

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



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

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U.S. SENTENCING COMMISSION GUIDELINES MANUAL CASE ANNOTATIONS FOR THE TENTH CIRCUIT

This document contains annotations to Tenth Circuit judicial opinions addressing some of the most commonly applied federal sentencing guidelines. The document was developed to help judges, lawyers and probation officers locate relevant authorities when applying the federal sentencing guidelines. It does not include all authorities needed to correctly apply the guidelines. Instead, it presents authorities that represent Tenth Circuit jurisprudence on selected guidelines. The document is not a substitute for reading and interpreting the actual guidelines manual; rather, the document serves as a supplement to reading and interpreting the guidelines manual.

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

I. Procedural Issues

A. Confrontation Right

United States v. Bustamante, 454 F.3d 1200 (10th Cir. 2006). The defendant was convicted of distributing more than fifty grams of methamphetamine. As part of his guilty plea, he admitted to distribution of 96.5 grams of methamphetamine, but the Presentence Investigation Report recommended that he be held responsible for a total of 630.3 grams. He argued that increasing his sentence by relying on hearsay testimony of officers involved in his case violated his Sixth Amendment right to confrontation. The circuit court disagreed, saying “*Crawford* concerned the use of testimonial hearsay statements at trial and does not speak to whether it is appropriate for a court to rely on hearsay statements at a sentencing hearing.”

B. Resolution of Disputed Factual Issues

United States v. West, 550 F.3d 952 (10th Cir. 2008). Fed. R. Crim. P. 32(i)(3)(B) requires the district court to resolve disputed portions of the presentence investigation report or explain why such resolution is unnecessary. Rulings on contested issues “need not be exhaustively detailed,” but must be “definite and clear.” The defendant must allege factual inaccuracy in order “to invoke the district court’s Rule 32 fact-finding obligation.” Convicted of being a felon in possession of a firearm, the defendant met his affirmative duty to articulate why he contested the accuracy of facts in the PSR. The district court simply adopted the PSR without change and failed to resolve the factual disputes raised by the defendant. The court remanded and directed the district court to resolve factual disputes or explain why resolution is unnecessary.

United States v. Jarvi, 537 F.3d 1256 (10th Cir. 2008). Rule 32 “codifies the common law right of allocution at sentencing,” requiring the district court to address the defendant personally and to hear any information regarding sentence mitigation. While the district court acted within its discretion not to consider his *pro se* motion, it committed reversible error by refusing to allow the defendant to speak to the issues he raised in writing as part of his allocution.

Even though the defendant made an “unjustified attempt to present the information earlier in a different form” by filing *pro se* motions, he did not forfeit his right of allocution, and should have been allowed to speak about the matters he raised, including his objection to “the fortyfold increase in drug quantity caused by converting the money in his house into drugs.”

United States v. Dozier, 444 F.3d 1215 (10th Cir. 2006). The defendant, convicted of mail fraud, protested when the district court imposed a 48-month sentence (above the guidelines range of 27 to 33 months) without providing him notice. The court agreed and vacated and remanded the sentence, saying “Rule 32(h) survives *Booker* and requires a court to notify both parties of any intention to depart from the advisory sentencing guidelines as well as the basis for such a departure when the ground is not identified in the presentence report or in a party’s prehearing submission.”¹

C. Prior Convictions

United States v. Brown, 529 F.3d 1260 (10th Cir. 2008). Defendant was convicted of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The district court sentenced him to ten years’ imprisonment, treating his previous conviction under Article 134 of the Uniform Code of Military Justice (UCMJ) as a predicate offense triggering this enhanced penalty. The court reversed this sentence, holding that the defendant’s UCMJ conviction was not a predicate enhancer under § 2252A because it was not a conviction under § 2252, and the plain language of § 2252A does not include Article 134 convictions.

United States v. Zuniga-Chavez, 464 F.3d 1199 (10th Cir. 2006). The defendant challenged the government’s proof of his prior convictions, arguing that the documents used to demonstrate his prior convictions were insufficiently reliable to satisfy the standard set forth in *Shepard v. United States*, 544 U.S. 13 (2005). Some of these documents were not certified copies, but the court held that “certification is not a prerequisite to reliability.” It also concluded that “[a] case summary obtained from a state court and prepared by a clerk—even if not certified by that court—may be sufficiently reliable evidence of conviction for purposes of enhancing a federal sentence where the defendant fails to put forward any persuasive contradictory evidence.”

United States v. Harris, 447 F.3d 1300 (10th Cir. 2006). *Booker* does not preclude the sentencing court from imposing a statutory minimum sentence based on the defendant’s prior convictions. “While it is true that the district court has no discretion to impose a sentence below the statutory minimum, the Supreme Court’s holdings in *Apprendi* and *Shepard* still apply the prior conviction exception. Thus, although it is typically unconstitutional to mandatorily enhance

¹ The United States Supreme Court held that Federal Rule of Criminal Procedure 32(h)’s notice requirement does not extend to non-guidelines variances. *Irizarry v. United States*, 553 U.S. 708 (2008); *United States v. Kaufman*, 546 F.3d 1242 (10th Cir. 2008), *cert. denied*, 130 S.Ct. 1013 (2009). At least one circuit has held that *Irizarry*’s holding does not change the requirement that the parties must be notified if the court intends to depart from the guidelines, *see United States v. Evans-Martinez*, 530 F.3d 1164 (9th Cir. 2008), and that Rule 32(i)(1)(C) requires that the parties have notice of relevant facts, even when the court is contemplating a non-guidelines variance, *see United States v. Warr*, 530 F.3d 1152 (9th Cir. 2008).

a sentence based on a judge-found fact, because the mandatory enhancement here is based on prior convictions, neither the Sixth Amendment nor *Booker* require a jury finding.”

United States v. Moore, 401 F.3d 1220 (10th Cir. 2005). The defendant pled guilty to being a felon in possession of firearms and had been convicted of three or more prior felonies, subjecting him to an enhanced sentence under the Armed Career Criminal Act (ACCA). Even after *Booker*, neither the existence of prior convictions, nor their classification as violent felonies, constitute facts that must be charged in an indictment and proven to a jury under a beyond a reasonable doubt standard. *See also United States v. Michel*, 446 F.3d 1122 (10th Cir. 2006) (whether ACCA predicate convictions “happened on different occasions from one another is not a fact required to be determined by a jury but is instead a matter for the sentencing court”); *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005) (the question of whether a prior conviction is for a crime of violence is a question of law).

II. Departures

United States v. Alapizco-Valenzuela, 546 F.3d 1208 (10th Cir. 2008). When a district court’s departure under Chapters Four and Five of the guidelines is reviewed on appeal, “we employ the same four-part test that we used prior to *Booker*. We ask: (1) whether the factual circumstances supporting a departure are permissible departure factors; (2) whether the departure factors relied upon by the district court remove the defendant from the applicable Guideline heartland thus warranting a departure; (3) whether the record sufficiently supports the factual basis underlying the departure; and (4) whether the degree of departure is reasonable.” When a district court’s variance is subject to appellate review, “we simply consider whether the length of the sentence is substantively reasonable utilizing the abuse-of-discretion standard.” The court affirmed the district court’s upward variance and articulated these standards, acknowledging that it has “at times . . . offered a slightly different approach” for review of departures and variances.

United States v. Martinez-Barragan, 545 F.3d 894 (10th Cir. 2008). Even after *Booker*, district courts must apply the guidelines and consider their recommended sentence as one of the sentencing factors in 18 U.S.C. § 3553(a). “One step in applying the Guideline is to determine whether or not to depart from the range specified in the Sentencing Table.” While departures and variances are “analytically distinct” and should not be confused, the “heartland analysis” is a legitimate part of a district court’s determination about whether either is warranted. Whether a case falls within the “heartland” is a “threshold question that a district court must decide when determining whether to grant a departure under the Guidelines.” It is also one of the factors a district court can consider when deciding whether to grant or deny a variance. However, a district court would err if it “concluded that a case was within the heartland of similar cases and that, since it could not justify a departure under the Guidelines, it could not vary from the recommended range either,” because the court is required to consider all § 3553(a) factors in every case. The district court did not err in denying defendant’s request for a downward departure and a downward variance.

United States v. Sierra-Castillo, 405 F.3d 932 (10th Cir. 2005). District courts must still consult the guidelines and take them into account when sentencing. The guidelines provide for

departures from the applicable sentencing range in certain specified situations. Although district courts post-*Booker* have discretion to assign sentences outside of the guidelines-authorized range, they should also continue to apply the guidelines departure provisions in appropriate cases.

III. Specific 3553(a) Factors

A. Unwarranted Disparities

1. Fast track

United States v. Martinez-Trujillo, 468 F.3d 1266 (10th Cir. 2006). The court rejected defendant’s argument that his sentence for illegal reentry after deportation must be lowered in order to avoid unwarranted disparity between him and others like him who were sentenced in districts with fast track programs. The court held that disparity created by lack of fast track programs cannot be considered unwarranted. “We considered a similar contention in *Morales-Chaires*. In that case we held that a district court could impose sentences on persons convicted of unlawful reentry without adjusting for disparities caused by fast-track sentencing We reserved for the future, however, ‘whether sentencing disparities caused by the existence of fast-track programs are or are not, or may be in certain circumstances, considered unwarranted under § 3553(a)(6).’ This case presents the question, and we answer it ‘No.’ We cannot say that a disparity is ‘unwarranted’ within the meaning of § 3553(a)(6) when the disparity was specifically authorized by Congress in the PROTECT Act.” *See also United States v. Jarrillo-Luna*, 478 F.3d 1226 (10th Cir. 2007) (same).

United States v. Morales-Chaires, 430 F.3d 1124 (10th Cir. 2005). The defendant was convicted of illegal reentry after deportation and sentenced to 77 months of imprisonment. On appeal, he argued that the lack of a fast track program in his district resulting in unwarranted sentencing disparity between him and other similarly situated defendants, and noted that he would have likely received a much lower sentence had he been convicted in another district with such a program. The court reviewed his case as a matter of first impression and, after discussing rulings by other circuits, concluded that “in this particular case, we need not resolve whether sentencing disparities caused by the existence of fast-track programs in some jurisdictions are or are not, or may be in certain circumstances, considered unwarranted under § 3553(a)(6). Section 3553(a)(6)’s directive to sentencing courts to avoid ‘unwarranted sentencing disparities among defendant [sic] with similar records who have been found guilty of similar conduct’ is but one of several factors for a court to consider in determining a reasonable sentence.” Because the district court had considered all of the § 3553(a) factors and determined that the defendant did not merit a lower sentence, the court held that the sentence was reasonable.

2. Co-defendants

United States v. Smart, 518 F.3d 800 (10th Cir. 2008). The defendant was convicted, after a trial, of inducing a minor to engage in sexually explicit conduct for the purpose of producing videotapes depicting such conduct, a violation of 18 U.S.C. § 2251(a). His guideline range was 168-210 months’ imprisonment. The district court imposed a sentence of 120 months’

imprisonment, or a 48-month downward variance. In upholding the sentence, the court held that it was procedurally and substantively reasonable, and stated that “a district court may also properly account for unwarranted disparities between codefendants who are similarly situated, and that the district court may compare defendants when deciding a sentence.” *See also United States v. Zapata*, 546 F.3d 1179 (10th Cir.) (disparity between defendant and more culpable co-defendant who had extensively cooperated with the government was insufficient to rebut the presumptive reasonableness on appeal of the district court’s within-guideline sentence), *cert. denied*, 129 S. Ct. 772 (2008); *United States v. Haley*, 529 F.3d 1308 (10th Cir.) (the district court did not err in denying defendant’s motion for downward variance on this ground, where his career offender status and failure to accept responsibility accounted for the disparity between his sentence and his co-defendant’s sentence), *cert. denied*, 129 S. Ct. 428 (2008); *United States v. Wittig*, 528 F.3d 1280 (10th Cir. 2008) (the district court “did not commit procedural error in considering the disparity between” the defendant and his co-defendant).

IV. Restitution

United States v. Visinaiz, 428 F.3d 1300 (10th Cir. 2005). The court upheld the district court’s imposition of restitution of \$107,000 in this second degree murder case. *Booker* applies only to judicial fact-finding that increases a criminal punishment in violation of the Sixth Amendment, and the Sixth Amendment is not implicated here because restitution does not constitute criminal punishment to be determined by a jury in the Tenth Circuit.

V. Reasonableness Review

A. General Principles

United States v. Sayad, 589 F.3d 1110 (10th Cir. 2009). Defendant pled guilty to interstate travel in aid of racketeering. The district court imposed a sentence of time served (90 days) plus five years’ probation, varying downward from a guidelines range of 60 months’ imprisonment. In discussing the factors included in 18 U.S.C. § 3553(a), the district court “highlighted Sayad’s lack of maturity, his supportive family, his lack of substance abuse problems, and good physical health.” The court also discussed the defendant’s cultural background, describing him as “a person whose native language [is] not English, who is not in a culture in which he grew up, and who is a religious and political refugee living as a stranger in a strange land.” Suggesting that a greater sentence would not have a deterrent effect on others, the court also wondered, “Who does it apply to? How many other people are there that are Iranian Christians that come in who can identify with this kind of thing.” The government appealed the sentence, arguing that the defendant’s religion and ethnicity were impermissible factors (or alternatively that there was insufficient evidence to support the idea that Iranian Christians require less deterrence than other groups). The appellate court reviewed for reasonableness, noting that it was unclear whether the government’s challenge was a procedural or a substantive one, and held that the district court did not err. Addressing procedural reasonableness, the Tenth Circuit concluded that the district court had “used the term ‘Iranian-Christians’ as a proxy to describe the close-knit nature of Sayad’s family and community.” Addressing substantive reasonableness, the appellate court held that there was adequate evidence on the record to support

the various factors on which the district court had based its variance. Thus, the appellate court affirmed district court's sentence.

United States v. Muñoz-Nava, 524 F.3d 1137 (10th Cir. 2008). The court upheld a significantly below-guidelines sentence, employing the standard articulated in *United States v. Todd*, 515 F.3d 1128 (10th Cir. 2008). The defendant, convicted of trafficking heroin, faced a recommended sentence of 46 to 57 months under the guidelines after the district court granted his objections. The district court denied defendant's downward departure motions but sentenced him to one year and one day in prison, plus one year of home confinement and five years of supervised release, after considering the factors in 18 U.S.C. § 3553(a). The government argued that the district court committed procedural error in its guidelines calculations and substantive error in its downward variance. The court disagreed and affirmed the sentence, employing the two-part analysis set forth in *Gall*. First, the court held that the sentence was procedurally reasonable and upheld the district court's legal conclusions on *de novo* review and factual findings on clear error review of its application of the guidelines. Second, the court held that the sentence was substantively reasonable under an abuse of discretion standard.

United States v. Smart, 518 F.3d 800 (10th Cir. 2008). The court upheld a below-guideline sentence, noting that the Supreme Court's decisions in *Kimbrough* and *Gall* "substantially invalidate[d] the rigorous form of review" applied by the circuit prior to those cases. The defendant was convicted, after a trial, of inducing a minor to engage in sexually explicit conduct for the purpose of producing videotapes depicting such conduct, a violation of 18 U.S.C. § 2251(a). His total offense level was 31, and his criminal history category was V, which resulted in a guideline range of 168-210 months' imprisonment. The district court imposed a sentence of 120 months' imprisonment, or a 48-month downward variance. In upholding the sentence, the court held that the sentence was procedurally and substantively reasonable, and discussed at length how *Kimbrough* and *Gall* "modify the application of our existing substantive reasonableness review and clarify the amount of deference we must afford to a district court's weighing of § 3553(a) sentencing factors." The court held that its approach prior to these Supreme Court cases—such as the approach laid out in *United States v. Garcia-Lara*, 499 F.3d 1133 (10th Cir. 2007), *vacated*, 128 S. Ct. 2089 (2008)—could not survive *Kimbrough* and *Gall*. It noted, however, the amount of variance from the guidelines remains a factor the court will take into account on appellate review.

United States v. Rodriguez-Felix, 450 F.3d 1117 (10th Cir. 2006). District courts may continue to make factual findings by a preponderance of the evidence standard post-*Booker*, and are required to consider the guidelines as one factor when deciding the appropriate sentence. *See also United States v. Ivory*, 532 F.3d 1095 (10th Cir. 2008) (district court did not err in using the preponderance of the evidence standard to make factual findings regarding several guidelines application determinations).

United States v. Kristl, 437 F.3d 1050 (10th Cir. 2006). Defendant was convicted of possessing a firearm after having sustained a felony conviction and was sentenced to 28 months, a sentence within the advisory guidelines range. The court remanded for resentencing because the district court erred by improperly adding criminal history points for a prior Colorado conviction.

In deciding this case, the court discussed the proper post-*Booker* reasonableness standard. It held that reasonableness review must be guided by the factors set forth in 18 U.S.C. § 3553(a), that a sentence properly calculated under the guidelines is entitled to a rebuttable presumption of reasonableness, and that this standard is a deferential one “that either the defendant or the government may rebut by demonstrating that the sentence is unreasonable when viewed against the other factors delineated in § 3553(a).” The court adopted a two-part review under the reasonableness standard: “First, we must determine whether the district court considered the applicable Guidelines range, reviewing its legal conclusions de novo and its factual findings for clear error. A non-harmless error in this calculation entitles the defendant to a remand for resentencing.” Second, if the district court properly considers the guidelines and sentences within the guidelines range, “the sentence is presumptively reasonable. The defendant may rebut this presumption by demonstrating that the sentence is unreasonable” in light of other § 3553(a) factors. *See also United States v. Wolfe*, 435 F.3d 1289 (10th Cir. 2006) (“Even after *Booker*, ‘[w]hen reviewing a district court’s application of the [s]entencing [g]uidelines, we review legal questions de novo and we review any factual findings for clear error, giving due deference to the district court’s application of the guidelines to the facts.’”).

United States v. Magallanez, 408 F.3d 672 (10th Cir. 2005). In sentencing criminal defendants for federal crimes, district courts are still required to consider guideline ranges, which are determined through application of the preponderance standard, just as they were before. The only difference is that the court has latitude, subject to reasonableness review, to depart from the resulting guideline ranges. When a district court makes a determination of sentencing facts by a preponderance of evidence test under the advisory guidelines, it is not bound by jury determinations reached through application of the more onerous reasonable doubt standard.

United States v. Yazzie, 407 F.3d 1139 (10th Cir. 2005). A district court commits constitutional error when it “applies the Guidelines in a mandatory fashion, makes factual findings (other than the fact of prior convictions), and imposes a sentence above the maximum that would apply in the absence of such findings.” In determining whether constitutional error occurred, the court must look at the actual sentence imposed, not the guidelines sentencing range. Here, the district court did not commit constitutional error because, although it made a judicial finding which it used to support a two-level enhancement, it imposed a sentence (135 months) which could have been imposed without this enhancement. The court upheld the defendant’s sentence, but noted that “treating the Guidelines as mandatory—regardless of whether the defendant is sentenced under § 3553(b)(1) or § 3553(b)(2)—is error.” Regarding this final point, the court stated that the “*Booker* Court . . . did not determine whether § 3553(b)(2) must be excised in order to remedy the Guidelines’ underlying Sixth Amendment violations. Applying *Booker’s* reasoning, we hold that it must be excised as well.” *See also United States v. Clark*, 415 F.3d 1234 (2005) (trial court committed plain error where it enhanced defendant’s sentence by using uncharged drug-related conduct and an upward adjustment for possession of a firearm).

B. Procedural Reasonableness

United States v. Cerno, 529 F.3d 926 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1905 (2009). The district court committed procedural error by refusing, as a matter of law, to consider the relative amount of force the defendant used in committing the aggravated sexual assaults. A jury convicted the defendant of these offenses, and the district court sentenced him to life, saying “I struggled to find something that is mitigating that I could use to reduce the sentence level” and indicating that he felt the law did not permit him to consider the relative force argument the defendant raised. Noting that the district court correctly interpreted the defendant’s statute of conviction, 18 U.S.C. § 2241(a), as not contemplating a comparative analysis of force, the court said,

[b]ut at sentencing, the minimal elements required to secure a conviction are not dispositive of the sentence a defendant should receive. Sentencing law simply does not foreclose a court’s individual consideration of the specific nature and circumstances of the offense conduct at issue, including whether the offense committed was more or less heinous than offenses committed by other defendants convicted under the same statute. Indeed, the sentencing statute mandates that a court consider the ‘nature and circumstances of the offense’ in fashioning a sentence ‘sufficient, but not greater than necessary’ to accomplish the sentencing goals outlined in the sentencing statute.

United States v. Peña-Hermosillo, 522 F.3d 1108 (10th Cir. 2008). Failure to provide proper explanation for a sentence is reversible procedural error. In this drug-trafficking case, the district court failed to properly explain its denial of a two-level enhancement for use of a minor (§3B1.4), its denial of a two-level enhancement for leadership role (§3B1.1(b)), and its below-guideline sentence based on extra-guidelines factors in 18 U.S.C. § 3553(a). The district court also failed to explain why it refused to hold an evidentiary hearing on disputed facts. Finally, the district court committed procedural error by providing a cursory, non-specific explanation for its alternative sentencing rationale. *See also United States v. Mendoza*, 543 F.3d 1186 (10th Cir. 2008) (affirming downward variance on plain error review because, although district court erred by failing to articulate specific reasons and by failing to provide a written statement of reasons, the government’s substantial rights were not affected).

United States v. Todd, 515 F.3d 1128 (10th Cir. 2008). Defendant was convicted at trial of possession with intent to distribute methamphetamine. The district court imposed a sentence within a guideline range which was based on actual possession of 37 grams of methamphetamine rather than the 680 grams the defendant “admitted” to possessing. The court reversed, holding that the district court committed procedural error by failing to consider the total amount of methamphetamine, since the defendant “has not challenged, contested, or contradicted” testimony concerning his admissions. The court held that appellate review must first ensure that the district court committed no procedural error, and then analyze whether the sentence is substantively reasonable. Review of procedural reasonableness begins with a *de novo* analysis of the district court’s legal conclusions regarding application of the guidelines, and review of the

district court's factual findings for clear error. As explained in *Rita* and *Gall*, "reasonableness" review means review for abuse of discretion. See also *United States v. Verdin-Garcia*, 516 F.3d 884 (10th Cir.), cert. denied, 129 S. Ct. 161 (2008) (stating "[r]easonableness review is a two-step process comprising a procedural and a substantive component" and upholding a life sentence for drug conspiracy convictions as procedurally and substantively reasonable, where defendants did not raise more than conclusory arguments under 18 U.S.C. § 3553(a)).

United States v. Ruiz-Terrazas, 477 F.3d 1196 (10th Cir. 2007) The court upheld a within-guidelines sentence in this illegal re-entry case. The defendant appealed, arguing that the district court had imposed a procedurally unreasonable sentence in that it did not address his arguments (made in a sentencing memorandum and argued at the sentencing hearing) for a non-guidelines sentence. The court held that the district court did not err because "[w]here, as here, a district court imposes a sentence falling within the range suggested by the Guidelines, Section 3553(c) requires the court to provide only a general statement of 'the reasons for its imposition of the particular sentence.'" The court said that where a sentence is outside the range, reasons must be stated with specificity. See also *United States v. Jarrillo-Luna*, 478 F.3d 1226 (10th Cir. 2007) (district court's duty to explain why it imposed sentence does not require explanation of why it declined to impose a different sentence).

United States v. Hall, 473 F.3d 1295 (10th Cir. 2007). The court reversed as procedurally unreasonable a below-guidelines sentence in this cocaine conspiracy and possession case. The only reason stated by the district court for imposing a below-guidelines sentence was that the defendant's criminal history was less than that of his co-defendants. The district court appeared to rely on a hypothetical guideline calculation to determine how far below the actual guideline range to sentence the defendant. The final sentence (155 months) reflected not only a reduced criminal history category but also a reduced offense level, and the district court did not explain why it would base the sentence on such a hypothetical guidelines calculation. On appeal, the court said "[w]e cannot countenance the court's methodology without any explanation as to why such a determination was made," noting that it "in no way intend[ed] to express an opinion in regard to what the ultimate sentence should be."

C. Substantive Reasonableness

United States v. Yanez-Rodriguez, 555 F.3d 931 (10th Cir. 2009). Affirming an upward variance of 93 months from the top of the guidelines range, the court held that while it "could conclude a different sentence was reasonable," the district court's above-guideline sentence was substantively reasonable, reasoned, and justified by the facts. The district court held multiple hearings, heard testimony from a defense psychologist, and "painstakingly went through each § 3553(a) factor" to articulate how each factor supported its variance. "Where, as here, the district court decides to vary from the Guideline sentencing range after a careful, reasoned, and reasonable consideration of the § 3553(a) factors, we cannot say the district court abused its discretion."

United States v. Friedman, 554 F.3d 1301 (10th Cir. 2009). The court reversed a below-guidelines sentence for bank robbery, where the district court granted a 94-month variance from

the bottom of the guidelines range. The defendant's "overwhelmingly extensive criminal history" qualified him for the career offender enhancement, but the district court varied downward from this punishment range because he was "very troubled to regard this man as a serial career offender, although he certainly is under the definition of the guidelines." The government argued on appeal that the sentence was substantively unreasonable, and the court agreed. Based on its review of "the undeniably sparse record," the court found that the sentence failed to reflect the seriousness of the robbery, promote respect for the law, and provide just punishment and adequate deterrence as required by 18 U.S.C. § 3553(a). While a district court may disagree with the career offender guideline post-*Kimbrough*, the district judge did not indicate any intent to do so in this case. The court was particularly disturbed by the district court's lack of explanation, saying, "although the government did not lodge a challenge to the procedural reasonableness of the district court's sentence, the very limited nature of the record and the paucity of reasoning on the part of the district court most certainly bear on our review of the substantive reasonableness" of the sentence.

United States v. Pinson, 542 F.3d 822 (10th Cir.), *cert. denied*, 129 S. Ct. 657 (2008). "Not without some qualms," the court upheld an above-guidelines sentence of a mentally ill defendant convicted of threatening the president, making a false statement, and mailing threatening communications. After hearing evidence from the Secret Service officer investigating the case, a psychologist who examined the defendant, the defendant's mother, and others, the district court found that he posed a danger to the community and sentenced him to 240 months. The court held there was no procedural error, since the district court's reasoning was unambiguous and had evidentiary support. It also held the sentence to be substantively reasonable, since the variance was based on articulated facts, tied to a specific § 3553(a) factor, and related to the conduct of the defendant's conviction. However, the court expressed its "concern that courts use upward variances to increase the incarceration time for those who might pose a risk to the public *because of* their mental health problems," noting that to do so circumvents civil commitment procedures, assesses the defendant's potential dangerousness prior to his receiving treatment, and relies upon a factor discouraged by the guidelines in §5H1.3.

United States v. Huckins, 529 F.3d 1312 (10th Cir. 2008). The court affirmed a below-guidelines sentence where the defendant pleaded guilty to possession of child pornography and criminal forfeiture. The district court – after considering the defendant's lack of significant criminal history, depression at the time of the offense, short time period in which the offense took place, lack of repeat offending by the defendant after his arrest, significant self-improvement efforts made by the defendant during the year and a half in which he waited to be prosecuted, and the fact that the defendant was 20 years old when he committed the crime – sentenced him to 18 months' imprisonment, a downward variance from the guidelines range of 78 to 97 months. On appeal, the government argued that this sentence was substantively unreasonable. The court held that the district court did not abuse its discretion, nothing that in reaching its decision, "the district court took significant time to carefully balance the nature and seriousness of the offense, the need for deterrence and the need to protect the public, with the history and characteristics of the defendant. In so doing, the court clearly appreciated the nature and seriousness of the offense, discussing Congress's decision to enhance penalties associated with possession of child pornography, and expressly rejecting a probationary sentence."

United States v. Zamora-Solorzano, 528 F.3d 1247 (10th Cir.), *cert. denied*, 129 S. Ct. 522 (2008). Affirming a within-guideline sentence for methamphetamine distribution and use of a firearm in furtherance of a drug trafficking offense, the court held that as long as a district court does not consider the guidelines mandatory, it may attribute them “considerable weight.” Citing *Rita*, the court held that a district court may not presume that the guidelines are substantively reasonable, and noted that the district court did not make this presumption here. The court also noted that the district court balanced all of the factors under 18 U.S.C. § 3553(a) and considered important the goal of uniformity in sentencing. Finally, the court held that while its decision in *United States v. Terrell*, 445 F.3d 1261 (10th Cir. 2006), is no longer good law for the proposition that district courts may apply a presumption of reasonableness to the guidelines, it remains good law for the proposition that district courts may afford the guidelines considerable weight.

United States v. Tindall, 519 F.3d 1057 (10th Cir. 2008). Upholding a within-guidelines sentence as substantively reasonable, the court held that the defendant, convicted of assault resulting in serious bodily injury, did not overcome the presumption it can afford the guidelines. Noting that the Supreme Court in *Gall* and *Rita* permits – but does not require – an appellate court to apply a presumption of reasonableness to a within-guidelines sentence that is imposed after proper calculation of the guidelines, the court held that the guidelines calculation here was entitled to a rebuttable presumption of reasonableness.

United States v. Sinks, 473 F.3d 1315 (10th Cir. 2007). The court upheld a within-guideline range sentence of 84 months in this felon-in-possession case. The defendant was convicted by jury trial in November 2003, but the probation office was not notified of the conviction until January of 2005, and did not prepare the PSR until March of 2005. The defendant appealed his 84-month sentence, arguing that the district court should have imposed a lower sentence in consideration of the sixteen months he spent in jail awaiting his sentencing on grounds that such consideration would have promoted respect for the law and provided just punishment. The court disagreed, saying “[a]lthough we too express regret that Sinks was all but forgotten for 16 months by the legal system designed to safeguard his rights, this fact alone does not render his sentence unreasonable.” While a district court may not afford too much weight to one § 3553(a) factor or set of factors, the defendant here did not overcome the presumption of reasonableness of his within-guidelines sentence.

United States v. Shaw, 471 F.3d 1136 (10th Cir. 2006). The court affirmed an above-guidelines sentence in this case in which the defendant pled guilty to a bank robbery during which he punched the bank manager in the face, knocking out one of the manager’s teeth and loosening several others. His co-defendant also pled guilty, and received a sentence of 105 months, the top of the guidelines range (imposed before *Booker*). The defendant’s guidelines range was 57-71 months, and the district court varied from the guidelines to impose a sentence of 105 months, finding that the guidelines sentence under-represented both the defendant’s criminal history and the seriousness of his conduct. The court upheld as substantively reasonable the district court’s sentence, noting the importance of avoiding sentencing disparity between similarly situated defendants, the underrepresentation of the defendant’s criminal history, and the

district court's "careful explanation of its reasoning." *See also United States v. Wittig*, 528 F.3d 1280 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 1985 (2009) (district court's above-guideline sentence was procedurally and substantively reasonable, and it was permissible for the district court to seek to avoid disparity between defendant and his co-defendant).

United States v. Valtierra-Rojas, 468 F.3d 1235 (10th Cir. 2006). The court upheld as substantively reasonable an above-guideline sentence in this illegal re-entry case. The defendant had been deported in 2000, after being convicted of involuntary manslaughter while driving under the influence of alcohol; shortly thereafter, he re-entered the country and was convicted of several traffic crimes, including two DUI convictions in 2003. The district court sustained the defendant's objection to the characterization of the involuntary manslaughter as a crime of violence, but imposed a sentence of 60 months, an increase from the advisory guideline range of 21-27 months. In upholding the sentence, the court calculated that the 60-month sentence represented a divergence of "122 % above the high end of the range" which, it said, "might seem extreme." However, the court said that it needed to "look at the divergence in terms of *both* percentage *and* absolute time."

D. Plain Error/Harmless Error

1. Harmless Error

United States v. Ollson, 413 F.3d 1119 (10th Cir. 2005). A defendant convicted of being a felon in possession of a firearm was not entitled to remand for resentencing pursuant to new advisory guidelines, determined by *Booker*. Even though the defendant's sentence was imposed under the mandatory guidelines system, the error was harmless. The sentencing court departed from the guidelines range in response to a §5K1.1 motion filed by the government based upon the defendant's provision of substantial assistance. Although the district court understood that it had discretion to reduce the sentence even more for substantial assistance, it did not do so. Consequently, the court concluded that the record showed that the defendant's sentence would have been the same under the post-*Booker* discretionary regime.

United States v. Labastida-Segura, 396 F.3d 1140 (10th Cir. 2005). The defendant raised a challenge to the constitutionality of the guidelines under *Blakely* at the time of sentencing. The district court overruled the objection, and computed the guidelines based on facts admitted by the defendant. The district court then imposed a sentence at the bottom end of the applicable guidelines range. On appeal, the court concluded that it must apply the remedial holding of *Booker* to the defendant's direct appeal even though his sentence did not involve a Sixth Amendment violation. The court concluded that the error was not harmless because it was impossible to determine if the district court would have imposed the same sentence if it had properly treated the guidelines as advisory only under *Booker* decision.

2. Plain Error

United States v. Johnson, 414 F.3d 1260 (10th Cir. 2005). The defendant argued that the district court erred by adding a two-level firearm enhancement based on judge-found facts not

alleged in the indictment or found by the jury. The court agreed that the case involved a constitutional *Booker* error. In light of the facts that the sentencing court had rejected the government's request for a life sentence and sentenced the defendant to the bottom of the applicable guideline range and that the errors increased the defendant's sentence by nearly 100 months, the court further found that the error should be noticed.

United States v. Clifton, 406 F.3d 1173 (10th Cir. 2005). The district court's *Booker* error in treating guidelines as mandatory rather than as advisory was plain error in a prosecution for lying to the grand jury about the ownership of a cell phone that the defendant allegedly obtained for a drug dealer, and thus required remand for resentencing. The guidelines required that the defendant be sentenced as an accessory, despite the lack of evidence that the defendant was aware of the drug trafficking. The district judge stated, while calculating defendant's base offense level, that "if I had more discretion, I would impose a lower sentence." Further, the district court sentenced the defendant at the bottom of the guidelines range notwithstanding his comment that he typically reserves the low end of the guidelines range for defendants who plead guilty. In sum, the district court believed the guidelines sentence in the defendant's case did not adequately reflect the nature and circumstances of her perjury offense. The error was egregious in this case because of the lack of evidence to support the entire sentence the guidelines required the district court to impose.

United States v. Williams, 403 F.3d 1188 (10th Cir. 2005). Imposition of a 210-month prison sentence under the Armed Career Criminal statute for a defendant convicted for being a felon in possession of a firearm constituted plain error, requiring a remand for resentencing. The sentence was imposed prior to *Booker*, and the sentencing judge indicated that he was disgusted with the sentence that he had to give, and that if it were up to him he would impose a five-year sentence.

United States v. Gonzalez-Huerta, 403 F.3d 727 (10th Cir. 2005) (en banc). The court announced how the plain error test would be applied in cases raising *Booker* issues. There are two distinct types of error that a court sentencing prior to *Booker* could make. First, a court could err by relying upon judge-found facts, other than those of prior convictions, to enhance a defendant's sentence mandatorily, thereby committing "constitutional *Booker* error." Second, a sentencing court could err by applying the guidelines in a mandatory fashion, as opposed to a discretionary fashion, even though the resulting sentence was calculated solely upon facts that were admitted by the defendant, found by the jury, or based upon the fact of a prior conviction, thereby committing "non-constitutional *Booker* error." See also *United States v. Sallis*, 288 F. App'x 457 (10th Cir.) (district court committed plain error when it sentenced defendant to an imprisonment term exceeding the statutory maximum, which was based on facts found by the jury concerning drug type and quantity), *cert. denied*, 129 S. Ct. 614 (2008).

E. Waiver of Right to Appeal

United States v. Green, 405 F.3d 1180 (10th Cir. 2005). A waiver of appellate review is not rendered unknowing or involuntary by *Booker* and *Blakely*. Enforcing the waiver would not result in a miscarriage of justice with respect to a sentence that was determined in part by judicial

factfinding under the guidelines but did not exceed the statutory maximum that Congress legislatively specified for the offense. *See also United States v. Porter*, 405 F.3d 1136 (10th Cir. 2005) (holding that the change *Booker* rendered in the sentencing landscape does not compel a conclusion that the defendant's plea agreement was unlawful).

VI. Revocation

United States v. Contreras-Martinez, 409 F.3d 1236 (10th Cir. 2005). Given that sentencing guidelines policy statements regarding revocation of supervised release were already advisory even before *Booker*, no *Booker* error could arise from district court's application of these policy statements. The district court's decision to apply the policy statements regarding revocation of supervised release exactly as written, and to order the alien's sentence for violating terms of his supervised release to run consecutively to his sentence for the current illegal reentry offense, was not an abuse of discretion but was a reasoned and reasonable decision. The record demonstrated that the district court knew that policy statements were advisory, and that it had discretion in this respect; it exercised its discretion, properly considered the nature and circumstances of the alien's offense, his criminal history, and all other relevant factors.

VII. Retroactivity

United States v. Bellamy, 411 F.3d 1182 (10th Cir. 2005). For purposes of retroactive application, *Booker* announced a new rule of criminal procedure that was not a watershed rule of criminal procedure implicating fundamental fairness and accuracy. Consequently, *Booker* does not apply retroactively to initial habeas petitions. *See also United States v. Price*, 400 F.3d 844 (10th Cir. 2005) (*Blakely* does not apply retroactively to initial § 2255 motions).

Bey v. United States, 399 F.3d 1266 (10th Cir. 2005). The defendant sought authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, contending that his sentence entered pursuant to the then-mandatory United States Sentencing Guidelines was unconstitutional under *Blakely* and *Booker*. The circuit court denied authorization, having previously concluded that *Blakely* was not to be applied retroactively to second or successive § 2255 motions. *See Leonard v. United States*, 383 F.3d 1146 (10th Cir. 2004). The *Booker* Court expressly applied its holding only to cases on direct review and did not expressly declare, nor has it since declared, that *Booker* should be applied retroactively to cases on collateral review. Accordingly, the appellate court declined to extend *Booker* to cases on collateral review.

VIII. Miscellaneous

United States v. Cherry, 433 F.3d 698 (10th Cir. 2005). The defendant was convicted at trial of distributing crack cocaine. He challenged the imposition of the mandatory minimum sentence of ten years. The court upheld the district court's sentence, holding that *Booker* did not render statutory mandatory minimum sentences unconstitutional.

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.3 Relevant Conduct

United States v. Hamilton, 587 F.3d 1199 (10th Cir. 2009). The circuit court reiterated its earlier holdings that relevant conduct can include conduct that occurred prior to the conspiracy of conviction, so long as that earlier conduct was “part of the same course of conduct or common scheme or plan as the offense of conviction.” Thus, the district court did not err in counting as relevant conduct marijuana distribution conspiracies that were separate from and took place before the charged conspiracy because his “allegedly independent actions involved the same type of activity as charged in the conspiracy, i.e., marijuana distribution.”

United States v. Griffith, 584 F.3d 1004 (10th Cir. 2009). Defendant had befriended a veteran who received VA benefits, and helped him manage his affairs. As the veteran’s health worsened, defendant was appointed fiduciary and payee for the veteran’s VA benefits. Defendant and the veteran later married, at which time the defendant became a spouse payee. As fiduciary payee and spouse payee, defendant took and used portions of the VA benefits for her own use. The district court considered defendant’s actions both before and after her becoming a federal benefit payee, including her actions after becoming a spouse payee, as relevant conduct for purposes of sentencing. On appeal, defendant argued that as a spouse payee, she was legally entitled to the VA benefits, and therefore that conduct during that time was not criminal. She also argued that the district court erred by considering her conduct during the time that she acted as the veteran’s informal helper. The Tenth Circuit held that relevant conduct must be (1) conduct “(2) related to the offense of conviction pursuant to U.S.S.G. §1B1.3 and (3) constituting a criminal offense under either a federal or state statute.” The court went on to hold that the district court had not erred in its inclusion of relevant conduct because the defendant’s informal helping of the veteran before becoming a payee was part of the same course of conduct and a common scheme or plan. Likewise, the marriage was a sham marriage, and thus her receipt of benefits after the marriage was also fraudulent. Although the district court did not identify specific state or federal statutes that made all of the conduct criminal, it was enough that PSR, which the court adopted entirely, identified state and federal statutes which the defendant’s conduct violated.

United States v. Mumma, 509 F.3d 1239 (10th Cir. 2007). The district court did not err when it concluded that conduct which cannot be considered relevant conduct under §1B1.3 can nevertheless be considered under 18 U.S.C. § 3553(a). A district court cannot “essentially abandon [] consideration of the advisory guidelines range and substitute [] a calculation based explicitly on unrelated conduct with which [the defendant has] not been charged or convicted.” *Id.* at 1245 n. 4. However, a district court may consider uncharged conduct that is supported by a preponderance of the evidence. Defendant was convicted of making a false statement to a financial institution and bankruptcy fraud. The district court’s sentence of 48 months imprisonment, an “extreme” upward variance above her guidelines range of 6-12 months, was reasonable and supported by evidence that met the preponderance-of-the-evidence standard.

See United States v. Allen, 488 F.3d 1244 (10th Cir. 2007), §5K2.0.

United States v. Osborne, 332 F.3d 1307 (10th Cir. 2003). For purposes of determining relevant conduct under §2B1.1, the district court need only make a reasonable estimate of loss. Given the evidence that any check with an account number could potentially be negotiated, all of the seized checks had account numbers on them, and a single stolen check would be counterfeited multiple times for increased amounts, the district court was not clearly erroneous in using the face value of the seized checks to estimate the intended loss.

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

United States v. Williams, 292 F.3d 681 (10th Cir. 2002). The district court did not err in treating the defendant’s unpaid debt to a creditor as relevant conduct. The defendant’s efforts to defraud his creditors exhibited multiple common factors and similarities. He obtained various loans each time by falsely professing unencumbered ownership of a Jaguar and providing a fraudulently obtained car title. Although the government did not indict the defendant for each of the loans, “[i]t is well established that sentencing calculations can include as relevant conduct actions that do not lead to separate convictions.”

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

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

United States v. Tran, 285 F.3d 934 (10th Cir. 2002). The district court did not err in finding that the defendant was engaged in a common scheme with his codefendants and therefore should be held responsible for their criminal conduct as well as his own. Looking to the record of facts from the district court, the court held on appeal “the acts of [the defendant’s] codefendants were performed in furtherance of jointly undertaken criminal activity that was both reasonably foreseeable to him and within the scope of his agreement” and thus the guideline was appropriate. *See also United States v. Gallant*, 537 F.3d 1202 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2026 (2009) (district court erroneously used “gain as a proxy for each defendant’s culpability” in determining loss from their fraudulent credit card scheme, where it should have held all defendants responsible for losses due to reasonably foreseeable acts of co-conspirators); *United States v. Thompson*, 518 F.3d 832 (10th Cir.) (defendant convicted of tax evasion was properly sentenced for reasonably foreseeable tax loss of co-conspirator), *cert. denied*, 129 S. Ct. 487 (2008); *United States v. Hernandez*, 509 F.3d 1290 (10th Cir. 2007) (evidence was sufficient to find drug quantity reasonably foreseeable).

United States v. Bolden, 132 F.3d 1353 (10th Cir. 1997). Despite the fact that the accomplice was actually a government informant, the accomplice’s possession of a firearm in an

attempted bank robbery could be attributed to the defendant. The evidence demonstrated that the defendant intended that the accomplice use the firearm during the robbery and encouraged such use.

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

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

United States v. Cobb, 584 F.3d 979 (10th Cir. 2009). In a Rule 11 plea agreement, the defendant, who was charged with distribution of crack cocaine, and the government each stipulated to a sentence at the bottom of the guideline range. The agreement was explicit that the sentence was “determined by application of the sentencing guidelines.” The district court accepted the agreement, and agreed with its guideline computation. The Sentencing Commission subsequently amended the guidelines, reducing base offense levels for crack-related offenses (USSG App. C, Amendments 706 (2007) and 715 (2008)). The defendant brought a motion for a reduced sentence pursuant to the amended guidelines and 18 U.S.C. § 3582. The district court denied the motion, concluding that it lacked the authority to reduce the sentence because the original sentence had not been “based on a sentencing range” that had subsequently been lowered by a guidelines amendment, as required by 18 U.S.C. § 3582(c)(2). The Tenth Circuit disagreed, holding that “[d]efendant’s sentencing disposition was tied to the guidelines at every step.” Indeed, the government had conceded that “if the Guidelines had been a different number . . . probably the Plea Agreement would have been a different number.” The appellate court also noted that under the guidelines in effect at the time of sentencing, “the district court was obligated to consider the guideline range in determining whether to accept the Rule 11 plea to a specific sentence (citing §6B1.2(c) (1998)). In light of this holding, the circuit court reversed the district court’s denial of defendant’s § 3582 motion, and remanded for further proceedings.

United States v. Dryden, 563 F.3d 1168 (10th Cir.), *cert. denied*, 130 S. Ct. 311 (2009). Defendant moved for a reduction of sentence under the retroactive amendment to the crack cocaine guideline. The district court denied the motion as the amendment would not have reduced the guideline range. Defendant appealed, arguing “the Commission's policy statement results from an unconstitutional delegation to the Commission of legislative authority to restrict the jurisdiction of federal courts.” “He states that under [§1B1.10], ‘the Sentencing Commission can control which cases the federal courts can and cannot hear’ and ‘submits that this is a power reserved to Congress alone.’” “Mr. Dryden’s nondelegation argument has at least one fatal deficiency: §1B1.10(a)(2) does no more than reiterate a *statutory* limitation on resentencing. His argument challenges a limitation created not by the Sentencing Commission under delegated authority, but by Congress itself. Section 3582(c) provides that a ‘court may not modify a term of imprisonment once it has been imposed’ unless a listed exception applies.” The “‘lowering’

requirement of § 3582(c)(2) is identical to the requirement in USSG §1B1.10(a)(2) that the amendment to the guidelines ‘have the effect of lowering the defendant’s applicable guideline range.’” Finding no error under plain-error review, the judgment of the district court was affirmed.

United States v. Rhodes, 549 F.3d 833 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2052 (2009). A “district court in a sentence modification proceeding is authorized only to ‘reduce the [originally imposed] term of imprisonment,’ 18 U.S.C. § 3582(c)(2), not to increase it.” Accordingly, the Sixth Amendment concerns addressed in *Booker* will not arise in sentencing modification hearings. *Booker* does not apply to such proceedings. The policy statement applicable to these proceedings, §1B1.10, “is binding on district courts pursuant to § 3582(c)(2),” and district courts lack authority to sentence below the amended guideline range. The court disagreed with the Ninth Circuit in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), and upheld the district court’s denial of defendant’s request to resentence him below the amended guideline range in a crack cocaine case.² See also *United States v. Pedraza*, 550 F.3d 1218 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2406 (2009) (2006 version of §1B1.10 “does not statutorily grant” authority to sentence under the amended guideline range); *United States v. Williams*, 575 F.3d 1075 (10th Cir. 2009) (other statements or reports by the Sentencing Commission do not negate the binding effect of §1B1.10).

United States v. Torres-Aquino, 334 F.3d 939 (10th Cir. 2003). A court may reduce a previously imposed sentence pursuant to 18 U.S.C. § 3582(c)(2) if the Sentencing Commission has lowered the applicable sentencing range and such a reduction is consistent with applicable policy statements issued by the Commission. The court held that because Amendment 632 was not listed in §1B1.10(c), the defendant was not entitled to relief under retroactive application of the amendment.

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

United States v. Heredia-Cruz, 328 F.3d 1283 (10th Cir. 2003). The defendant was convicted of illegally re-entering the country after previously being convicted of an aggravated felony. On appeal, the defendant argued that the district court violated the *ex post facto* clause by enhancing his base offense level for a 1987 alien smuggling conviction that was not considered an “aggravated felony” at the time. The court held that the sentencing enhancement in §2L1.2 does not violate the *ex post facto* clause. The guideline punishes a defendant for illegal reentry, not the underlying aggravated felony.

United States v. Gerber, 24 F.3d 93 (10th Cir. 1994). A sentencing court must apply the guidelines that are in effect on the date the defendant is sentenced unless doing so raises *ex post facto* concerns. “The *Ex Post Facto* Clause . . . bars the sentencing court from retroactively

² The Sentencing Commission amended §2D1.1 to reduce the disparity between crack and powder cocaine by affording a 2-level reduction in base offense levels for crack cocaine offenses. USSG App. C, Amendments 706 (2007) and 715 (2008). It made these amendment retroactive and substantively amended §1B1.10. USSG App. C, Amendments 712, 713, and 716 (2008).

applying an amended guideline provision when that amendment disadvantages the defendant.” *Id.* at 95-96. See also *United States v. Saavedra*, 523 F.3d 1287 (10th Cir. 2008); *United States v. Thompson*, 518 F.3d 832 (10th Cir.), *cert. denied*, 129 S. Ct. 487 (2008).

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.1 First Degree Murder

See *United States v. Hanson*, 264 F.3d 988 (10th Cir. 2001), §§5K2.8 and 5K2.9.

§2A1.2 Second Degree Murder

See *United States v. Hanson*, 264 F.3d 988 (10th Cir. 2001), §§5K2.8 and 5K2.9.

§2A1.3 Voluntary Manslaughter

United States v. Cherry, 572 F.3d 829 (10th Cir. 2009). The court affirmed a guideline sentence for a felon in possession that was determined using §2A1.3 (voluntary manslaughter). During an argument, several persons exchanged gunfire, resulting in the death of one individual. No bullet was recovered from the body, making “who fired the fatal round * * * an open question.” Defendant contended the court erred in using §2A1.3 as “there was no proof he fired the fatal shot.” The court stated “Although we are aware of no federal case in point, it appears that criminal liability for homicide does not turn on proof that the defendant was the actual instrument of the death,” and cited cases concerning manslaughter convictions involving jointly engaged activities to support use of the guideline. The court stated,

[m]oreover, even if the federal offense of voluntary manslaughter did not encompass Mr. Cherry’s conduct, we still think it was a proper analogy for purposes of the sentencing guidelines. (In our view, the district court may have been lenient in not analogizing Mr. Cherry’s conduct to a more serious form of homicide.) The district court found that Mr. Cherry precipitated the gun battle that led to Moore’s death and that he had the requisite intent for voluntary manslaughter. It was only fortuitous if his shot was not the one that killed Moore.

§2A2.2 Aggravated Assault

United States v. Tindall, 519 F.3d 1057 (10th Cir. 2008). “Serious bodily injury” as defined in 18 U.S.C. § 113(a)(6) and (b) is broader than the definition of this term in §2A2.2(b)(3). Both “serious bodily injury” and “permanent or life-threatening bodily injury,” as defined in this guideline, “are consistent with a plea to assault resulting in serious bodily injury under § 113(a)(6), depending on the nature of the victim’s injuries.” The district court did not err in assessing a seven-level increase for “permanent or life-threatening bodily injury” under

§2A2.2(b)(3)(C), based on an undisputed statement by the treating emergency room physician regarding the extent of the victim's injury. The doctor's statement constituted sufficient evidence and established the necessary facts by a preponderance of the evidence. *See also United States v. Egbert*, 562 F.3d 1092 (10th Cir. 2009) (where victim was never found, and where the only testimony concerning extent of injury was by lay witnesses, evidence was insufficient to prove "serious bodily injury").

United States v. Pettigrew, 468 F.3d 626 (10th Cir. 2006). The court upheld the district court's application of an upward departure on grounds that the defendant's conduct, which included driving with a blood-alcohol level approximately three times the legal limit, crossing a highway against traffic, and doing so with a history of alcohol abuse resulting in the death of at least one other person, was so excessively reckless as to put the case outside the heartland of §2A2.2 cases.

United States v. Sherwin, 271 F.3d 1231 (10th Cir. 2001). The district court calculated a defendant's sentence under §2A2.2 after determining that the defendant used a car door as a dangerous weapon against a police officer. The court held that the district court correctly characterized the door as a "dangerous weapon" under §2A2.2 because the car door was undoubtedly an "instrument" used by the defendant to physically assault the officer and that its weight, size, and force were capable of causing bodily injury to the officer.

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

United States v. Drewry, 365 F.3d 957 (10th Cir. 2004), *vacated*, 543 U.S. 1103 (2005), *reinstated*, 133 F. App'x 543 (10th Cir. 2005). The defendant was convicted of physical and sexual abuse of four children in Indian country. The district court enhanced his sentence under §2A3.1(b)(1) for the use of force or threats in the course of sexually assaulting one of the children. The evidence established that the eleven year old victim was intimidated and threatened over a lengthy period of time. The child stated that she was scared of defendant, who was frequently violent with her and her siblings, that he had pulled her hair, hit her face, and thrown her to the floor and stomped on her stomach, and that he once told her he might kill her and bury her by the creek. The court held that the victim's submission to the defendant's sexual abuse was a result of the fear of force and, therefore, the district court properly enhanced the defendant's sentence on basis of use of force or threats of force. *See also United States v. Chee*, 514 F.3d 1106 (10th Cir. 2008) (the base offense level under §2A3.1(a) and the four-level enhancement for use of force under §2A3.1(b)(1) apply where a defendant is convicted of either sexual abuse or aggravated sexual abuse); *United States v. Allen*, 488 F.3d 1244 (10th Cir. 2007) (vacating the district court's sentence for unreasonableness, because the district court used §2A3.1 as one analogous guideline provision and considered an alleged intent to commit sexual abuse or murder that was "completely unrelated to his sale of methamphetamine" as a basis for upward departure).

United States v. Cryar, 232 F.3d 1318 (10th Cir. 2000). The district court did not err when it calculated the defendant's offense level under §2A3.1 instead of §2X1.1 for attempts. The defendant pled guilty to transporting child pornography and was convicted of attempted

sexual abuse. On appeal, the defendant challenged the application of §2A3.1(b) and argued that the applicable guideline should be §2X1.1. The defendant stated that 18 U.S.C. § 2241(c) criminalizes behavior at the point in time of the crossing of the state line and, at the time he crossed, he made no attempt to engage in a sexual act with a child. The court, however, held that the defendant was not convicted of crossing state lines while holding impure thoughts, but rather he was convicted of the crossing of state lines with the intent to engage or attempt to engage in a sexual act with a person under the age of twelve.

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

Loss Issues (§2B1.1(b)(1))

United States v. Griffith, 584 F.3d 1004 (10th Cir. 2009). Defendant had befriended a veteran who received VA benefits, and helped him manage his affairs. As the veteran's health worsened, defendant was appointed fiduciary and payee for the veteran's VA benefits. Defendant and the veteran later married, at which time the defendant became a spouse payee. As fiduciary payee and spouse payee, defendant took and used portions of the VA benefits for her own use. Defendant was charged with embezzling funds from the VA. On appeal, she challenged the court's calculation of loss and consequent determination of her offense level under §2B1.1. Included in the district court's loss calculation was a \$10,000 installment loan taken out in the victim's name for the purchase of a car. The car was subsequently repossessed. The appellate court held that the district court clearly erred by including the \$10,000 in its calculation of direct loss. The circuit court also held that the district court had clearly erred by including in its estimated loss calculation \$30,216 in credit card debt which the defendant had incurred by misusing the victim's credit. The court held that "the Government offered no evidence that this credit card debt was ever paid, and the commentary to the Guidelines make clear that loss must constitute 'pecuniary harm.' U.S.S.G. § 2B1.1, cmt. N. 3(A)(i)-(iii). While we do not doubt that Griffith's conduct caused harm to Norvell's credit rating, 'pecuniary harm' under the Guidelines 'does not include . . . harm to reputation, or other noneconomic harm.'" These errors were ultimately harmless, however, because the district court stated on the record that it would have imposed the same sentence even if the total loss had been significantly less. The district court did not err in its estimated loss calculation when it included 60 percent of "\$76,876 in questionable expenditures made over the course of [defendant's] relationship with [the victim]." The court based this amount on the PSR's analysis of each person's financial situation and lifestyle before the fraud, concluding that the defendant profited more from the expenditures than did the victim.

United States v. Sutton, 520 F.3d 1259 (10th Cir. 2008). There is "more than one permissible way to measure loss in criminal odometer tampering cases," and the district court did not err in using one of those measures and rejecting another permissible measure suggested by

the defendant. Other circuits “have recognized that loss may be calculated in a variety of ways,” including the different ways proposed by the defendant and the government in this case.

United States v. Ary, 518 F.3d 775 (10th Cir. 2008). When a defendant objects to facts stated in the PSR, the government must prove those facts by a preponderance of the evidence at the sentencing hearing. Because the government failed to prove by a preponderance of the evidence that the defendant stole certain items, the items could not be used to calculate the amount of loss. Regarding the items which the government proved to be stolen, the district court properly calculated loss by using the auction price of those items as a measure of fair market value.

United States v. Lin, 410 F.3d 1187 (10th Cir. 2005). Despite the parties’ stipulation to an actual loss amount, the district court calculated the defendants’ sentence by using the aggregate credit limits of all altered or counterfeit credit cards in the defendants’ possession. The court held that the district court could aggregate the credit limits of all counterfeit or altered credit cards in defendants’ possession to reach the amount of loss for guideline sentencing purposes, when sentencing defendants for using altered or counterfeit access devices, absent evidence at sentencing that defendants did not intend to use maximum credit limit of the cards. The amount of loss to be considered is the defendants’ intended, rather than actual, loss, if an intended loss can be determined, and if the intended loss exceeds the amount of actual loss. Given the lack of record evidence to suggest that the defendants did not intend to use the maximum credit limits of the cards, the district court did not commit clear error when it calculated the intended loss amount. The court also upheld the enhancement for production or trafficking in unauthorized access devices.

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

United States v. Haddock, 12 F.3d 950 (10th Cir. 1993). The loss enhancement “is only for loss to victims, not for gain to defendants.” A defendant’s gain may only be used as an alternative estimate of a victim’s loss if that loss cannot be determined, and only where there was an actual or intended loss to the victim. *See also United States v. Gallant*, 537 F.3d 1202 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2026 (2009) (district court must begin its evaluation of loss from the perspective of the victim, not the defendant, and a defendant’s gain can only be used as an alternative measure of loss in certain limited circumstances; if the district court questions the reasonable estimate of loss, it should “request additional evidence, such as expert testimony, from the parties.”); *United States v. Galloway*, 509 F.3d 1246 (10th Cir. 2007) (“[U]se of gain as an estimate of loss must be limited to transactions in which there was indeed a loss.”).

Victim Table (§2B1.1(b)(2))

United States v. Orr, 567 F.3d 610 (10th Cir. 2009). In discussing the number of victims, the court found “§2B1.1 and its Application Notes all focus on ‘actual loss,’ and if an individual credit card account holder is fully and timely reimbursed by his or her credit card company or

issuing bank for any fraudulent charges made with the account (or is not required to pay any such charges), then he or she has suffered no ‘actual loss’” and is not counted as a victim.³

Sophisticated Means (§2B1.1(b)(9))

United States v. Jones, 530 F.3d 1292 (10th Cir.), *cert. denied*, 129 S. Ct. 583 (2008). The guidelines commentary accompanying §2B1.1(b)(9)’s “sophisticated means” enhancement does not require that a defendant’s scheme be more sophisticated than an average bank fraud scheme. “In fact, the section applies to offenses other than bank fraud, including larceny, offenses involving stolen property, property damage, or property destruction, fraud, forgery, and counterfeiting.” Unlike a similar enhancement in §2T1.3, where commentary requires that the tax fraud be more intricate or necessitate greater planning than a “routine tax evasion case,” §2B1.1(b)(9)’s inquiry relies on whether the fraud’s execution or concealment was particularly complex or intricate. Affirming the district court’s sentence and holding that it did not err in applying this upward adjustment, the court noted that each defendant’s “scheme is readily distinguishable from less sophisticated means by which the myriad crimes within the ambit of §2B1.1 may be committed.”

Means of Identification (§2B1.1(b)(10))

United States v. Tatum, 518 F.3d 769 (10th Cir. 2008). Counterfeit checks and the bank account numbers printed on them are not access devices within the meaning of §2B1.1(b)(10) and 18 U.S.C. § 1028(d)(1). The district court erred when it increased defendant’s base offense level by six levels on this ground.

§2B3.1 Robbery

Brandishing or Possessing a Dangerous Weapon (§2B3.1(b)(2)(E))

United States v. Farrow, 277 F.3d 1260 (10th Cir. 2002). The district court did not err in applying an enhancement for a weapon under §2B3.1(b)(2)(E) to a defendant who pretended to have a gun in his pocket during a bank robbery. The court held that the defendant’s actions and language at the scene and his admission to FBI investigators that he did not have a gun, but did have his hand in his pockets as if he had one, was sufficient evidence to trigger the application of the dangerous weapon enhancement.

Threat of Death (§2B3.1(b)(2)(F))

United States v. Arevalo, 242 F.3d 925 (10th Cir. 2001). The notes that the defendant handed to the tellers during the robbery constituted “threats of death” warranting a two-level enhancement under §2B3.1(b)(2)(F). The defendant’s two statements “I have a gun and I’m

³ The Commission has amended the commentary to §2B1.1(b)(2) to expand the definition of victim in cases involving a means of identification. In such cases, a victim will include any individual whose means of identification was used unlawfully or without authority. The amendment will take effect on November 1, 2009.

willing to use it” and “If you do what I say, you will live” implied that failure to comply with the defendant’s instructions would result in death. *United States v. Ellis*, 525 F.3d 960 (10th Cir.) (note reading “I have a gun and I want you to give me all of your large bills or I’ll use it” constituted a death threat per §2B3.1(b)(2)(F)), *cert. denied*, 129 S. Ct. 318 (2008).

Bodily Injury Table (§2B3.1(b)(3))

United States v. Metzger, 233 F.3d 1226 (10th Cir. 2000). The defendant was convicted of robbery of a credit union during which a police officer mistakenly shot a driver in the parking lot whom he believed to be the perpetrator. The district court applied the bodily injury enhancement under §2B3.1(b)(3)(B) to increase a defendant’s sentence. The court held that the district court properly applied the four-level enhancement under §2B3.1(b)(3)(B) because the victim’s injury was a reasonably foreseeable result of the defendant’s conduct. *See United States v. Malone*, 222 F.3d 1286 (10th Cir. 2000) (district court’s decision to apply the four-level enhancement under §2B3.1(b)(4)(A) based on the defendant’s abduction of the victim in order to facilitate the commission of the carjacking was not plain error).

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

United States v. Pearson, 211 F.3d 524 (10th Cir. 2000). The defendant’s bank robbery offense level was increased under §2B3.1(b) for physically restraining bank personnel with a gun. He received a consecutive sentence for his 18 U.S.C. § 924(c) conviction. The court held that the district court properly increased the bank robbery offense level for physical restraint with a gun. No impermissible double counting occurred because physical restraint with a gun during a robbery under §2B3.1(b)(4)(B) and the possession of the firearm under 18 U.S.C. § 924(c) involved two distinct acts and punished two distinct harms. *See also United States v. Miera*, 539 F.3d 1232 (10th Cir. 2008) (pointing the gun all around the bank in a way that took in all present, commanding people not to move, and blocking the front entrance to the back were actions that constituted “something more” than brandishing a firearm and supported the §2B3.1(b)(4)(B)’s two-level enhancement for physical restraint), *cert. denied*, 129 S. Ct. 964 (2009); *United States v. Rojas*, 531 F.3d 1203 (10th Cir. 2008) (district court properly enhanced defendant’s sentence under §2B3.1(b)(6), and this enhancement for taking a firearm did not constitute impermissible double counting because it “involves conduct that is distinct from using, possessing, brandishing, or discharging” a firearm under § 924(c)); *United States v. Rucker*, 178 F.3d 1369 (10th Cir. 1999) (enhancement for otherwise using a gun and for physical restraint of victims, stemming from the defendant’s single act of pointing the gun at the victims, was not improper double counting).

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

United States v. Bruce, 78 F.3d 1506 (10th Cir. 1996). The application of a five-level enhancement under §2B3.2(b)(3)(A)(iii) was warranted where defendant possessed weapons at home when he mailed an extortion letter threatening their use. The defendant admitted to possessing the weapons prior to his arrest and the police found weapons in defendant’s home

upon searching it. The court held that the defendant's weapons possession demonstrated that the defendant was prepared to follow through with his threats if his monetary demands were not met.

§2B5.3 Criminal Infringement of Copyright or Trademark

United States v. Foote, 413 F.3d 1240 (10th Cir. 2005). The defendant participated in a conspiracy to traffic in counterfeit goods. Because an exact record of the defendant's sales was not available, the district court calculated the retail value of the infringing goods seized by the total of the defendant's bank account deposits and cashed checks during the relevant time period. The district court then subtracted the defendant's legitimate income and reduced the resulting value by ten percent to reflect its determination that no more than that proportion of goods sold at the defendant's store constituted non-counterfeit merchandise. The court held that district courts have "considerable leeway in assessing the retail value of the infringing items," and "need only make a reasonable estimate of the loss, given the available information." In the absence of more accurate information indicating the retail value of the counterfeit goods sold by the defendant, the court held that the sentencing court's decision to include bank account transactions in its calculation did not constitute clear error.

Part D Offenses Involving Drugs

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

Drug Quantity (§2D1.1(a)(5))

United States v. Hinson, 585 F.3d 1328 (10th Cir. 2009). The district court properly calculated the quantity of drugs attributable to the defendant when, *inter alia*, it converted over \$40,000 in cash found in defendant's vehicle into its drug quantity equivalent. Evidence was presented at trial that the defendant "was a long-term methamphetamine dealer who sold drugs out of his car." A witness also testified that he had seen the defendant place drug money in his car.

United States v. Nash, 482 F.3d 1209 (10th Cir. 2007). The district court "committed constitutional *Booker* error" by calculating the defendant's base offense level under §2D1.1(c) using judicially found facts rather than jury-found facts. While the judge found that the defendant had intended to convert powder cocaine in to crack cocaine, resulting in a base offense level of 36, the jury found that the defendant possessed one kilogram of powder cocaine, supporting a base offense level of 26. The district court should have relied upon the jury's finding and imposed a base offense level of 26.

United States v. Boyd, 289 F.3d 1254 (10th Cir. 2002). The district court erred in not calculating the amount of drugs attributable to the defendant by a preponderance of the evidence, as required by the guideline. The court held that there was no evidence in the record supporting the district court's finding that the government's greater measurement of quantity was more accurate than the defendant's lesser measurement taken later. The court vacated and remanded

the sentence after finding that the district court looked outside the record for a factual basis for the drug quantity relied upon for sentencing.

United States v. Higgins, 282 F.3d 1261 (10th Cir. 2002). The sentencing court determined the amount of methamphetamine attributed to the defendants based on testimony regarding two quantities of a chemical used to manufacture the drug. The court held that while a court's determination of drug quantity attributed to defendants may be an approximation, the estimate used to establish the offense level under the guidelines must have "some basis of support in the facts of the particular case" and must have "sufficient indicia of reliability." Finding that the estimates of methamphetamine attributable to the defendants did not have indicia of reliability, the court remanded the case for sentencing. *See also United States v. Todd*, 515 F.3d 1128 (10th Cir. 2008) (in determining the advisory guideline range, the district court must consider the defendant's uncontested admission that he had possessed 680.4 grams of methamphetamine in addition to the 37 grams of methamphetamine confiscated from him).

United States v. Smith, 264 F.3d 1012 (10th Cir. 2001). The defendant pled guilty to possession of pseudoephedrine, one of the key ingredients for manufacture of methamphetamine. The relevant sentencing guideline for possession of pseudoephedrine is §2D1.11 which provides for a cross-reference to §2D1.1 if the defendant is determined to have been manufacturing methamphetamine. The court held that it is not necessary for the defendant to possess a full working lab to be convicted of attempting to manufacture methamphetamine. The defendant had most of the equipment for a full working lab and had already begun the first step of the manufacturing process. It is not necessary for the defendant to possess all the necessary precursor chemicals to be considered to have taken a substantial step toward manufacture.

United States v. Asch, 207 F.3d 1238 (10th Cir. 2000). In determining the applicable sentencing range for a defendant convicted of conspiracy to distribute and possession with intent to distribute controlled substances, drugs possessed for personal consumption can be considered when determining the sentencing guidelines range but cannot be considered when determining the statutory sentencing range pursuant to 21 U.S.C. § 841(b).

United States v. Decker, 55 F.3d 1509 (10th Cir. 1995). The district court did not err in treating 100 percent pure d,1-methamphetamine as "methamphetamine (actual)" under the sentencing guidelines. The defendant was convicted for manufacturing a substance consisting of both d,1-methamphetamine and d-methamphetamine. The court ruled that the district court correctly treated pure d,1-methamphetamine as "methamphetamine (actual)" for sentencing purposes. The guidelines instruct courts to assign the weight of the entire mixture of substance to the controlled substance that results in the greater offense level when the mixture consists of more than one controlled substance, thereby precluding the defendant's claim that his base offense level should have been determined by combining the calculated marijuana equivalents of the amounts of d,1-methamphetamine and d-methamphetamine in the substance. *See also United States v. Verdin-Garcia*, 516 F.3d 884 (10th Cir.) (district court properly converted different controlled substances to marijuana equivalency in determining the base offense level), *cert. denied*, 129 S. Ct. 161 (2008).

Possession of a Dangerous Weapon (§2D1.1(b)(1))

United States v. Pompey, 264 F.3d 1176 (10th Cir. 2001). The district court did not err in enhancing the defendant's sentence by two levels for possession of a firearm during the course of a drug conspiracy. Once the government has satisfied its initial burden showing a temporal and spatial relationship among the weapon, the defendant, and the drug trafficking, the burden shifts to the defendant to prove that it is clearly improbable that the weapon was connected with the offense. Actual seizure from the defendant is not necessary. *See also United States v. Sallis*, 533 F.3d 1218 (10th Cir. 2008) (defendant's acquittal on the firearm charge did "not bar the district court from considering that same conduct at sentencing" in enhancing his sentence under §2D1.1(b)(1); defendant did not show that his connection with the firearm and drug-trafficking was clearly improbable).

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

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

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

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

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit⁴

United States v. Lewis, 240 F.3d 866 (10th Cir. 2001). The defendant was convicted of violating the Lacey Act, in connection with a commercial elk-hunting venture that he ran from his 320-acre tract of property located adjacent to wildlife refuge. The district court included in its calculation of loss under §2F1.1 the value of the elk intended to be killed, along with the value of the other elk actually killed. The court held that the district court reasonably concluded that the defendant intended to cause the killing of a second elk and, as such, its value should be included in the calculation of loss in the defendant's case. *See United States v. Nichols*, 229 F.3d 975 (10th Cir. 2000) (entire amount of bad checks written on an account acquired by using a false social security number can be considered in calculating the loss, even though the bank recovered some of the losses).

⁴ USSG §2F1.1 was deleted by consolidation with USSG §2B1.1. *See* USSG App. C, Amendment 617. This change became effective on November 1, 2001.

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

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

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; Possessing Material Involving the Sexual Exploitation of a Minor

United States v. Burgess, 576 F.3d 1078 (10th Cir.), *cert. denied*, 130 S. Ct. 1028 (2009). The defendant was convicted of transportation and possession of child pornography. The defendant claimed the district court erred in denying a two-level downward adjustment §2G2.2(b)(1) by equating transportation with the concept of transfer. Citing *United States v. Fore*, 507 F.3d 412 (6th Cir. 2007), the court found the adjustment properly denied. Quoting *Fore*, the court found defendant failed to show his conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor, as his conduct "also encompassed the transportation of [such] materials * * * , an offense that is separate and distinct from, and goes beyond, the mere receipt or solicitation of pornography * * * ." The court also noted that "§2G2.2(b)(1) is devoid of any language suggesting that the offense of transporting child pornography in interstate commerce otherwise qualifies for the two-level decrease in a defendant's offense level."

United States v. Geiner, 498 F.3d 1104 (10th Cir. 2007). The defendant's use of a file-sharing program, which allowed him to obtain child pornography at a faster speed in exchange for him making his files available to others, supported a five-level enhancement under §2G2.2(b)(3)(B). The faster downloading capabilities constituted a "thing of value" within the meaning of this guideline provision.

United States v. Garcia, 411 F.3d 1173 (10th Cir. 2005). The defendant pled guilty to interstate transportation of child pornography, based on sending photos to an undercover agent which depicted minors engaging in sexual conduct with adults. In the course of the interaction with the agent, the defendant suggested specific acts of the mother and girls that he wanted the agent to photograph. The sentencing court applied the cross reference in §2G2.2(c)(1) to §2G2.1, which is applicable if the offense involved causing, transporting, permitting or seeking by

advertisement to have a minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The court upheld application of the cross-reference, reasoning that the defendant's quest to obtain sexually explicit photos was part of a common scheme and common course of conduct and that the defendant sent his pornography as a trade for the pornographic pictures of the girls.

United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003). The defendant was convicted of receiving or distributing, by computer, images of minors engaged in sexually explicit conduct; possession of the images; and distribution of the images. On appeal, the defendant claimed that the district court erred (1) by imposing the enhancement under §2G2.2(b)(1) for possession of images of prepubescent children; and (2) by imposing the enhancement for sadistic conduct under §2G2.2(b)(3). The defendant argued that expert testimony was required to prove that the minors in the images were prepubescent. The court found that the images so obviously depicted prepubescent children that no expert testimony was required. The court also affirmed the enhancement for possessing sadistic images under §2G2.2(b)(3), concluding that the district court applied the enhancement because it found that some of the images depicted anal or vaginal penetration of prepubescent children by adults causing pain and humiliation.

§2G2.4 Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct⁵

United States v. Thompson, 281 F.3d 1088 (10th Cir. 2002). The district court did not err when applying a two-level enhancement under §2G2.4(b)(2) to the sentences of two defendants convicted of violating 18 U.S.C. § 2252(a)(5)(B), child pornography possession. Section 2G2.4(b)(2) permits a two-level enhancement when a defendant is in possession of ten or more "items" containing visual depictions involving the sexual exploitation of a minor. Both defendants had hundreds of such depictions on less than ten computer disks and argued that the district court erred in interpreting "items" to include computer files, rather than the disks themselves. The court determined that the term "items" in §2G2.4(b)(2) meant computer files, not the entire disks. A file is a different kind of container that may be transported electronically far more easily than the listed items and thus should be sufficient to trigger the enhancement under §2G2.4(b)(2).

Part J Offenses Involving the Administration of Justice

§2J1.3 Perjury or Subornation of Perjury

United States v. Olsen, 519 F.3d 1096 (10th Cir. 2008). When perjury is committed in respect to another crime, the defendant should be sentenced under §2J1.3(c)(1), and the government is not required to charge the defendant with the underlying offense or demonstrate that he or she committed it. Instead, the government must prove that the perjury was "related to the criminal offense in a very entwined and enmeshed way." Tenth Circuit precedent does not foreclose a defendant's argument that a dramatic increase in the guideline range requires proof

⁵ See USSG App. C, Amendment 649.

greater than preponderance of the evidence. However, in this case the perjury's relation to a murder was proven beyond a reasonable doubt.

United States v. Sinclair, 109 F.3d 1527 (10th Cir. 1997). The district court assessed a three-level upward adjustment of the defendant's offense level pursuant to §2J1.3(b)(2) for substantial interference with the administration of justice. The defendant argued that the government failed to establish that his perjured testimony caused an unnecessary expenditure of substantial government or court resources. The court concluded that substantial interference with the administration of justice may be inferred if the defendant concealed information of which he is the only known source. In the instant case, the district court had made a specific finding that the perjured testimony offered by the defendant at the trial was the cornerstone of the defense and led to additional false testimony. *See also United States v. Smith*, 531 F.3d 1261 (10th Cir. 2008) (defendant's conduct in contesting his ACCA enhancement by filing a false expungement order caused "unnecessary expenditure of substantial governmental or court resources" because the state incurred expenses taking the defendant to the hearing reopening his prior conviction, the hearing itself was an expenditure of prosecutorial and court resources, and expert services were employed to evaluate authenticity).

Part K Offenses Involving Public Safety

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

Base Offense Level (§2K2.1(a))

United States v. Rooks, 556 F.3d 1145 (10th Cir.), *cert. denied*, 130 S. Ct. 136 (2009). The district court correctly held that a conviction for Texas third degree sexual assault involving penetration without consent constitutes a crime of violence for purposes of the enhancement at §2K2.1(a)(2) and §4B1.2(a). This statute sets forth a crime of violence under §4B1.2(a) because it presupposes a lack of consent. Additionally, it is similar "in kind as well as in degree of risk posed" to the enumerated offenses, as required by the Supreme Court's holding in *Begay*. The relevant portion of this Texas statute requires "intentional, non-consensual conduct against a person," and the prohibited conduct "endangers the health and life of the victim," a factor the court "previously considered relevant to determining whether the offense is violent and aggressive." There is no distinction "between inchoate and completed crimes for the purposes of defining a crime of violence under §4B1.2(a)," so the fact that the defendant was convicted of attempted sexual assault did not change the analysis.

United States v. Saavedra, 523 F.3d 1287 (10th Cir. 2008). In order to obtain an upward adjustment under §2K2.1(a)(5), the government must prove that the firearm defendant possessed a shotgun barrel shorter than 18 inches. It does not have to prove that the defendant knew the barrel was shorter than 18 inches, because §2K2.1(a)(5) does not have a scienter requirement. Unlike this guideline provision, 18 U.S.C. § 922(g) requires the government to prove that a defendant knew that a firearm has special alleged characteristics (such as too short a barrel), but the defendant here pleaded guilty to this offense.

United States v. Dell, 359 F.3d 1347 (10th Cir. 2004). The defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and possession of a stolen firearm in violation of 18 U.S.C. § 922(j). The district court relied upon a prior drug charge as a prior felony conviction for the purposes of calculating his base offense level. The defendant challenged the base offense level on appeal, asserting that the drug charge should not be considered a conviction under §2K2.1(a)(4)(A) because he entered a plea in abeyance after which he successfully completed court-ordered treatment and the state court dismissed the charge at the conclusion of his treatment. The court rejected the defendant’s assertion that it should look to state law to determine whether the offense was a conviction. After concluding that the defendant’s plea in abeyance should receive one criminal history point under §4A1.1(c), and because §2K2.1 explicitly relies upon the criminal history guidelines to direct a sentencing court to the appropriate base offense level, the court concluded that the district court properly counted the plea in abeyance as a conviction under §2K2.1(a)(4)(A) in determining the defendant's base offense level.

Lawful Sporting Purposes or Collection (2K2.1(b)(2))

United States v. Collins, 313 F.3d 1251 (10th Cir. 2002). The district court erred in determining that application of §2K2.1(b)(2) was precluded by two instances of lawful, non-sporting use. Section 2K2.1(b)(2) should be read broadly to encompass circumstances that are consistent with the provision’s intent to provide a lesser punishment for possession of a firearm that is more benign. The district court must examine the totality of the circumstances, including the specific circumstances of possession and actual use, rather than relying on a single factor to preclude application of the guideline. *But see United States v. Hanson*, 534 F.3d 1315 (10th Cir. 2008) (upholding district court denial of a downward adjustment under §2K2.1(b)(2) because, although target practice and “plinking” are sporting purposes, the defendant failed to show by a preponderance of the evidence that his sole purpose was sporting, in light of his criminal history, addiction to methamphetamine, involvement in a “drug lifestyle,” and the fact that the firearm was a 9 millimeter handgun).

Possession in Connection with Another Felony (§2K2.1(b)(6))

United States v. Bunner, 134 F.3d 1000 (10th Cir. 1998). An enhancement under §2K2.1(b)(5)⁶ for possession of a weapon in connection with another felony is appropriate when “the weapon facilitated or had the potential to facilitate the underlying felony.” In this case, the court affirmed the district court’s application of this upward adjustment, where the defendant’s handgun was found in his bedroom in close proximity to methamphetamine and items used in

⁶ The Commission redesignated USSG §2K2.1(b)(5) as subsections (b)(6) and (c)(1), effective November 1, 2006. See USSG App. C, Amendment 691.

drug trafficking.⁷ See also *United States v. Morris*, 562 F.3d 1131 (10th Cir. 2009) (“another felony offense” includes offenses committed contemporaneously with the unlawful possession of a weapon; §2K2.1(b)(6) and application note 14(B) are not inconsistent); *United States v. Payton*, 405 F.3d 1168 (10th Cir. 2005) (proximity of weapons and drugs is important in determining whether or not possession of a weapon is in connection with another felony); *United States v. Mozee*, 405 F.3d 1082 (10th Cir. 2005) (district court committed plain error in enhancing sentence under §2K2.1(b)(6), where evidence of connection was contradicted and not overwhelming, and a jury may have had a reasonable doubt about it); *United States v. Blackwell*, 323 F.3d 1256 (10th Cir. 2003) (sufficient evidence supported the district court’s finding that the defendant pointed the gun at the officers who were in fear of imminent bodily threat; the defendant possessed the weapon in connection with the state crime of felony menacing); *United States v. Brown*, 314 F.3d 1216 (10th Cir. 2003) (enhancement for possession of a weapon in connection with another felony is inappropriate if the possession is coincidental or unrelated to the underlying felony, but appropriate if the weapon facilitated or had the potential to facilitate the felony; district court properly found that defendant possessed a firearm in connection with his escape).

Cross Reference (§2K2.1(c))

United States v. Varela, 586 F.3d 1249 (10th Cir. 2009). Defendant was convicted at trial of being a felon in possession of a firearm. The district court found that Varela had also possessed 150 to 500 grams of methamphetamine with the intent to distribute, and calculated the sentence using the cross reference provision of §2K2.1(c)(1)(A) because Varela had possessed the firearm in connection with another felony offense. On appeal, Varela argued that “the Guidelines provide no guidance regarding when to use subsection (c)(1) or (b)(5), except for the use of the word “commission” in subsection (c)(1).” On this basis, Varela argued that the cross reference only applies if the firearm was actually *used* in the *commission* of the felony, and thus that the district court erred. The appellate court disagreed, holding that the plain language of the guidelines dictates that the sentencing court should calculate the guideline range using each subsection and apply whichever results in a greater sentence.

United States v. Jardine, 364 F.3d 1200 (10th Cir. 2004), *vacated*, 543 U.S. 1102 (2005), *reinstated*, 406 F.3d 1261 (10th Cir. 2005). The defendant was convicted of being a felon and person previously convicted of a domestic violence crime in possession of a firearm. The district court applied the cross-reference in §2K2.1(c) to §2X1.1 because the defendant had used or possessed firearms in connection with drug trafficking activities. Although there was no proof that the firearms which formed the basis for the defendant’s conviction were used in connection with his drug trafficking activities, the district court applied the cross-reference, reasoning that

⁷ In 2006, the Commission amended §2K2.1(b)(5) (redesignated as (b)(6) and (c)(1) by the same amendment) to resolve a circuit split concerning the application of the enhancement for the use of a firearm in connection with a burglary and drug offense. In the case of a burglary offense, the enhancement applies to a defendant who takes a firearm in the course of a burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary. In the case of a drug trafficking offense, the enhancement applies where the firearm is found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia. See USSG App. C, Amendment 691.

such a connection is not necessary. The court affirmed, holding that §2K2.1(c)(1) applies to any firearm or ammunition, including that firearm or ammunition used by a defendant in connection with another offense, even if different from the particular firearm or ammunition upon which defendant's felon-in-possession conviction is based.

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

United States v. Battle, 289 F.3d 661 (10th Cir. 2002). The district court did not err in choosing to sentence the defendant to consecutive sentences for separate crimes under 18 U.S.C. § 924. The court held that section 924(c)(1) mandates a consecutive sentence for the use of a firearm in the commission of a violent crime, and section 924(c) mandates a consecutive sentence in addition to the sentence for use of a firearm used in the commission of a violent crime where the evidence supports the aggravating factors outlined in section 924(j).

United States v. Wheeler, 230 F.3d 1194 (10th Cir. 2000). The district court did not err in sentencing the defendant in excess of the 84-month mandatory minimum. The court held that a sentencing court has the power to impose a sentence greater than the statutory mandatory minimum required by 18 U.S.C. § 924(c) if the defendant's criminal history category and offense level indicates a term higher than the minimum under the statute. The court reversed because the methodology used by the district court was erroneous because the 22 months in excess of the seven-year mandatory minimum was not determined based on the defendant's offense level and criminal history. The defendant's sentence was vacated and remanded for resentencing.

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Alapizco-Valenzuela, 546 F.3d 1208 (10th Cir. 2008). The district court correctly applied a two-level enhancement under §2L1.1(b)(8) for involuntary detention, where the smuggled immigrants were held in stash houses, forced to call family or friends for money to secure their release, stripped of their shoes and personal belongings, confronted with armed men, and told that if payments were not made they would not be released. In making its ruling, the district court complied with Federal Rule of Criminal Procedure 32's requirement that a court rule on disputed portions of the presentence investigation report and other controverted matters.

United States v. Aranda-Flores, 450 F.3d 1141 (10th Cir. 2006). The defendant contested a reckless conduct enhancement imposed pursuant to §2L1.1(b)(5), and the court held that the defendant's conduct did not support the enhancement. The defendant "departed at night to avoid being apprehended by law enforcement; . . . chose a circuitous route on a two-lane highway instead of a major interstate; . . . drove eight-and-a-half hours and made only one brief stop for gasoline; . . . fell asleep at the wheel; and . . . did not have a United States driver's license." The court concluded that, although the defendant's conduct did in fact cause several deaths due to his collision with another vehicle, the conduct was not reckless because falling asleep at the wheel did not in and of itself constitute reckless conduct. Rather, the court said, it

looked to factors such as “lack of sleep, length of time at the wheel, presence of sure warning signs, influence of drugs or alcohol, and strenuous activities before driving.” With no evidence of any such factors in the record, the court concluded that the reckless conduct enhancement was improperly applied.

United States v. Maldonado-Ramires, 384 F.3d 1228 (10th Cir. 2004). The defendant pleaded guilty to transporting illegal aliens within the United States. In arriving at a sentence under the guidelines, the district court increased the defendant's base offense level by two points pursuant to §2L1.1(b)(5), concluding that the defendant's offense conduct had “recklessly creat[ed] a substantial risk of death or serious bodily injury to another person.” The evidence established that the defendant was driving a minivan containing six illegal aliens when he lost control of the minivan, causing it to roll over. One of the passengers was killed in the accident and several others were injured. At the time of the accident, one passenger was sitting in the front passenger seat and the remaining five passengers were lying on the floor of the minivan. The rear seats and seatbelts had been removed from the van and the defendant had directed the aliens to lie down on the floor of the minivan to avoid detection. The court affirmed the district court’s finding. *See also United States v. Muñoz-Tello*, 531 F.3d 1174 (10th Cir. 2008) (upholding district court’s enhancement of defendant’s sentence under §2L1.1(b)(5), where defendant drove for ten hours at night in an overloaded vehicle, instructed two passengers to lie in the cargo area, and was involved in an accident that killed four of the passengers), *cert. denied*, 129 S. Ct. 1314 (2009).

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

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

Crime of Violence (§2L1.2(b)(1)(A))

United States v. Yanez-Rodriguez, 555 F.3d 931 (10th Cir. 2009). Defendant’s Kansas conviction for aggravated sexual battery constitutes a crime of violence. The statute prohibits non-consensual sexual contact with another person, so it is a “forcible sex offense.” As such, it is categorically a crime of violence. *See also United States v. Gonzalez-Jaquez*, 566 F.3d 1250 (10th Cir. 2009) (California conviction for sexual battery – touching against the will for sexual arousal, gratification or abuse – is categorically a crime of violence).

United States v. Barraza-Ramos, 550 F.3d 1246 (10th Cir. 2008). A conviction under Florida law for aggravated battery is not categorically a crime of violence for purposes of §2L1.2(b)(1)(A)(ii), because the elements of the offense of simple battery do not necessarily require the use, attempted use, or threatened use of physical force. Aggravated battery is not a crime enumerated in §2L1.2, so courts must decide whether it has as an element the use, attempted use, or threatened use of physical force against a person. The Florida statute defining “aggravated battery” does not set forth a substantive offense, but a sentencing enhancement, so courts must determine whether Florida’s simple battery constitutes a crime of violence. Simple battery can be committed by either touching, striking, or causing bodily harm. “Because Florida’s battery statute defines the offense in multiple ways,” the court examined judicial records from the

defendant's prior conviction "to determine which part of the statute to analyze." Based on those records, it could not determine whether the defendant was convicted of touching or striking. Since mere touching does not constitute physical force, the court reversed the district court's application of the 16-level enhancement and remanded for resentencing.

United States v. Servin-Acosta, 534 F.3d 1362 (10th Cir. 2008). Although the state court's minute order, along with corroborating evidence, was sufficient to prove – by a preponderance of the evidence – the fact of the defendant's California conviction for second-degree robbery, it was insufficient proof that this conviction constituted a crime of violence for purposes of §2L1.2(b)(1)(A)(ii).

United States v. Zuniga-Soto, 527 F.3d 1110 (10th Cir. 2008). Clarifying its approach to the determination of which predicate offenses constitute crimes of violence under §2L1.2(b)(1)(A), the court held that "§2L1.2's 'as an element' language limits the scope of a proper inquiry to the statutory definition of the prior offense and does not permit judicial examination of the facts behind conviction." The court reversed the defendant's sentence, holding that his prior Texas conviction for assaulting a public servant did not qualify as a crime of violence.

United States v. Rodriguez-Enriquez, 518 F.3d 1191 (10th Cir. 2008). A conviction under Colorado law for assault two (drugging a victim) is not a crime of violence for purposes of §2L1.2(b)(1)(A)(ii), because the elements of the offense do not require the use, attempted use, or threatened use of physical force.

United States v. Maldonado-Lopez, 517 F.3d 1207 (10th Cir. 2008). The Supreme Court requires sentencing judges to take a formal categorical approach when determining whether a prior conviction is a crime of violence. This means that the district court must look only to the statutory definitions of the prior offense of conviction, and not the facts underlying the conviction. However, if the statute is ambiguous or broad enough to include violent and nonviolent crimes, the district court can look to charging papers, judgments of conviction, plea agreements or statements by the defendant on the record, presentence investigation reports adopted by the court, and findings by the sentencing judge. Here, the district court properly examined underlying documents, but there was not sufficient evidence to show whether one of the prior convictions was a violent crime. The district court erred in enhancing the defendant's base offense level under §2L1.2(b)(1)(E), comment. (n.4).

United States v. Ruiz-Rodriguez, 494 F.3d 1273 (10th Cir. 2007). A conviction under Nebraska law for first-degree false imprisonment is not a crime of violence for purposes of §2L1.2(b)(1)(A)(ii), because the elements of the offense do not require the use, attempted use, or threatened use of physical force.

United States v. Gonzalez-Coronado, 419 F.3d 1090 (10th Cir. 2005). The defendant was convicted of entering the United States illegally after having been deported. He argued on appeal that his state conviction for attempted aggravated assault should not be considered a crime of violence under §2L1.2 because he was sentenced to probation rather than to imprisonment. The

court held that, unlike 8 U.S.C. § 1326(b)(2)'s requirement that an aggravated felony must result in a sentence of at least one year, §2L1.2 does not require that a prior conviction result in a sentence of any particular length to be a crime of violence. The court held that the district court did not err in applying the guidelines when it enhanced the defendant's base offense level by sixteen under §2L1.2(b)(1)(A)(ii), based upon the prior Kansas conviction for attempted aggravated assault, even though that prior conviction resulted in only probation.

United States v. Hernandez-Rodriguez, 388 F.3d 779 (10th Cir. 2004). The defendant pled guilty to illegal reentry into the United States in violation of 8 U.S.C. § 1326. The district court imposed an eight-level enhancement for an aggravated felony under §2L1.2(b)(1)(C), because the Utah conviction for attempted riot met the "crime of violence" definition in 18 U.S.C. § 16(a). The court agreed with the district court's conclusion that the charging document and plea supported a finding that this conviction was a crime of violence. The district court did not engage in any fact-finding, but instead relied on readily available facts to which the defendant stipulated. The charging document and the judgment unequivocally established that the conviction for a violation of the attempted riot statute was an "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." See also *United States v. Torres-Romero*, 537 F.3d 1155 (10th Cir. 2008) (using the modified categorical approach, and after analyzing Colorado's guilty plea procedures, the court held that the information and judgment of conviction for defendant's Colorado drug offense supported the district court's 16-level enhancement).

United States v. Torres-Ruiz, 387 F.3d 1179 (10th Cir. 2004). California felony conviction for driving under the influence is not a "crime of violence" for purposes of §2L1.2. The court concluded that the phrase "crime of violence," as used in §2L1.2(b)(1)(A), incorporates an intent requirement that cannot be satisfied by negligent conduct. The district court erred in imposing a 16-level enhancement to the defendant's offense level under §2L1.2(b)(1)(A). See *Leocal v. Aschcroft*, 543 U.S. 1 (2004) (alien's conviction for driving under the influence of alcohol and causing serious bodily injury in an accident, in violation of Florida law, was not a "crime of violence," and therefore, was not an "aggravated felony" warranting deportation).

United States v. Munguia-Sanchez, 365 F.3d 877 (10th Cir. 2004). The court affirmed the district court's holding that a Colorado conviction for sexual assault of a child constitutes a crime of violence under §2L1.2(b)(1)(A)(ii). A conviction for sexual assault on a child constitutes a crime of violence regardless of the victim's alleged consent. See also *United States v. De La Cruz-Garcia*, 590 F.3d 1157, (10th Cir. 2010) (Colorado conviction for attempted sexual assault on a child is a crime of violence for purposes of §2L1.2(b)(1)(A)).

United States v. Martinez-Candejas, 347 F.3d 853 (10th Cir. 2003). The defendant pled guilty to illegally reentering the United States after deportation in violation 8 U.S.C. § 1326. The district court determined that the defendant's prior offense for conspiracy to transport and harbor illegal aliens had been committed for profit, thereby triggering a 16-level enhancement under §2L1.2(b)(1)(A). The court examined 1) whether the prior conspiracy offense constituted an alien smuggling offense and 2) whether a court may look beyond the elements of this prior

offense to determine it was committed for profit. In terms of the first issue, the court determined that the phrase “alien smuggling offense” should be construed broadly, and includes transportation and harboring aliens. Regarding the second issue, the court concluded that the district court properly considered the underlying facts of the prior offense to determine whether it was committed for profit.

United States v. Ruiz-Gea, 340 F.3d 1181 (10th Cir. 2003). The defendant pled guilty to illegally reentering the United States after deportation in violation of 8 U.S.C. § 1326. The district court applied §2L1.2(b)(1)(A)(i), concluding that the defendant had a prior Utah “drug trafficking offense for which the sentence imposed exceeded 13 months.” The defendant appealed, arguing that his prior sentence did not exceed 13 months because the initial term was suspended but for 90 days. Because the defendant’s probation had been revoked and the revocation exceeded the necessary period, the court affirmed. This guideline provision does not require a formalistic examination of the sentence and can include a sentence imposed on revocation.

Aggravated Felony (§2L1.2(b)(1)(C))

United States v. Santana-Illan, No. 08-4210, 2009 WL 5103592 (10th Cir., Dec. 29, 2009). Defendant pled guilty to illegally reentering the United States following deportation. Defendant had two prior convictions for simple possession. The PSR recommended, and the district court imposed, an enhancement based on §2L1.2(b)(1)(C), arguing that Santana-Illan’s second possession conviction could have been prosecuted as recidivist possession, and thus an aggravated felony as defined by the guidelines. The Tenth Circuit described the process by which the guideline definition of aggravated felony is to be determined as “a series of statutory cross references” ending at “18 U.S.C. § 924(c)(2), which defines the term ‘drug trafficking crime’ as ‘any felony punishable under the Controlled Substances Act.’ Thus, for purposes of §2L1.2(b)(1)(C), a prior state drug conviction qualifies as an aggravated felony if it would be punishable as a felony under the CSA.” Using this definition, the Tenth Circuit reversed the district court, holding that using the “hypothetical felony approach,” the sentencing court was to compare the statute of the state crime that was actually prosecuted to the CSA. Thus, the sentencing court could only look to see if the state crime of simple possession could be prosecuted as a felony under the CSA, which it could not. The government’s proposed approach would require the court to add “a hypothetical to a hypothetical” by looking beyond the state statute of conviction to other crimes that *could* have been prosecuted, and then determine if those other crimes *could* be prosecuted as felonies under the CSA. In rejecting the government’s approach, the Tenth Circuit joined the First, Second, Third, and Sixth Circuits, and ruled on a question pending before the Supreme Court in *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 1012 (2009).

United States v. Sanchez-Garcia, 501 F.3d 1208 (10th Cir. 2007). A conviction under Arizona law for unlawful use of means of transportation is not an aggravated felony for purposes of §2L1.2(b)(1)(C), because it was not a crime of violence within the definition of 8 U.S.C.

§ 1101(a)(43), which incorporates the definition of crime of violence found in 18 U.S.C. § 16. Analyzing the Arizona statute of conviction under the categorical approach, the court held that it does not involve a substantial risk of force against another person or property.

United States v. Saenz-Mendoza, 287 F.3d 1011 (10th Cir. 2002). The district court did not err in finding that a Utah conviction for a child abuse-cruelty to child misdemeanor qualified as an “aggravated felony” for purposes of an enhancement under the guideline. An offense need not be classified as a felony to qualify as an aggravated felony as that term is statutorily defined in the Immigration and Nationality Act. *See also United States v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007) (a Colorado conviction for misdemeanor unlawful sexual contact is a forcible sex offense, thus classifying as a crime of violence).

United States v. Salas-Mendoza, 237 F.3d 1246 (10th Cir. 2001). The district court did not err in identifying the crime of transporting aliens as an “aggravated felony” for the purposes of a sentencing enhancement under §2L1.2(b)(1)(A). A plain reading of 8 U.S.C. § 1103(a)(43)(N) indicates that transportation of aliens is clearly related to alien smuggling.

United States v. Vasquez-Flores, 265 F.3d 1122 (10th Cir. 2001). The district court did not err in imposing a sentencing enhancement for defendant’s prior Utah conviction of attempted receiving or transferring a stolen motor vehicle. The court held that whether a crime is an aggravated felony for sentencing purposes does not depend on its characterization under state law. “Theft offense” includes more than just “theft” itself. A conviction for attempting to knowingly receive or transfer a stolen motor vehicle qualifies as an aggravated felony.

Part Q Offenses Involving the Environment

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

United States v. Dillon, 351 F.3d 1315 (10th Cir. 2003). The defendant pled guilty to a charge of knowingly storing hazardous waste without a permit in violation of 42 U.S.C. § 6928(d)(2)(A) and 18 U.S.C. § 2. At the sentencing, the district court applied a nine-level enhancement under §2Q1.2(b)(2) because the offense resulted in a substantial likelihood of death or serious bodily injury, and a four-level enhancement pursuant to §2Q1.2(b)(4) because the offense involved storage without a permit. The court held that the district court did not err when it found that storing ignitable hazardous waste created a substantial risk of serious injury, warranting the nine-level (b)(2) enhancement. The court also rejected a claim of impermissible double counting relating to the (b)(4) enhancement. In the instant case, the offense required that the §2Q1.2(b)(4) enhancement for storing without a permit be applied in order to capture the full extent of the offense’s wrongfulness. Accordingly, the district court did not engage in impermissible double counting when it applied the upward adjustment pursuant to §2Q1.2(b)(4).

United States v. Overholt, 307 F.3d 1231 (10th Cir. 2002). The district court did not err when it enhanced the defendant’s offense level pursuant to §2Q1.2(b)(1)(A) for unlawfully

injecting liquid waste into Class II disposal wells. The court held that proof of actual contamination of the environment is not necessary to trigger §2Q1.2(b)(1)(A).

Part S Money Laundering and Monetary Transaction Reporting

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

United States v. Adargas, 366 F.3d 879 (10th Cir. 2004). The defendant pled guilty to a charge of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). At sentencing, the district court applied a two-level enhancement pursuant to §2S1.1(b)(2)(B), and the defendant appealed. Application Note 3(c) of the commentary on §2S1.1 directs a sentencing court not to apply the two-level increase if (1) the defendant was convicted of a conspiracy under 18 U.S.C. § 1956(h), and (2) the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. The defendant argued that the language, “the sole object of that conspiracy,” should be interpreted to mean what defendant understood to be the object of the conspiracy. The court held that the phrase “that conspiracy” plainly referred back to the conspiracy of which “the defendant was convicted . . . under 18 U.S.C. § 1956(h).” It was undisputed that defendant was convicted of conspiring to commit the offenses defined in 18 U.S.C. § 1956(a)(1)(A)(I) and (B)(I). The court concluded that the sentencing court correctly applied §2S1.1(b)(2)(B).

Part X Other Offenses

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

United States v. Martinez, 342 F.3d 1203 (10th Cir. 2003). The defendant pled guilty to being an accessory after the fact to an attempted armed robbery in violation of 18 U.S.C. § 3. The defendant argued on appeal that the court should have used the attempt guideline, §2X1.1, as opposed to §2B3.1 when sentencing him. The court held that where a defendant is convicted of an attempt crime not itself covered by a specific offense guideline, calculation of a defendant’s sentence must be pursuant to §2X1.1. The court upheld the sentence, however, finding that the defendant would not have been entitled to a §2X1.1 reduction because all necessary acts for completion of the underlying offense were present.

§2X3.1 Accessory After the Fact

See United States v. Olsen, 519 F.3d 1096 (10th Cir. 2007), §2J1.3.

United States v. Lang, 364 F.3d 1210 (10th Cir. 2004), *vacated*, 543 U.S. 1108 (2005), *reinstated in part*, 405 F.3d 1060 (10th Cir. 2005). The defendants were convicted of acting as accessories after the fact to the distribution of heroin, conspiring to do so, and other offenses. Based on its reading of §2X3.1(a), the district court considered the entire quantity of drugs distributed by the drug organization, including those about which the accessory did not know, or

could not have reasonably known, when calculating the accessory's sentence. It interpreted the guidelines to require a reasonable-knowledge finding only for specific offense characteristics of the underlying offense. This presented the court with an issue of first impression. Reviewing *de novo*, the court held that the reasonable knowledge requirement in cases under §2X3.1 applies only to specific offense characteristics of the underlying offense. Because drug quantity was not a specific offense characteristic of unlawfully trafficking heroin, the district court did not err in considering the entire quantity of drugs distributed by the drug organization, including those about which the accessory did not know, or could not have reasonably known, when calculating the accessory's sentence.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Kaufman, 546 F.3d 1242 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1013 (2009). The district court committed procedural error when it failed to make findings concerning whether or not the offense involved a large number of vulnerable victims under §3A1.1(b)(2). This guideline does not define the term “large number,” but commentary accompanying another guideline—§2H4.1, which concerns sentences for involuntary servitude crimes—indicates that ten victims constitutes a large number. The district court should apply this standard to the defendants in this case, whose “offenses include involuntary servitude convictions.”

United States v. Proffit, 304 F.3d 1001 (10th Cir. 2002). The district court erred when it enhanced the defendant’s offense level based on the victim’s vulnerability. Victim vulnerability is reserved for exceptional cases in which the victim is unusually vulnerable or particularly susceptible to the crime committed. Although the victim had recently learned that he had cancer and might only have a few months to live, the victim was a sophisticated and successful businessman. The link between the victim’s illness and the defendant’s success in defrauding him was indirect. The court held that allowing a vulnerable victim enhancement based on illness alone would suggest that sick individuals as a group qualify as vulnerable victims. *See also United States v. Scott*, 529 F.3d 1290 (10th Cir. 2008) (victim’s vulnerabilities—her small and fragile physical size, her immaturity, and her runaway status—were known or should have been known to defendant at the time he placed her in his car and transported her across state lines, and supported an enhancement under §3A1.1(b)(1); these vulnerabilities were not incorporated in another guideline provision, and so their consideration under this enhancement did not constitute double counting).

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

United States v. Caballero, 277 F.3d 1235 (10th Cir. 2002). The defendants were convicted of charges related to a conspiracy involving a scheme to defraud immigrants seeking legal permanent residence. The district court applied a two-level enhancement for exploitation of vulnerable victims and an additional two-level enhancement for the large number of vulnerable

victims involved. The defendants challenged the enhancement on appeal. Sixteen victims testified before the district court, illustrating their language problems, unfamiliarity with the laws of the United States, and illegal status which the court used to dub them as “vulnerable.” Concluding that the district court did not merely apply a class-based enhancement to the group of illegal aliens because the victims differed in the type of vulnerabilities from which they suffered, the court affirmed the sentence. *See also United States v. Chee*, 514 F.3d 1106 (10th Cir. 2008) (defendant’s victim, who suffered from diminished mental capacity, seizures, and partial paralysis, was vulnerable; the district court properly applied the vulnerable victim enhancement).

§3A1.2 Official Victim

United States v. Rakes, 510 F.3d 1280 (10th Cir. 2007). The district court properly applied §3A1.2 to enhance defendant’s advisory guideline range as calculated under §2A6.1, which does not include the official status of a victim in its base offense level.

United States v. Coldren, 359 F.3d 1253 (10th Cir. 2004). The defendant was convicted of being a felon in possession of a firearm. He argued on appeal that the district court impermissibly double counted the fact that he pointed a rifle at a police officer because this conduct served as the factual basis for both the four-level increase under §2K2.1(b)(5) (use of the weapon in connection with another felony) and the three-level increase under §3A1.2(b)(1) (assaulting a police officer). The court held that these sentence enhancements did not result in impermissible double counting. Although both enhancements to the defendant's offense level were based on the same incident, they were based on distinct aspects of the defendant's conduct.

§3A1.3 Restraint of Victim

United States v. Holbert, 285 F.3d 1257 (10th Cir. 2002). The district court did not err in applying the enhancement for events that occurred “in the course of the offense,” which included conduct for which the defendant was accountable under §1B1.3. Although the restraint of the victim occurred more than six weeks prior to the offense for which the defendant pled guilty, the language of the guideline allows relevant conduct through its wording “in the course of the offense.”

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. VanMeter, 278 F.3d 1156 (10th Cir. 2002). The district court did not err in applying a two-level enhancement to a defendant who supervised another participant in a criminal scheme. Although the accomplice that the defendant supervised was not a “participant” in the commission of the crime for which the defendant was convicted, the §3B1.1 enhancement was properly applied based on the defendant’s supervision of the accomplice’s participation in other relevant crimes. *See also United States v. Gallant*, 537 F.3d 1202 (10th Cir. 2008) (government must prove that the defendant supervised at least one criminal participant to warrant

an enhancement under §3B1.1, even when the allegation underlying the enhancement is that the criminal activity was “otherwise extensive”), *cert. denied*, 129 S. Ct. 2026 (2009).

United States v. Cruz Camacho, 137 F.3d 1220 (10th Cir. 1998). Whether a defendant held an aggravating role is a question that requires fact-finding and legal analysis. A district court’s fact-finding attendant to this mixed question of law and fact is subject to a clear error standard on appellate review. *See also United States v. Peña-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008) (district court’s reasoning in failing to impose an upward adjustment for aggravating role was not definite and clear; remanding for further fact-finding and explanation pursuant to Federal Rule of Criminal Procedure 32(i)(3)(B)); *United States v. Chisum*, 502 F.3d 1237 (10th Cir. 2007) (district court did not clearly articulate the reasons for enhancing defendant’s sentence; remanding for further fact-finding and articulation of reasoning).

United States v. Lacey, 86 F.3d 956 (10th Cir. 1996). “Participant” under §3B1.1 can include persons who are acquitted of criminal conduct for purposes of determining the defendant’s role in the offense.

§3B1.2 Mitigating Role

United States v. Salazar-Samaniega, 361 F.3d 1271 (10th Cir. 2004). The defendant, convicted for possession of cocaine with intent to distribute, was not entitled to a sentence reduction for a minor role. The evidence established that the defendant transported cocaine from one state to another, and he bought and insured the carrier car. The only evidence that the defendant was not more than a transporter came from the defendant himself. The court held that a defendant’s own testimony that others were more heavily involved in a criminal scheme may not suffice to prove his minor or minimal participation, even if uncontradicted by other evidence, and found that the district court’s conclusion that the defendant did not have a minor role was not clearly erroneous. *See also United States v. Martinez*, 512 F.3d 1268 (10th Cir.) (district court did not err in denying defendant’s request for application of the minor role adjustment where he was a mere courier but was equally culpable as his codefendant, and where his relevant conduct included only the amount of drugs he actually carried), *cert. denied*, 128 S. Ct. 2461 (2008); *United States v. Eckhart*, 569 F.3d 1263 (10th Cir. 2009) (“Though [defendants] contend they were mere couriers, we have recognized ‘(d)rug couriers are an indispensable component of drug dealing networks’ and have ‘refused to adopt a per se rule allowing a downward adjustment based solely on a defendant’s status as a drug courier.’ * * * ‘Instead, a downward adjustment for a defendant’s role in an offense turns on the defendant’s culpability relative to other participants in the crime.’”).

United States v. Jeppeson, 333 F.3d 1180 (10th Cir. 2003). A role in offense reduction under §3B1.2 is unavailable to a defendant who qualifies as a career offender under §4B1.1.

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

United States v. Edwards, 325 F.3d 1184 (10th Cir. 2003). The defendant objected to the district court’s application of the adjustment under §3B1.3 for abusing a position of trust, arguing

that she did not occupy the type of position for which §3B1.3 was designed: a position “characterized by professional or managerial discretion.” The defendant’s tasks were solely ministerial and the defendant had no authority to exercise discretionary judgment with respect to any part of her job. Job titles do not control whether §3B1.3 applies. In the instant case, the evidence did not support the district court’s application of the abuse of position of trust adjustment. *See also United States v. Spear*, 491 F.3d 1150 (10th Cir. 2007) (defendant lacked substantial discretionary authority in her job as an examinations assistant; district court erred in imposing an upward adjustment for abuse of position of trust).

United States v. Haber, 251 F.3d 881 (10th Cir. 2001). The district court did not err in applying the enhancement to defendant under §3B1.3 for misrepresenting himself as a manager of an investment firm. The defendant was entrusted with the supervision and management of the investment funds of his investors in Israeli operations, which he later converted for his personal use. By his own admission the defendant acknowledged that he was the “key man” in the purported business and that no one else had the connections he had with anyone in Israel or knew how to conduct the business. *See also United States v. Arreola*, 548 F.3d 1340 (10th Cir. 2008) (defendant “exercised substantial discretionary authority” in her procurement department job; district court correctly imposed an upward adjustment for abuse of position of trust); *United States v. Chee*, 514 F.3d 1106 (10th Cir. 2008) (because defendant’s special skill as a medicine man afforded him unquestioned access to the victim and shielded him from detection, the district court correctly enhanced defendant’s sentence for abuse of position of trust); *United States v. Ma*, 240 F.3d 895 (10th Cir. 2001) (district court did not err in applying the sentence enhancement provision of §3B1.3 to the defendant who was a postal employee convicted of theft of undelivered United States mail while working in that position).

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

United States v. Kravchuk, 335 F.3d 1147 (10th Cir. 2003). The appellate court affirmed the district court’s finding that, under §3B1.4, an enhancement can be applied for the use of a minor to the defendants between the ages of 18 and 21, even though the congressional directive leading to promulgation of this section required the Sentencing Commission to promulgate sentence enhancements for a “defendant 21 years of age or older . . . if the defendant involved a minor [less than 18 years old] in the commission of the offense.” *See also United States v. Peña-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008) (Congress originally directed the Commission to promulgate an enhancement for use of a minor by defendants over 21 years old, but the Commission did not include an age limitation or a limitation based on age proximity).

United States v. Tran, 285 F.3d 934 (10th Cir. 2002). Application of the enhancement does not require proof that a minor was knowingly solicited to participate in the offense.

Part C Obstruction

§3C1.1 Obstruction of Justice

United States v. Contreras, 506 F.3d 1031 (10th Cir. 2007). When a defendant's obstructive conduct impedes or delays prosecution by both federal and state authorities, an enhancement pursuant to §3C1.1 may be warranted. The district court correctly enhanced defendant's sentence, where the federal and state charges were based on the same underlying conduct but the obstructive conduct preceded the federal indictment.

United States v. Bedford, 446 F.3d 1320 (10th Cir. 2006). The district court correctly enhanced the defendant's sentence pursuant to §3C1.1 where the defendant actually swallowed crack cocaine during an arrest, and later attempted to hide its presence in his vomit at the police station. The district court found that the defendant's actions had prevented the police from determining the quantity of the controlled substance, and the court concluded that these actions were not excepted by application note 4(d) of the commentary to §3C1.1 because, on the whole, they did not constitute an attempt but instead were a successful obstruction, and they were not "spontaneous or reflexive" but "deliberate action[s]." The court also held that, although the "material hindrance" requirement in application note 4(d) applies only to conduct contemporaneous with the arrest, even if it were to apply the requirement the "conspicuously low" threshold of materiality was easily satisfied given the importance of drug evidence and drug quantity in such prosecutions. *See also United States v. Smith*, 534 F.3d 1211 (10th Cir.) (district court correctly applied §3C1.1's enhancement based on indirect threats to a witness, because the guideline commentary contemplates indirect threats, and defendant presented no evidence that the commentary "violates her constitutional or statutory rights"), *cert. denied*, 129 S. Ct. 654 (2008).

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

United States v. Tran, 285 F.3d 934 (10th Cir. 2002). The district court did not err in enhancing the defendant's sentence after he failed to give his proper name to a magistrate judge. The court held that the type of conduct to which this guideline applies includes "providing materially false information to a judge or magistrate." Withholding one's identity is material within the meaning of the guideline. The defendant's continued failure to identify himself properly at his subsequent court hearings is more than sufficient to allow a conclusion that an adjustment was warranted.

United States v. Chavez, 229 F.3d 946 (10th Cir. 2000). The district court did not err by imposing a two-level enhancement for obstruction based on the defendant's perjury during her trial testimony. On appeal, the defendant argued that her testimony did not rise to the level of perjury merely because the jury and the court did not believe her. The court disagreed and held that the defendant's story was "inherently unbelievable." There was ample evidence in the

record that the defendant expected a drug delivery at night and went out to meet the courier, and this evidence completely contradicted the defendant's explanations at trial. *See also United States v. Salazar-Samaneiga*, 361 F.3d 1271 (10th Cir. 2004) (upholding application of obstruction increase for perjury at suppression hearing).

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

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

United States v. Battle, 289 F.3d 661 (10th Cir. 2002). The district court committed error when it grouped Chapter Two, Part A offenses under the guideline, rather than determining the combined offense level under §3D1.4. Section 3D1.2 specifically states that offenses to which Chapter Two, Part A applies cannot be grouped. The error was harmless, however, because the calculation resulted in a lower offense level for the defendant. *See also United States v. Martin*, 528 F.3d 746 (10th Cir.) (district court properly grouped charges, where beatings and rapes happened over the course of a few hours and were part of one attack), *cert. denied*, 129 S. Ct. 433 (2008); *United States v. Hasson*, 287 F. App'x 712 (10th Cir. 2008) (district court committed non-harmless procedural error when it grouped two separate counts of conviction prior to applying a specific offense characteristic; this error increased defendant's advisory imprisonment range and directly contradicted instructions in §3D1.2(d) and §1B1.1).

United States v. Malone, 222 F.3d 1286 (10th Cir. 2000). The district court did not err in failing to group the U.S. Express robbery and the carjacking under §3D1.2(c). On appeal, the defendant argued that because the carjacking was a specific offense characteristic of robbery under §2B3.1(b)(5), the court was required to group the offenses. The court disagreed and held that the harm caused by the U.S. Express robbery was not the same as the harm caused by the carjacking. The two offenses posed threats to distinct and separate societal interests—those of the U.S. Express and those of the victim. *See also United States v. Parker*, 551 F.3d 1167 (10th Cir. 2008) (grouping of multiple counts is not appropriate where, as here, multiple victims were affected by the offense; district court appropriately separated the two counts and afforded an upward adjustment under §3D1.4).

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

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

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Muñoz-Nava, 524 F.3d 1137 (10th Cir. 2008). The district court properly granted a third level for acceptance of responsibility under §3E1.1(b) over government objection, where the government asserted only that defendant took six weeks to notify it of his intent to plead guilty, and where it engaged in no trial preparation.

United States v. Brown, 316 F.3d 1151 (10th Cir. 2003). The district court erred when it concluded that §3E1.1(a) allowed a compromise one-level downward adjustment for acceptance of responsibility. The court held that §3E1.1(a) must be interpreted in a binary fashion: either the defendant qualifies for the full two-level acceptance of responsibility adjustment or the defendant gains no acceptance of responsibility adjustment at all. *See also United States v. Lozano*, 514 F.3d 1130 (10th Cir. 2008) (district court erred in granting only a one-level downward adjustment, after articulating several reasons for granting acceptance of responsibility after defendant proceeded to trial).

United States v. Eaton, 260 F.3d 1232 (10th Cir. 2001). The district court did not err in refusing to apply a two-level reduction to the defendant's sentence for acceptance of responsibility. Although the district court was correct that assertion of an entrapment defense does not bar the defendant from receiving the reduction, the defendant also did not show any reason that he should receive the reduction. The defendant claimed that he should receive the reduction simply because he testified truthfully at trial. The court held, however, that the district court's finding that the defendant never engaged in any conduct indicating that he accepted responsibility was not clearly erroneous. Because the inquiry into acceptance of responsibility is heavily fact-based, the court deferred to the judgment of the district court.

United States v. Prince, 204 F.3d 1021 (10th Cir. 2000). The district court did not err in considering reports of the defendant's criminal conduct in prison while awaiting sentencing when determining whether acceptance of responsibility applied. The court held that the government did not violate the plea agreement by supplying the probation department with the reports of the defendant's post-plea agreement conduct. The court further held that the guidelines do not prohibit a sentencing court from considering, in its discretion, criminal conduct unrelated to the offense of conviction in determining whether a defendant qualifies for an adjustment for acceptance of responsibility under §3E1.1. *See also United States v. Wooten*, 377 F.3d 1134 (10th Cir. 2004) (acknowledging the wrongfulness of one's conduct after conviction, without more, is insufficient to warrant a decrease for acceptance of responsibility); *United States v. Salazar-Samaneiga*, 361 F.3d 1271 (10th Cir. 2004) (reversing acceptance reduction for committing perjury at a suppression hearing and denying guilt at trial); *United States v. Archuletta*, 231 F.3d 682 (10th Cir. 2000) (holding that two-level reduction for acceptance of responsibility was precluded because the defendant obstructed justice by fleeing before her original sentencing hearing); *United States v. Saffo*, 227 F.3d 1260 (10th Cir. 2000) (holding that acceptance of responsibility reduction does not apply to a defendant who did not deny that she committed the acts that occurred but never admitted any culpability for those acts); *United States*

v. Patron-Montano, 223 F.3d 1184 (10th Cir. 2000) (holding that the court can properly consider a defendant’s lie about relevant conduct in evaluating the defendant’s eligibility for a §3E1.1 acceptance of responsibility reduction).

United States v. Portillo-Valenzuela, 20 F.3d 393 (10th Cir. 1994). A downward adjustment for acceptance of responsibility may apply where a defendant goes to trial only to preserve legal arguments. *See also United States v. Ellis*, 525 F.3d 960 (10th Cir.) (only in rare cases does an adjustment for acceptance of responsibility apply where a defendant has proceeded to trial), *cert. denied*, 129 S. Ct. 318 (2008); *United States v. Collins*, 511 F.3d 1276 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 80 (2009) (district court can, but is not required to, grant an adjustment for acceptance of responsibility when a defendant proceeds to trial; factors under application note 1 may also be considered); *United States v. Tom*, 494 F.3d 1277 (10th Cir. 2007) (district court erred by granting an adjustment for acceptance of responsibility where defendant, who admitted his participation in events leading to victim’s death, proceeded to trial and denied having the requisite *mens rea*); *United States v. Gauvin*, 173 F.3d 798 (10th Cir. 1999) (district court properly afforded defendant an adjustment for acceptance of responsibility, even though he proceeded to trial).

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Caldwell, 585 F.3d 1347 (10th Cir. 2009). Defendant was convicted in 2002 of driving while a habitual offender (a state offense). For that offense, he was sentenced to twelve months of probation and 30 days in jail. As an alternative to serving the 30 days, he was given the option of paying a fine. The record showed that the defendant paid part of the fine, and served 5 days in jail in March 2006 to satisfy the sentence. The defendant committed the instant offenses (distribution of cocaine and cocaine base) in April 2002 and May 2005. In calculating the defendant’s criminal history category, “the district court determined that Mr. Caldwell qualified for a two-point increase pursuant to U.S.S.G. §4A1.1(d)” because he had committed the instant offense “while under any criminal justice sentence, including probation” “A criminal justice sentence is defined as any sentence that would qualify for a criminal history point under §4A1.2(c) . . . which . . . includes within its purview any sentence of more than twelve months’ probation or thirty days’ imprisonment, provided that at least a portion of that term of imprisonment is actually served.” In a case of first impression, the Circuit Court considered whether a defendant’s criminal history category can be increased for committing an offense while serving under a “criminal justice sentence” where the probationary term the defendant was serving at the time of the offense only later qualified as a “criminal justice sentence” due to events taking place after the offense of conviction. The Circuit Court held that the district court erred in applying the two-point increase, because the defendant was not “under” a “criminal justice sentence” at the time he committed any of the conduct of conviction.

United States v. Charles, 576 F.3d 1060 (10th Cir.), *cert. denied*, 130 S. Ct. 1027 (2009). The district court held, based upon circuit precedent, that defendant's prior escape conviction was a "crime of violence." "Before [*Chambers v. United States*, 129 S. Ct. 687 (2009),] the categorization of an escape conviction was well-settled in this Circuit, because we held that all escape convictions were "crimes of violence" under § 4B1.2." "While *Chambers* did not speak directly to "walkaway" escapes, * * * *Chambers* undermines our prior case law." As the defendant was convicted of a generic escape statute, which included failing to return to custody, the case was remanded to the district court to determine, using a modified categorical approach, whether defendant's escape conviction was a "crime of violence."

United States v. Saavedra, 523 F.3d 1287 (10th Cir. 2008). Sentencing courts must apply the version of the guidelines in effect at the time of sentencing unless to do so would raise *ex post facto* concerns. The court reversed defendant's sentence and remanded for resentencing because the district court improperly calculated defendant's criminal history by assessing criminal history points for an ordinance violation that was not shown to be a violation of state law. The PSR lacked evidence detailing the specific ordinance violated and the nature of the alleged conduct, and the district court did not inquire into the matter. Calculating defendant's criminal history category in this manner was procedural error.

United States v. Johnson, 414 F.3d 1260 (10th Cir. 2005). The district court added two criminal history points based on its finding that the defendant was on parole at the time of his crimes. The court found that the defendant was supervised until December 1998. The court held that the assessment of criminal history points was in error because the conspiracy charged in the superseding indictment did not begin until after defendant was released from parole.

United States v. Bush, 405 F.3d 909 (10th Cir. 2005). Where the government proves the existence of a conviction, the defendant bears the burden of showing by a preponderance of the evidence that he did not waive counsel when he pleaded guilty to a misdemeanor conviction. Here, the records of the prior conviction apparently were destroyed, the final judgment enjoyed a presumption of regularity, and the defendant did not submit an affidavit denying that he waived counsel. *See also United States v. Jackson*, 493 F.3d 1179 (10th Cir. 2007) (right to assistance of counsel extends to misdemeanor cases involving an imprisonment sentence, so the district court must disregard defendant's misdemeanor jail sentence; however, the court was free to consider the conviction itself and the fine in tailoring defendant's sentence).

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

United States v. Rosales-Garay, 283 F.3d 1200 (10th Cir. 2002). The defendant was deported in 1995, after committing a felony drug offense. He was arrested for illegal entry in the United States in 2000. Because the defendant was on probation at the time of arrest, the

district court added two criminal history points under §4A1.1, which permits the enhancement if the defendant committed the instant offense while under any criminal justice sentence, including probation. The court affirmed, holding that the district court correctly applied the enhancement under §4A1.1 because the defendant committed the illegal entry offense charged when he was found, and at that time he was serving a probationary sentence. *See also United States v. Villarreal-Ortiz*, 553 F.3d 1326 (10th Cir. 2009) (“found” is when the government knows—or could have known through proper diligence—a person’s whereabouts, that he or she is a prior deportee, and that he or she is illegally in the United States); *United States v. Hernandez-Noriega*, 544 F.3d 1141 (10th Cir. 2008) (district court correctly added criminal history points under §4A1.1 even though defendant was in custody when officials found him; illegal re-entry is a continuing offense for sentencing purposes).

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

United States v. Dozier, 555 F.3d 1136 (10th Cir. 2009). The district court correctly held that the prison sentence imposed following revocation of a probation term for a prior, unrelated conviction was a “prior sentence” within the meaning of §4A1.1 and §4A1.2(a)(1). The defendant—who received a below-guideline sentence—argued that the revocation sentence should not be counted in determining criminal history points because the conduct underlying the revocation was the same conduct that formed the basis of the instant federal offense. The court disagreed with the defendant, looked to Sixth Circuit precedence for guidance, and held as a matter of first impression that “where probation is revoked based on the same conduct forming the basis of a federal offense, the imposition of the original sentence is attributable to the original act of conviction, not the act underlying the revocation.”

United States v. Perez de Dios, 237 F.3d 1192 (10th Cir. 2001). The district court did not err by including a prior misdemeanor conviction for driving without proof of insurance in the calculation of the defendant’s criminal history. Applying the “essential-characteristics-of-the-crime” test which compares the underlying conduct of the offenses involved, the court held that the defendant’s prior misdemeanor conviction was properly included in the defendant’s criminal history calculation. The court also ruled that the superficial similarity that both offenses involve driving a car was overshadowed by the significant difference between speeding and driving without proof of insurance. Unlike the former, which is concerned with actually operating an automobile, the latter is concerned with failing to abide by regulations designed to assure that unsafe drivers are not on the road at all.

§4A1.3 Adequacy of Criminal History Category

See United States v. Allen, 488 F.3d 1244 (10th Cir. 2007), §5K2.0.

United States v. Rice, 358 F.3d 1268 (10th Cir. 2004), *vacated*, 543 U.S. 1103 (2005), *reinstated*, 405 F.3d 1108 (10th Cir. 2005). The district court erroneously double counted when it used the same prior conduct of producing child pornography in Mississippi to both increase the defendant’s base offense level and his criminal history category. The district court properly used the defendant’s prior uncharged conduct for producing child pornography in Mississippi as

relevant conduct for purposes of applying the cross-reference in §2G2.2(c) and increasing his base offense level for count two. The district court should not, however, have used that prior conduct to increase the defendant's criminal history category. Because the guidelines prohibit using a prior sentence involving relevant conduct both to increase the defendant's base offense level and to increase his criminal history category, the court held that such double use is also prohibited when the conduct at issue was uncharged and did not result in a sentence.

United States v. Hurlich, 348 F.3d 1219 (10th Cir. 2003). The court affirmed the methodology employed by the district court in determining the degree of upward departure. In determining the degree of upward departure, the district court hypothesized that the defendant's criminal history score of 39 would place him in a theoretical criminal history category of XIV. It equated an eight-step increase in criminal history to eight offense levels, yielding a sentencing range of 63 to 78 months. The court held that the methodology adopted by the district court was reasonable and the judge succinctly, but adequately, explained the reasons for the degree of departure from the guidelines.

United States v. Walker, 284 F.3d 1169 (10th Cir. 2002). The district court did not err in departing upward upon deciding that criminal history category VI did not adequately reflect the seriousness of the defendant's 34 total criminal history points. The district court did err, however, in relying solely on the number of criminal history points exceeding the requirement of criminal history category VI for the degree of departure. The district court departed one offense level for each additional conviction that was in excess of the number required to place the defendant in criminal history category VI. The court held the explanation does nothing more than restate the justification for upward departure and does not fulfill the separate requirement of stating the reasons for imposing the particular sentence.

United States v. Hannah, 268 F.3d 937 (10th Cir. 2001). The district court did not err in departing upward from the defendant's criminal history category of VI but gave an insufficient explanation for the degree of departure applied. The court held that the district court must articulate reasons for the degree of departure using any reasonable methodology hitched to the Sentencing Guidelines. The district court's reliance on the recommendation of departure articulated in the PSR was insufficient explanation for the degree of departure.

United States v. Lowe, 106 F.3d 1498 (10th Cir. 1997). The district court did not err in departing above criminal history category VI in sentencing the defendant. It is permissible to depart upward from criminal history category VI when the defendant is also a career offender. In this particular case, the court departed upward based on three considerations independent of the defendant's status as a career offender, including: 1) offenses that were not included in his characterization as a career offender because they were outside of the applicable time period; 2) prior violent offenses that were not counted because they were consolidated for sentencing; and 3) the similarity between the defendant's "criminal past" and the instant offense.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

See United States v. Turner, 285 F.3d 909 (10th Cir. 2002), §4B1.2.

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

United States v. Gay, 240 F.3d 1222 (10th Cir. 2001). The district court did not err in applying the “otherwise applicable” offense level under §2D1.1 and the specified §4B1.1 criminal history category VI because the offense level under the §2D1.1 was greater than the defendant’s career criminal offense level. The court held that the reference under §4B1.1 to the application of criminal history category VI to “every case” should be interpreted to mean that the sentencing court must employ category VI regardless of which offense level is applied.

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

United States v. Williams, 559 F.3d 1143 (10th Cir. 2009). Battery on a police officer under Oklahoma law is a crime of violence for purposes of §4B1.2. The court found that it “ordinarily involves purposeful, aggressive, and violent conduct, and creates a serious potential risk of physical injury,” and so is similar in kind to §4B1.2(a)(2)’s enumerated offenses. It also held that this battery “presents a similar risk as the enumerated crimes” because it ordinarily involves more violence than slight touching, and involves an “overt act against the police officer.”

United States v. Dennis, 551 F.3d 986 (10th Cir. 2008). Defendant’s Wyoming conviction for knowingly taking immodest, immoral or indecent liberties with a minor is not a crime of violence for purposes of §4B1.1(a). This statute does not have as an element the use—or attempted or threatened use—of physical force against another person. Neither is it one of the enumerated offenses in §4B1.2(a)(2). Finally, it does not qualify as a crime of violence under §4B1.2(a)(2)’s residual clause, because it “is not similar in risk” to the offenses enumerated in §4B1.2(a)(2). Guideline commentary allowing the district court to review “conduct ‘expressly charged’” does not provide “license to look at the underlying facts of the case.” The court remanded with instructions to resentence without the enhancement.

United States v. Karam, 496 F.3d 1157 (10th Cir. 2007). Defendant’s Ohio conviction for trafficking in marijuana constituted a controlled substance offense for purposes of §4B1.1(a), because the statute of conviction prohibits only conduct that is distribution of, or possession with intent to distribute, a controlled substance.

United States v. Vigil, 334 F.3d 1215 (10th Cir. 2003). Aggravated incest under Colorado law is a crime of violence for purposes of §4B1.2. Aggravated incest involved conduct that presented a serious potential risk of physical injury to another under §4B1.2(a)(2) and the possibility of the child-victim’s sincere consent to aggravated incest was irrelevant.

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

§4B1.4 Armed Career Criminal

United States v. Scoville, 561 F.3d 1174 (10th Cir.), *cert. denied*, 130 S. Ct. 217 (2009). Defendant’s Ohio breaking and entering conviction qualified as a predicate violent felony under 18 U.S.C. § 924(e)(2)(B) because, employing the modified categorical approach set forth in *Shepard v. United States*, 544 U.S. 13 (2005), conduct prohibited by this statute constitutes generic burglary. Ohio third-degree burglary also constitutes a violent felony for § 924(e) purposes because, although this statute does not set forth generic burglary under either the categorical or modified categorical approach, it is similar in kind and degree of risk to § 924(e)’s enumerated offenses.

United States v. Gonzales, 558 F.3d 1193 (10th Cir.), *cert. denied*, 130 S. Ct. 169 (2009). Defendant’s Wyoming conviction for burglary qualified as a predicate violent felony under 18 U.S.C. § 924(e)(2)(B). Employing *Taylor*’s categorical approach, the court held that conduct proscribed by this Wyoming statute fit the generic meaning of burglary, an enumerated offense.

United States v. Zuniga, 553 F.3d 1330 (10th Cir.), *cert. denied*, 130 S. Ct. 62 (2009). Defendant’s Texas conviction for possession of a deadly weapon in a penal institution qualifies as a predicate violent felony under 18 U.S.C. § 924(e)(2)(B). Employing *Begay*, the court held that possession of a deadly weapon in prison presents a serious potential risk of physical injury to a person and that it is similar in kind and degree of risk to the Armed Career Criminal Act’s enumerated offenses. This offense presents a risk of physical injury because it requires possession of something capable of causing death or serious bodily injury, and because its commission must be in a penal institution. It is similar to the enumerated offenses because it involves purposeful, violent, and aggressive conduct. Even though the statute includes “recklessly” as one possible *mens rea*, “it is reasonable to surmise that those who possess deadly weapons in a penal institution typically intend to possess them,” so this offense involves purposeful conduct. It is violent because it indicates that the defendant was prepared to use violence, and aggressive because it is likely to produce a dangerous response.

United States v. West, 550 F.3d 952 (10th Cir. 2008). The district court properly considered the defendant’s Utah convictions for engaging in a criminal enterprise and failing to stop at a police officer’s command as predicate enhancers under the Armed Career Criminal Act. The defendant waived his argument that the criminal enterprise conviction does not qualify as a serious drug offense by affirmatively conceding the issue in the district court. His conviction for failing to stop at a police officer’s command is a violent felony under the ACCA’s residual clause. The Supreme Court’s decision in *Begay v. United States*, 553 U.S. 137 (2008), “requires a two-part inquiry, considering both (1) whether the offense of conviction ‘presents a serious potential risk of physical injury to another’” and “(2) whether the offense is ‘roughly similar, in kind as well as in degree of risk posed, to the’ offenses enumerated” in 18 U.S.C. § 924(e)(2)(B)(ii). In addressing these two questions, courts must use the categorical approach or, if necessary, the modified categorical approach. Crimes involving eluding or evading police with a vehicle, such as the crime at issue here, should “categorically be deemed to present a serious

potential risk of physical injury to another.” Failing to stop at a police officer’s order is a deliberate choice to disobey, “will always be directly confrontational,” and presents a serious potential risk of physical injury to another. It is similar to the residual clause’s enumerated offenses because it involves violent, aggressive, and purposeful conduct.

United States v. Cummings, 531 F.3d 1232 (10th Cir. 2008). The district court properly considered the defendant’s three Maine burglary convictions as predicate enhancers under the Armed Career Criminal Act. Employing the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990), the court stated that “the Maine statutory definition of burglary is remarkably similar to the generic definition” and held that “it is clear that the Maine statute is coterminous with the generic definition, and thus, the district court properly sentenced Cummings under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4.”

United States v. Baker, 508 F.3d 1321 (10th Cir. 2007). The defendant’s 1997, 1999, and 2003 Kansas burglary convictions were proper predicates under the Armed Career Criminal Act, even though Kansas had restored his civil rights as to the 1997 conviction. The court held that in determining “whether state law expressly restricts a felon’s right to possess firearms,” it must “look to the whole of state law.” Before the date on which Kansas law restored his civil rights as to the 1997 conviction, he sustained the 1999 conviction, so the district court properly enhanced his sentence as an armed career criminal. The court acknowledged that while three circuits (the Fourth, Sixth, and Tenth) agree with this “whole of state law” approach, three other circuits (the Fifth, Seventh, and Ninth) disagree.

United States v. Coronado-Cervantes, 154 F.3d 1242 (10th Cir. 1998). A nonforcible sexual assault involving a child victim and an adult offender is a crime of violence as that term is defined in §4B1.4. The court reached this conclusion despite the fact that the state statute violated by the defendant did not have as an element the use, attempted use, or threatened use of physical force and the record contained no evidence that the defendant used or threatened to use force against the victim. *See also United States v. Moyer*, 282 F.3d 1311 (10th Cir. 2002).

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

United States v. Cerno, 529 F.3d 926 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1905 (2009). Defendant was convicted by a jury of aggravated sexual abuse, and was sentenced to life imprisonment. The court reversed his sentence because the district court failed to consider a relevant factor under § 3553(a), but it upheld the district court’s five-level enhancement under §4B1.5(b). In doing so, the court held that a “covered sex offense” is one perpetrated against a minor, and a minor is anyone under the age of 18.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

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

United States v. Cervantes, 519 F.3d 1254 (10th Cir. 2008). The district court did not commit clear error in denying the defendant a reduction under safety valve. The defendant had the burden to prove that he qualified for safety valve by a preponderance of the evidence, and could not rely only on the facts contained in the presentence investigation report.

United States v. Stephenson, 452 F.3d 1173 (10th Cir. 2006). The defendant challenged the district court's determination that he was not eligible for safety valve relief in spite of his submission of a "proffer letter" to the government offering to provide more information. The court upheld the district court's determination that the letter was insufficient to satisfy the requirement in §5C1.2(a)(5). The court concluded that the district court did not err in determining that the defendant had not fully disclosed all the information he knew about the conspiracy in which he was involved, and that the government did not have an affirmative duty to seek further information from him in response to his proffer. *See also United States v. Altamirano-Quintero*, 511 F.3d 1087 (10th Cir. 2007) (facts admitted by the defendant in the plea agreement did not entitle him to safety valve relief, where he was otherwise eligible but did not debrief with government agents; while 18 U.S.C. § 3553(f)(5) does not require that a defendant debrief nor specify a mode of communication with the government, the district court did not commit clear error by finding that the defendant failed to prove he had made a complete and truthful disclosure to the government).

United States v. Zavalza-Rodriguez, 379 F.3d 1182 (10th Cir. 2004). The district court made a finding that, on the one hand, a §2D1.1 sentence enhancement applied because "a dangerous weapon . . . was possessed," and that, on the other hand, for purposes of a downward departure under the safety valve provision, §5C1.2(a)(2), the defendant did not "possess a firearm or other dangerous weapon . . . in connection with the offense." The court affirmed, concluding that a finding that a §2D1.1 sentence enhancement applies does not necessarily preclude a finding that a §5C1.2 sentence reduction also applies. The court reasoned that the scope of activity covered by §2D1.1 is broader than the scope of activity covered by §5C1.2. For purposes of §2D1.1 constructive possession, either physical proximity or participation in a conspiracy, is sufficient to establish that a weapon "was possessed," and for purposes of §5C1.2, the court looks to the defendant's own conduct in determining whether the defendant has established by a preponderance of the evidence that the weapon was not possessed "in connection with the offense."

United States v. Saffo, 227 F.3d 1260 (10th Cir. 2000). The court held that a defendant sentenced under §§2D1.11 and 2S1.1 is not eligible for the safety valve reduction under §2D1.1.

Part D Supervised Release

§5D1.3 Condition of Supervised Release

United States v. Walser, 275 F.3d 981 (10th Cir. 2001). The district court did not err in imposing a special condition of supervised release barring a defendant convicted of child pornography from using the Internet without prior permission. Because the defendant was not completely banned from using the Internet but was required to obtain permission from the probation office to use it, the condition more readily accomplishes the goal of restricting use of the Internet and more delicately balances the protection of the public with the goals of sentencing.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Galloway, 509 F.3d 1246 (10th Cir. 2007). Although a defendant's gain may be used to determine his or her offense level in certain circumstances, gain "is not an appropriate estimate of loss when determining the amount of restitution under §5E1.1," and the district court erred in imposing restitution based on defendant's gain rather than actual loss. *See also United States v. Gallant*, 537 F.3d 1202 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2026 (2009) ("Unlike loss under the Guidelines, the Mandatory Victims Restitution Act requires proof of actual loss and does not allow alternative metrics, such as gain;" although the district court must reduce restitution by the amount given to the victim as part of a civil settlement, the fact that such a settlement has been reached does not bar an order of restitution).

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

Part F Sentencing Options

§5F1.5 Occupational Restrictions

United States v. Wittig, 528 F.3d 1280 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009). A district court has broad discretion in setting conditions of supervised release, but "its discretion must be exercised in accordance with 18 U.S.C. §§ 3583(d) and 3563(b) and USSG

§5F1.5.” Reviewing the district court’s setting of special conditions for abuse of discretion, the court held that the district court erred in setting occupational restrictions that were not reasonably related to the defendant’s criminal conduct, were not reasonably necessary to protect the public, and entailed greater deprivation of liberty than necessary. The district court also erred by failing to consider less restrictive alternatives.

Part G Implementing the Total Sentence of Imprisonment

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

United States v. Wood, 386 F.3d 961 (10th Cir. 2004). The defendant, a Native American, pled guilty to one count of second degree burglary in violation of the Indian Major Crimes Act (IMCA). Federal law assimilates the crime's definition and punishment under state law because burglary is a crime not defined and punished by federal law. In the state where the offense was committed, burglary was punishable by two to seven years imprisonment. The defendant’s guidelines range was zero to six months. She argued that the district court had the discretion to suspend her sentence and impose a period of probation pursuant to state law. The district court ruled that it lacked the discretion to suspend the sentence because federal law assimilated only the range of punishment between the minimum and maximum sentences set forth in the state statute. Because the guideline range fell below the minimum sentence, the district court imposed a sentence of two years. The court affirmed, reasoning that when sentencing defendants for assimilated crimes, federal courts have consistently declined to assimilate state laws if such laws conflict with the guidelines and their underlying policies. Because the guidelines deny the district court the discretion to suspend a sentence of imprisonment, that option is unavailable to defendants convicted of violating the IMCA.

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Price, 265 F.3d 1097 (10th Cir. 2001). The court held that §5G1.2(d) is a mandatory provision so sentences imposed under the guidelines must be imposed consecutively when necessary to reach the total guideline punishment. *See also United States v. Pinson*, 542 F.3d 822 (10th Cir.) (upholding consecutive imposition of sentences for threatening the president, making a false statement, and mailing threatening communications), *cert. denied*, 129 S. Ct. 657 (2008).

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

United States v. Moyer, 282 F.3d 1311 (10th Cir. 2002). The district court did not err in sentencing the defendant to consecutive, rather than concurrent, sentences under §5G1.3. The court held that the district court had the discretion to sentence the defendant under §5G1.3(c) after considering the directives in §5G1.3(c) when imposing the sentence because neither §5G1.3(a) nor §5G1.3(b) applied to the defendant. *See also United States v. Hahn*, 551 F.3d 977 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1687 (2009) (courts have discretion under policy statement §5G1.3(c) to run a sentence concurrent, partially concurrent, or consecutive to another

sentence; while district courts are required to provide a statement of reasons, they are not required to make specific findings concerning this issue).

United States v. McCary, 58 F.3d 521 (10th Cir. 1995). The case was remanded for resentencing a second time, in order for the district court to impose the 17-month enhancement portion of the subsequent 63-month Oklahoma federal sentence to run consecutively to the 211-month Texas federal sentence. The government, on cross-appeal, asserted that the 17-month portion of the sentence, which was designated as an enhancement to sanction the conduct for occurring while the defendant was released on bond, should have been imposed to run consecutively because it was governed by 18 U.S.C. § 3147. The court agreed and held that “the more general provisions of §5G1.3(b), even if otherwise applicable, must be limited in the circumstances of this case by the more specific provisions of 18 U.S.C. § 3147 and §2J1.7.” *Id.* at 523.⁸

Part H Specific Offender Characteristics

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

United States v. Muñoz-Nava, 524 F.3d 1137 (10th Cir. 2008). Prior to the Supreme Court’s decision in *Gall*, Tenth Circuit precedent disfavored consideration of family circumstances, per §5H1.6. “*Gall*, however, indicates that factors disfavored by the Sentencing Commission may be relied on by the district court in fashioning an appropriate sentence.” The court affirmed the district court’s below-guideline sentence based on defendant being the primary caretaker for his 8-year-old son and elderly parents with medical problems.

United States v. McClatchey, 316 F.3d 1122 (10th Cir. 2003). The court held that the defendant was not entitled to a downward departure for extraordinary family circumstances based on the defendant’s care of his severely disabled 22-year-old son and the good character references for community service submitted on his behalf. The court further held that the defendant was also not entitled to an aberrant behavior downward departure based on the defendant’s prior law-abiding life. The court held that a downward departure based on family circumstances was not appropriate “absent evidence that the defendant was the only individual able to provide the assistance a family member needs.” *See also United States v. Reyes-Rodriguez*, 344 F.3d 1071 (10th Cir. 2003) (departures based on family circumstances require “exceptional” conditions and the defendant would have to be the only individual able to provide the assistance a family member needs to qualify for this type of departure).

⁸ USSG §2J1.7 was deleted and replaced by §3C1.3 effective November 1, 2006. *See* USSG App. C, Amendment 684.

Part K Departures

United States v. Fuentes, 341 F.3d 1216 (10th Cir. 2003). The court held that the government is entitled to notice of the court’s intent to depart downward.⁹

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

United States v. A.B., 529 F.3d 1275 (10th Cir.), *cert. denied*, 129 S. Ct. 440 (2008). Defendant was convicted of possession with intent to distribute over fifty grams of methamphetamine and possession of a firearm in connection with a drug trafficking crime. The government filed a motion under §5K1.1 and § 3553(e) to reduce his sentence based on his substantial assistance. The district court granted the motion and sentenced him to 117 months’ imprisonment. On appeal, the defendant argued that the district court committed procedural error by failing to consider § 3553(a) factors *in addition* to the government’s substantial assistance, and by failing to consider § 3553(a) factors *prior to* evaluating the government’s motion. He asserted that had the district court taken either of these approaches, he could have received a sentence of sixty months. The court affirmed the sentence and held that the district court did not commit procedural error. Regarding the first question, the court held that the district court had authority under § 3553(e) to “depart below the mandatory minimum” but “was without authority to go further below the statutory minimum based upon § 3553(a) factors” after granting the substantial assistance departure. The court left unresolved the second question, holding that the district court did consider relevant § 3553(a) factors prior to turning to the substantial assistance motion.

United States v. Doe, 398 F.3d 1254 (10th Cir. 2005). The district court notified the parties of its intent to depart upward. Both parties argued against the departure, because of the defendant’s cooperation with the government. The district court refused to consider the cooperation because the government had not filed a §5K1.1 motion. The court reversed, holding that the government’s decision not to file a §5K1.1 motion did not prevent the district court from fully considering the defendant’s assistance in deciding whether to depart upward or in calculating the proper degree of departure. The district court erred as a matter of law when it refused to fully consider the defendant’s cooperation in deciding whether to depart and in setting the degree of departure.

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

United States v. Allen, 488 F.3d 1244 (10th Cir. 2007). The district court erred when it departed upwardly based on defendant’s non-drug related, uncharged, professed desire to kidnap, rape, and murder young girls. The defendant was convicted of possession with intent to distribute methamphetamine, and was subject to an advisory guideline range of 120-135 months. After considering FBI testimony about defendant’s statements that he wished to perform these acts on girls, evidence found on defendant’s computer, and an informant’s taped conversations

⁹ See *supra* note 1.

with defendant, the district court imposed a sentence of 360 months. The court held this sentence to be unreasonable, finding that the district court erred in considering this unrelated and uncharged conduct as a basis for an upward departure under §5K2.0, an enhancement for uncharged conduct under §1B1.3, a variance above the guideline range, and as counting toward criminal history.

United States v. Bayles, 310 F.3d 1302 (10th Cir. 2002). 18 U.S.C. § 922(g)(8) prohibits the possession of a firearm following the issuance of a state court protective order. A defendant's ignorance of § 922(g)(8) does not remove his or her conduct from the heartland and is therefore not a permissible basis for departure.

United States v. Jose-Gonzalez, 291 F.3d 697 (10th Cir. 2002). The district court did not err in relying on the number of deaths and injuries as a basis for an upward departure even though death and bodily injury are considered under §2L1.1. Recognizing that §2L1.1 does take into account both injury and death, the court held that the offense-level increases for multiple aliens were not intended as a means of dealing with multiple deaths or injuries. Because the circumstances of multiple deaths and injuries had not been adequately considered by the Commission, their factors supported a departure. *See also United States v. Muñoz-Tello*, 531 F.3d 1174 (10th Cir. 2008) (upholding district court's five-level upward departure using the method set forth in *Jose-Gonzalez*, where it determined that §§5K2.0 and 5K2.1 were applicable and found that four of defendant's passengers were killed and three other passengers were seriously injured), *cert. denied*, 129 S. Ct. 1314 (2009).

United States v. Hanson, 264 F.3d 988 (10th Cir. 2001). The defendant pled guilty to second degree murder and the government sought an upward departure on the grounds that the murder was premeditated. The court held that the issue of premeditation was already taken into account by the guidelines based on the separate guidelines for first and second degree murder. Because the guidelines had already accounted for the issue of premeditation, the district court was correct in its finding that premeditation would be an inappropriate basis for an upward departure.

United States v. Constantine, 263 F.3d 1122 (10th Cir. 2001). The district court did not err in denying the defendant a downward departure for aberrant behavior. An aberrant behavior departure must be based on something more than the fact that the particular offense is a first offense. Although spontaneity is not required for an aberrant behavior departure, there must be some exceptional circumstance or evidence that the act was outside the course of a defendant's normal behavior. *See also United States v. Alvarez-Pineda*, 258 F.3d 1230 (10th Cir. 2001) (in order to qualify for an aberrant behavior departure, the defendant must introduce evidence of his otherwise law-abiding life).

United States v. Armenta-Castro, 227 F.3d 1255 (10th Cir. 2000). The district court did not err in rejecting the defendant's request for a downward departure based on sentencing disparity. A district court may not grant a downward departure from an otherwise applicable guideline sentencing range on the ground that, had the defendant been prosecuted in another

federal district, the defendant may have benefitted from the charging or plea-bargaining policies of the United States Attorney in that district.

United States v. Benally, 215 F.3d 1068 (10th Cir. 2000). Combining legally impermissible and factually inappropriate grounds for departure cannot make a case one of the extremely rare cases contemplated by §5K2.0 to warrant a downward departure.

§5K2.1 Death (Policy Statement)

United States v. Montgomery, 550 F.3d 1229 (10th Cir. 2008). The defendant was convicted of possession of firearms and ammunition by a convicted felon. The court upheld the district court's upward departure based on the defendant's wife's suicide by one of his firearms. The plain language of §5K2.1 does not restrict the district court "to granting an upward departure only when the 'death resulted' from a homicide." It does not "require that the victim be killed by the defendant or by anyone else." Among several factors the district court must consider are "matters that would normally distinguish among levels of homicide," but upward departures under this guideline "have been sanctioned in cases where the death resulted from criminal conduct that could not be clearly deemed to have effected a homicide." The defendant's emotional and physical abuse of his wife, his knowledge that she had previously attempted suicide, his attempt to keep her from taking antidepressants, and his threat to take their son from her, "all indicate that her suicide by his weapon was reasonably foreseeable" to him.

§5K2.8 Extreme Conduct (Policy Statement)

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

§5K2.9 Criminal Purpose (Policy Statement)

United States v. Hanson, 264 F.3d 988 (10th Cir. 2001). The defendant pled guilty to second degree murder. The district court refused to grant an upward departure based on the defendant's commission of a robbery in the course of the murder. The court held that robbery is one of the issues that distinguishes first and second degree murder under the guidelines, and an upward departure based on a factor that distinguishes the crime in such a fashion is inappropriate. The district court's refusal to upwardly depart was proper.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Constantine, 263 F.3d 1122 (10th Cir. 2001). The district court did not err in refusing to grant the defendant a downward departure based on his obsessive compulsive disorder. The defendant pled guilty to possession of an unregistered firearm. A departure for diminished capacity under §5K2.13 is not applicable to crimes involving actual violence or a

serious threat of violence. The court held that there is a serious threat of violence inherent in such an offense.

United States v. Mitchell, 113 F.3d 1528 (10th Cir. 1997). The district court could not appropriately depart downward after it found that the defendant's incarceration was necessary to protect the public. Downward departures for diminished capacity under §5K2.13 are permitted only if the defendant's "criminal history does not indicate a need for incarceration to protect the public." Because the court had made a factual finding that the defendant constituted a threat to the public, a departure under §5K2.13 was foreclosed.

§5K2.20 Aberrant Behavior (Policy Statement)

United States v. Andrews, 447 F.3d 806 (10th Cir. 2006). Defendant, convicted of bank robbery, moved for a downward departure based on aberrant behavior and community ties. The district court granted his motion. Pre-*Booker*, the court reversed, saying he did not qualify for an aberrant behavior departure because he had more than one criminal history point, and that his community ties were not sufficiently exceptional to warrant departure. On remand, the district court reluctantly imposed a within-guideline sentence, and the defendant appealed. Post-*Booker*, the court again reversed and remanded for resentencing, noting that "in light of *Booker*, the district court's decision to impose a sentence outside the guidelines range was not unreasonable." The court further held that "while the guidelines discourage consideration of certain factors for downward departures, *Booker* frees courts to consider those factors as part of their analysis under § 3553(a)."

See *United States v. McClatchey*, 316 F.3d 1122 (10th Cir. 2003), §5H1.6.

CHAPTER SIX: Sentencing Procedures and Plea Agreements

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors (Policy Statement)

United States v. Peña-Hermosillo, 522 F.3d 1108 (10th Cir. 2008). Although §6A1.3 does not give any party the right to introduce live testimony, all parties "must be given an 'adequate' opportunity to present relevant information to the court." The district court erred by not allowing the government to present testimony to attempt to rebut the defense witness's statements.

United States v. Espinoza, 338 F.3d 1140 (10th Cir. 2003). Section 6A1.3 permits the consideration of reliable hearsay with "sufficient corroboration." The out of court declaration by an unidentified informant was properly considered in support of an obstruction adjustment where good cause existed for non-disclosure of that informant's identity and there was sufficient corroboration as to the particulars of the informant's report in the record to justify reliance.

United States v. Jones, 80 F.3d 436 (10th Cir. 1996). The district court did not err in its adoption of the sentencing guideline calculations recommended in the presentence report. By participating in a sentencing hearing without objection, the defendant automatically waived the minimum review period provided for by Rule 32(b)(6)(A).

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.1 Classification of Violations (Policy Statement)

See United States v. Contreras-Martinez, 409 F.3d 1236 (10th Cir. 2005), Post-Booker section.

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

United States v. Urcino-Sotello, 269 F.3d 1195 (10th Cir. 2001). The district court did not err in imposing consecutive sentences upon revocation of the defendant's supervised release. Although §7B1.3 is a policy statement calling for consecutive sentences, the district court was not free to disregard the guideline. The district court must consider the factors set out in 18 U.S.C. § 3553(a) before deciding whether to impose a consecutive or concurrent sentence. The defendant then has the burden to come forward with a reason for the court to choose a concurrent sentence rather than a consecutive sentence. *See also United States v. Perez*, 251 F. App'x 523 (10th Cir. 2007) (district court did not err by failing to address the defendant's arguments under § 3553(a) in detail); *United States v. Ceja-Martinez*, 233 F. App'x 873 (10th Cir. 2007).

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

United States v. Tsosie, 376 F.3d 1210 (10th Cir. 2004). The court reviewed *de novo* the district court's decision to impose an enlarged sentence on the defendant upon revocation of his supervised release for the sole purpose of his rehabilitation. Concluding that when determining the imposition and length of supervised release, a court is required to consider rehabilitation factors, the court then examined whether the revocation sentence imposed in excess of that recommended in chapter seven was reasoned and reasonable. After examining the various facts surrounding the defendant's alcoholism and the problems it caused that were cited by the district court in support of the sentence, the court held that it was not unreasonable for the district court to determine that the defendant was more likely to successfully address his alcoholism in a prison setting given his failure to address it outside of prison.

United States v. Burdex, 100 F.3d 882 (10th Cir. 1996). In an issue of first impression, the Tenth Circuit joined the Third, Fourth, Fifth and Eleventh Circuits in holding that the sentencing court need not give notice before departing upward from a sentencing range recommended by the policy statements of chapter seven. Because those policy statements are not binding on the sentencing court, a departure from a chapter seven range is not a "departure" from

a binding guideline. *See also United States v. Redcap*, 505 F.3d 1321 (10th Cir. 2007) (explaining that post-*Booker* jurisprudence continues to recognize difference between initial sentencing and revocation proceedings, including that the Sixth Amendment does not apply to revocation of supervised release).

United States v. Hurst, 78 F.3d 482 (10th Cir. 1996). The district court did not err in imposing a sentence in excess of the range recommended in §7B1.4. The circuit court noted that every circuit court that has considered the impact of *Stinson* and *Williams* on §7B1.4 has concluded that it is only advisory and not binding. All of the circuit courts that have considered the impact of *Stinson* and *Williams* have concluded that the “policy statements of chapter seven do not interpret or explain a guideline.” Because the policy statements regarding revocation of supervised release are advisory rather than mandatory in nature, a district court who imposes a sentence in excess of that recommended in chapter seven will only be reversed if its decision was not reasoned and reasonable. *See United States v. Kelley*, 359 F.3d 1302 (10th Cir. 2004) (district court must consider policy statements in Chapter 7, but those policy statements are advisory).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Villa-Vazquez, 536 F.3d 1189 (10th Cir. 2008). The defendant entered a plea of guilty, with a plea agreement, to illegal reentry after deportation. Among other things, the plea agreement bound the government to recommend a reduction for acceptance of responsibility and a sentence at the bottom of the guideline range. Instead, the government objected to the defendant being afforded a reduction for acceptance of responsibility, and moved for an upward departure. The district court sentenced him to 120 months’ imprisonment. The court reversed and remanded for resentencing before a different district judge, saying, “[t]he government’s argument that it honored its promises reeks of the lamp.” Additionally, the court held that the plea agreement was binding on the government once the defendant’s guilty plea was accepted, even though the plea agreement itself had not yet been accepted by the district court.

United States v. Cudjoe, 534 F.3d 1349 (10th Cir. 2008). The court reversed and remanded for resentencing before a different district judge, holding that the government breached the plea agreement by advocating for a sentence in excess of 30 years. While the agreement permitted the government to advocate for certain guidelines enhancements, it also included a promise to refrain from advocating for a sentence in excess of 30 years, providing that the defendant did not make false factual assertions. The agreement did not require the defendant to refrain from objecting to the presentence investigation report, and the government’s claim that defendant’s objections put the facts in dispute and excused the government from its promise is without merit. Noting the numerous constitutional rights waived by the defendant when entering a plea agreement, the court said “the government must stay faithful to its promises to the defendant. Where, as here, the government falls short of its promise, a correction is required to ‘preserv[e] the integrity of the criminal justice process, and the public’s faith in this integrity.’”

United States v. Silva, 413 F.3d 1283 (10th Cir. 2005). The court held that nothing in *Booker* invalidates the validity of sentences imposed under Rule 11(c)(1)(c). The defendant received the specific sentence that he bargained for as part of his guilty plea. Having exposed himself to a specific punishment, he waived the right to claim that he was the victim of a mandatory sentencing system. The court dismissed the appeal.

Rule 32

See United States v. West, 550 F.3d 952 (10th Cir. 2008), Part I, Section B.

See United States v. Jarvi, 537 F.3d 1256 (10th Cir. 2008), Part I, Section B.

See United States v. Dozier, 444 F.3d 1215 (10th Cir. 2006), Part I, Section B.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 3582

See United States v. Cobb, 584 F.3d 979 (10th Cir. 2009), §1B1.10.