th Cir. 1992). The circuit court held that its ruling in *French* was inapplicable because in French, the federal and state charges arose from the same relevant conduct, thereby triggering the application of USSG §5G1.3(b); and its decision in *Haney* was inapplicable because the case did not raise the issue of whether USSG §5G1.3(c) was applicable.

United States v. O'Hagan, 139 F.3d 641 (8th Cir.), *cert. denied*, 522 U.S. 1133 (1998). The district court did not err in departing downward to give the defendant credit for time served on his expired state sentence for the same conduct. Although the applicable 1987 version of USSG §5G1.3 did not allow for credit in expired sentences, the court of appeals, applying the *Koon* departure analysis, found that the Sentencing Commission did not prohibit the departure. The court concluded that the expired state sentence was an unmentioned or perhaps an encouraged factor, and the district court thus had authority to depart.

See United States v. Otto, 176 F.3d 416 (8th Cir. 1999), §5K2.0, p. 70.

United States v. Terry, 305 F.3d 818 (8th Cir. 2002). The district court correctly determined that subsection (b) of USSG §5G1.3 was inapplicable. On appeal, the defendant argued that the district court erred when it ordered his federal sentences to run consecutively to his undischarged state sentences. Defendant claimed that USSG §5G1.3(b) required the district court to order the federal sentences to run concurrently to the undischarged state sentences because the criminal conduct giving rise to the undischarged state sentences was used to determine the appropriate offense level for the federal sentences. The Eighth Circuit noted that defendant correctly pointed out that USSG §5G1.3(b) mandated that a federal sentence run concurrently to an undischarged state sentence if the offense giving rise to the state conviction was fully taken into account in the determination of the offense level for the federal conviction. In the instant case, the offenses that led to defendant's state convictions, however, were not considered by the district court for sentencing purposes. The presentence report clearly

indicated that defendant's state offenses were not taken into account in determining his offense level under the guidelines. The presentence report also showed that defendant's state convictions were not considered when determining his criminal category. Apart from the presentence report, it was clear that the federal charges were filed because defendant videotaped the abuse and continued to possess the videotapes and the state charges were filed because defendant committed the abusive acts themselves. In other words, the district court had discretion to impose a consecutive sentence because the state and federal offenses were distinct and separate wrongs and because defendant's state convictions did not affect his federal offense level or his criminal history category. Accordingly, the district court correctly determined §5G1.3(b) was inapplicable.

United States v. Washington, 17 F.3d 230 (8th Cir.), *cert. denied*, 513 U.S. 852 (1994). The defendant was convicted of being a felon in possession of a firearm. He appealed the district court's failure to specify whether his sentence was to be concurrent or consecutive with his undischarged state sentences, one of which was for a robbery relating to this firearms offense. The circuit court remanded the case for clarification in light of the requirements of USSG §5G1.3, and directed the district court to make the sentence concurrent to the related state sentence pursuant to USSG §5G1.3(b) because the district court fully considered the conduct supporting the state sentence when it calculated the offense level for the instant offense. Further, the circuit court directed the district court to determine whether USSG §5G1.3(a) applied to the other state sentence, in which case the instant federal sentence may be consecutive; otherwise USSG §5G1.3(c) requires the sentence to be fashioned so that a reasonable incremental increase in punishment will be achieved.

United States v. White, 354 F.3d 841 (8th Cir. 2004). The case was remanded to the district court to determine whether the defendant should be granted a downward departure to account for time served during the pendency of his state court proceedings. The defendant was convicted of being a felon in possession of a firearm. On appeal, the defendant requested that his case be remanded to the district court, claiming that the district court did not recognize its authority to depart under §5G1.3. The Eighth Circuit noted that Application Note 7 to §5G1.3 allowed a departure to account for time already served where the current and prior offense involved the same conduct. Having reviewed the transcript, the court noted that the statements made by the district court indicated that it believed that the determination of whether to credit the defendant for time already served rested with the Bureau of Prisons. The court concluded that because the guidelines allowed for downward departures under circumstances such as the defendant's, it was left with no alternative but to remand for consideration of whether a departure was appropriate.

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Goff, 20 F.3d 918 (8th Cir.), *cert. denied*, 513 U.S. 987 (1994). The district court erred in granting a downward departure to the defendant based on the absence of prior convictions, the "relatively minor nature of the offense," the defendant's advanced age, and the defendant's family responsibilities. These factors have already been taken into consideration by the

Sentencing Commission in formulating the guidelines and the circuit court determined that in this case none of these factors "whether viewed singly or in combination" were so extraordinary as to warrant a departure. *See United States v. Simpson*, 7 F.3d 813, 819 (8th Cir. 1993).

United States v. Rimel, 21 F.3d 281 (8th Cir.), *cert. denied*, 513 U.S. 1104 (1994). The district court did not err in refusing to depart below the applicable guideline range based on the defendant's age. USSG §5H1.1 permits downward departures when the defendant is "elderly and infirm." In this case there was no evidence that the defendant was infirm.

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

United States v. Johnson, 318 F.3d 821 (8th Cir. 2003). The appellate court reversed the district court's grant of a downward departure based on defendant's physical condition. On appeal, the government argued that the district court abused its discretion in granting a five-year downward departure under USSG §5H1.4 based on the defendant's physical condition. The Eighth Circuit stated a defendant's physical condition must be assessed in the light of the situation the defendant would encounter while imprisoned. In other words, an ailment might be called "extraordinary" if it is substantially more dangerous for prisoners than for non-prisoners. *See United States v. Krilich,* 257 F.3d 689, 693 (7th Cir. 2001). In the instant case, defendant's physical impairment, although serious, was not extraordinary. Imprisonment would not constitute more than normal hardship for defendant, nor would it subject him to more than normal inconvenience or danger. Based on the record, there was no finding that defendant's physical impairment would have a substantial present effect on his ability to function within the confines of a prison environment. The defendant's heart problems obviously restricted the scope of his exertional activities, but that would be no more the case in prison than in the outside world; it was in the light of the prison environment that defendant's restrictions must be weighed. The court held that the district abused its discretion in granting the downward departure under USSG §5H1.4.

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

See United States v. Goff, 20 F.3d 918 (8th Cir.), *cert. denied*, 513 U.S. 987 (1994), §5H1.1, page 62.

Part K Departures

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

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[17]Effective April 30, 2003, the Commission, in response to a congressional directive in the 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. Anzalone, 148 F.3d 940 (8th Cir.), *opinion reinstated, reh'g denied*, 161 F.3d 1125 (8th Cir. 1998). The district court erred in denying the defendant's motion to compel the government to move for a substantial assistance departure based on a plea agreement. The government based its refusal on information that the defendant had recently possessed and used controlled substances. The court of appeals held that USSG §5K1.1 and 18 U.S.C. § 3553(e) do not give prosecutors a general power to control the length of sentences: the prosecutor's discretion is limited to the substantial assistance issue. Therefore, the government cannot base its USSG §5K1.1 decision on factors other than the substantial assistance provided by the defendant. The government may advise the sentencing court if there are unrelated factors that in the government's view should preclude or severely restrict any downward departure relief. The district court may weigh such alleged conduct in exercising its departure discretion.

United States v. McClure, 338 F.3d 847 (8th Cir. 2003). The appellate court affirmed the district court's refusal to order the government to file a substantial assistance motion. The defendant pled guilty to conspiracy to distribute 500 grams or more of methamphetamine. Before the sentencing hearing, the government informed defendant that it was not going to file a substantial assistance motion. The defendant moved for an order to compel, but the district court denied the motion. The defendant was facing a ten-year mandatory minimum sentence, however the government agreed not to oppose application of the safety valve provision. At sentencing, the district court found that the defendant qualified for the safety valve which allowed her to bypass the mandatory minimum and to receive a two-level reduction. The district court also gave her another two-level reduction as a minor participant and a three-level reduction for acceptance of responsibility. The defendant was sentenced to 46 months. On appeal, the defendant argued that the government should have been required to file a substantial assistance motion. More specifically, the defendant argued that the district court should have granted her motion to compel because she had met her cooperation responsibility but was being punished for using drugs while on pretrial release. The Eighth Circuit noted that a plea agreement in which the government specifically retained its discretion under §5K1.1 will defeat a motion to compel unless the defendant is able to show unconstitutional motive or bad faith. In the instant case, the plea agreement spelled out in very specific detail that a substantial assistance motion was only a potential benefit of the defendant's cooperation and that whether it would be made was within the sole discretion of the government. The record showed that the government's clear position was that it did not believe that the defendant's assistance had been substantial and its only comment about her drug use was that it undercut the defendant's value as a future witness. Therefore, the district court did not abuse its discretion by denying the motion to compel; the sentence was affirmed.

United States v. Stockdall, 45 F.3d 1257 (8th Cir. 1995). The district court did not err in finding that the government neither violated the defendants' plea agreements nor exceeded its authority under 18 U.S.C. § 3553(e) by limiting its substantial assistance motions to only one of the defendants' applicable mandatory minimum sentences. The defendants argued that they were entitled to specific performance of their understanding of the plea agreements, in light of the government's failure to advise them that it might limit any section 3553(e) motion it filed. The defendants claimed that they reasonably construed the agreements as requiring that any section 3553(e) motion the government elected to file would apply to all of their mandatory minimum sentences, and that based on the discussion in *United*

States v. De La Fuente, 8 F.3d 1333, 1337-39 (9th Cir. 1993), their reasonable understanding of the plea agreements was controlling. The circuit court rejected this argument, ruling that the fact that the plea agreements were silent on this issue does not permit a defendant to assume that the government would file an unlimited section 3553(e) motion. Moreover, the circuit court held that the government was permitted to limit its substantial assistance motion because "the plain language of section 3553(e) authorizes the government to make a substantial assistance motion decision for each mandatory minimum sentence to which the defendant is subject." However, the district court erred in allowing the government to limit its substantial assistance motions to only one of the defendants' applicable mandatory minimum sentences based on its interest in reducing the district court's discretion to depart from the government's suggestion of the appropriate total sentences.

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

United States v. Allery, 175 F.3d 610 (8th Cir. 1999). The case was remanded for resentencing because the district court granted a downward departure based on both valid and invalid grounds. The valid ground for departure was based on the relatively minimal amount of force used to commit abusive sexual contact. The defendant had forced himself on the victim while she was asleep, but she freed herself when she woke up. The degree of force involved was the minimal amount necessary to sustain a conviction, making the case atypical enough to warrant a downward departure. Because the "case almost necessarily falls outside the heartland of cases that the applicable guideline covers," the court's finding did not amount to an abuse of discretion. The district court erred in concluding that the defendant's lack of criminal behavior before and after being convicted on the instant offense supported a departure based on "aberrant behavior." Simply obeying the law following a conviction does not take a case out of the heartland. Further, "aberrant behavior" must be a "spontaneous and seemingly thoughtless act," but here, the defendant's acts required planning.

United States v. Bieri, 21 F.3d 811 (8th Cir. 1993), *cert. denied*, 513 U.S. 878 (1994). The district court's refusal to depart may only be reviewed if there is evidence that the district court believed that it had no authority to depart. *See United States v. Evidente*, 894 F.2d 1000 (8th Cir.), *cert. denied*, 495 U.S. 922 (1990). The district court did not err in refusing to depart because the defendants were the parents of young children. Under USSG §5H1.6, family ties and responsibilities are not relevant in determining whether a departure should be granted unless they are extraordinary and fall outside the "heartland" of cases taken into consideration by the guidelines. *United States v. Harrison*, 970 F.2d 444, 447 (8th Cir. 1992). The circuit court found this situation to be analogous to *Harrison*, in which a single parent was incarcerated and the court held that although the impact on the children was detrimental, it did not amount to "extraordinary circumstances outside the heartland of cases considered by the guidelines," and should not be considered. Finally, the defendant mother's

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[18]Effective April 30, 2003, the Commission, in response to a congressional directive under the 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.

first-time offender status did not justify a downward departure based on "aberrant behavior." The structure of the sentencing table accounts for the absence of a criminal record. *See* USSG §5H1.8; *see also United States v. Simpson*, 7 F.3d 813, 819 (8th Cir. 1993) (departure based solely on first time offender status is improper).

United States v. Chapman, 356 F.3d 843 (8th Cir.), *cert. denied*, 124 S. Ct. 1701 (2004). The appellate court remanded for the district court to consider the defendant's request for a downward departure based on his post-offense rehabilitation. The defendant was convicted of conspiring to distribute marijuana. On appeal, the defendant argued that the district court erred in denying him a downward departure based on his post-offense rehabilitation. The Eighth Circuit held that atypical post-offense rehabilitation could by itself be the basis for a departure under §5K2.0. Atypical post-offense rehabilitation did not necessarily require the defendant accepting responsibility or commencing rehabilitative efforts before his arrest. For example, the court noted that a defendant admitting his wrongdoing to his family and friends was evidence that a district court could take into consideration when determining if a defendant's post-offense rehabilitation was genuine and extraordinary as required for a §5K2.0 departure. The absence of an acceptance of responsibility did not necessarily preclude a departure under §5K2.0: it would simply make it more difficult for a defendant to prove that his rehabilitation was genuine and atypical. Likewise, pre-arrest rehabilitative efforts may better demonstrate a defendant's sincere desire to change his or her life than post-arrest efforts that may be tainted by a motive to appear reformed. Ultimately, only the atypicality of a defendant's post-offense rehabilitation determined whether a §5K2.0 downward departure was appropriate. The court held that the timing of a defendant's pre-sentencing rehabilitative efforts and his failure to be accountable for his crime did not necessarily preclude a §5K2.0 downward departure for extraordinary post-offense rehabilitation. The case was remanded to the district court so it could assess whether the defendant's post-offense rehabilitative efforts were truly extraordinary.

United States v. Colbert, 172 F.3d 594 (8th Cir. 1999). The district court did not err in denying the defendant's request for a downward departure based on susceptibility to abuse in prison, victim provocation, and family circumstances. The defendant, a police officer, was convicted of a civil rights violation under color of law for assaulting a prisoner. Although in *Koon v. United States*, 116 S. Ct. 2035 (1996), the Supreme Court upheld a departure based on susceptibility to abuse in prison and victim provocation, the facts of that case are distinguishable. Unlike the instant case, the Rodney King incident involved a "torrent of national publicity" and the victim had "physically threatened" the defendant. In addition, the impact of the defendant's incarceration on his family is not out of the ordinary.

United States v. Cole, 357 F.3d 780 (8th Cir. 2004). The appellate court reversed the district court's upward departure. The defendant called a 911 operator and stated, "Anthrax is in one of your schools now. Final warning." The defendant pled guilty to transmitting a threat in interstate commerce. At sentencing, the district court departed upward five levels based on the following four factors: 1) the disruption of governmental functions caused by the defendant's call – §5K2.7; 2) the significant danger to the public health and safety posed by defendant's call – §5K2.14; 3) the defendant's recidivistic tendencies; and 4) the timing of the offense. The defendant appealed the

upward departure. The Eighth Circuit stated that the district court's reliance on §5K2.7 was misplaced. In the instant case, the specific offense characteristics of §2A6.1 already provided for an increase in the base offense level if governmental functions are substantially disrupted. Because the district court did not increase the defendant's base offense level under this provision, it erred in departing based on §5K2.7. By not increasing the base offense level, the district court implicitly found the governmental functions of the school and mail delivery system were not disrupted to a substantial degree. Accordingly, the district court was presented with facts insufficient to warrant a departure under §5K2.7 and erred in departing where the base offense level was left untouched by the disruption of governmental functions. Similarly, the facts appearing in the record did not satisfy a departure based on §5K2.14. By all indications defendant's threat was empty. The defendant did not send anthrax to the school and had no means to carry out his threat. So the defendant's conduct posed no danger to national security, public health, or safety. The court noted that although it had not addressed the application of §5K2.14, cases from other circuits generally supported the notion that a real, as opposed to an empty threat must be present. See United States v. Leahy, 169 F.3d 433 (7th Cir. 1999). While the defendant's assertion likely caused a significant degree of apprehension amongst law enforcement officers and school personnel, apprehension was not the same as significant endangerment. The court concluded that given the flaws in the application of §§5K2.7 and 5K2.14, it could not conclude either section justified an upward departure, even in light of the timing of the offense. The case was remanded to the district court for resentencing.

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

United States v. DeShon, 183 F.3d 888 (8th Cir. 1999). The district court did not abuse its discretion in granting a downward departure based on post-offense rehabilitation. The defendant pled guilty to income tax evasion, money laundering, and interstate transportation of property by fraud. The court departed from a guideline range of 30 to 37 months and imposed a sentence of five months' community confinement without work release and two years of supervised release with a special condition of five months' home confinement. During investigation of the offense, but before indictment, the defendant "made a decision to radically alter his lifestyle" and "renewed his life in church." Witnesses at the sentencing hearing, including victims of the defendant's crime, testified that the defendant frequently attended church services, participated in counseling, admitted to the community his guilt and shame. In addition, a pretrial services officer testified that the defendant's efforts at rehabilitation were "extraordinary." The "concrete change of life," was "exceptional enough to be atypical of cases in which the acceptance of responsibility reduction is usually granted." In response to

the government's objection to the extent of the departure, the appellate court stated that "[a] district court is not required to explain, mechanically and in detail, why it rejected each offense level.

United States v. Heilmann, 235 F.3d 1146 (8th Cir. 2001). The defendant pled guilty to a charge of traveling interstate to promote and facilitate the commission of felony drug offenses. At sentencing, the district court relegated one of the defendant's criminal history points for trespassing to a "family feud," as suggested by the defendant's motion for downward departure. This resulted in lowering the defendant's criminal history to category I. If the trespassing count had been included, the defendant would have had a criminal history category of level II. On appeal, the government argued that the district court provided no factual basis for its downward departure. The court agreed that the lower court abused its discretion and remanded for resentencing.

United States v. Hipenbecker, 115 F.3d 581 (8th Cir. 1997). In a case of first impression, the appellate court affirmed the district court's decision to depart upward under USSG §5K2.0 and to deny the defendant's request for a downward adjustment for acceptance of responsibility under USSG §3E1.1 based on a single act of criminal conduct. The defendant asserted that the district court impermissibly double-counted. The defendant committed embezzlement while she was free on bond pending her federal sentencing. Based on her continued criminal conduct, the district court departed upward two levels under USSG §5K2.0 and declined to grant the request for a two-level reduction under USSG §3E1.1. The circuit court reviewed the decision *de novo* and affirmed, citing with approval the Eleventh Circuit's reasoning in *United States v. Aimufua*, 935 F.2d 1199 (11th Cir. 1991). The double-counting test is two pronged. It is permissible if 1) the Commission intended the result, and 2) each statutory section concerns "conceptually separate notions relating to sentencing." Regarding the first prong, the policy statement for USSG §5K2.0 specifically states that the court may depart for a reason already considered in the guideline "(*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate." Regarding the second prong, USSG §3E1.1's commentary provides that further criminal conduct is an example of conduct that is inconsistent with acceptance of responsibility. This additional criminal conduct can also be considered under Chapter Four for criminal history. "[T]he Commission necessarily contemplated double-counting when it created USSG §3E1.1."

United States v. Lopez-Salas, 266 F.3d 842 (8th Cir. 2001). The Eighth Circuit held that deportable-alien status and the collateral consequences flowing from that status can serve as a basis for departure. The defendants were convicted of various drug offenses and were sentenced to 156 months and 96 months respectively. Before sentencing, the INS filed a detainer against each defendant, designating them as aliens subject to deportation at the end of their sentences and making them ineligible for certain benefits, such as early release upon completion of a drug-treatment program or placement in a minimum security facility. Consequently, the district court found that the defendants were subject to harsher sentences based on their deportation status and departed downward. The Government appealed the departure. The court joined the Seventh, Ninth, and District of Columbia Circuits in holding that alien status and its collateral consequences may be considered as a basis for departure. Because the departure may not always be appropriate, the district court must nonetheless justify the

departure on specific grounds. Because the defendants failed to distinguish their situations as unusual or atypical from other defendants who would be ineligible for the same benefits, the court reversed the departure. *Cf. United States v. Cardosa-Rodriguez*, 241 F.3d 613, 614 (8th Cir. 2001) (holding that deportable-alien status can not be considered as a basis for departure when the defendant was sentenced under USSG §2L1.1. Because deportable-alien status is an element of the offense, it alone cannot take the case outside the guideline's heartland.). *See also United States v. Sera*, 267 F.3d 872 (8th Cir. 2001) (holding that counsel's failure to move for downward departure based on defendant's deportable-alien status or his willingness to waive objection to deportation did not establish an ineffective assistance of counsel claim).

United States v. Martin, 195 F.3d 1018 (8th Cir. 1999). The defendant pled guilty to one count of being a felon in possession of a firearm. Because the defendant's prior conviction was based on stalking and harassment, and the second conviction was very similar to previous dangerous behavior, the district court departed upwards. On appeal, the defendant argued that the district court erred in departing upwards under USSG §5K2.9 for committing "the offense in order to facilitate or conceal the commission of another offense." *Id*. at 1019. The court held that the upward departure was appropriate given the circumstances of both offenses.

United States v. Merrival, 176 F.3d 1079 (8th Cir. 1999). The district court did not err in imposing a 12-level upward departure based on death and physical injury. The defendant's involuntary manslaughter conviction resulted from a drunk driving incident, during which the defendant lost control of his car and struck two parked cars, causing the death of two occupants and serious injuries to three others. The court at sentencing mentioned four grounds for departure including (1) extensive involvement of alcohol, (2) two deaths, (3) three people seriously injured, and (4) "the defendant's prior criminal record consisting solely of tribal arrests." In imposing the sentence, however, the court mentioned only death and injury. Ordinarily when a court bases a departure on valid and invalid grounds, the case is remanded for resentencing. The guidelines authorize a court to depart based on death or significant injury. These two factors are sufficient to support the 70-month sentence imposed, although the district court "acted at the outermost limits of its discretionary authority."

United States v. Moskal, 211 F.3d 1070 (8th Cir. 2000). The defendant was an attorney and partner at a prominent law firm. He was convicted of embezzling large sums of money from the law firm and its clients. The district court notified all parties that an upward departure may be warranted. At sentencing, the district court departed upwards based on five findings: 1) the embezzlement involved a large number of vulnerable victims; 2) the defendant manipulated these victims to gain their trust; and 3) the defendant employed a number of methods to defraud his victims; 4) the defendant's conduct damaged the law firm's goodwill and standing in the legal community; and 5) the defendant's conduct adversely impacted the legal profession and justice system. *Id*. at 1073. The Court found all five factors for departure to be permissible under the guidelines. *See also United States v. Sample*, 213 F.3d 1029, 1032 (8th Cir. 2001) (upholding upward departure based on extreme degree of psychological injury to victims of identity theft when defendant was properly notified of the potential for departure). *Cf. United States v. Lewis*, 235 F.3d 394, 397 (8th Cir. 2000) (affirming upward departure based on extreme psychological injury when an illegal alien was held captive and subject to

abuse); *United States v. Loud Hawk*, 245 F.3d 667, 670 (affirming ten-level upward departure based on extreme barbaric circumstances in the murder of defendant's parents).

United States v. Newlon, 212 F.3d 423 (8th Cir. 2000). The defendant pled guilty to being a felon in possession of a firearm. Prior to arrest, the defendant had, at his own request, attended a program aimed at treating his alcohol and drug addictions. The district court departed downwards because of the extraordinary rehabilitative effort the defendant had made considering his environmental circumstances and IQ. On appeal, the government argues that IQ and environmental circumstances are discouraged departure factors under the guidelines. *Id*. at 137. The court determined that the district court's downward departure was actually based on the defendant's rehabilitative effort, rather than on discouraged factors. Thus, the district court did not abuse its discretion.

See United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998), §5G1.3, p. 61.

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

United States v. Rodriguez-Ochoa, 169 F.3d 529 (8th Cir. 1999). The district court properly denied the defendants' request for a downward departure based on their mistaken belief that they were transporting marijuana rather than methamphetamine. The nature of a controlled substance is relevant only as a sentencing factor, and the guidelines manual already takes into account a drug "defendant's mistake of fact on his or her sentencing accountability." *See* USSG §1B1.3, comment. (n.2(a)(1)).

United States v. Sheridan, 270 F.3d 669 (8th Cir. 2001). The defendant pled guilty to sexual abuse of a minor child more than four years younger than himself within an Indian reservation, in violation of 18 U.S.C. §§ 2243(a) and 1153. The district court erred in departing downward because the victim was apparently promiscuous, having given the defendant a sexually transmitted disease. The appellate court found that this was an impermissible ground for departure, stating that USSG §1A3.2 already adequately takes into account a victim's willingness to engage in the act. *Id*. at 672.

United States v. Webb, 218 F.3d 877 (8th Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001). The defendant pled guilty to one count of conspiracy to possess with intent to distribute marihuana. The defendant's criminal history placed him in Criminal History Category III. After considering the

defendant's criminal history, the district court found that level III overstated the seriousness of the defendant's past criminal conduct. Consequently, the district court departed downwards to place the defendant in Criminal History Category I. After the departure, the defendant requested application of the safety valve, USSG §5C1.2. The district court determined that the safety valve requires that the defendant have not more than one criminal history point and thus refused to apply the safety valve. On appeal, the defendant argued that the district court erred in tallying his criminal history points when it considered him ineligible for safety valve relief. *Id*. at 878. The court held that nothing in USSG §4A1.3, "the provision under which the district court shifted [the defendant] into a lower criminal history category, indicates that a category change under this provision deletes previously assessed criminal history points for the purposes of the [safety valve] analysis." *Id*. at 881. Therefore, the defendant was not eligible for safety valve relief.

United States v. Weise, 89 F.3d 502 (8th Cir. 1996). The district court erred in granting a downward departure to the defendant under USSG §5K2.0. The defendant, who lives on the Red Lake Reservation, was convicted of second degree murder for stabbing an individual after a night of drinking. The district court departed downward based on the difficult reservation conditions, the defendant's consistent employment record and unique family ties and responsibilities. The district court also determined that a departure was warranted based on the fact that the conduct was a single act of aberrant behavior. The circuit court reviewed this decision under the abuse of discretion standard. The circuit court stated that departures based on trying conditions on a reservation were not authorized if the defendant does not demonstrate that he himself had struggled under difficult conditions. *See United States v. Haversat*, 22 F.3d 790, 795 (8th Cir. 1994); *United States v. One Star*, 9 F.3d 60, 61 (8th Cir. 1993). In short, merely living on a reservation where conditions are difficult for some is not dispositive. The circuit court found that the defendant did not demonstrate personal difficulties on the reservation, and that the pre-sentence report showed a good family upbringing and no evidence of physical or sexual abuse. Finding that it could not determine what made the defendant's case different from the typical case, the circuit court remanded for a "refined assessment" of the issue. On the issue of departure based on aberrant behavior, the circuit court stated that aberrant behavior is more than being out of character and contemplates an action that is "spontaneous and seemingly thoughtless." *United States v. Garlich*, 951 F.2d 161, 164 (8th Cir. 1991). Noting that the defendant, unprovoked, went and got a knife from across the room and returned to stab the victim, the circuit court found that the conduct was not a single act of aberrant behavior.

United States v. Woods, 159 F.3d 1132 (8th Cir. 1998). The district court did not abuse its discretion in granting a downward departure based on the nature of the defendant's money laundering offense and the defendant's charitable activities. The court found that USSG §2F1.1, the guideline for the underlying offense, was more appropriate than USSG §2S1.1, the money laundering guideline. The defendant's underlying offense was bankruptcy fraud, and therefore fell outside the "heartland" of the typical money laundering offense. This finding is supported by the Sentencing Commission's extensive study of the money laundering guidelines, statements made in a report of the House Judiciary Committee in rejecting proposed money laundering amendments, the Department of Justice report on charging practices, and the Commission's response to that report. The district court granted an additional departure based on the defendant's charitable activity. The defendant's exceptional efforts

to provide for two troubled young women and an elderly friend provided an appropriate basis for departure.

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

See United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998), §1B1.2, p. 1.

United States v. Yellow, 18 F.3d 1438 (8th Cir. 1994). The district court did not err in departing upward for extreme psychological injury where the defendant was convicted of raping his younger brother, who suffers from cerebral palsy, and younger sister. The circuit court held that the district court was entitled to rely upon a psychologist's professional opinion regarding the severity and likely duration of psychological harm suffered, and that the district court's 72-month upward departure was reasonable for the severe psychological injury the defendant inflicted on his victims.

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

United States v. Archambault, 344 F.3d 732 (8th Cir. 2003). The appellate court affirmed the district court's application of an upward departure under USSG §5K2.7. The defendant pled guilty to one count of arson. At sentencing, the district court upwardly departed under USSG §5K2.7. On appeal, the defendant challenged the departure, arguing that a Native American Tribal District was not a "governmental entity" for purposes of USSG §5K2.7. The Eighth Circuit disagreed with the defendant's argument. The court stated that the Rock Creek District was a recognized governing authority of the Standing Rock Sioux Tribe–a sovereign entity under federal law. *See* Act of Mar. 2, 1889, ch. 405, § 3, 25 Stat. 888, 889 (codified as amended 25 U.S.C. §§ 476, 477). As such, it was a body of persons that constituted the governing authority of the Standing Rock Sioux Tribe and was a "governmental entity" under USSG §5K2.7. The court held that the upward departure was justified because the facts showed that defendant's arson significantly interrupted a governmental function. The Rock Creek District used as its governmental function the vans that the defendant destroyed or damaged to deliver meals on wheels, to transport district youth to community events, and to provide transportation to community members for travel. While the disruption did not stop the meals on wheels program, the district chairman testified the loss caused many of the other members of the community to lose their source of transportation for three months. Accordingly, the district court's upward adjustment pursuant to USSG §5K2.7 was affirmed.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Clark, 45 F.3d 1247 (8th Cir. 1995). The district court did not err in imposing a 24-month upward departure for extreme conduct based on its finding that the defendant degraded and terrorized his victim during the commission of a carjacking. In particular, the defendant had stuck a gun to the victim's head, traveled around with the victim still in the car, robbed him, and repeatedly told him that he was going to die. In the district court's evaluation, the defendant terrorized, abused and debased the victim, conduct sufficiently unusual to warrant an upward departure. The defendant argued that the factors on which the district court relied–abduction of the victim and use of a

firearm–had already been taken into account in the carjacking and firearms guidelines under which he was sentenced. The circuit court agreed that these factors had already been into account, but cited USSG §5K2.0 and *United States v. Joshua*, 40 F.3d 948, 951-52 (8th Cir. 1994), in concluding that the upward departure was still justified because these factors were present to a degree substantially in excess of that which is ordinarily involved in the offense. Additionally, the fact that the victim was not physically harmed did not preclude a USSG §5K2.8 upward departure–criminal conduct that does not cause physical harm may nonetheless be "unusually heinous, cruel, brutal or degrading to the victim" such that an upward departure is warranted. *See United States v. Perkins*, 929 F.2d 436 (8th Cir. 1991).

See United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998), §1B1.2, p. 1.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Premachandra, 32 F.3d 346 (8th Cir. 1994). The district court correctly determined, by considering the facts and circumstances of the robbery for which the defendant was convicted, that the defendant's offense was not a "nonviolent offense," pursuant to USSG §5K2.13. The court declined to address the government's request to define "nonviolent offense" by referring to USSG §4B1.2(1)(I), which defines nonviolent offense as one that does not have "as an element the use, attempted use, or threatened use of physical force against the person of another." The court further found that the actions taken by the appellant, specifically, wearing a facial disguise, covering the rear license place of the getaway vehicle and entering the bank with an empty briefcase, were inconsistent with a "single act of aberrant behavior."

United States v. Woods, 359 F.3d 1061 (8th Cir. 2004). The appellate court affirmed the district court's denial of a downward departure pursuant to §5K2.13. The defendant pled guilty to a bank robbery. The defendant was unarmed at the time of the robbery, but he eventually walked out of the bank with $19,800. The issue on appeal was the interpretation of the text of §5K2.13 which was substantially amended in 1998. The district court, in denying a downward departure, relied on *United States v. Petersen,* 276 F.3d 432 (8th Cir. 2002). The Eighth Circuit noted that although it affirmed the district court based on *Petersen,* it registered a respectful disagreement with the reasoning, though not the result of that case. The *Petersen* decision restated the court's interpretation of the pre-November 1998 guideline. When the Commission amended §5K2.13, it identified the court's interpretation of the old policy statement as one of two divergent views that created a conflict in the circuits. The court noted the Commission's "compromise approach" to resolving the conflict meant it did not intend to endorse one of the two polar positions, and that the broad categorical rule stated by *Petersen* did not survive the amendment. The Eighth Circuit stated that, under amended §5K2.13, the sentencing court was to focus on the facts and circumstances of the defendant's offense, not on the elements of the offense, as under the court's interpretation of the old version. The new policy statement required the court to analyze whether the facts and circumstances involved a serious threat of violence, rather than whether the offense qualified as a "crime of violence" under §4B1.2(a). The court concluded by stating that if and when its full court decided to review its precedent *en banc*, then it would be appropriate to consider whether a district court has authority to entertain a departure under

amended §5K2.13 if it concludes that the facts and circumstances of a particular bank robbery do not involve actual violence or a serious threat of violence.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part B Plea Agreements

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

Morris v. United States, 73 F.3d 216 (8th Cir. 1996). The district court did not err in allowing the government to cross-examine a clinical psychologist at the sentencing hearing. The defendant set her unfaithful husband's bed on fire on a military reservation, and pled guilty to assault with intent to do bodily injury, 18 U.S.C. § 113(c). The plea agreement bound the government to take no position on a defense motion for a downward departure on the ground that the act was a single act of aberrant behavior. At the sentencing hearing, the defense called a clinical psychologist to testify about domestic violence. When the testimony began to develop additional expert testimony about spousal abuse, the government examined the witness to try to narrow the source of domestic turbulence to the incident of marital infidelity. The defendant argued that the government violated the plea agreement by "taking a position." In a case of first impression in the Eighth Circuit, the appellate court addressed the "boundaries of 'taking a position' on departures from guideline sentences." The court noted that the control of cross- examination during a sentencing hearing "must be guided by specific facts and argument in each case." The court stated that there is no "black letter list of permitted and not permitted questions" at a sentencing hearing. The court in refusing to establish a black letter rule, held ". . . only that in this case where the witness began to shift the focus of the grounds for a downward departure from the agreed fact that marital infidelity had precipitated the offense, to a larger collection of grievances based upon spousal abuse, the prosecutor had the right to employ reasonable cross-examination to bring the inquiry back to the agreed facts."

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

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

United States v. Hartman, 57 F.3d 670 (8th Cir. 1995). The district court did not err in imposing an additional term of supervised release after a term of imprisonment following revocation of the defendant's initial term of supervised release. Following revocation of his initial term of supervised release, the defendant was sentenced to nine months' imprisonment and 27 months' supervised release. On appeal, the defendant acknowledged that the circuit court has repeatedly held that a revocation sentence imposed under 18 U.S.C. § 3583(e) may include imprisonment and supervised release. *See, e.g.*, *United States v. Love*, 19 F.3d 415, 416 (8th Cir.), *cert. denied*, 513 U.S. 967 (1994); *United States v. Schrader*, 973 F.3d 623, 625 (8th Cir. 1992). The circuit court noted that it could not overrule another panel's decision and that it had consistently declined to reconsider *Schrader en banc*. The circuit court rejected the defendant's argument that the express language in 18 U.S.C. § 3583(h) allowing courts to impose a revocation sentence consisting of both imprisonment and supervised release, indicates that the circuit court had previously misinterpreted 18 U.S.C. § 3583(e) which lacked

such express language. The court noted that the legislative history of section 3583(h) indicates that the new legislation was intended to confirm the court's interpretation of the prior law.

United States v. St. John, 92 F.3d 761 (8th Cir. 1996). The appellate court affirmed the district court's decision to impose a revocation sentence that included both a term of imprisonment and a term of supervised release pursuant to 18 U.S.C. § 3583(h). Upon revocation of supervised release, the defendant was sentenced to 14 months' imprisonment to be followed by 22 months' supervised release, totaling 36 months, the length of his original term of supervised release. The defendant, relying on the Ninth Circuit's construction of the statute, argued that at the time he was sentenced, 18 U.S.C. § 3583(e)(3) had been interpreted as not authorizing supervised release upon revocation of supervised release. Additionally, the defendant argued that section 3583(h), which increases the penalty for the offenses, was enacted subsequent to his conviction. The appellate court rejected the defendant's arguments, and held that the *Ex Post Facto* Clause did not apply to judicial constructions of statutes. Additionally, because the availability of supervised release under 18 U.S.C. § 3583(h) did not increase the penalty authorized under 18 U.S.C. § 3583(e)(3), there was no *ex post facto* violation.

United States v. Stephens, 65 F.3d 738 (8th Cir. 1995). The district court did not err in applying the mandatory revocation requirement of 18 U.S.C. § 3583(g)(3). The defendant appealed the district court's revocation of his supervised release, arguing that the court erred by considering his need for medical treatment for AIDS in deciding to revoke supervised release. The circuit court concluded that it was immaterial that the district court took the defendant's need for medical treatment into account when it ordered revocation of his supervised release. The circuit court stated that this case was controlled by 18 U.S.C. § 3583(g), providing in part: "If the defendant . . . (3) refuses to comply with drug testing imposed as a condition of supervised release . . . the court shall revoke the term of supervised release." The circuit court held that the defendant's failure to comply with the drug testing conditions imposed by the district court was a knowing and willful violation, and therefore he was subject to the mandatory revocation requirement of 18 U.S.C. § 3583(g)(3).

United States v. Wilson, 37 F.3d 1342 (8th Cir. 1994). The defendant was sentenced to 30 months' imprisonment and 4 years' supervised release upon his plea of guilty to conspiring to possess and distribute marijuana. While on supervised release, he admitted that he had used marijuana, violating a condition of his supervised release. His supervised release was revoked pursuant to 18 U.S.C. § 3583(e)(3), and he was sentenced to 16 months' imprisonment and an additional term of supervised release equal to "the remainder of term upon completion of 16-month incarceration period." The defendant appealed his revocation sentence, and urged the court to reconsider its decision in *United States v. Schrader*, 973 F.2d 623, 625 (8th Cir. 1992), which permits a district court to "require the offender to serve a portion of the time remaining on the term of supervised release in prison and the remaining time on supervised release." The appellate court noted that it had no authority to overrule a prior panel decision, and that the court had declined on numerous occasions to reconsider *Schrader en banc*. In any event, the appellate court noted that the remaining time on the original supervised release term would expire some six or seven months after the defendant served the 16 months' imprisonment, so that his total revocation sentence would not exceed two years. This is well

within the three-year limit on imprisonment set by 18 U.S.C. § 3583(e)(3), and the sentence was affirmed.

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

United States v. Hendricks, 171 F.3d 1184 (8th Cir. 1999). The district court erred in sentencing a defendant who qualified for the safety valve to a period of supervised release that applied to the otherwise applicable mandatory minimum statute. When a defendant meets the criteria for the safety valve, the court must sentence the defendant without regard to any statutory minimum. The applicable term of supervised release under the guidelines was three to five years, but the court felt it was constrained to impose the ten-year term mandated by statute and found that a ten-year term was "appropriate." The commentary to USSG §5C1.2 specifically provides that a defendant who qualifies for the safety valve is "exempt from any otherwise applicable . . . statutory minimum term of supervised release." USSG §5C1.2, comment. (n.9). Although a court may depart upward, the court's statement that a ten-year term was "appropriate" does not provide grounds for departure.

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

United States v. Shaw, 180 F.3d 920 (8th Cir. 1999). The district court did not err in imposing a revocation sentence of 24 months in prison to be followed by three years of supervised release, even though policy statements in Chapter Seven provided for a revocation sentence of three to nine months. Because Chapter Seven policy statements are merely advisory and not binding, the 24-month sentence was not an upward departure and the defendant was not entitled to notice of that the sentence would exceed the recommended range. The revocation sentence did not amount to an abuse of discretion because the defendant repeatedly failed to submit to drug tests and needed long-term intensive drug treatment.

United States v. Rodriguez-Favela, 337 F.3d 1020 (8th Cir. 2003). The appellate court affirmed the district court's revocation sentence that fell within the maximum limitation stated in 18 U.S.C. § 3583(e). In 1999, the defendant pled guilty to illegal reentry after deportation. He was sentenced to 20 months of imprisonment and 3 years of supervised release. In 2001, an undercover police officer arrested the defendant after the defendant had sold him 1.5 grams of marijuana. The defendant pled guilty to illegal reentry after deportation thereby admitting that he had also violated the special condition of his supervised release that provided he would not illegally reenter the United States. At sentencing, the government moved for an upward departure on the new illegal reentry conviction. The district court denied the motion and sentenced defendant to consecutive sentences of 30 months of imprisonment and 3 years of supervised release for the new illegal reentry conviction and 24 months of imprisonment for the supervised release violation. The defendant appealed only the supervised release revocation sentence. On appeal, the defendant argued that the government's motion for an upward

departure for the illegal reentry conviction deprived him of his due process rights on the ground that he had no notice that the government would seek a greater punishment than that set forth in the plea agreement. The Eighth Circuit noted that the defendant's argument was meritless. The district court denied the government's upward departure motion and sentenced defendant within the statutory maximum and within the sentence contemplated in the plea agreement. Therefore, even absent the notice, the defendant had suffered no cognizable injury. The defendant also argued that the government's motion for an upward departure violated his due process rights because the motion influenced the district court to increase the revocation sentence. The court noted that this argument was equally meritless. The court concluded that absent an abuse of discretion, it would not vacate a revocation sentence that fell within the maximum limitation stated in 18 U.S.C. § 3583(e). The district court's sentence was affirmed.

APPLICABLE GUIDELINES/*EX POST FACTO*

United States v. Behler, 14 F.3d 1264 (8th Cir.), *cert. denied*, 513 U.S. 960 (1994). The district court erred in sentencing the defendant pursuant to the guidelines in effect at the time of sentencing instead of the version in effect at the time he committed the offense. The defendant argued that his sentence for methamphetamine distribution violated the *ex post facto* clause because the method used to determine the quantity of methamphetamine imposed harsher penalties than the method in effect at the time the defendant committed his offense. Under the 1987 version, the quantity of methamphetamine was determined by the weight of the entire mixture or substance containing the methamphetamine. Under the 1992 version, the quantity of methamphetamine is determined by either the actual weight of the drug contained in the mixture or substance or by the weight of the entire mixture or substance containing the methampheta-mine. The guidelines then require that the court use the quantity that results in the higher offense level. The district court used the actual weight which produced a base offense level that was four levels higher than what would have been imposed under the 1987 version of the guidelines. Thus, the Eighth Circuit remanded with instructions to resentence the defendant according to the guidelines in effect at the time he committed the offense.

See United States v. Comstock, 154 F.3d 845 (8th Cir. 1998), §5G1.3, p. 60.

CONSTITUTIONAL CHALLENGES

Sixth Amendment

United States v. Hughes, 16 F.3d 949 (8th Cir.), *cert. denied*, 513 U.S. 897 (1994). The defendant pled guilty to using a firearm in drug trafficking and was sentenced to the statutorily mandated five-year prison sentence. He appealed his sentence claiming he constructively lacked counsel at his sentencing hearing thereby violating his Sixth Amendment right to counsel. The circuit court affirmed his sentence, finding that the defendant's counsel did not ask to be withdrawn until after the sentencing and the defendant made no request for alternative counsel prior to that. *Cf. United States v. Mateo*, 950 F.2d 44 (1st Cir. 1991). Defense counsel's role at sentencing was necessarily limited because of the mandatory minimum sentence involved.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Osment, 13 F.3d 1240 (8th Cir. 1994). The court reversed and vacated the defendant's guilty plea because the district court failed to advise him of the mandatory supervised release term to which he was subject. The defendant argued that the consequences of a revocation of supervised release should be considered as part of the "maximum possible penalty" for purposes of complying with Rule 11(c)(1). The court concluded that the plain language of the rule mandates that the district court tell the defendant not only of the applicability of a term of supervised release, but also of the term's effect. Failure to do so constitutes error and renders the plea defective. Whether the error is considered harmless is relative to the advice provided. Because the defendants maximum possible penalty (approximately 75 months' imprisonment) exceeded the 60-month statutory penalty of which he was advised, the district's court's failure to apprise the defendant of the mandatory supervised release term was not harmless error.

Rule 32

United States v. Moser, 168 F.3d 1130 (8th Cir. 1999). The district court did not err in imposing an enhancement for more-than-minimal planning based on facts asserted in the presentence report, because the defendant objected only to the recommendation in the report and not to the facts themselves. Rule 32(c)(1) requires a court to resolve any objection to a PSR, but "unless a defendant objects to a specific factual allegation contained in the PSR, the court may accept that fact as true for sentencing purposes." The defendant's objection was too vague to entitle him to a hearing.

United States v. Patterson, 128 F.3d 1259 (8th Cir. 1997). The district court's failure to provide the defendant an opportunity for allocution prior to imposing sentence in the defendant's supervised release revocation proceeding was not harmless error. The sentence was vacated and remanded for resentencing. The right of allocution derives from Rule 32(c)(3)(C) of the Federal Rules of Criminal Procedure. Even though the defense counsel was given an opportunity to argue against an upward departure, the appellate court held that failure to provide the defendant an opportunity to address the court personally before sentencing was not harmless error.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924

United States v. Bradshaw, 153 F.3d 704 (8th Cir. 1998). The district court properly dismissed Bradshaw's motion to vacate his prior conviction under 18 U.S.C. § 924(c). The trial court had defined "use" and "carry" interchangeably in its instructions to the jury. Although the definition was erroneous under *Bailey v. United States*, 516 U.S. 137, 143 (1995), it was consistent with the Supreme Court's pronouncements regarding the "carry" prong in *Muscarello v. United States*, 118 S.

Ct. 1911 (1998). Because the evidence supported Bradshaw's conviction for having "carried" a firearm as *Muscarello* defined it, he was not prejudiced by the instructional error on "use."

See United States v. Schaffer, 110 F.3d 530 (8th Cir. 1997), 18 U.S.C. § 3553(e).

<u>18 U.S.C. § 3553(e)</u>

United States v. Schaffer, 110 F.3d 530 (8th Cir. 1997). In addressing a question of first impression in the circuit, the appellate court agreed with the Eleventh Circuit's decision in *United States v. Aponte*, 36 F.3d 1050, 1052 (11th Cir. 1994), that 18 U.S.C. § 924(c)'s mandatory minimum sentence of 60 months is the proper departure point for a downward departure granted under an 18 U.S.C. § 3553(e) motion based on substantial assistance. The appellate court rejected the defense argument that, because there is no specific base offense level for a section 924(c)(1) conviction, section 2X5.1 of the guidelines instructs the court to apply the most analogous offense guideline. The defense unsuccessfully argued that the two-level enhancement for possession of a firearm, a specific offense characteristic of a drug trafficking crime at guideline §2D1.1(b)(1) was the most analogous guideline to "using or carrying a firearm during or in relation to a drug trafficking crime."

<u>18 U.S.C. § 3583</u>

United States v. Engelhorn, 122 F.3d 508 (8th Cir. 1997). In addressing a case of first impression in the circuit, the court held that "although the term of incarceration imposed upon a defendant convicted under the ACA [Assimilated Crimes Act, 18 U.S.C. § 13] may not exceed that provided by state substantive law, the total sentence imposed–consisting of a term of incarceration followed by a period of supervised release–may exceed the maximum term of incarceration provided for by state law." In so holding, the court cited with approval the Fourth Circuit's opinion in *United States v. Pierce*, 75 F.3d 173 (4th Cir. 1996). The appellate court noted that under the South Dakota law assimilated in this case, a period of probation involving government supervision can follow a term of incarceration, and it "serves society's goal of rehabilitation." Thus, the sentence imposed by the federal district court–a term of incarceration plus a term of supervised release–"was similar to a punishment the defendant could have faced in a state court. In this case, therefore, supervised release is a 'like punishment' for ACA purposes."

United States v. Rodriguez-Favela, 337 F.3d 1020 (8th Cir. 2003). The appellate court affirmed the district court's revocation sentence that fell within the maximum limitation stated in 18 U.S.C. § 3583(e). In 1999, the defendant pled guilty to illegal reentry after deportation. He was sentenced to 20 months of imprisonment and three years of supervised release. In 2001, an undercover police officer arrested defendant after defendant had sold him 1.5 grams of marijuana. The defendant pled guilty to illegal reentry after deportation thereby admitting that he had also violated the special condition of his supervised release that provided he would not illegally reenter the United States. At sentencing, the government moved for an upward departure on the new illegal reentry conviction. The district court denied the motion and sentenced defendant to consecutive sentences of 30 months of imprisonment and three years of supervised release for the new illegal reentry conviction and 24 months

of imprisonment for the supervised release violation. The defendant appealed only the supervised release revocation sentence. On appeal, the defendant argued that the government's motion for an upward departure for the illegal reentry conviction deprived him of his due process rights on the ground that he had no notice that the government would seek a greater punishment than that set forth in the plea agreement. The Eighth Circuit noted that defendant's argument was meritless. The district court denied the government's upward departure motion and sentenced defendant within the statutory maximum and within the sentence contemplated in the plea agreement. Therefore, even absent the notice, the defendant had suffered no cognizable injury. The defendant also argued that the government's motion for an upward departure violated his due process rights because the motion influenced the district court to increase the revocation sentence. The court noted that this argument was equally meritless. The court concluded that absent an abuse of discretion, it would not vacate a revocation sentence that fell within the maximum limitation stated in 18 U.S.C. § 3583(e). The district court's sentence was affirmed.

United States v. Watkins, 14 F.3d 414 (8th Cir. 1994). The district court's imposition of a term of supervised release did not violate the five-year statutory maximum under 18 U.S.C. § 924(c). The defendant relied on *United States v. Allison*, 953 F.2d 870 (5th Cir.), *cert. denied*, 504 U.S. 962 (1992), to support his argument that the supervised release was wrongly imposed because 18 U.S.C. § 924(c) does not provide for it. The court of appeals examined the language of 18 U.S.C. § 3583(a) which empowers the sentencing court to assess a term of supervised release "as part of the sentence. . . ." This language, as opposed to language providing "as part of the incarceration," indicates that a term of supervised release may be imposed in addition to any term of incarceration. Further, the court of appeals relied on the Fifth Circuit's subsequent order in *Allison* which recognized that although section 924(c) does not explicitly mention supervised release, 18 U.S.C. § 3583 expressly authorizes it. *See United States v. Allison*, 986 F.2d 896, 897 (5th Cir. 1992) (order).

21 U.S.C. § 841

See United States v. Bongiorno, 139 F.3d 640 (8th Cir.), *cert. denied*, 525 U.S. 865 (1998), §5D1.2, p. 58.

United States v. Ortega, 150 F.3d 937 (8th Cir. 1998), *cert. denied*, 525 U.S. 1087 (1999). The district court did not err in counting the defendant's prior suspended imposition of sentence as a prior conviction for purposes of the life sentence enhancement for prior drug felony convictions. The defendant argued that the prior state court case did not result in a conviction under state law–he was required to serve three years of supervised probation but also received a suspended imposition of sentence. The court of appeals rejected this argument, concluding that the determination when the conviction is final is to be made under federal law. Although the defendant had since moved to withdraw his guilty plea in the state court, the court of appeals would consider the conviction final until such time as the state granted the defendant's motion to withdraw. The suspended imposition is a prior felony conviction which has become final for purposes of 21 U.S.C. § 841(b). If the defendant's motion to withdraw his guilty plea is successful, he would attack any federal sentence, if it is enhanced due to the prior conviction, under 28 U.S.C. § 2255.

<u>21 U.S.C. § 841(b)(1)</u>

United States v. Warren, 149 F.3d 825 (8th Cir. 1998). The defendant argued that, because of a typographical error in the statute at the time of his offense, he should have been sentenced to a five-year, instead of a ten-year, mandatory minimum sentence. At that time, the same amount of a quantity of a mixture containing methamphetamine–100 grams–was listed as triggering both the five- and ten-year sentences. The necessary quantity for the ten-year penalty was intended to be 1,000 grams, and the statute was later amended. The court of appeals held that, although penal laws are strictly construed, they should not be construed so as to defeat the obvious intent of the statute. The defendant had fair warning that he faced at least ten years' incarceration.

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

United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000). After a jury trial, the defendant was convicted of one count of conspiracy to distribute methamphetamine. At sentencing, the district court determined the amount of drugs ascribable to the defendant based on preponderance of the evidence. The defendant's resulting sentence was subject to a statutory mandatory minimum penalty for drug quantity. The defendant argued that his sentence violates *Apprendi* because the drug quantity should have been submitted to jury and proven beyond a reasonable doubt. *Id*. at 933. The court found that statutory minimum penalties were permissible under *Apprendi* because they naturally fall within a given statutory range. *Id*. Further, the defendant was not subject to a sentence above the prescribed statutory maximum, and was not entitled to resentencing. *See also United States v. Ortiz*, 236 F.3d 420, 422 (8th Cir. 2001) (holding that when drug quantity is not submitted to a jury and the resulting sentence is below the prescribed statutory maximum, there is no *Apprendi* violation).

United States v. Diaz, 296 F.3d 680 (8th Cir.), *cert. denied,* 537 U.S. 940 (2002). *Apprendi* does not forbid a district court from finding the existence of sentencing factors, including drug quantity, by a preponderance of the evidence; rather, it prevents courts from imposing sentences greater than the statutory maximum based on such findings. *Id.* at 683. The first step in sentencing for the district court after *Apprendi* is to make findings and calculate a sentencing range under the guidelines based on those findings. If the sentencing range exceeds the statutory maximum, *Apprendi* requires that the defendant be sentenced to not more than the statutory maximum term of imprisonment instead of the total punishment calculated under the guidelines. *Id.* at 684. However, when a defendant has been convicted of multiple counts, the sentencing court may not merely reduce the sentence imposed from the guidelines range to the statutory maximum on the greatest count. Section 5G1.2(d) of the guidelines requires that if the maximum sentence allowed under any one count does not reach the total punishment as calculated under the guidelines, the district court must impose consecutive sentences on the multiple counts until it reaches a sentence equal to the total punishment calculation under the guidelines. This is permissible because imposing consecutive sentences on multiple counts does not violate *Apprendi* when the sentence for each count does not violate the statutory maximum for that count. *Id.* at 684. This case overruled *United States v. Bradford,* 246 F.3d 1107 (8th Cir. 2001), and *United States v. Hollingsworth*, 257 F.3d 871 (8th Cir. 2001), to the extent that they hold that

§5G1.2(d) is discretionary and that remand is necessary where the *Apprendi* violation can be cured by running sentences consecutively under that section.

United States v. Franklin, 250 F.3d 653 (8th Cir.), *cert. denied*, 534 U.S. 1009 (2001). After a mistrial, the defendant was ultimately convicted of conspiracy to possess with intent to distribute marijuana, aiding and abetting another to possess approximately 34 pounds of marijuana, and attempted witness tampering. The defendant argued that the sentence, derived under USSG §2D1.1, was in violation of the rule set forth in *Apprendi* because the drug quantity was found by a preponderance of the evidence. The Court agreed that defendant's sentence was beyond the prescribed statutory maximum and remanded for resentencing. The defendant, however, sought a new trial to establish drug quantity. The Court stated that a new trial was not necessary to correct the *Apprendi* violation.

United States v. McDonald, 336 F.3d 734 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1461 (2004). The appellate court affirmed the district court's sentence and found no *Apprendi* violation. The defendant was one of 54 people indicted for being a member of a large drug ring. At sentencing, the district court sentenced defendant to 20 years for being involved in a conspiracy to distribute an unspecified amount of cocaine. On appeal, the defendant suggested that his sentence suffered from an *Apprendi* problem. The defendant was convicted of conspiracy to distribute and possess with intent to distribute cocaine and cocaine base, marijuana, and PCP. The defendant noted that the jury made no specific finding as to what type of drug he was guilty of conspiring to distribute. The defendant claimed this was significant because conspiracy to distribute an unspecified amount of marijuana carries a smaller statutory maximum sentence than conspiracy to distribute cocaine base. The Eighth Circuit noted that, based on the record, the evidence left no question that the defendant was seriously involved in a large conspiracy to distribute cocaine, therefore there was no reversible error. The defendant's second argument related to his conviction for distributing two ounces of cocaine. The defendant noted that his verdict did not specify the amount of cocaine base that the jury convicted him of distributing. The court noted that, despite no specific findings of drug quantity by the jury, the defendant's sentence was affirmed because specific drug quantities were alleged in the indictment, and it was clear from the evidence that the jury could not have reasonably found otherwise. In other words, under these facts, the failure to get a special verdict from the jury with an explicit finding of quantity did not impugn the integrity of or raise doubt about the fairness of the proceedings. Accordingly, the district court's judgment was affirmed.

United States v. Moss, 138 F.3d 742 (8th Cir. 1998), *denial of post-convection relief affirmed by* 252 F.3d 993 (2001), *cert. denied*, 534 U.S. 1097 (2002). The defendant was convicted of conspiracy to possess with intent to distribute crack cocaine. On habeas appeal, defendant argued that his section 2D1.1 sentence was in violation *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the drug quantity was not charged in the indictment or submitted to the jury during trial. The court held that while the defendant's sentence was in violation of *Apprendi* because the drug quantity raised the sentence above the statutory maximum, *Apprendi* was not a watershed rule. *Moss*, 252 F.3d at 1000. Therefore, defendant was not entitled to relief on collateral review. *Id*. at. 1001.

See also Jarrett v. United States, 2001 WL 1155003 at *2 (8th Cir. (Minn.)) (holding that defendant was precluded from raising an *Apprendi* claim on collateral review).

United States v. Nicholson, 231 F.3d 445 (8th Cir.), *cert. denied*, 532 U.S. 912 (2001). Multiple defendants were convicted for their involvement in a drug conspiracy. Among other things, two defendants argued that their sentences were in violation of *Apprendi* because drug quantity was not submitted to a jury. The Court determined that although *Apprendi* was decided after the present case, the rule set forth in *Apprendi* required resentencing because, "a new rule of constitutional criminal procedure is normally applied retroactively to all cases pending on direct review." *Id*. at 454 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *Powell v. Nevada*, 511 U.S. 79, 80 (1994)). Therefore, the Court vacated and remanded the defendants' sentences.

United States v. Soltero-Corona, 258 F.3d 858 (8th Cir. 2001). The defendant was convicted of possession of methamphetamine with intent to distribute and was sentenced as a career offender. On appeal, the defendant claimed that his sentence violated *Apprendi* because the drug quantity subjected him to a sentence higher than the statutory maximum. The court determined that the sentence was in violation of *Apprendi*, but that the error did not affect the "fairness, integrity, or public reputation of judicial proceedings" because the defendant agreed to the drug quantity during the change-of-plea hearing. *Id*. at 859 (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993).

United States v. Titlbach, 300 F.3d 919 (8th Cir. 2002), *cert. denied*, 537 U.S. 1137 (2003). The district court did not err in basing its sentencing calculation on a quantity of drugs greater than that which the jury specified in its special verdict form. The defendant argued that her sentence violated the tenets of *Apprendi*. The court noted that this argument has no viability after the Supreme Court's recent decision in *Harris v. United States*, 536 U.S. 545 (2002) (upholding a sentence based, in part, on the district court's finding at sentencing that brandishing is not an element of the offense, but is a fact that can be used at sentencing, and did not violate the Sixth Amendment).

United States v. Vaca, 289 F.3d 1046 (8th Cir. 2002). The defendant pled guilty to conspiracy to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(vii), and 21 U.S.C. § 846, and to retaliating against a witness by damaging his property, under 18 U.S.C. § 1513(b)(1) and (2). On appeal, the defendant argued, *inter alia*, that 21 U.S.C. §§ 841 and 846 are facially unconstitutional because they do not require the government to charge and prove drug quantity and type. In holding that the two statutes are not facially unconstitutional, the Court noted that other circuits have rejected similar challenges. *See United States v. Buckland*, 277 F.3d 1173 (9th Cir. 2002) (*en banc*) *United States v. Kelly*, 272 F.3d 622 (3d Cir. 2001); *United States v. McAllister*, 272 F.3d 228 (4th Cir. 2001).

United States v. Wainright, 351 F.3d 816 (8th Cir. 2003). Acquitted conduct can be considered when determining a sentence under the guidelines, so long as that conduct has been proved by a preponderance of the evidence. The defendant was found guilty of interstate transportation of stolen property in violation of 18 U.S.C. § 2314 in excess of $350,000. The district court increased the defendant's base offense level by 11 levels because the total loss was more than $350,000. The

defendant objected, arguing that because the loss in the count of conviction was $23,724.70, the loss for sentencing purposes should be based only on that figure, not the more than $350,000 figure. The district court found that the loss included relevant conduct caused by the scheme, noting that acquitted conduct can be considered if it is proved by a preponderance of the evidence, and concluded that the loss of more than $350,000 was supported by a preponderance of the evidence. On appeal, the defendant argued that the district court's ruling violated *Apprendi*. The Eighth Circuit noted that acquitted conduct could be considered when determining a sentence under the guidelines, so long as that conduct has been proved by a preponderance of the evidence. Furthermore, the defendant's sentence did not exceed the statutory maximum sentence. Accordingly, the district court did not commit plain error in calculating the total offense level and there was no *Apprendi* violation.